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SCHOOL OF LAW

A TREATISE

ON THE

LAW OF DAMAGES

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF CONTRACT AND TORT

BY J. G. SUTHERLAND

AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION"

FOURTH EDITION

BY

JOHN R. BERRYMAN

IN FIVE VOLUMES

VOL. V

CHICAGO

CALLAGHAN AND COMPANY

1916

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TABLE OF CONTENTS

VOL. V.

CHAPTER XXXVII.—Damages Resulting from Death.

References are to sections.

No action for, at common law; admiralty gives statutes effect 1259
Nature of the statutory action 1260
Diversities as to beneficiaries; rights of non-resident aliens ... 1261
Only pecuniary losses compensated in England and Canada 1262
Same subject; rule in the United States; exemplary damages; interest 1263
Recovery of nominal damages 1264
Recovery by widow 1265
Recovery by husband 1266
Children's loss from death of parent 1267
Facts and circumstances to be considered in estimate of damages 1268–1271
Recovery for death of child 1272–1275
Damages recoverable by collateral kindred 1276
Damages to the deceased's estate 1277
Special damages 1278
Contracts exempting from liability 1279
Where the injury is done in another state 1280

CHAPTER XXXVIII.—Seduction, Criminal Conversation and Alienation of Affections.

The technical not the real gist of the action for seduction 1281
Who may maintain the action 1282
Evidence for plaintiff, and damages recoverable 1283
Evidence for defendant in mitigation 1284
Criminal conversation and alienation of affections 1285

CHAPTER XXXIX.—Damages for Torts in Admiralty.

Fundamental difference between liability in admiralty and at common law; exemplary damages 1286
Division of loss in collision cases; contribution between joint wrongdoers 1287
Rule applicable to other torts; in what proceedings recovery may be had by passengers; nominal damages 1288

596248

References are to sections.

Liability confined to proximate loss; certainty of damage 1289
Total loss; elements of damage 1290
Total loss; what is 1291
Partial loss; elements of damage 1292, 1293
Interest 1294
Mitigation of liability 1295
Recovery by owner of cargo; who may sue 1296

CHAPTER XL.—Damages under the Federal Employers Liability Act.

Introductory 1297
Historical 1298
Scope of act 1299
Amendment of 1910 1300
Validity 1301
Effect 1302
Same subject; effect on state compensation acts 1303
Binding effect of federal decisions 1304
Employers within the act 1305
Employees within the act; necessity for employment in interstate commerce 1306
Same subject; tests 1307
Same subject; existence of relation of master and servant 1308
Same subject; necessity for direct and substantial relation to interstate commerce 1309
Same subject; instrumentalities or employees engaged in both classes of commerce 1310
Same subject; interstate character of traffic 1311
Same subject; trains operated between intrastate termini 1312
Same subject; injury while not actively employed 1313
Same subject; negligent fellow-servant need not be engaged in interstate commerce 1314
Same subject; preparation of instrumentalities for use 1315
Same subject; employees of electric railways 1316
Same subject; employees engaged in construction work 1317
Same subject; repairs and maintenance 1318
Same subject; movement of cars, switching, coupling, etc. 1319
Same subject; employees engaged in transportation by water .. 1320
Same subject; miscellaneous employees 1321
Negligence under the act 1322
Assumption of risk 1323
Contributory negligence; effect 1324
Same subject; distinction between contributory negligence and assumption of risk 1325
Same subject; employee's negligence as the sole cause of injury 1326
Same subject; what constitutes contributory negligence 1327

References are to sections.

Same subject; burden of proof 1328
Same subject; violation of federal statutes 1329
Same subject; instructions on contributory negligence 1330
Damages for personal injuries 1331
Damages in case of death; beneficiaries 1332
Same subject; measure and elements of damages 1333
Same subject; recovery for pain and suffering of decedent 1334
Same subject; extraneous circumstances as affecting recovery 1335
Same subject; joinder of actions for pain and suffering and pecuniary loss 1336
Same subject; instructions 1337
Same subject; apportionment of damages 1338
Same subject; distribution of the amount recovered 1339
Release, compromise, and former adjudication or recovery; releases in general 1340
Same subject; release subsequent to injury 1341
Same subject; compromise or release by decedent as affecting action for his death 1342
Same subject; effect of release by beneficiary 1343
Same subject; power of representative to compromise 1344
Same subject; former adjudication or recovery 1345
Limitation of actions 1346
Pleading; requisites and sufficiency in general 1347
Same subject; amendments 1348
Same subject; actions for death 1349
Same subject; alternative; allegations setting up both state and federal law 1350
Practice in general 1351
Same subject; parties 1352
Same subject; removal of causes 1353
Same subject; evidence 1354
Same subject; instructions 1355
Same subject; special interrogatories 1356
Same subject; question for jury 1357
Appeal and error 1358

CHAPTER XLI.—Workmen's Compensation Acts.

Introduction 1359
Nature, scope, and effect 1360
Constitutionality in general 1361
Same subject; delegation of judicial functions 1362
Same subject; abolition of defenses 1363
Same subject; police power; vested and contract rights; due process of law 1364
Same subject; right to jury trial 1365
Same subject; right to judicial remedies 1366

References are to sections.

Same subject; impairment of obligation of contracts 1367
Same subject; compulsory acts 1368
Same subject; provisions governing partial invalidity 1369
Same subject; tax provisions 1370
Same subject; by whom and how constitutional question may be raised 1371
Same subject; insurance provisions 1372
Conflict of laws 1373
Existence of relation of master and servant 1374
Election 1375
Employments within the acts 1376
Accidents or injuries arising out of and in the course of employment; general rules 1377
Same subject; disease 1378
Same subject; wilful misconduct 1379
Same subject; acts of nature 1380
Same subject; sportive acts 1381
Same subject; suicide 1382
Same subject; intermission from or suspension of work 1383
Same subject; assaults 1384
Dependency 1385
Notice 1386
Award of compensation 1387
Injuries caused by negligence of third persons 1388

THE LAW OF DAMAGES.

VOL. V.

CHAPTER XXXVII.

DAMAGES RESULTING FROM DEATH.*

§1259. No action for, at common law; admiralty gives statutes effect.
1260. Nature of the statutory action.
1261. Diversities as to beneficiaries; rights of non-resident aliens.
1262. Only pecuniary losses compensated in England and Canada.
1263. Same subject; rule in the United States; exemplary damages; interest.
1264. Recovery of nominal damages.
1265. Recovery by widow.
1266. Recovery by husband.
1267. Children's loss from death of parent.
1268–1271. Facts and circumstances to be considered in estimate of damages.
1272–1275. Recovery for death of child.
1276. Damages recoverable by collateral kindred.
1277. Damages to the deceased's estate.
1278. Special damages.
1279. Contracts exempting from liability.
1280. Where the injury is done in another state.

§ 1259. No action for, at common law; admiralty gives statutes effect. By the common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party; the cause of action dies with the person entitled to sue.[1] By that law the death of a human

[1] Broom's Leg. Max. 400; Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 545; Gulf, etc. R. Co. v. Beall, 91 Tex. 310, 41 L.R.A. 807.

*See ch. 40, *post*, damages under the Federal Employers' Liability Act.

being is not a private wrong and no compensation therefor or for any resulting loss is recoverable.[2] The same doctrine prevails under the general maritime law where death is the result of negligence.[3] Various reasons have been suggested to account for this rule; and it is probable that they have not wholly lost their force.[4] The rule does not, however, prevent an action by the master for the loss of the services of his apprentice or by the husband for those of his wife by a wrongful personal injury though death ensue; since in these cases the action accrued to the master or husband, and no reasons exist for holding that the death of the injured servant or wife could affect it.[5] By parity of reason, why should not the parent have his action for a like loss in case of injury to his infant child, notwithstanding the death of such child?[6] In these cases the damages are not the result of the death but of the wrongful act disabling the person

[2] Sherlag v. Kelley, 200 Mass. 232, 19 L.R.A.(N.S.) 633, 128 Am. St. 414; Gilkerson v. Missouri Pac. R. Co., 222 Mo. 173, 24 L.R.A. (N.S.) 844; Duncan v. St. Luke's Hospital, 113 App. Div. (N. Y.) 68; Harshman v. Northern Pac. R. Co., 14 N. D. 69; Shaw v. Charleston, 57 W. Va. 433; Insurance Co. v. Brame, 95 U. S. 754, 24 L. ed. 580; The Harrisburg, 119 U. S. 199, 30 L. ed. 358; Nickerson v. Harriman, 38 Me. 277; Carey v. Berkshire R. Co., 1 Cush. 475; Connecticut Mut. Ins. Co. v. New York R. Co., 25 Conn. 272, 65 Am. Dec. 571; Green v. Hudson River R. Co., 28 Barb. 9, 2 Keyes 294; Worley v. Cincinnati R. Co., 1 Handy 481; Pennsylvania R. Co. v. Adams, 55 Pa. 499; Selma R. Co. v. Lacey, 49 Ga. 106, 14 Am. Neg. Cas. 111, 218; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; Indianapolis, etc. R. Co. v. Keely, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Kramer v. San Francisco St. R. Co., 25 Cal. 434; Grosso v. Delaware, etc. R. Co., 50 N. J. L. 317; Eden v. Lexington R. Co., 14 B. Mon. 204. See § 1273 for the rule in Louisiana.

[3] In re La Bourgogne, 117 Fed. 261.

[4] See Hyatt v. Adams, Connecticut Mut. L. Ins. Co. v. R. Co., Grosso v. R. Co., Worley v. R. Co., *supra*.

[5] Indianapolis & M. R. T. Co. v. Reeder, 42 Ind. App. 520.

Such cases are distinguishable from those in which death is the fact on which the right of action depends, as in Connecticut Mut. L. Ins. Co. v. R. Co., *supra*, in which a life insurance company unsuccessfully sought to recover from a railroad company damages for negligently causing the death of a person whose life it had insured, thereby subjecting it to the payment of the policy.

[6] Eden v. R. Co., Hyatt v. Adams, *supra;* Jackson v. Pittsburgh, etc. R. Co., 140 Ind. 241, 49 Am. St. 192; Sorensen v. Balaban, 11 App. Div. (N. Y.) 164.

Burial expenses of a child are the result of its death, and cannot

from whom the plaintiff had the right to service, and the recovery is limited to the loss during the interval between the injury and the death.[7] But the rule is not so limited in some states.[8] In England it is not so limited unless the death formed an essential part of the cause of action. Where the action was by the husband against the seller of unwholesome food which caused the death of the wife he recovered the increased expense incurred after her death in securing such services as she had customarily rendered in caring for his home and family; but could not recover the expenses of her funeral.[9] In this country the last limitation is not everywhere recognized if death was not coincident with the injury; the husband has been permitted to recover, on common law principles, for the loss of the services of his wife, for his loss of time and the expense incurred in her burial.[10]

The common-law rule has been abrogated by statutes in all or nearly all the states of the Union as well as in England. These provide that compensation may be recovered for the injury or pecuniary loss resulting from the death of a person, caused by the wrongful act or negligence of another. For reasons connected with the public good this modern legislation has in special cases, and for the benefit of particular persons and to a limited amount, created a liability for injuries resulting from death where caused by misconduct of a certain specified character. These enactments subject the wrong-doer to damages

be recovered except under a statute. Jackson v. etc. R. Co., *supra*.

In Baker v. Bolton, 1 Camp. 493, Lord Ellenborough ruled that the husband might recover for distress of mind and loss of society from the moment of the injury to his wife up to the time of her death, but that in a civil court the death of a human being could not be complained of as an injury; and the damages to the plaintiff because of the injury to his wife must stop with the period of her existence.

7 Jackson v. R. Co., Sorenson v. Balaban, *supra*.

8 Stevenson v. Ritter L. Co., 108 Va. 575, 18 L.R.A.(N.S.) 316; Edgar v. Castello, 14 S. C. 20, 37 Am. Rep. 719; Harris v. Kentucky L. Co. (Ky.), 74 S. W. 94.

9 Jackson v. Watson (1909), 2 K. B. 193. Compare Sherlag v. Kelley, *supra*.

10 Philby v. Northern Pac. R. Co., 46 Wash. 173, 9 L.R.A.(N.S.) 1193, 123 Am. St. 926, following Worley v. R. Co., *supra*; Davis v. Railway Co., 53 Ark. 117, 7 L.R.A. 283.

which are to be appropriated as is just for the benefit of those who, in ordinary cases, would be the greatest pecuniary sufferers.[11] Because death is the fact which gives the right of action the damages recoverable are to be measured by the law in force when that event occurred, and not that in effect when the injury which resulted in death was sustained.[12]

Courts of admiralty give effect to such statutes when they are operative in the territory in which life was lost,[13] and this may be done in proceedings by the owner of the vessel which was the cause of the death for a limitation of his liability under the federal statute.[14] In such cases the recovery will not be limited according to the maritime law, nor by the seaman's contract with his employer, nor by the Harter act, nor by the negligence of the vessel on which the deceased was employed,[15] but by the statutes or decisions of the highest court of the state to which the vessels belonged; the amounts awarded by juries in particular cases are not to be considered as binding precedents.[16]

§1260. Nature of the statutory action. By statute in some states the right of action of the injured party survives for all damages which he was entitled to recover; it is preserved notwithstanding his death. But in an action which so survives, any damages which resulted from the death are not recoverable.[17] Such legislation and the rights accruing thereunder

[11] Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 275, 65 Am. Dec. 571.

[12] Weber v. Third Ave. R. Co., 12 App. Div. (N. Y.) 512; Keeley v. Great Northern R. Co., 139 Wis. 448.

[13] The Harrisburg, 119 U. S. 199, 30 L. ed. 358; State v. Hamburg-Am. S. P. Co., 190 Fed. 240; In re Clyde S. S. Co., 134 Fed. 95; Trauffler v. Detroit & C. N. Co., 181 Fed. 256, 4 N. C. C. A. 977; Cornell S. Co. v. Fallon, 102 C. C. A. 345, 179 Fed. 293.

[14] The Northern Queen, 117 Fed. 906; The Hamilton, 77 C. C. A. 150, 146 Fed. 724.

[15] Same cases, 207 U. S. 398, 52 L. ed. 264, aff'g 146 Fed. 724.

[16] The Saginaw and The Hamilton, 139 Fed. 906; Quinette v. Bisso, 69 C. C. A. 503, 136 Fed. 825, 5 L.R.A.(N.S.) 303.

In case of the death of a seaman the ground or extent of his recovery in tort, had he lived, does not prevent the recovery of full indemnity under the statute of the state upon which the action is brought. Cornell S. S. Co. v. Fallon, 102 C. C. A. 345, 179 Fed. 293.

[17] Melzner v. Northern Pac. R. Co., 46 Mont. 162; Stewart v. United E. L. & P. Co., 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St.

are therefore not germane to the subject of this chapter.[18] In some states provision is made by statute for the survival of the action which accrued to the deceased for all the damages he was entitled to recover; and also damages resulting to the parties for whose use and benefit the action survives from the death, consequent upon the injuries received.[19] The latter dam-

410; Wetherell v. Chicago City R. Co., 104 Ill. App. 357; Kyes v. Valley Tel. Co., 132 Mich. 281, 13 Am. Neg. Rep. 340; Hendricks v. American Exp. Co., 138 Ky. 704, 32 L.R.A.(N.S.) 867; Bellamy v. Whitsell, 123 Mo. App. 610. See Louisville & N. R. Co. v. Simrall, 127 Ky. 55.

Under other statutes the right of action for a personal injury survives the death of the person injured, and the recovery by his personal representative is the value of the life of the decedent to him. Kling v. Torello, 87 Conn. 301, 46 L.R.A.(N.S.) 930.

[18] Gately v. Taylor, 211 Mass. 60, 39 L.R.A.(N.S.) 472. See Love v. Detroit, etc. R. Co., 170 Mich. 1; Goodsell v. Hartford, etc. R. Co., 33 Conn. 51; Olivier v. Houghton County St. R. Co., 134 Mich. 367.

Where an action for death was pending at the time a statute was enacted providing for the recovery for the conscious suffering of the decedent and the pleading in the original action was amended after the enactment of the statute a limitation in the original death statute as to the amount of the recovery had no effect upon the new cause of action, the recovery under which was governed by common-law rules. Gilpatrick v. Cotting 214 Mass. 426.

[19] Mahoning Valley R. Co. v. Van Alstine, 77 Ohio 395, 14 L.R.A. (N.S.) 893. See Wabash S. D. Co. v. Black (Tenn.), 61 C. C. A. 639, 126 Fed. 721; St. Louis, etc. R. Co. v. Stamps, 84 Ark. 241; Code of Tennessee, §§ 2291, 2292, Act of March, 1883; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291, 9 Am. Neg. Cas. 491; Louisville, etc. R. Co. v. Burke, 6 Cold. 45; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Holton v. Daly, 106 Ill. 131; Merrihew v. Chicago City R. Co., 92 Ill. App. 346.

In Tennessee all the damages resulting from the death of a wife and mother, including those sustained by her infant child, are to be recovered by the husband as administrator. Railroad v. Johnson, 97 Tenn. 667, 34 L.R.A. 442.

In Michigan the right of action given by statute to the personal representatives of the deceased for the personal injury resulting from his negligent killing and that which survives under another statute, for negligent injuries to persons, are not separate and distinct causes of action, nor is the remedy under the latter statute excluded because death ultimately ensued from the injury. Dolson v. Lake Shore, etc. R. Co., 128 Mich. 444. Compare Hurst v. Detroit City R. Co., 84 Mich. 539.

The opposing view is held in Colorado. Kelley v. Union Pac. R. Co., 16 Colo. 455, 9 Am. Neg. Cas. 132.

In Kentucky one statute provides for the survival of actions for per-

ages are those generally provided for in statutes which are the subject of this chapter. In this country they are chiefly modeled after the English statute commonly called Lord Campbell's

sonal injuries and another for the recovery of damages resulting from death when it is caused by any wrongful act or negligence. Under the former there can be no recovery where the injury causes immediate death, for then there was in the decedent no right of action to survive. It is otherwise if there was an appreciable interval. It is held in that state, where the personal injury causes death but not instantly, that there is an election to sue under either provision; but recovery under one bars recovery under the other. Hansford v. Payne, 11 Bush 380; Connor v. Paul, 12 id. 144.

In Illinois, under similar provisions, it is held that an action which survives is for a personal injury which does not cause death; that an action given for recovery of damages which result from death is the only action for the negligence or fault which causes it. Holton v. Daly, 106 Ill. 131.

The same is held in Kansas: McCarthy v. Railroad Co., 18 Kan. 46, 26 Am. Rep. 742; Eureka v. Merrifield, 53 Kan. 794; Martin v. Missouri Pac. R. Co., 58 Kan. 475, 3 Am. Neg. Rep. 165. See Hulbert v. Topeka, 34 Fed. 510. And in Rhode Island: Lubrano v. Atlantic Mills, 19 R. I. 129, 34 L.R.A. 797. See Southern Bell Tel. & T. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694, where the question is discussed in its bearings upon another issue.

In Maine the damages resulting from death are allowed only in cases where the death was instantaneous; and where the injured person does not die immediately the action survives and no other remedy is needed. State v. Maine Cent. R. Co., 60 Me. 490, 15 Am. Neg. Cas. 294; State v. Grand Trunk R., 61 Me. 114, 14 Am. Rep. 552, 15 Am. Neg. Cas. 294.

The same rule has been applied to ch. 124, laws of 1891. Sawyer v. Perry, 88 Me. 42, 15 Am. Neg. Cas. 291.

The language of the statutes where survival of actions for personal injury is provided for and there is also provision for recovery of damages resulting from death is broad enough to entitle the personal representative to recover the damages which accrue to the decedent and also those which result from the death ensuing from the same injury. As appears by the foregoing cases, there is a reluctance in the states from which those citations are taken to allow damages in this broad sense, or to regard those statutes as affording a right to cumulative damages. The actions thus provided for give damages mostly of a different nature, and it would seem quite consistent with the policy of the statutes, if not necessary to their natural force and operation, to allow both classes of damages. To hold otherwise, if death ensues from the personal injury for which the injured person has a right of action, is unwarrantably to restrict the operation of the statute. There is nothing on the face of these statutes to make one operate to repeal the other or to require an election under which the action should be brought, with

Act, the text of which will be found in a note.[20] There has been some diversity of expression as to the limits of the cause of

the effect of renouncing the right given by the other.

The view expressed in this note is in accord with Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693; Davis v. Railway, 53 Ark. 117, 7 L.R.A. 283; Brown v. Chicago, etc. R. Co., 102 Wis. 137, 44 L.R.A. 579; Hurst v. Detroit City R. Co., 84 Mich. 539 (but see Dolson v. Lake Shore, etc. R. Co., *supra*); Leggott v. Great Northern R. Co., 1 Q. B. Div. 599; Robinson v. Canadian Pac. R. Co., [1892] App. Cas. 481; Needham v. Grand Trunk R. Co., 38 Vt. 294 (compare the last case with Legg v. Britton, 64 Vt. 652; Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400; Connors v. Burlington, etc. R. Co., 71 Iowa 490, 60 Am. Rep. 814; Putnam v. Southern Pac. R. Co., 21 Ore. 230; Belding v. Black Hills, etc. R. Co., 3 S. D. 369; Hamilton v. Morgan's L. & T. R. & S. S. Co., 42 La. Ann. 824. See Mulchahey v. Washburn C. W. Co., 145 Mass. 281, 1 Am. St. 458, 15 Am. Neg. Cas. 621.

Under the Pennsylvania statute providing for the survival of actions in negligence cases where the plaintiff dies, recovery may be had, not only for the mental and physical suffering up to the time of death and diminution of earning power during the period he would probably have lived, but also for the value of his life. Maher v. Philadelphia T. Co., 181 Pa. 391. By the value of the life is meant, not its value to others, but the value of the advantages of which the injured party was deprived because of the diminution or loss of earning power. No damages can be recovered for the loss which other persons sustained by reason of the death. McCafferty v. Pennsylvania R. Co., 193 Pa. 339, 6 Am. Neg. Rep. 693, 74 Am. St. 690.

Under the statutes of Washington a father may maintain an action to recover for the death of his child notwithstanding the administrator of the child's estate may have recovered against the same defendant for causing the child's death. Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400.

A recovery by the personal representative for the death of the intestate while being carried under a contract does not affect the representative's right to recover for damage to the intestate's personal estate caused during his lifetime by medical expenses and loss from inability to attend to business. Daly v. Dublin, etc. R. Co., 30 L. R. Ire. 514, following Bradshaw v. Lancashire & Y. N. Co., L. R. 10 C. P. 189.

[20] 9 and 10 Vict., ch. 93. It recites that no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrongdoer in such case should be answerable in damages for the injury so caused by him; and enacts that whensoever the death of a person shall be caused by a wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had

action thus created.[21] A personal injury by the defendant's wrongful act, neglect or default is the basis of his liability, but only because it produces death, and the liability is only for the damages which result from the death to those for whose use and benefit the statutory action is given. It is a new cause of action because there is an element in it additional to that which constituted the cause of action in favor of the person injured, viz.: death must ensue as a consequence of the injury to him.[22] It

not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

In so far as the state statutes cover the same field as is covered by the federal employer's liability act regulating the liability of interstate railroads for the death or injury of their employees while engaged in interstate commerce they were superseded by the federal act. Mondou v. New York, etc. R. Co., 223 U. S. 1, 56 L. ed. 327, 38 L.R.A. (N.S.) 44.

[21] Blake v. Midland R. Co., 18 Q. B. 93; Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Barnett v. Lucas, Irish Rep. 6 C. L. 247; Pym v. Great Northern R. Co., 2 B. & S. 759; Leggott v. Great Northern R. Co., 1 Q. B. Div. 599; Safford v. Drew, 3 Duer 627; Whitford v. Panama R. Co., 23 N. Y. 465; Holton v. Daly, 106 Ill. 131.

[22] Louisville & N. R. Co. v. Simrall, 127 Ky. 55; Anderson v. Wetter, 103 Me. 257, 15 L.R.A.(N.S.) 1003; (Perkins v. Oxford P. Co. 104 Me. 109, 21 Am. Neg. Rep. 116); Stewart v. United E. L. & P. Co., 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. 410; Bolick v. Railroad, 138 N. C. 370; Mahoning Valley R. Co. v. Van Alstine, 77 Ohio 395, 14 L.R.A.(N.S.) 893; Osteen v. Southern R., 76 S. C. 368; Andrews v. Hartford, etc. R. Co., 34 Conn. 57; In re Mayo's Est., 60 S. C. 401, 54 L.R.A. 660; Weber v. Third Ave. R. Co., 12 App. Div. (N. Y.) 512; Perham v. Portland Elec. Co., 33 Ore. 451, 40 L.R.A. 799, 73 Am. St. 730; The Oregon, 73 Fed. 846; Seward v. The Vera Cruz, L. R. 10 App. Cas. 59; Holland v. Brown, 35 Fed. 43; Hurlbert v. Topeka, 34 id. 510; Martin v. Missouri Pac. R. Co., 58 Kan. 475, 3 Am. Neg. Rep. 165; Northern Pac. R. Co. v. Adams, 64 C. C. A. 196, 13 Am. Neg. Rep. 579, 116 Fed. 324; Burns v. Grand Rapids R. Co., 113 Ind. 169; Lange v. Schoettler, 115 Cal. 388; Burk v. Arcata & M. R. R. Co., 125 Cal. 364, 73 Am. St. 52; Cooper v. Shore E. Co., 63 N. J. L. 558; Maney v. Chicago, etc. R. Co., 49 Ill. App. 105; McKay v. New England D. Co., 92 Me. 454; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 153, 8 Am. Neg. Rep. 490, 51 L.R.A. 235. See Chesapeake & O. R. Co. v. Dixon, 179 U. S. 131.

No new right is given by the Missouri statute; the right of action is preserved and transmitted. Hennessy v. Bavarian B. Co., 145 Mo. 104, 112, 68 Am. St. 554, 41 L.R.A. 385; Brink v. Wabash R. Co., 160 Mo. 87, 53 L.R.A. 811.

In Vermont the statute, which is nearly a copy of Lord Campbell's Act, does not create a new and ad-

is a different cause of action also, because only the damages which ensue from the death are recoverable.[23] It is essential that the personal injury which causes the death appear to have proceeded from the wrongful act, neglect or default of the defendant.[24] Any evidence, therefore, which would be admissible in an action by the injured person to controvert that charge is equally admissible as a defense to the statutory action.[25] And

ditional cause of action in favor of the beneficiaries, but provides for the recovery of a new class of damages if a right of action would have existed in the deceased but for his death. Legg v. Britton, 64 Vt. 652

[23] Thomas v. Chicago & N. W. R. Co., 202 Fed. 766; Garrett v. Louisville & N. R. Co., 197 Fed. 715; Almquist v. Wilcox, 115 Minn. 37; Ingersoll v. Detroit, etc. R. Co., 163 Mich. 268, 32 L.R.A.(N.S.) 362; McLaughlin v. Hebron Mfg. Co., 171 Fed. 269; Chesapeake & O. R. Co. v. Banks, 142 Ky. 746; Texas & N. O. R. Co. v. Walker, 58 Tex. Civ. App. 615.

[24] Mageau v. Great Northern R. Co., 103 Minn. 290, 15 L.R.A.(N.S.) 511.

The injury caused by the defendant need not be the only cause of death; if it be established that such injury set in motion other causes, which produced the disease and the death, and which, without the injury, would not have produced death, an action lies. Weber v. Third Ave. R. Co., 12 App. Div. (N. Y.) 512; Purcell v. Lauer, 14 App. Div. (N. Y.) 33, 2 Am. Neg. Rep. 57. See Hoey v. Metropolitan St. R. Co., 70 App. Div. (N. Y.) 60.

[25] Sullivan-S. L. Co. v. Watson (Tex.), 155 S. W. 179; Smith v. National C. & I. Co., 135 Ky. 671; Larocque v. Conheim, 42 N. Y. Misc. 613; Brammer v. Norfolk & W. R. Co., 107 Va. 296; Pendleton v. Richmond, etc. R. Co., 104 Va. 813; Kelly v. Hendrie, 26 Mich. 255; Michigan Cent. R. Co. v. Campau, 35 id. 468; Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410, 16 Am. Neg. Cas. 146; Tucker v. Chaplin, 2 C. & K. 730; Willetts v. Buffalo, etc. R. Co., 14 Barb. 588.

In McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260, it was held killing a man by inducing him to drink a pint of whisky was actionable.

If the person entitled to the benefit of the recovery contributed to cause the death it will defeat the action. Williams v. Railroad Co., 60 Tex. 205, 15 Am. Neg. Rep. 701; Pittsburgh, etc. R. Co. v. Vining, 27 Ind. 513, 92 Am. Dec. 269; Baltimore, etc. R. Co. v. State, 30 Md. 47; Railway Co. v. Snyder, 24 Ohio St. 670. In the latter case the contributory negligence of the father in the exposure of his infant child to the injury which caused its death was fatal to his action, though it would not have affected the action if the infant had survived.

Under the Ohio statute the damages are to be assessed with reference to the injury sustained by each beneficiary; such beneficiaries as contributed to the death of the decedent by negligence cannot recover; those who did not so contribute are not affected by the contributory negligence of the others. Wolf v. Lake Erie & W. R. Co., 55 Ohio St.

it has been held that any subsequent matter of discharge, arising in the life-time and by the act of the injured party, sufficient to satisfy, bar or release his action will be fatal to the new action by his personal representatives if death ensue.[26] In Kentucky under a particular statute a new cause of action arises in which neither the deceased nor his administrator has any interest; hence the settlement of an action brought by him to recover for his injuries does not bar the widow's right to recover for his subsequent death.[27] The death of a person entitled to sue pending the suit neither abates the action in the common-law sense, nor is the cause of action to be compensated for discharged;[28] but in such a case the damages which may be recovered will be limited in duration and extent to the life-time of such person.[29] It is otherwise under some statutes.[30] But one action can be maintained,[31] and that must be by the person authorized to sue.[32] An action brought by the widow of the decedent abates after

517, 12 Am. Neg. Cas. 508, 12 Am. Neg. Rep. 162, 36 L.R.A. 812.

[26] Mehegan v. Boyne City, G. & A. R. Co., 178 Mich. 694; Mooney v. Chicago, 239 Ill. 414; Louisville R. Co. v. Raymond, 135 Ky. 738, 27 L.R.A.(N.S.) 176; Strode v. St. Louis T. Co., 197 Mo. 616; Hodge v. Rutland R. Co., 112 App. Div. (N. Y.) 142; Read v. Great Eastern R. Co., L. R. 3 Q. B. 555; Dibble v. New York & E. R. Co., 24 Barb. 183; Hecht v. Ohio & M. R. Co., 132 Ind. 507; Southern Bell Tel. & T. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694 (two judges dissenting).

A settlement with the decedent held a bar. Whitford v. Panama R. Co., 23 N. Y. 484, per Comstock, J., dissenting. His release given the same effect. Holton v. Daley, 106 Ill. 131. So a recovery by him in his lifetime and the judgment paid. Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Rep. 271.

If the injured person began a suit which his administrator prosecuted to judgment after his death such judgment bars a second suit for the benefit of the widow although the recovery was solely for the injuries to the deceased in his lifetime. Legg v. Britton, 64 Vt. 652.

[27] Donahue v. Drexler, 82 Ky. 157, 56 Am. Rep. 886. See Louisville R. Co. v. Raymond, 135 Ky. 738, 27 L.R.A.(N.S.) 176.

[28] Cooper v. Shore Elec. Co., 63 N. J. L. 558; Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 8 Am. Neg. Rep. 490, 51 L.R.A. 235.

[29] Cooper v. Shore Elec. Co., *supra*.

[30] Gilkerson v. Missouri Pac. R. Co., 222 Mo. 173, 24 L.R.A.(N.S.) 844, ruled under the statute as it was prior to 1905.

[31] Riggs v. Northern Pac. R. Co., 60 Wash. 292; McFadden v. St. Paul Coal Co., 183 Ill. App. 36, aff'd 263 Ill. 441.

[32] Billingsley v. St. Louis, etc. R. Co., 84 Ark. 617, 120 Am. St. 95.

her death if she is not survived by any person dependent upon the decedent for support.[33] The cause of action does not survive the death of the wrong-doer where that occurs before the death of the person injured.[34] In the absence of any act done by the deceased to bar a suit by him if he had survived the right of action is a vested right in favor of those who are authorized to sue, and cannot be affected by the payment of money, after the death of the person injured, to one who was his beneficiary in a relief fund established by the defendant.[35] A compromise made by the widow of the decedent in good faith is binding upon their children though made without the consent of their guardian, they not being proper parties though required to be named in the pleading.[36]

§ 1261. Diversities as to beneficiaries; rights of non-resident aliens. The statutes under consideration do not provide uniformly for the same distribution of the fruits of recoveries. The most noticeable difference and the one which affects greatly the elements of damage is that between statutes which provide that the damages shall be distributed to the widow, husband and near kin of the deceased and those which provide that they shall be part of his estate. Under the former the beneficiaries may recover the amount of loss resulting to them from the death; under the latter no such inquiries are relevant, but the question is how much has his estate suffered by his death. The subject of damages under statutes in the first category will be considered, after remarking that it has been decided in Wisconsin, Pennsylvania, Washington and Colorado that the general language employed in the statutes thereof does not include non-resident aliens as beneficiaries where the deceased was instantly killed or died without conscious pain.[37] But residents of a sister state are not non-resident aliens, neither is a widow of

[33] Dillier v. Cleveland, etc. R. Co., 34 Ind. App. 52.

[34] Beavers v. Putnam, 110 Va. 713.

[35] Neill v. Wilson, 146 N. C. 242; McKeering v. Pennsylvania R. Co., 65 N. J. L. 57, 8 Am. Neg. Rep. 486, and cases cited.

[36] Shambach v. Middlecreek E. Co., 45 Pa. Super. Ct. 300.

[37] McMillan v. Spider Lake S. & L. Co., 115 Wis. 332, 60 L.R.A. 589; Roberts v. Great Northern R. Co., (Wash.) 161 Fed. 239; Patek v. American S. & R. Co., (Colo.) 21 L.R.A.(N.S.) 273, 83 C. C. A. 284,

a resident who has taken the first step to become a citizen though she lives in a foreign country, it being her purpose to join her husband in the state in which he resided up to the time of his decease.[38] A resident is not barred of his right of action though it is dependent upon the alienship of other non-residents relatives of the deceased.[39] According to the great weight of authority non-resident aliens are not barred of the benefits given by statutes of this nature.[40]

§ 1262. Only pecuniary losses compensated in England and Canada. There is no dissent in the English decisions made since 1852 from the rule that damages cannot be awarded for mental suffering or loss of society, but must be restricted to pecuniary loss. The language of Lord Campbell's act on this point is: "The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought." Its title is "an act for compensating the families of persons killed." It also provides that the amount

154 Fed. 190; Maiorano v. Baltimore & O. R. Co., 216 Pa. 402, 21 L.R.A.(N.S.) 271, 116 Am. St. 778 (right not given by treaty with Italy).

38 Laconte v. Kenosha, 149 Wis. 343.

39 Pries v. Ashland L., P. & St. R. Co., 143 Wis. 606.

40 Atchison, etc. R. Co. v. Fajardo, 74 Kan. 314, 6 L.R.A.(N.S.) 681; Kellyville C. Co. v. Petraytis, 195 Ill. 215, 88 Am. St. 193; Romano v. Capital City B. & P. Co., 125 Iowa 591, 68 L.R.A. 132, 106 Am. St. 323; Low Moor I. Co. v. La Bianca, 106 Va. 83; Anustaskas v. International C. Co., 51 Wash. 119, 21 L.R.A.(N.S.) 267, 130 Am. St. 1089; Saveljich v. Lytle L. & M. Co., 97 C. C. A. 443, 173 Fed. 277 (it is said in a note written by the judge that sixteen states and one territory hold in opposition to the Wisconsin and Pennsylvania rule, citing the cases); Baltimore & O. R. Co. v. Baldwin, (Ohio) 75 C. C. A. 211, 144 Fed. 53; Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438; Kaneko v. Atchison, etc. R. Co., (Cal.) 164 Fed. 262; Davidson v. Hill (1901), 2 K. B. 606, dissenting from Adam v. British, etc. S. S. Co. (1898), 2 Q. B. 430; Pittsburgh, etc. R. Co. v. Naylor, 73 Ohio 115, 3 L.R.A.(N.S.) 473, 19 Am. Neg. Rep. 487, 112 Am. St. 701; Trotta v. Johnson, 121 Ky. 827; Young v. Louisville & N. R. Co., 121 Ky. 483; Gaska v. American C. & F. Co., 127 Mo. App. 169; Cetofonte v. Camden C. Co., 78 N. J. L. 662, 27 L.R.A.(N.S.) 258; Alfson v. Bush, 182 N. Y. 393, 19 Am. Neg. Rep. 35, 108 Am. St. 815; Renlund v. Commodore M. Co., 89 Minn. 41; McGovern v. Philadelphia & R. Ry. Co., 235 U. S. 389, 59 L. ed. 283, 8 N. C. C. A. 67.

recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for *solatium* materially influenced the court in reaching the conclusion that only pecuniary losses are within the intent of the law.[41] The Canadian statute is not unlike the English. The courts of Ontario have differed greatly as to the signification of the word "injury." The majority of the judges of the queen's bench division held that the damages resulting from the loss of a wife or mother, no matter how excellent her qualities or how faithful she might be in discharging her duties and promoting the material and moral condition and prospects of her children, are purely sentimental and not of a sufficiently pecuniary character to support an action. A majority of the judges of the court of appeal differed from this view and held that what is meant by pecuniary loss in all the decided cases in which the expression has been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental losses. A majority of the supreme court of the Dominion of Canada concurred in this view.[42] The same court holds that no recovery can be had for *solatium* merely. This is the rule under the code of Lower Canada,[43] and in New Zealand.[44] Neither at common law nor under Lord Campbell's act can a parent recover the cost of funeral expenses incurred in the burial of a minor child who was residing at home when killed.[45]

§ 1263. Same subject; rule in the United States; exemplary damages; interest. In some states the statutes provide in terms

[41] Black v. Midland R. Co., 18 Q. B. 93.

[42] St. Lawrence, etc. R. v. Lett, 11 Can. Sup. Ct. 422; Lett v. St. Lawrence, etc. R., 11 Ont. App. 1, 1 Ont. 545; Ronson v. Canadian Pac. R. Co., 18 Ont. L. R. 337.

[43] Canadian Pac. R. Co. v. Robinson, 14 Can. Sup. Ct. 105.

It is said in Canadian Pac. R. Co. v. Lachance, 42 Can. Sup. Ct. 205, that the ground upon which that case was decided was to some extent shaken by the judgment of the privy council in Robinson v. Canadian Pac. R. Co., [1892] App. Cas. 481.

[44] Greymouth-Point Elizabeth R. & C. Co. v. McIvor, 16 New Zeal. L. R. 258.

[45] Clark v. London G. O. Co., [1906] 2 K. B. 648; Toronto R. Co. v. Mulvaney, 38 Can. Sup. Ct. 327.

for the recovery of damages for a pecuniary injury, and in others the word pecuniary is not used, but the construction given is the same, restricting the damages to such injury. The theory of the statutes is that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of recovery is limited to the value of that interest.[46] The rule confining recoveries to pecuniary

[46] Delaski v. Northwestern I. Co., 70 Wash. 143; Bond v. United R., 159 Cal. 270; Fowler v. Chicago, etc. R. Co., 234 Ill. 619; Pittsburg, etc. R. Co. v. Gates, 137 Ill. App. 309; Illinois Cent. R. Co. v. Whiteaker, 122 id. 333; Pittsburgh, etc. R. Co. v. Reed, 44 Ind. App. 635; Falender v. Blackwell, 39 Ind. App. 121; McCarthy v. Claflin, 99 Me. 290; Stewart v. United E. L. & P. Co., 104 Md. 332, 8 L.R.A.(N.S.) 384, 118 Am. St. 410; McDonald v. Champion I. & S. Co., 140 Mich. 401; King v. Ann Arbor R. Co., 144 Mich. 65; Dando v. Home Tel. Co., 126 Mo. App. 242; Calcatera v. Iovaldi, 123 Mo. App. 347 (it is said that a remark to the contrary in Sharp v. National B. Co., 179 Mo. 553, was *obiter*), a view expressed also in the case next cited; Marshall v. Consolidated J. M. Co., 119 Mo. App. 270; Christensen v. Floriston P. & P. Co., 29 Nev. 552; McCabe v. Narragansett E. L. Co., 26 R. I. 427, 17 Am. Neg. Rep. 355; Missouri, etc. R. Co. v. Wallace, 53 Tex. Civ. App. 127; Ft. Worth, etc. R. Co. v. Linthicum, 33 Tex. Civ. App. 375; Boucher v. Wisconsin Cent. R. Co., 141 Wis. 160; Hamann v. Milwaukee B. Co., 136 Wis. 39; Austin v. Metropolitan St. R. Co., 108 App. Div. (N. Y.) 249; Conover v. Harrisburg & S. C. Co., 161 Ill. App. 74; Pittsburgh, etc. R. Co. v. Brown, 178 Ind. 11; Galveston, etc. R. Co. v. Salisbury (Tex. Civ. App.), 143 S. W. 252; Oakes v. Maine Cent. R. Co., 95 Me. 103; Geiger v. Worthen, 66 N. J. L. 576; In re California N. & I. Co., 110 Fed. 670; Kesler v. Smith, 66 N. C. 154; Telfer v. Northern R. Co., 30 N. J. L. 188, 12 Am. Neg. Cas. 275; Quin v. Moore, 15 N. Y. 434; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc R. Co. v. Morris, 26 Ill. 400; Conant v. Griffin, 48 id. 412; Illinois Cent. R. Co. v. Weldon, 52 id. 295; Chicago v. Scholten, 75 id. 468; Baltimore, etc. R. Co. v. State, 24 Md. 271, 33 id. 542; Paulmier v. Erie R. Co., 34 N. J. L. 151, 16 Am. Neg. Cas. 643; Kelley v. Chicago, etc. R. Co., 50 Wis. 381, 17 Am. Neg. Cas. 905; Regan v. Same, 51 Wis. 599; McKeigue v. Janesville, 68 Wis. 50; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Murphy v. New York, etc. R. Co., 88 N. Y. 445, 5 Am. Neg. Cas. 238; Donaldson v. Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391; Long v. Morrison, 14 Ind. 595, 77 Am. Dec. 72; James v. Christy, 18 Mo. 162; Owen v. Brockschmidt, 54 Mo. 285; Porter v. Hannibal, etc. R. Co., 71 Mo. 66, 36 Am. Rep. 454; Pennsylvania R. Co. v. McCloskey, 23 Pa. 526, 12 Am. Neg. Cas. 548; Same v. Butler, 57 Pa. 335, 10 Am. Neg. Cas. 210; Huntingdon, etc. R. Co. v. Decker, 84 Pa. 419; Catawissa R. Co. v. Armstrong, 52 Pa. 282; Pennsylvania R. Co. v. Bantom, 54

losses is not applied in a strict sense. "When we consider," says Fullerton, "the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only losses of money." [47] "A liberal scope was designedly left for the action of the jury; they are to give such damages as they shall deem a fair and just compensation with reference to the pecuniary injury resulting from such death; they are not tied down to any precise rule. Within the limit of the statute as to amount and the species of injury sustained the matter is to be submitted to their sound judgment and discretion. They must be satisfied that pecuniary injury resulted. If so satisfied they are at liberty to allow them from whatever source they actually proceeded which could produce them. If they are satisfied from the history of the family or the intrinsic probabilities of the case that they were sustained by the loss of bodily

Pa. 495; Nashville R. Co. v. Stevens, 9 Heisk. 12; St. Louis, etc. R. Co. v. Rawley, 90 Ill. App. 653; McKay v. New England D. Co., 92 Me. 454; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 13 Am. Neg. Cas. 60; James v. Richmond & D. R. Co., 92 Ala. 231; Orgall v. Chicago, etc. R. Co., 46 Neb. 4; Chicago, etc. R. Co. v. Young, 58 Neb. 678; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 5 Am. Neg. Rep. 417; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10, 6 Am. Neg. Rep. 179; Gulf, etc. R. Co. v. Finley, 11 Tex. Civ. App. 64; Lehigh I. Co. v. Rupp, 100 Pa. 95; Pennsylvania Co. v. Lilly, 73 Ind. 252; Klepsch v. Donald, 4 Wash. 436, 31 Am. St. 936; Lange v. Schoettler, 115 Cal. 388; Schmidt v. Menasha W. Co., 99 Wis. 300; Denver, etc. R. Co. v. Spencer, 25 Colo. 9; Malott v. Shimer, 153 Ind. 35, 6 Am. Neg. Rep. 263.

Some statutes fix the sum which may be recovered regardless of the damage sustained. Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173, 24 L.R.A.(N.S.) 844 (under § 2864, R. S. 1899); Casey v. St. Louis T. Co., 116 Mo. App. 235; King v. St. Louis, etc. R. Co., 130 Mo. App. 368; Anderson v. Missouri Pac. R. Co., 196 Mo. 442, 113 Am. St. 748.

In South Carolina pecuniary loss need not, but may, be shown. Barksdale v. Seaboard A. L. R., 76 S. C. 183.

[47] McIntyre v. New York Cent. R. Co., 37 N. Y. 295, 5 Am. Neg. Cas. 97; Tilley v. Hudson River R. Co., 24 id. 471; Pennsylvania R. Co. v. Keller, 67 Pa. 300; Chicago, etc. R. Co. v. Porterfield, 19 Tex. Civ. App. 225, 4 Am. Neg. Rep. 461; Sternfels v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 494; Gulf, etc. R. Co. v. Johnson, 1 Tex. Civ. App. 103. But see Walker v. Lake Shore etc. R. Co., 104 Mich. 606, 617, 16 Am. Neg. Cas. 143, 1 Am. Neg.

care or intellectual culture, or moral training which the mother had before supplied, they are at liberty to allow for it." [48]

Rep. 267, 111 Mich. 518; Ewen v. Chicago & N. R. Co., 38 Wis. 613, 12 Am. Neg. Cas. 658.

[48] Gentry v. Wabash R. Co., 172 Mo. App. 638; Trieber v. New York, etc. R. Co., 149 App. Div. (N. Y.) 804; Michigan Cent. R. Co. v. Vreeland, *infra;* Tilley v. Hudson River R. Co., 29 N. Y. 252, 286; Phalen v. Rochester R. Co., 31 App. Div. (N. Y.) 448; Walker v. McNeill, 17 Wash. 582; Baltimore & O. R. Co. v. Taylor, 109 C. C. A. 172, 186 Fed. 828 (W. Va.); Stockton v. Pennsylvania R. Co., 182 Fed. 282; Felt v. Puget Sound E. R., 175 Fed. 477; Duke v. St. Louis, etc. R. Co., 172 Fed. 684; Valente v. Sierra R. Co., 168 Cal. 412; Hale v. San Bernardino Valley T. Co., 156 Cal. 713; Ruppel v. United R., 1 Cal. App. 666, 19 Am. Neg. Rep. 303; quoting the text; Anderson v. Great Northern R. Co., 15 Idaho 513, quoting the text; Cox v. L. & N. R. Co., 137 Ky. 388; Black v. Michigan Cent. R. Co., 146 Mich. 568; Gamache v. Johnson T. F. & M. Co., 116 Mo. App. 596; Batton v. Public Service Co., 75 N. J. L. 857, 18 L.R.A.(N.S.) 640, 127 Am. St. 855; Carter v. West Jersey & S. R. Co., 76 N. J. L. 602, 19 L.R.A.(N.S.) 128; O'Doherty v. Postal Tel.-C. Co., 134 App. Div. (N. Y.) 298; Railway Co. v. Sweet, 57 Ark. 287; International, etc. R. Co. v. McVey, 99 Tex. 28; St. Louis S. R. Co. v. Huey (Tex. Civ. App.), 130 S. W. 1017; Missouri, etc. R. Co. v. Wallace, 53 Tex. Civ. App. 127; San Marcos E. L. & P. Co. v. Compton, 48 Tex. Civ. App. 586; Houston & T. Cent. R. Co. v. Rutland, 45 Tex. Civ. App. 621; Chesapeake & O. R. Co. v. Ghee, 110 Va. 527; Pocahontas C. Co. v. Rukas, 104 Va. 278, 20 Am. Neg. Rep. 49; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356; McKiernan v. Lehmaier, 85 Conn. 111; Missouri, etc. R. Co. v. Hurdle (Tex. Civ. App.), 142 S. W. 992; Cleveland, etc. R. Co. v. Van Laningham, 52 Ind. App. 156.

In an action to recover for the death of a father the condition of the mother's health during her lifetime may be shown. International, etc. R. Co. v. McVey, 46 Tex. Civ. App. 181.

The opinion of the commissioner in Ward v. Dampskibsselskabet Kjoebenhaven, 144 Fed. 524, contains a statement of the sums awarded in several cases and the action of the courts thereon.

In Houston & T. C. Ry. Co. v. Loeffler (Tex. Civ. App.), 51 S. W. 536, the earnings of the deceased and the amount of money turned over to his wife were shown. It was said: The charge intrenches upon the discretion of the jury if they are to look only to the sums of money which would probably have come into the hands of the wife from the earnings of the husband had he not been killed. The jury are to consider all evidence bearing on the subject, including the pecuniary status of the parties, and their reasonable expectations from the labors of the husband; and from all the facts, and from the experience and observation of the jury, determine what sum would be be a just compensation to the wife for the pecuniary loss sustained by her in the death of her husband, allowing her nothing for distress and the depreciation of his society.

There is almost entire harmony in denying a recovery for the mental suffering of the beneficiaries of the deceased, or as a *solatium*.[49] In some states the language of the statutes has

It is said in Webb v. Denver, etc. R. Co., 7 Utah 17, 23. The word "pecuniary" in this connection is not construed in any very strict sense, and the tendency is to still greater liberality, and to include every element of injury that may be deemed to have a pecuniary value, although this value may not be susceptible of positive proof, and can only be vaguely estimated. It may include the loss of nurture, of the intellectual, moral and physical training which a mother only can give to children. Tilley v. Hudson River R. Co., 29 N. Y. 252, 286. It may include the loss of expected services of children who, at the time of their death, are too young to render any service (Ihl v. Forty-second St., etc. R. Co., 47 N. Y. 317, 7 Am. Rep. 450, 12 Am. Neg. Cas. 327), or of children or persons under no legal or moral obligation to render service or support, if the circumstances shown make it probable it will be rendered (Chicago & N. R. Co. v. Bayfield, 37 Mich. 205; Railroad Co. v. Barron, 5 Wall. 90, 18 L. ed. 591). It may include the loss of the society of a near relative (Beeson v. Green Mountain G. M. Co., 57 Cal. 20, 13 Am. Neg. Cas. 461, and may include damages for the loss of the father by children who are of full age, living away from the home of the deceased and supporting themselves. Lockwood v. New York, etc. R. Co., 98 N. Y. 523.

[49] Penoza v. Northern Pac. Ry. Co., 215 Fed. 200; McLaughlin v. United Rys. of San Francisco, 169 Cal. 494, L.R.A. 1915E 1205; Standard Forgings Co. v. Holmstrom, 58 Ind. 306; Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, L.R.A. 1915C 632; Arnold v. State, 163 App. Div. (N. Y.) 253; Smith v. Chicago, R. I. & P. R. Co., 42 Okla. 577; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Kelly v. City of Higginsville, 185 Mo. App. 55; Houston & T. C. R. Co. v. Walker, — Tex. —, 173 S. W. 208 [rev'g 167 S. W. 199]; Whitmer v. El Paso, etc. R. Co., 201 Fed. 193 (New Mexico); Cain v. Southern R. Co., 199 Fed. 211; Shields v. Dale, 168 Ill. App. 362; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417 rev'g 189 Fed. 495; American R. Co. v. Didrickson, 227 U. S. 145, 57 L. ed. 456; St. Louis, etc. R. Co. v. Geer (Tex. Civ. App.), 149 S. W. 1178; Felt v. Puget Sound E. R., 175 Fed. 282; Swift v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; Kountz v. Toledo, etc. R. Co., 189 Fed. 494; Smith v. Cissell, 22 App. Cas. (D. C.) 318; Helena G. Co. v. Rogers, 98 Ark. 413; Howey v. New England N. Co., 83 Conn. 278; Glawson v. Southern Bell Tel. & T. Co., 9 Ga. App. 450; Ferreira v. Honolulu R. T. & L. Co., 16 Hawaii 615; Ohio Valley T. Co. v. Wernke, 42 Ind. App. 326; Voelker v. Hill-O. C. Co., 153 Mo. App. 1; San Marcos E. L. & P. Co. v. Compton, 48 Tex. Civ. App. 586; Smith v. Lehigh Valley R. Co., 177 N. Y. 379 (it was error to admit in evidence a photograph of the deceased, a handsome woman); Ballinger v. Rader, 153 N. C. 488;

been regarded as warranting a recovery for the wounded feelings of the beneficiaries. Under a statute empowering the jury to give "such damages as they may think proportioned to the injury resulting from such death to the parties, respectively, for whom and for whose benefit such action shall be brought," the wounded feelings of the beneficiaries may be considered in estimating the damages.[50] Such feelings are

Byrd v. Southern Exp. Co., 139 N. C. 273; Morales v. San Juan L. & T. Co., 4 Porto Rico Fed. 361; (but compare Perianes v. Valdes, id. 126); Bremer v. Minneapolis, etc. R. Co., 96 Minn. 469; Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623 (the statute uses "necessary injury"); Wood v. Omaha, 87 Neb. 213; Johnson County v. Carmen, 71 Neb. 682; Hackney v. Delaware & A. Tel. Co., 69 N. J. L. 335; McCabe v. Narragansett E. L. Co., 26 R. I. 427, 17 Am. Neg. Rep. 355; Gulf, etc. R. Co. v. Farmer, 102 Tex. 235; Texas & N. O. R. Co. v. Walker, 58 Tex. Civ. App. 615; Houston & T. Cent. R. Co. v. Rutland, *supra;* International, etc. R. Co. v. McVey, 46 Tex. Civ. App. 181; Pittsburgh, etc. R. Co. v. Brown, 178 Ind. Redding v. Security Mut. L. Ins. Co. (Mo. App.), 144 S. W. 185; McCleary v. Pittsburg R. Co., 47 Pa. Super. Ct. 366; Kansas Pac. R. Co. v. Miller, 2 Colo. 465, 466; Illinois Cent. R. Co. v. Benz, 108 Tenn. 670, 58 L.R.A. 690; Chicago v. Major, 18 Ill. 349, 68 Am. Dec. 553; Chicago, etc. R. Co. v. Morris, 26 Ill. 400; Chicago, etc. R. Co. v. Shannon, 43 Ill. 346, 14 Am. Neg. Cas. 368; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Holton v. Daly, 106 Ill. 131; Chicago, etc. R. Co. v. Harwood, 80 Ill. 88; Oakes v. Maine Cent. R. Co., 95 Me. 103; Covington St. R. Co. v. Packer, 9 Bush 455, 15 Am. Rep. 725; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641, 12 Am. Neg. Cas. 327; Freeman v. Railroad, 107 Tenn. 340; North Chicago St. R. Co. v. Brodie, 156 Ill. 317; O'Fallon C. Co. v. Laquet, 89 Ill. App. 13; Commercial Club v. Hilliker, 20 Ind. App. 239; Railroad v. Wyrick, 99 Tenn. 500; Taylor, etc. R. Co. v. Warner, 84 Tex. 122; McGown v. International & G. N. R. Co., 85 Tex. 289, St. Louis, etc. R. Co. v. Freeman, 36 Ark. 41, 11 Am. Neg. Cas. 147, 12 Am. Neg. Rep. 479; Kake v. Horton, 2 Hawaii 209; Donaldson v. Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391; Southwestern R. Co. v. Paulk, 24 Ga. 356, 366; Hyatt v. Adams, 16 Mich. 180; Webb v. Denver, etc. R. Co., 7 Utah, 17, 23; Lazell v. Newfane, 70 Vt. 440; Walker v. McNeill, 17 Wash. 582; Hunt v. Conner, 26 Ind. App. 41; Stuckey v. Atlantic C. L. R. Co., 60 S. C. 237; Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 76; Barth v. Kansas City E. R. Co., 142 Mo. 535, 556, 3 Am. Neg. Rep. 682; Knight v. Sadtler L. &. Z. Co., 75 Mo. App. 541, 550; Regan v. Chicago, etc. R. Co., 51 Wis. 599; Green v. Southern Pac. Co., 122 Cal. 563; Wells v. Denver, etc. R. Co., 7 Utah 482, 17 Am. Neg. Cas. 688; Mobile & O. R. Co. v. Watly, 69

expressly made a ground of recovery by the statute of Florida.[51] In Louisiana physical and mental pain and suffering are elements of damage, regardless of whether other actual damages are claimed or not; the latter if the relations existing between decedent and the plaintiff were such as should exist between persons sustaining the same relations to each other.[52] Under the Missouri act providing for the recovery of such damages as are deemed fair and just with reference to the necessary injury resulting, parents may recover for the loss of the comfort, society and love of a child.[53] The Virginia statute permits the jury to award such damages as to it may seem fair and just. Under it punitive damages may be awarded, and the jury may consider the mental suffering of those for whose benefit the action was prosecuted.[54] The West Virginia act is to the same effect, and covers the same kind of compensatory

Miss. 145, 12 Am. Neg. Cas. 186; International, etc. R. Co. v. Boykin, 32 Tex. Civ. App. 72.

50 Nohrden v. Northeastern R. Co., 59 S. C. 87, 105; Brickman v. Southern R., 74 S. C. 306.

Punitive damages are also recoverable if the facts justify them. Lundy v. Southern Bell Tel. & T. Co., 90 S. C. 25.

Under this statute an instruction as to decedent's earning capacity and expectancy is not prejudicial, for the reason that such was merely an item of damages competent for the consideration of the jury. Southern R. Co. v. Disoker, 13 Ga. App. 799 (under South Carolina statute).

51 Florida East Coast R. Co. v. Hayes, 66 Fla. 589; Seaboard A. L. R. v. Moseley, 60 Fla. 186; Callison v. Brake, 63 C. C. A. 354, 129 Fed. 196 (by parents).

52 Burvant v. Wolfe, 126 La. 787, 29 L.R.A.(N.S.) 677; Bourg v. Brownell-D. L. Co., 120 La. 1009, 124 Am. St. 448; Cherry v. Louisiana & A. R. Co., 121 La. 471, 17 L.R.A.(N.S.) 505, 126 Am. St. 323; Dobyns v. Yazoo, etc. R. Co., 119 La. 72; Wooten v. United I. & R. M. Co., 128 La. 294; Robertson v. Jennings, 128 La. 795, 3 N. C. C. A. 882; Wood v. Gulf Ref. Co., 128 La. 968.

53 Sharp v. National B. Co., 179 Mo. 553.

"Necessary injury" means necessary pecuniary damage. The whole of the husband's probable earnings is not the measure of his widow's recovery; that is to be measured by the value of his support and maintenance. Knight v. Sadtler L. & Z. Co., 75 Mo. App. 541; Hawkins v. Missouri Pac. R. Co., 182 Mo. 323. See also Troll v. Laclede Gas Light Co., 182 Mo. App. 600, where by necessary inference, the court gives the same effect to the phrase.

54 Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396; Chesapeake & O. R. Co. v. Ghee, 110 Va. 527; Pocahontas C. Co. v. Rukas, 104 Va. 278, 20 Am. Neg Rep. 49; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356. See Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 46 L.R.A. 367.

damages as well as exemplary damages.[55] The same conclusion was announced in a California case ruled under a like statute;[56] but that case was soon disapproved, and the rule declared to be that in estimating the pecuniary losses of a wife from the death of her husband the jury may consider whether or not the deceased was a good husband, able and willing to provide well for his wife.[57] The Utah statute provides for the recovery of such damages as under all the circumstances of the case may be just. Under it the benefits which parents may derive from an adult child are "not to be limited in all cases to mere contributions of money, but may consist of the various elements that enter into the domestic relations of parent and child, living in one family or otherwise."[58] In case of the death of the husband and father the jurors may consider the benefits from the associations, comforts and pleasures that they may reasonably believe from the evidence his family would have received from him had his life been spared.[59] Though it be provided by statute that "all causes of action shall survive and may be brought notwithstanding the death of the person entitled or liable to the same," pain and suffering resulting from an injury are not elements of damage in an action by the administrator of the injured person brought to recover damages to the latter's estate.[60] In Connecticut damages are recoverable on the same grounds and are measured by the same rule as if the action had been brought in the lifetime of the decedent.[61] Under a statute

[55] Wigal v. City of Parkersburg, 74 W. Va. 25; Kelley v. Railroad Co., 58 W. Va. 216; Thomas v. Electrical Co., 54 W. Va. 395.

[56] Cleary v. City R. Co., 76 Cal. 240.

[57] Morgan v. Southern Pac. Co., 95 Cal. 510, 17 L.R.A. 71; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 527, 18 Am. St. 248.

There is no legal connection between negligence resulting in the death of a person and a physical injury caused by a nervous shock produced by news of the death upon the mother of the deceased. Norfolk & W. R. Co. v. Stevens, Adm'r, *supra*.

There need not be a special allegation of the loss of the society, comfort, protection or services of a deceased son. Bond v. United R., 159 Cal. 270.

[58] Rogers v. Rio Grande Western R. Co., 32 Utah 367, 125 Am. St. 876.

[59] Chilton v. Union Pac. R. Co., 8 Utah 47.

[60] Dwyer v. Chicago, etc. R. Co., 84 Iowa 479, 11 Am. Neg. Cas. 522; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 16 Am. Neg. Cas. 294.

[61] Wilmot v. McPadden, 79 Conn. 367.

making the loss of means of support the ground of recovery, injury to the plaintiff because of over-work performed after the disability of her husband because of intoxication, is not a ground of recovery.[62]

In some states the constitutions or statutes provide for the recovery of exemplary damages.[63] The right to recover such damages is given by the constitution of Kentucky: "Whenever the death of a person shall result from an injury inflicted by negligence or wrongful acts, then, in every such case, dam-

[62] Elshire v. Schuyler, 15 Neb. 561.

[63] Denver & R. G. R. Co. v. Frederic, 57 Colo. 90; Southern R. Co. v. Diseker, 13 Ga. App. 799 (under South Carolina statute); Boott Mills v. Boston & M. R. Co., 218 Mass. 582; Young v. St. Louis, etc. R. Co., 227 Mo. 307 (under the statute of 1905; Coleman v. Himmelberger-H. L. & L. Co., 105 Mo. App. 254; Olsen v. Montana O. P. Co., 35 Mont. 400; Christensen v. Floriston P. & P. Co., 29 Nev. 552; Barksdale v. Seaboard A. L. R., 76 S. C. 183; Osteen v. Southern R., 76 S. C. 368 (an amendment of the statute adopted in 1902 changed the former rule); Brickman v. Southern R., 74 S. C. 306; Louisville, etc. R. Co. v. Orr, 91 Ala. 548, 13 Am. Neg. Cas. 60; Thompson v. Louisville, etc. R. Co., 91 Ala. 496, 13 Am. Neg. Cas. 67, 11 L.R.A. 146; Kansas Pac. R. Co. v. Miller, 2 Colo. 467; Same v. Lundin, 3 id. 100; Turner v. Norfolk & W. R. Co., 40 W. Va. 675, 17 Am. Neg. Cas. 838 (but see Couch v. Chesapeake & O. R. Co., 45 W. Va. 51, the judges being equally divided in opinion); Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396; Gray v. McDonald, 104 Mo. 303; Barth v. Kansas City E. R. Co., 142 Mo. 535, 558, 3 Am. Neg. Rep. 682; St. Louis, etc. R. Co. v. Moore, 101 Miss. 768, 39 L.R.A.(N.S.) 978 (the statute does not expressly provide therefor, it seems).

The California statute formerly provided for the recovery of exemplary damages; but, owing to a change, they are not now recoverable. Lange v. Schoettler, 115 Cal. 388.

The right to such damages is given by the Constitution of Texas to a certain class of persons, and cannot be claimed by any others. Winnt v. International, etc. R. Co., 74 Tex. 32, 5 L.R.A. 172.

Under a statute allowing punitive damages within fixed limits evidence of the pecuniary injury caused by the death is inadmissible. Ervin v. St. Louis, etc. R. Co., 158 Mo. App. 1. *Contra*, Boyd v. Missouri Pac. R. Co., 249 Mo. 110, 4 N. C. C. A. 233.

The Colorado statute, providing that damages may be recovered for death in such amount, not exceeding $5,000, as the jury may deem fair and just in consideration of the degree of defendant's culpability has been construed as penal, and hence evidence of pecuniary loss occasioned by the death is incompetent. Denver & R. G. R. Co. v. Frederic, 57 Colo. 90. The same seems to be true in Massachusetts, under the Employer's Liability Act. Boott Mills v. Boston & M. R. Co., 218 Mass. 582.

ages may be recovered for such death from the corporations and persons so causing the same." This language includes, not alone compensatory damages, but all varieties of damages known to the law.[64] In Washington under a statute allowing the recovery of pecuniary or exemplary damages, both cannot be recovered in every case; in case of mere neglect the pecuniary loss measures the recovery; in case of injury caused by moral or legal wrong, amounting to wilfulness, exemplary damages may be added.[65] The last proposition appears to be in accord with a Missouri case.[66] Under the Alabama act, which provides for the recovery of such damages as the jury may assess, the damages are punitive and exemplary in every case —punitive of the act done and intended by their imposition to stand as an example to deter others from the commission of mortal wrongs or to incite to diligence in the avoidance of fatal casualties—the purpose being the preservation of human life regardless of the pecuniary value of a particular life to the next of kin under statutes of distribution. The admeasurement of the recovery must be by reference alone to the quality of the wrongful act or omission, the degree of culpability involved in the doing of the act or in the omission to act as required by the dictates of care and prudence, and without any reference to, or consideration of, the loss or injury the act or omission

[64] Illinois Cent. R. Co. v. Outland's Adm'x, 160 Ky. 714; Louisville & N. R. Co. v. Setser, 149 Ky. 162; Louisville & N. R. Co. v. King, 131 Ky. 347; Illinois Cent. R. Co. v. Sheegog, 126 Ky. 252; Continental C. Co. v. Cole, 146 Ky. 821; Louisville & N. R. Co. v. Kelly, 100 Ky. 421. But compare Louisville & N. R. Co. v. Orr, 91 Ala. 548.

In Kentucky it is proper to ask the court to instruct the jury to specify which part of the verdict is allowed for compensatory damages and which for those which are punitive. In a case where no such request was made, and where the verdict failed to show that any part of the damages were exemplary, the court seems to have treated the whole verdict as compensatory damages. Illinois Cent. R. Co. v. Outland's Adm'x, 160 Ky. 714.

[65] Klepsch v. Donald, 4 Wash. 436, 444, 31 Am. St. 936.

[66] Calcaterra v. Iovaldi, 123 Mo. App. 347.

In Missouri the statute provides that in determining the amount of damages in an action for causing death, the jury may have regard to mitigating or aggravating circumstances attending the neglect or default of defendant. Dalton v. St. Louis Smelting & Refining Co., 188 Mo. App. 529.

may occasion to the living.[67] Under the Alabama statute, known as the Employers' Liability Act, the damages recoverable are limited to such as are compensatory.[68] It has also been said that such statutes have for their purpose more than compensation; it is intended by them, also, to promote safety of life and limb by making negligence that causes death costly to the wrong-doer.[69] The general rule which requires that actual damage shall be sustained as a basis for exemplary damages applies in actions upon death statutes; the plaintiff may not object to the sufficiency of the latter.[70] If an excessive sum is awarded the court may set aside the verdict.[71] Exemplary damages are recoverable in Arkansas.[72] To be recovered against a corporation because of the act or neglect of its servant, no bad faith, evil intent, malice or intentional wrong

[67] Jones v. Birmingham Railway, Light & Power Co., 12 Ala. App. 474; Burnwell Coal Co. v. Setzer, — Ala. —, 67 So. 604; Richmond & D. R. Co. v. Freeman, 97 Ala. 289, 294, 13 Am. Neg. Cas. 64, following previous cases; Louisville & N. R. Co. v. Tegner, 125 Ala. 593; Same v. Lansford, 42 C. C. A. 160, 102 Fed. 62; McGhee v. McCarley, 44 C. C. A. 252, 103 Fed. 55; Randle v. Birmingham R., L. & P. Co., 169 Ala. 314; Kennedy v. Davis, 171 Ala. 609; Osteen v. Southern R., 76 S. C. 368; Louisville & N. R. Co. v. Perkins, 1 Ala. App. 376.

Under this statute an instruction which permitted the jury to assess the amount of damages recoverable for the death of a child at "a small sum or nominal damages" if they found that such sum would sufficiently punish defendant was held erroneous by its reference to nominal damages. Illinois Cent. R. Co. v. Robinson, — Ala. —, 66 So. 519.

In Sloss-S. S. & I. Co. v. Drane, 88 C. C. A. 34, 160 Fed. 780, the right to recover punitive damages under the Alabama Code of 1896 is denied; the recovery need not be limited to compensatory damages, but may extend to such as the jury may award in their discretion under proper instructions.

It is immaterial whether the deceased was an adult or a minor. Louisville & N. R. Co. v. Bogue, 177 Ala. 349.

Damages cannot be mitigated by proof of the care and competence of the person whose act or neglect caused the death. Adler v. Martin, 179 Ala. 97.

[68] Southern Iron & Steel Co. v. Boston, — Ala. —, 66 So. 684; Citizens' L., H. & P. Co. v. Lee, 182 Ala. 561.

[69] Per Shelby, C. J., in Whitmer v. El Paso & S. W. Co., 119 C. C. A. 637, 201 Fed. 193. The statute considered provided for exemplary damages.

[70] Louisville & N. R. Co. v. Street, 164 Ala. 155.

[71] Cox v. Birmingham R., L. & P. Co., 163 Ala. 170.

[72] St. Louis, etc. R. Co. v. Stamps, 84 Ark. 241.

being shown, it must appear that the master had knowledge of the servant's unfitness or incapacity.[73] Under the Missouri act there can be a recovery of punitive damages only under circumstances which would have permitted their recovery if the action had been brought by the deceased.[74] Under the Nevada statute it is not required that the complaint specify what portion, or whether any, of the damages asked are claimed as exemplary.[75] The constitution of Texas provides that in case of wilful homicide there shall be responsibility for exemplary damages. Where a case is within that provision the jury may be directed to award such damages,[76] if actual damages are recoverable.[77] Exemplary damages are recoverable under the

[73] Benner v. Truckee River G. E. Co., 193 Fed. 740.

[74] Kuehne P. Co. v. Allen, 78 C. C. A. 418, 148 Fed. 666.

Section 5425 of the Revised Statutes of Missouri, 1909, providing for both compensatory and punitive damages for death or injury caused by a public conveyance is inapplicable to cases of injury or death due to an automobile, although section 8523 of the same statute provides that for injury or death caused by an automobile "damages for such injury or death may be recovered as provided in section 5425," and in such case only compensatory damages are recoverable. The reason given is that section 5425 contained a reference to a penalty which was lacking in section 8523. Roberts v. Trunk, 179 Mo. App. 358.

[75] Peers v. Nevada P., L. & W. Co., 118 Fed. 400.

[76] Morgan v. Barnhill, 55 C. C. A. 1, 118 Fed. 24; Holland v. Closs (Tex. Civ. App.), 146 S. W. 671.

The Texas statute gives an action for "actual damages" when death is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, * * * or by the unfitness, gross negligence or carelessness of their servants or agents; when it is caused by the wrongful act, negligence, unskilfulness or default of another; and in a separate section provides that when death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered. These provisions are construed to authorize exemplary damages only for the defendant's wilful act, omission or gross negligence; if the defendant is a corporation the act, omission or negligence must be attributable to one who represented it in its corporate capacity, as its officer, not of a mere ordinary servant or agent. Houston, etc. R. Co. v. Cowser, 57 Tex. 293; International, etc. R. Co. v. McDonald, 75 id. 41. The retention in the defendant's service of the servant whose negligence has caused death is not sufficient to constitute a ratification of his act so as to authorize the imposition of exemplary damages. Id.

[77] Wilson v. Brown (Tex. Civ. App.), 154 S. W. 322.

civil damage statute of Illinois[78] and Tennessee.[79] There cannot be a recovery of such damages under the death statutes of several states.[80] In New York interest is recoverable from the date of death in accordance with the general rule relating to injuries to property.[81] In Michigan where the damages are computed as of the time of the death interest may be added to the date of the trial.[82] Questions as to damages for death arising under the Federal Employers' Liability Act are treated elsewhere.[83]

§ 1264. Recovery of nominal damages. In England and some states of the Union some actual damages must be shown as essential to the maintenance of the action; merely to show that, in other respects, the facts bring the case within the statute will not entitle the plaintiff to nominal damages.[84] There is reasonable ground for this doctrine where the statute requires that the damages shall be apportioned among the beneficiaries;[85] and where it is provided that the recovery shall be such sum as the jury shall deem fair and just.[86] The general rule in the United States is that at least nominal damages may be recovered. "The

[78] Belting v. Hobbett, 142 Ill. 72.

[79] Union R. Co. v. Carter, 129 Tenn. 459. Under Shannon's Code, §§ 4025–4028, a widow may recover not only compensatory damages for her own loss, but also any damages which deceased might have recovered if he had survived, and punitive damages if the facts make a proper case for the allowance of such damages. Where the recovery exceeds the amount of compensatory damages the excess is to be regarded as smart money.

[80] Western U. Tel. Co. v. Catlett, 100 C. C. A. 489, 177 Fed. 71 (passing on the North Carolina act which provides for the recovery of a fair and just compensation for the pecuniary damage); Palmer v. Philadelphia, etc. R. Co., 218 Pa. 114; Atchison, etc. R. Co. v. Townsend, 71 Kan. 524, 18 Am. Neg. Rep. 328.

[81] Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145, 149, 8 Am. Neg. Rep. 490, 51 L.R.A. 235.

[82] Larsen v. Home Tel. Co., 164 Mich. 295.

[83] Ch. 40.

[84] Vining v. Rexford (Pa.), 201 Fed. 904; Duckworth v. Johnson, 4 H. & N. 653, 15 Am. Neg. Rep. 633; Boulter v. Webster, 13 Week. Rep. 289; Lazelle v. Newfane, 70 Vt. 440, 446; McGown v. International, etc. R. Co., 85 Tex. 289; Cooper v. Shore E. Co., 63 N. J. L. 558, 567; Rouse v. Detroit E. R., 128 Mich. 149; Romeo v. Western C. & M. Co., 157 Ill. App. 67; Rader v. Galveston, etc. R. Co. (Tex. Civ. App.), 137 S. W. 718.

[85] Shallue v. Long Tunnel G. M. Co., 10 Vict. L. R. (law) 56.

[86] Kelley v. Railroad Co., 58 W. Va. 216, 2 L.R.A.(N.S.) 898.

only condition," says Comstock, J., "on which the right of the administrator to sue under the statute depends is the common-law right of the injured person to maintain an action if he were living."[87] "It may be added," he said, "that, as the statute expressly gives the right of action, nominal damages at least could be recovered."[88] And where the action is given for the benefit of the widow or next of kin, and it appears there are such, there may be a recovery to that extent, though no actual or substantial loss to them be shown.[89] Where collateral kindred are the parties in interest proof of damage must be made or nominal damages cannot be recovered,[90] at least in a court of admiralty.[91] Where lineal and collateral kindred join as parties and substantial injury is shown by the former, the recovery is not limited to a nominal sum.[92]

Actual damages resulting from the death are made recover-

[87] Quin v. Moore, 15 N. Y. 434.

[88] Id.; Lyons v. Cleveland, etc. R. Co., 7 Ohio St. 337, 70 Am. Dec. 75; St. Louis, etc. R. Co. v. Binn, 10 Kan. App. 468, 8 Am. Neg. Rep. 602; Pizzi v. Reid, 72 App. Div. (N. Y.) 162; Seaboard A. L. R. v. Moseley, 60 Fla. 186; Savage v. Hayes, 142 Ill. App. 316; Atchison, etc. R. Co. v. Fajardo, 74 Kan. 314; Davis v. Arkansas S. R. Co., 117 La. 320; Crabtree v. Missouri Pac. R. Co., 86 Neb. 33, 136 Am. St. 633, citing the text; Morgan v. Oronogo Circle M. Co., 160 Mo. App. 99. Compare Regan v. Chicago, etc. R. Co., 51 Wis. 599.

[89] Swift v. Johnson, 71 C. C. A. 619, 138 Fed. 867, 1 L.R.A. (N.S.) 1161; Bonato v. Peabody C. Co., 156 Ill. App. 196; Brennen v. Chicago & C. C. Co., 147 id. 263; Cleveland, etc. R. Co. v. Starks, 174 Ind. 345; Rockford, etc. R. Co. v. Delaney, 82 Ill. 198; Johnson v. Missouri Pac. R. Co., 18 Neb. 690; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Shannon, 43 id. 338, 14 Am. Neg. Cas. 368; Grotenkemper v. Harris, 25 Ohio St. 510; Pennsylvania R. Co. v. Keller, 67 Pa. 300; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Howard v. Delaware & H. R. C. Co., 40 Fed. 195, 6 L.R.A. 75; Kelley v. Chicago, etc. R. Co., 50 Wis. 381, 17 Am. Neg. Cas. 905; North Chicago St. R. Co. v. Brodie, 156 Ill. 317; Burk v. Arcata & M. R. R. Co., 125 Cal. 364, 73 Am. St. 52; Chicago, etc. R. Co. v. Gunderson, 174 Ill. 495; Anderson v. Chicago, etc. R. Co., 35 Neb. 95, 102; Jenkins v. Hankins, 98 Tenn. 545, 559; Broughel v. Southern New England Tel. Co., 73 Conn. 614. But see Hurst v. Detroit City R. Co., 84 Mich. 539, 548.

[90] Chicago, etc. R. Co. v. Gunderson, *supra;* Pittsburgh, etc. R. Co. v. Reed, 44 Ind. App. 635.

[91] In re California N. & I. Co., 110 Fed. 670.

[92] Grace & H. Co. v. Strong, 224 Ill. 630.

able by a variety of expressions in the several statutes, but they are all interpreted in general to indicate substantially the same view on phases of the injury. The main inquiry is, what is the pecuniary loss to those persons for whose benefit in a particular case the action is brought? What aid or advantage, having a pecuniary value, have these persons lost by reason of the death? This inquiry is considerably diversified by the different relationships embraced by the statute. This consideration justifies separate generalization of the action relative to each class of beneficiaries.

§ 1265. Recovery by widow. The recovery by a widow of damages resulting to her from the death of her husband will be governed by the general rule applicable to all the beneficiaries provided for by the statute, which is the present value of her reasonable expectation of pecuniary advantage from the continuance of the life of the deceased,[93] regard being had to the

[93] Kipros v. Uintah Ry. Co., 45 Utah 389; Frechett v. Illinois Cent. R. Co., 188 Ill. App. 377; Chesapeake & P. Tel. Co. v. State, 124 Md. 527; Boos v. Minneapolis, St. P. & S. S. M. R. Co., 127 Minn. 381; Powell v. Union Pac. R. Co., 255 Mo. 420; Zitnik v. Union Pac. R. Co., 95 Neb. 152; Radley v. Leray Paper Co., 214 N. Y. 32, L.R.A.1915E 1199, [motion for reargument denied, 214 N. Y. 688]; Arnold v. State, 163 App. Div. (N. Y.) 253; Embler v. Gloucester Lumber Co., 167 N. C. 457; Great Western Coal & Coke Co. v. Coffman, 43 Okla. 404; Great Western Coal & Coke Co. v. Boyd, 43 Okla. 438; St. Louis & S. F. R. Co. v. Long, 41 Okla. 177; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; McDaniel v. Lebanon Lumber Co., 71 Ore. 15; Gillett v. Flanner-Steger Land & Lumber Co., 159 Wis. 578; Secord v. John Schroeder Lumber Co., 160 Wis. 1; Belstner v. Town of Sumner, 157 Wis. 556; Sadowski v. Thomas Furnace Co., 157 Wis. 443; Missouri, etc. R. Co. v. West, 38 Okla. 581; Gulf, etc. R. Co. v. Beezley (Tex. Civ. App.), 153 S. W. 651; McDonald v. Sydney, 46 Nova Scotia 436; Hoffman v. R. Co., *infra;* Louisville & N. R. Co. v. Morris, 179 Ala. 239; St. Louis, etc. R. Co. v. Freeman, 89 Ark. 326; Kansas City S. R. Co. v. Henric, 87 Ark. 443; Consolidated S. Co. v. Staggs, 164 Ind. 331; Larsen v. Home Tel. Co., 164 Mich. 295; Gundy v. Nye-S. F. Co., 89 Neb. 599; Young v. Beveridge, 81 Neb. 180; Hackney v. Delaware & A. Tel. Co., 69 N. J. L. 335; New York, etc. R. Co. v. Roe, 4 Ohio C. C. (N.S.) 284; Irwin v. Pennsylvania R. Co., 226 Pa. 156; Burns v. Same, 219 Pa. 225; Carmona v. Fajando D. Co., 5 Porto Rico Fed. 209; International, etc. R. Co. v. McVey, 99 Tex. 28; David v. Southwestern R. Co., 41 Ga. 223; Potter v. Chicago, etc. R. Co., 21 Wis. 372, 7 Am. Neg. Cas. 157, 94 Am. Dec. 548; Louisville, etc. R. Co. v. Case, 9 Bush 728;

prospect of his advancement and increased salary under civil service rules;[94] but evidence as to the specific salaries of higher positions is not admissible.[95] The damages recoverable by her

Railroad Co. v. Barron, 5 Wall. 93; Telfer v. Northern R. Co., 30 N. J. L. 188, 12 Am. Neg. Cas. 275; Rafferty v. Buckman, 46 Iowa 195; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 17 Am. Neg. Cas. 443, 6 Am. St. 840; Central R. Co. v. Thompson, 76 Ga. 770; San Antonio T. Co. v. White, 94 Tex. 468, 9 Am. Neg. Rep. 616; Harrison v. Sutter St. R. Co., 116 Cal. 156, 1 Am. Neg. Rep. 403; Hayes v. Williams, 17 Colo. 465, 474, 13 Am. Neg. Cas. 573; Williams v. Walton, 9 Houst. 322, 13 Am. Neg. Cas. 787; Louisiana E. R. Co. v. Carstens, 19 Tex. Civ. App. 190; English v. Southern Pac. Co., 13 Utah 407, 421, 12 Am. Neg. Cas. 626, 57 Am. St. 772, 35 L.R.A. 155; Abbot v. McCadden, 81 Wis. 563, 29 Am. St. 910; Liermann v. Chicago, etc. R. Co., 82 Wis. 286, 33 Am. St. 37; Harkins v. Pullman P. C. Co., 52 Fed. 724; May v. West Jersey & S. R. Co., 62 N. J. L. 67, 5 Am. Neg. Rep. 417; McHugh v. Schlosser, 159 Pa. 480, 39 Am. St. 699, 23 L.R.A. 574; Alabama M. R. Co. v. Jones, 114 Ala. 519, 1 Am. Neg. Rep. 551, 62 Am. St. 121; Oakes v. Maine Cent. R. Co., 95 Me. 103; McLean v. Board, 7 Vict. L. R. (law) 239; Greenwood v. King, 82 Neb. 17.

An instruction which fails to limit the measure of damages to the pecuniary loss sustained by the wife as a result of her husband's death is not prejudicial where the damages recovered would not have been excessive under a proper instruction. Great Western Coal & Coke Co. v. Coffman, 43 Okla. 404; Great Western Coal & Coke Co. v. Boyd, 43 Okla. 438.

The fact that decedent was in the habit of becoming intoxicated is competent as bearing on his probable earnings and consequently on the financial loss sustained by the wife as a result of his death. Fearon v. New York Life Ins. Co., 162 App. Div. (N. Y.) 560.

[94] Central R. Co. v. Minor, 2 Ga. App. 804; King v. Ann Arbor R. Co., 144 Mich. 65; Conrad v. New York Cent., etc. R. Co., 137 App. Div. (N. Y.) 372; Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441. See Hoffman v. Chicago, etc. R. Co., 91 Neb. 783.

Due allowance for the probable increase in the earning capacity of the decedent may be made where it is shown he was in the line of promotion. The jury must not indulge in extravagant speculation outside the evidence as to what the increased earning capacity might be. The burden is on the plaintiff to produce evidence of a substantial nature to show what the future earnings would probably be and their present value. St. Louis, etc. R. Co. v. Freeman, 89 Ark. 326.

The earnings of the decedent in an occupation he had followed, it not appearing he was disqualified to pursue it or had permanently abandoned it, may be shown. Alabama G. S. R. Co. v. McWhorter, 156 Ala. 269.

[95] Barr v. Southern California Edison Co., 24 Cal. App. 22; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Ittner B. Co. v. Ashby, 198 Ill. 562; Kountz v. Toledo, etc. R. Co., 189 Fed. 494; Vreeland v. Michigan Cent. R. Co., id. 495; Ward v. Dampskibsselskabet Kjoebenhavn,

will include the value of her support by and the protection of her husband during the time he would probably have lived and supported her but for his death, unless her life expectancy is less than his.[96] The jury may also consider the addition that the earnings of the deceased would probably have made to his wealth and property had he continued to live, and the reasonable expectation the widow had of pecuniary advantage by ultimately receiving a share of such earnings as one of his

144 Fed. 524; Peters v. Southern Pac. Co., 160 Cal. 48; Paris, etc. R. Co. v. Robinson, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622; Voelker v. Hill-O. C. Co., 153 Mo. App. 1; Haines v. Pearson, 107 Mo. App. 481; Neary v. Northern Pac. R. Co., 41 Mont. 480; Mize v. Rocky Mt. Bell Tel. Co., 38 Mont. 521, 129 Am. St. 659; Halverson v. Seattle E. Co., 35 Wash. 600; Keeley v. Great Northern R. Co., 139 Wis. 448; Ryan v. Oshkosh G. L. Co., 138 Wis. 466; Dyas v. Southern Pac. Co., 140 Cal. 296; Hale v. San Bernardino Valley T. Co., 156 Cal. 713.

There must be a time limit on the value of such support, and evidence to show its value. Texas & P. R. Co. v. Gullett (Tex. Civ. App.), 134 S. W. 262.

If the allowance in favor of a widow on account of the loss of the society, comfort and protection of her husband exceeds that made on account of her pecuniary loss, it will be deemed excessive. Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 45 Fla. 278.

The earnings of the deceased just prior to death are to be considered in connection with his capacity, the probable duration of his life and the amount of his earnings which would probably have gone to his family. Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674, 101 Am. St. 434.

It is presumed that the deceased was industrious and sober, treated his family properly and, having a fixed income, gave them adequate support. Toledo R. & L. Co. v. Ward, 25 Ohio C. C. 399, 2 Ohio C. C. (N.S.) 256. "And even if he had not theretofore performed such duties his widow had a right to their performance, and is not to be limited to merely nominal damages for the negligent destruction of that right." Voelker v. C. Co., *supra*.

The words "necessary injury" include any damages which may be estimated according to a pecuniary standard, whether present, prospective or proximate. Barth v. Kansas City E. R. Co., 142 Mo. 535, 559, 3 Am. Neg. Rep. 682.

Under some civil damage acts all the consequences of loss of support may be recovered and such other loss as may be proved. Pilkins v. Hans, 87 Neb. 7.

In Delaware the recovery is controlled by the probable time the deceased would have lived but for the wrong, and the portion of his gross earnings or income the wife would have received from him. Gatta v. Philadelphia B. & W. R. Co., 2 Boyce (Del.) 551.

[96] Helena G. Co. v. Rogers, 104 Ark. 59.

heirs.[97] The amount of his probable accumulations would depend on his age, occupation, habits, bodily health and ability.[98] In considering the accumulations which the deceased

[97] Tidmarsh v. Chicago, etc. R. Co., 149 Wis. 590; Peters v. Southern Pac. Co., 160 Cal. 48; New York, etc. R. Co. v. Roe, 4 Ohio C. C. (N. S.) 284; Neary v. Northern Pac. R. Co., 41 Mont. 480; Texas & N. O. R. Co. v. Walker, 58 Tex. Civ. App. 615; Gray v. Phillips, 54 Tex. Civ. App. 148; Spiking v. Consolidated R. & P. Co., 33 Utah 313 (accumulations likely to be produced by the skill, personal supervision and diligence of the deceased); Ryan v. Oshkosh G. L. Co., 138 Wis. 466; West v. Bayfield M. Co., 144 Wis. 106, 5 N. C. C. A. 279; Lawson v. Chicago, etc. R. Co., 64 Wis. 448, 54 Am. Rep. 634, 10 Am. Neg. Cas. 562; Castello v. Landwehr, 28 Wis. 522; Annas v. Milwaukee, etc. R. Co., 67 id. 48, 58 Am. Rep. 848, 10 Am. Neg. Cas. 546; Kaspari v. Marsh, 74 Wis. 563, 17 Am. Neg. Cas. 924; Harrison v. Sutter St. R. Co., 116 Cal. 156, 168; Florida Cent. & P. R. Co. v. Foxworth, 41 Fla. 1, 76; Chicago & A. R. Co. v. Kelly, 182 Ill. 267, 272, 6 Am. Neg. Rep. 488, aff'g 80 Ill. App. 675; Gulf, etc. R. Co. v. Johnson, 1 Tex. Civ. App. 103; Rudiger v. Chicago, etc. R. Co., 101 Wis. 292, 302; Bauer v. Richter, 103 Wis. 412, 420. *Contra*, Baltimore & P. R. Co. v. Golway, 6 App. Cas. (D. C.) 142, 178, and see cases cited *infra*, this section.

Under a statute making the gross value of a husband's life the measure of his widow's recovery, regardless of whether she had, previous to his death, received anything from him or not, and without regard to what his personal expenses may have been, the increased prosperity of his family after his death is irrelevant. Boswell v. Barnhart, 96 Ga. 521, 14 Am. Neg. Cas. 82.

Conversely it seems that if the evidence tends to show that the expectation of the widow could not be more than the mere necessaries of life in a very humble station, her recovery will be cut down accordingly, as where the deceased was 49 years of age and was a steady worker, but had accumulated no property. In that case on appeal the court drew the inference that the daily wage, of which there was no evidence, could not have been large if at that age deceased had saved nothing. Belstner v. Town of Sumner, 157 Wis. 556.

[98] Missouri, etc. R. Co. v. West, 38 Okla. 581; Burns v. Pennsylvania R. Co., 219 Pa. 225; Pocahontas C. Co. v. Rukas, 104 Va. 278, 20 Am. Neg. Rep. 49; Norfolk & W. R. Co. v. Cheatwood, 103 Va. 356; Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Holmes v. Oregon, etc. R. Co., 6 Sawyer 262; Au v. New York, etc. R. Co., 29 Fed. 72; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103, 12 Am. Neg. Cas. 169; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302, 14 Am. Neg. Cas. 362, 34 Am. Rep. 168; Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409; Taylor v. Western Pac. R. Co., 45 Cal. 323, 13 Am. Neg. Cas. 349; McIntyre v. New York Cent. R. Co., 37 N. Y. 287, 5 Am. Neg. Cas. 97; Catawissa R. Co. v. Armstrong, 52 Pa. 282; Mansfield, etc. Co. v. McEnery, 91 id. 185, 36 Am. Rep. 662; Kesler v. Smith, 66 N. C.

might have made to his estate the future income of invested capital, disconnected with his personal exertions, and any such income beyond that which is the result of such exertions is to be excluded.[99] A wife has a right to support during her life out of her husband's estate.[1] She partakes of the benefits of his affluence while they both live, and if she survive her share of the estate is always augmented by its increase. So long as the legal relation of husband and wife exists, without reference to the will of the husband, the wife not having forfeited her right as such by her own wrong, she is entitled to support from him in accordance with her station in life.[2] Hence, the damages to which she is entitled are not affected though her husband left her a year or more before his death and had no communication with her in the meantime, and intended never to return to her or contribute to her support.[3] But it is otherwise if, during his

154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Central R. Co. v. Thompson, 76 Ga. 770; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Opsahl v. Judd, 30 Minn. 126; Ohio, etc. R. Co. v. Voight, 122 Ind. 288, 9 Am. Neg. Cas. 291; Railway Co. v. Sweet, 60 Ark. 550; Belting v. Hobbett, 142 Ill. 72; Boyd v. Missouri Pac. R. Co., 249 Mo. 110 (ruled under § 5425, R. S. 1909).

[99] Underwood v. Old Colony St. R. Co., 33 R. I. 319; McAdory v. Louisville & N. R. Co., 94 Ala. 272.

[1] Bish. Marr. Women, §§ 57, 58, 892.

[2] Florida Cent. & P. R. Co. v. Foxworth, *supra;* Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 377.

As damages are to be assessed as of the date of decedent's death it is immaterial when plaintiff and decedent were married. Radley v. Leray Paper Co., 214 N. Y. 32, L.R.A. 1915E 1199 [motion for reargument denied, 214 N. Y. 688].

[3] Dallas & W. R. Co. v. Spicker, 61 Tex. 427, 48 Am. Rep. 297; Central R. Co. v. Bond, 111 Ga. 13; Ingersoll v. Detroit & M. R. Co., 163 Mich. 268, 32 L.R.A.(N.S.) 362. Compare Creamer v. Moran, 41 Wash. 636, where such facts are referred to as bearing on the measure of the recovery. See § 1267. There seems to be a good reason for permitting inquiry into the relations of the deceased with his wife as bearing upon the value of her right to his support, and especially the value of his care and protection of her. Holland v. Closs (Tex. Civ. App.), 146 S. W. 671.

Similarly, evidence that the husband and wife did not live together at the time of the husband's death, or the reasons therefor was held incompetent, unless the offer of evidence was accompanied by an offer to prove desertion or other forfeiture of the right to support. Boos v. Minneapolis, St. P. & S. S. M. R. Co., 127 Minn. 381.

life-time, the wife has lost her legal right to support by living in adultery.[4] Aside from offenses against the marital relation, the habits and moral character of the widow are not open to investigation.[5] There may be added to the foregoing elements of damage the value of the services of a deceased husband and father in the superintendence, attention to, and care of his family, and the education of his children.[6] But it is otherwise, in an action brought for the benefit of the widow and next of kin, as to the funeral expenses,[7] and the cost of nursing, medical attention, etc.[8]

Life tables (though they are not essential,[9] nor conclu-

[4] Stimpson v. Wood, 57 L. J. (Q. B.) 484, 59 L. T. Rep. 218, 36 Week. Rep. 734; Orendorf v. New York Cent., etc. R. Co., 119 App. Div. (N. Y.) 638.

[5] Boos v. Minneapolis, St. P. & S. S. M. R. Co., 127 Minn. 381; Consolidated S. Co. v. Morgan, 160 Ind. 241.

[6] Kansas City S. R. Co. v. Henrie, 87 Ark. 443; St. Louis, etc. R. Co. v. Caraway, 77 Ark. 405; Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674, 101 Am. St. 434; Carmona v. Fajardo D. Co., 5 Porto Rico Fed. 209 (loss of society); Railway Co. v. Sweet, 57 Ark. 287, 295; § 1263.

In some cases the language is less specific—as that in determining the pecuniary damages it may be shown what kind and character of a husband and father the deceased was. Darks v. Scudder-G. G. Co., 146 Mo. App. 246. But see Roth v. Bien, 33 Ohio Cir. Ct. 480, [aff'd 87 Ohio St. 483], holding that evidence of a father's disposition and conduct toward the children is incompetent where the circumstances under which the evidence is offered show that it was offered merely to enhance damages.

Under a statute providing for such damages as the jury may consider proper, considering all damages of every kind to any and all the parties interested, it is proper to regard the loss to the wife and children of the companionship, protection and society of the husband and father, but not by way of *solatium*. St. Louis, etc. R. Co. v. Moore, 101 Miss. 768, 39 L.R.A.(N.S.) 978.

[7] Maney v. Chicago, etc. R. Co., 49 Ill. App. 105, 113.

In New York funeral expenses are not an element of damages for the death of a husband unless the beneficiary is legally liable to pay them. In re Huth, 152 N. Y. Supp. 215.

[8] Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Same v. Waade, 54 Ill. App. 215, 226.

[9] Rober v. Northern Pac. R. Co., 25 N. D. 394; Standard Oil Co. v. Reagan, 15 Ga. App. 571; Clark v. Iowa Cent. R. Co., 162 Iowa 630; Boswell v. Barnhart, 96 Ga. 521, 524; Philadelphia, etc. R. Co. v. Tucker, 35 App. Cas. (D. C.) 123, citing the text and holding that the jury could judge as to the age and health of the plaintiff from seeing her; Warren, etc. R. Co. v. Waldrop, 93 Ark. 127 (expectancy may be

sive [10]) if they approximately show the expectancy of life of persons of the age of him whose rights are involved or upon whose expectancy of life such rights depend,[11] are persuasive evidence [12] and may be used to ascertain the gross amount of the value of life;[13] (and if unopposed by other evidence should

judged of from appearance); Little v. Bousfield, 165 Mich. 654; Ruehl v. Lidgerwood Rural Tel. Co., 23 N. D. 6; Atchison, etc. R. Co. v. Hughes, 55 Kan. 491, 503, 3 Am. Neg. Cas. 479; Kansas City S. R. Co. v. Morris, 80 Ark. 528 (expert testimony is admissible); South Omaha v. Sutliffe, 72 Neb. 746; Young v. Beveridge, 81 Neb. 180 (conclusion may be arrived at from age, health and appearance).

The average duration of the decedent's life is to be assumed though he was engaged in a dangerous occupation. Dobyns v. Yazoo, etc. R. Co., 119 La. 72.

10 Standard Oil Co. v. Reagan, 15 Ga. App. 571; Moses v. Mathews, 95 Neb. 672; San Bois Coal Co. v. Resetz, 43 Okla. 384; Secord v. John Schroeder Lumber Co., 160 Wis. 1; Texas Mexican R. Co. v. Higgins, 44 Tex. Civ. App. 523; Louisville & N. R. Co. v. Anderson, 150 Ala. 350.

The jury may find that the duration of a particular life would have been much longer and that the earning capacity of the deceased would have extended over a greater period than the tables show. Sternfels v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 494.

As data or evidence, tending to show expectancy of life, mortality tables are not conclusive. Their weight as such is determinable by the triers of fact. To be competent, it is not necessary that evidence be offered to show that deceased conformed to the standard of health and vigor adopted in such tables. Such evidence goes to the weight, and not to the competency of the tables as evidence. Broz v. Omaha M. & G. Hospital Ass'n, 96 Neb. 648, L.R.A.1915D 334. To a similar effect see San Bois Coal Co. v. Resetz, 43 Okla. 384.

Where life tables are admitted to prove the expectancy of life of decedent when killed, a defendant who has not at the trial asked for an instruction defining the evidentiary effect to be given to the tables cannot assign as error the fact that the court did not of its own motion give such an instruction. Murray v. Omaha Transfer Co., 95 Neb. 175.

11 Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241; Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, rev'd 238 U. S. 599; Slaughter v. Goldberg, Bowen & Co., 26 Cal. App. 318; Wabash R. Co. v. Gretzinger, 182 Ind. 155; Illinois Cent. R. Co. v. Outland's Adm'x, 160 Ky. 714; Murray v. Omaha Transfer Co., 95 Neb. 175; Craig v. Chicago, St. P., M. & O. R. Co., 97 Neb. 586; Pearl v. Omaha, etc. R. Co., 115 Iowa 535; Decker v. McSorley, 111 Wis. 91, 13 Am. Neg. Rep. 631; Valente v. Sierra R. Co., 158 Cal. 412; Chicago, etc. R. Co. v. Hambel, 2 Neb. (Unof.) 607.

12 Secord v. John Schroeder Lumber Co., 160 Wis. 1.

13 Ward v. Dampskibsselskabet Kjoebenhavn, 144 Fed. 524; Springfield E. L. & P. Co. v. Calvert, 134 Ill. App. 285; Harrison v. Sutter St. R. Co., 116 Cal. 156, 168, 1 Am.

be controlling);[14] but such amount must be reduced to its present value; in other words, where the value of the life, less the personal expenses of the deceased, is the measure of damages the sum awarded must not exceed the amount which would be realized each year during the estimated continuance of life by his net earnings,[15] or by the contributions he would have made

Neg. Rep. 403; Belting v. Hobbett, 142 Ill. 72; § 455.

[14] Secord v. John Schroeder Lumber Co., 160 Wis. 1.

Where life tables were offered in evidence to prove decedent's expectancy of life, and were objected to on the sole ground that such tables were not authenticated to be correct, which objection was overruled, and no exception taken, defendant is precluded from assigning as error the fact that such expectancy was not proved to be that which was shown by the tables. Devine v. Grand Trunk Western Ry. Co., 188 Ill. App. 612.

[15] Clark v. Iowa Cent. R. Co., 162 Iowa 630; Sadowski v. Thomas Furnace Co., 157 Wis. 443; St. Louis, etc. R. Co. v. Hitt, 76 Ark. 227; Engvall v. Des Moines City R. Co., 145 Iowa 560; Louisville & N. R. Co. v. Massie, 138 Ky. 449; Little v. Bousfield, 165 Mich. 654; Rivers v. Bay City T. Co., 164 Mich. 696; Goodes v. Lansing S. T. Co., 150 Mich. 494; Roberson v. L. Co., *infra;* Watson v. Seaboard A. L. R. Co., 133 N. C. 188; Burns v. Pennsylvania R. Co., 219 Pa. 225; McCabe v. Narragansett E. L. Co., 26 R. I. 427; West v. Bayfield M. Co., 144 Wis. 106, 5 N. C. C. A. 279; Atlantic, etc. R. Co. v. Newton, 85 Ga. 517; Rowley v. London, etc. R. Co., L. R. 8 Ex. 221; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 356, 378, 11 Am. Neg. Cas. 475; McAdory v. Louisville & N. R. Co., 94 Ala. 272, 13 Am. Neg. Cas. 114; Houston, etc. R. Co. v. Cowser, 57 Tex. 293; Alabama M. R. Co. v. Jones, 114 Ala. 519, 62 Am. St. 121.

The data by which a court may test the propriety of a verdict has been stated in a late Wisconsin case as follows: 1st, The average earning power of the deceased at the time of his death: 2nd, His expectancy of life; 3rd, His probable average earning power during such expectancy, considering his condition of health, what he had been accustomed to earn and all the circumstances bearing on the question; 4th, The proportion of such earning capacity which with reasonable certainty would have reached the wife had he not been taken away; 5th, The present worth thereof; and 6th, The amount it would take to purchase an income during the expectancy of his life equal to the amount the dependents would probably have received out of his earnings. Secord v. John Schroeder Lumber Co., 160 Wis. 1.

Upon proof of a person's age, health and earning capacity a jury may estimate the value of her life. and reduce that value to its present cash value by any method satisfactory to them which produces a result which is reasonable and authorized by the evidence. If they adopt a method other than that suggested by the court, and reach a result fairly deducible from the evidence, the verdict will be sustained, al-

during his life expectancy for the support of his family as shown by what he had contributed thereto.[16] In Pennsylvania a widow, without regard to her life expectancy, takes such a proportion of the damages as she would have taken in her husband's personal estate if he had died intestate; hence her expectancy of life is not material.[17]

In considering the personal expenses of the deceased the amount he was expending for the education and maintenance of a brother and money saved for the purpose of investing in land from month to month are not to be deducted from his gross earnings.[18] In estimating the accumulations the deceased would probably have made the jury should be instructed to consider that, in his declining years he might experience diminished capacity to labor and earn money.[19] Where the testimony was to the effect that the deceased spent all his earnings on himself and his wife the court assumed that one-half thereof was used for her benefit, and that at the end of his expectancy of life nothing would have been saved. The measure of the wife's recovery was such sum as, being put to interest, will each year, by taking a part of the principal and adding it to the

though another result might be reached by the method suggested by the court, provided the result obtained be legal, just and accurate. Standard Oil Co. v. Reagan, 15 Ga. App. 571, 8 N. C. C. A. 209.

The method prevailing in the forum governs the reduction of damages though the cause of action arose elsewhere. Georgia, etc. R. Co. v. Sasser, 4 Ga. App. 276.

By statute in Georgia no deduction is to be made for the personal expenses of the husband had he lived. Central R. Co. v. Newman, 138 Ga. 145.

16 Meola v. Quincy M. Co., 174 Mich. 305.

The pecuniary loss to a widow by reason of her husband's death must be measured by the present worth of such portion of his earnings, had he lived to the limit of his expectancy of life, as would with reasonable certainty have inured to her. Sadowski v. Thomas Furnace Co., 157 Wis. 443.

17 Emery v. Philadelphia, 208 Pa. 492, 16 Am. Neg. Rep. 563, distinguishing Baltimore, etc. T. R. Co. v. State, 71 Md. 573.

18 Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458, 2 Am. Neg. Rep. 294.

Only such deduction is to be made from the probable earnings of the deceased as are reasonably necessary to meet his personal expenses, considering his age, manner of living, calling and other circumstances. Roberson v. Johnson L. Co., 154 N. C. 328; Carter v. Railroad, 139 N. C. 499 (not his expenditures).

19 Western & A. R. Co. v. Moore, 94 Ga. 457.

interest, yield one-half the sum of the earnings of the deceased.[20] If there is reasonable expectation that the widow would receive something from the surplus earnings of the husband, an allowance should be made therefor.[21] But this hard-and-fast rule is not everywhere approved. It is said by an able judge that it was undoubtedly proper for the jury to consider under the evidence what amount of money invested in an annuity would yield the yearly amount the widow and next of kin[22] would probably have received from the deceased had he lived, but they were not bound to allow damages based upon that method, nor any particular method of investment of money. It would be proper for a jury, upon proper evidence, to consider what amount invested in government bonds, well-secured mortgages on real estate, or any other safe security, would yield the annual amount the injured parties would probably have received from the deceased had he lived; but it would not be the province of the court to direct them to allow an amount based upon any one of these methods of investment. Indeed, if, after considering all of the evidence, they found difficulty in arriving at a conclusion by mathematical calculations based on any method of investment, they would be authorized to estimate the loss according to their own good sense and sound judgment.[23]

[20] Louisville & N. R. Co. v. Trammell, 93 Ala. 350, 13 Am. Neg. Cas. 140; Decatur C. W. & Mfg. Co. v. Mehaffey, 128 Ala. 242.

[21] Rudiger v. Chicago, etc. R. Co., 101 Wis. 292.

[22] For cases where the court on appeal by use of this method tested the verdict to see whether it was excessive or not see Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241; Kansas City Southern R. Co. v. Leslie, 112 Ark. 305, rev'd 238 U. S. 599; Standard Oil Co. v. Reagan, 15 Ga. App. 571, 8 N. C. C. A. 207; Wabash R. Co. v. Gretzinger, 182 Ind. 155; Clark v. Iowa Cent. R. Co., 162 Iowa 630; Zitnik v. Union Pac. R. Co., 95 Neb. 152; Gillett v. Flanner-Steger Land & Lumber Co., 159 Wis. 578; Secord v. John Schroeder Lumber Co., 160 Wis. 1; Sadowski v. Thomas Furnace Co., 157 Wis. 443.

[23] Per Sanborn, C. J., in St. Louis, etc. R. Co. v. Needham, 3 C. C. A. 129, 52 Fed. 371; Houston & T. Cent. R. Co. v. Turner, 34 Tex. Civ. App. 397, 17 Am. Neg. Rep. 272. See § 1268; Harkins v. Pullman P. C. Co., 52 Fed. 724; Baltimore & O. R. Co. v. Golway, 6 App. Cas. (D. C.) 143, 178; Honea v. St. Louis, etc. R. Co., 245 Mo. 621.

In passing on an instruction limiting the jury to the present worth of the probable amount the deceased would have contributed to the support of the plaintiff, it was said that while the jury may not arbi-

It was also held error to instruct the jury that if they believed the plaintiff's expectancy of life was greater than that of her husband they could add to the sum which would purchase such an annuity the present value of any property that she would probably have received as dower if the husband had not been killed. The earnings of the deceased had been used in support of his family. The court observed: Under this evidence so many chances and contingencies of life and death, of sickness and health, of accident and injury, of the birth and rearing of children, conditioned the lives and relations of this husband and wife that no court was authorized to instruct the jury that they must allow the widow one-third or one-half of the present value of the husband's probable future accumulations if they were of the opinion she would have outlived him if he had not been killed.[24] Where several years have elapsed since the death and before the trial and the next of kin have not received anything the deferred payments on the annuity basis and interest thereon should be awarded, and the present value of an annuity for the remaining portion of the estimated life of the decedent.[25]

The number and the ages of children dependent upon a widow for support are proper subjects of proof in an action by her to recover for the death of her husband. Such evidence shows her loss. During the husband's life-time he was bound to support them; after his death that obligation, to the extent of her pecuniary ability, devolved upon their mother.[26] The ill-

trarily assess such sum as to them may seem "proportionate to the injury," without reference to the facts and circumstances of the case, yet the law does confide in them considerable discretion, and the court should not undertake to lay down a fixed rule by which they must be governed. Merchants & P.'s O. Co. v. Burns, 96 Tex. 573, 17 Am. Neg. Rep. 267. And that a calculation based on the present worth of the estimated earnings of the deceased leaves out of consideration the element of an increase in earning capacity, and assumes that existing rates of interest will continue. The law leaves the damages to the fair judgment of the jury subject to the power of the court over the verdict. Texas & P. R. Co. v. Johnson, 48 Tex. Civ. App. 135.

[24] St. Louis, etc. R. Co. v. Needham, *supra*.

[25] Danskin v. Pennsylvania R. Co., 83 N. J. L. 522.

[26] Hughes v. Danville Brick Co., 180 Ill. App. 603; Burton v. Kansas City, 181 Mo. App. 427; Zitnik v. Union Pac. R. Co.,

health of the plaintiff may be shown,[27] as may the physical condition of the children, the time they have been receiving medical attention and their continued need of it.[28] The financial situation of the widow or next of kin cannot be gone into;[29] nor can it be shown that she gave birth to a still-born child after

95 Neb. 152; Galveston, H. & S. A. Ry. Co. v. Pennington, — Tex. Civ. App. —, 166 S. W. 464; Boyer v. Northwestern E. R. Co., 174 Ill. App. 161; Boyd v. Missouri Pac. R. Co., 249 Mo. 110 (ruled under § 5425, R. S. 1909); The San Rafael, 72 C. C. A. 388, 141 Fed. 270; Choctaw, etc. R. Co. v. Doughty, 77 Ark. 1; Bonato v. Peabody C. Co., 156 Ill. App. 196; Beyer v. Peoria, etc. T. Co., id. 47; Pittsburgh, etc. R. Co. v. Sudhoff, 173 Ind. 314; Voelker v. Hill-O. C. Co., 153 Mo. App. 1; Brinkman v. Gottenstroeter, 153 Mo. App. 351; Ogan v. Missouri Pac. R. Co., 142 Mo. App. 248; Williams v. Metropolitan St. R. Co., 141 Mo. App. 625; Hartnett v. United Rys. Co. of St. Louis, 162 Mo. App. 554; Hamann v. Milwaukee B. Co., 136 Wis. 39; Horr v. Howard Co., 126 Wis. 160; Mulcairns v. Janesville, 67 Wis. 24, 17 Am. Neg. Cas. 903, 907, 908; Louisville & N. R. Co. v. Banks, 132 Ala. 471; Coffeyville M. & G. Co. v. Carter, 65 Kan. 565, 12 Am. Neg. Rep. 594; Pool v. Southern Pac. Co., 7 Utah 303, 310, 17 Am. Neg. Cas. 687, 693; Chilton v. Union Pac. R. Co., 8 Utah 47, 17 Am. Neg. Cas. 695; English v. Southern Pac. Co., 13 Utah 407, 421, 57 Am. St. 772, 35 L.R.A. 155; Alabama M. R. Co. v. Jones, 114 Ala. 519, 1 Am. Neg. Rep. 551, 62 Am. St. 121; Abbot v. McCadden, 81 Wis. 563, 29 Am. St. 910; Felton v. Spiro, 24 C. C. A. 321, 2 Am. Neg. Rep. 682, 78 Fed. 576; Hunt v. Conner, 26 Ind. App. App. 41; Railroad v. Davis, 104 Tenn. 442, 452; Spiro v. Felton, 73 Fed. 91. *Contra,* Litchfield & N. R. Co. v. Shuler, 134 Ill. App. 615; Illinois Cent. R. Co. v. Ashline, 56 id. 475; but compare Chicago & A. R. Co. v. Pearson, 82 id. 605, 614; Chicago Edison Co. v. Moren, 86 id. 152. See Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712.

And so under a statute fixing the limits of a penalty. Boyd v. Missouri Pac. R. Co., 249 Mo. 110, 4 N. C. C. A. 233.

The number of children is only competent as tending to show the amount of pecuniary loss. Zitnik v. Union Pac. R. Co., 95 Neb. 152.

If the children have a separate right of action evidence as to them is inadmissible. Larzelere v. Kirchgessner, 73 Mich. 276.

27 Coffeyville M. & G. Co. v. Carter, The San Rafael, Hamann v. B. Co., *supra;* Evarts v. Santa Barbara C. R. Co., 3 Cal. App. 712. *Contra,* Seattle E. Co. v. Hartless, 75 C. C. A. 317, 144 Fed. 379.

28 Simoneau v. Pacific E. R. Co., 159 Cal. 494, 2 N. C. C. A. 137.

29 Lee v. Toledo, St. L. & W. R. Co., 184 Ill. App. 144; Hughes v. Danville Brick Co., 180 Ill. App. 603; Gundy v. Nye-Schneider-Fowler Co., 89 Neb. 599; Consolidated G., etc. Co. v. Smith, 109 Md. 186, 21 Am. Neg. Rep. 262; Litchfield & M. R. Co. v. Shuler, 134 Ill. App. 615; Pittsburgh, etc. R. Co. v. Kinnare, 203 Ill. 388; Brennen v. Chicago & C. C. Co., 241 Ill. 610, and local cases cited.

the cause of action accrued.[30] Under the act of congress of 1885,[31] which provides that the creditors of the deceased shall not have any interest in the recovery and that the damages shall be assessed with reference to the injury done to the widow and next of kin of the deceased, it is proper to show that the latter were helpless young children, and that they and their mother depended for support entirely upon the father and husband. The injury done by taking his life was much greater to persons so situated than it would be to next of kin able to maintain themselves, and who had never depended, and had no right to depend, upon the deceased for their maintenance.[32] Adult children are not to be wholly ignored in the assessment of damages.[33] The use made of the earnings of the decedent may be shown.[34]

[30] Preble v. Wabash R. Co., 149 Ill. App. 584 (not fatal error).

Under a statute providing for the recovery of such damages as are a fair and just compensation for the pecuniary injuries sustained the widow may show she was dependent upon deceased for support (Amas v. Milwaukee & N. R. Co., 67 Wis. 46, 58 Am. Rep. 848), and sustain an allegation in the complaint that a child was born and died after the death of the husband. Preble v. Wabash R. Co., 243 Ill. 340.

[31] Ch. 126, 23 Stats. 307.

[32] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 93, 39 L. ed. 624, 631, 13 Am. Neg. Cas. 803.

But it has been held erroneous to instruct the jury that they may consider that the decedent was the sole support of his wife. Kerrigan v. Market St. R. Co., 138 Cal. 506.

[33] Toledo R. & L. Co. v. Ward, 2 Ohio C. C. (N.S.) 256.

[34] Pittsburgh, etc. R. Co. v. Kinnare, 203 Ill. 388; Chicago, R. I. & P. R. Co. v. Gunn, 112 Ark. 401; Lee v. Toledo, St. L. & W. R. Co., 184 Ill. App. 144; Hughes v. Danville Brick Co., 180 Ill. App. 603; Wabash R. Co. v. Gretzinger, 182 Ind. 155; Powell v. Union Pac. R. Co., 255 Mo. 420; Arnold v. State, 163 App. Div. (N. Y.) 253; San Bois Coal Co. v. Resetz, 43 Okla. 384; St. Louis & S. F. R. Co. v. Long, 41 Okla. 177; Galveston, H. & S. A. Ry. Co. v. Pennington, — Tex. Civ. App. —, 166 S. W. 464; Southern Pac. Co. v. Vaughn, — Tex. Civ. App. —, 165 S. W. 885.

The sum contributed by the deceased to the support of his family ought to be shown; it cannot be inferred from proof of his earnings, nor from the knowledge of jurors as to the probable cost thereof, at least in the absence of evidence as to the manner in which the family lived. St. Louis, etc. R. Co. v. Caraway, 77 Ark. 405. It is essential to the recovery of more than nominal damages that it be shown what the deceased contributed to the support of his family. Brennen v. Chicago & C. C. Co., 147 Ill. App. 263.

Evidence of the amount of decedent's household expenses is competent as tending to throw some light

The widow's remarriage will not preclude her from maintaining the action[35] nor affect the amount she is entitled to recover;[36] nor will the fact that she married the deceased after he sustained the injury which resulted in his death, the statute giving the right of action to his "widow."[37] Under a statute

on the amount of pecuniary loss sustained by the wife by the death of the husband. Powell v. Union Pac. R. Co., 255 Mo. App. 420.

In an action by a widow for the death of her husband, evidence is competent that deceased was a "good provider." Ft. Worth & D. C. Ry. Co. v. Stalcup, — Tex. Civ. App. —, 167 S. W. 279.

Similarly it was shown that decedent spent no money for foolishness, but passed his pay check to his wife, who paid bills and banked the balance. St. Louis & S. F. R. Co. v. Long, 41 Okla. 177.

Where it does not appear what proportion of his wages the deceased contributed to his family, the jury may not infer that he contributed the entire amount earned, but it may infer that he contributed the larger portion. In this case it was held that a fair inference would be that he contributed three-fourths. Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241.

[35] International, etc. R. Co. v. Kuehn, 70 Tex. 582, 12 Am. Neg. Cas. 602, 603.

[36] Richardson F. Co. v. Peters, 82 Ill. App. 508; Chicago, etc. R. Co. v. Lagerkrans, 65 Neb. 566; Chicago, etc. R. Co. v. Driscoll, 207 Ill. 9; Consolidated S. Co. v. Morgan, 160 Ind. 241. See Jones v. McMillan, 129 Mich. 86; Hewitt v. East Jordan L. Co., 136 Mich. 110.

"The reason is that a right of action arises at the time of the death to recover just what was lost by it; and the loss thus occasioned is none the less, even though the injured party thereafter acquire, through his own skill or industry, or the charity or affection of another, more than he lost." St. Louis, etc. R. Co. v. Cleere, 76 Ark. 377.

The Georgia code provides that "a widow, and if no widow, a child or children, may recover for the homicide of the husband or parent," and gives the right of survivorship to the children if the widow dies. A right of action in a widow does not die on her remarriage; and the fact that thereby she becomes the wife of a wealthy man does not lessen the amount she may recover. Georgia R. & B. Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492.

There the damages may be mitigated by proof of the deceased's contributory negligence. Atlantic, etc. R. Co. v. Newton, 85 Ga. 517.

[37] Gross v. Electric T. Co., 180 Pa. 99.

It is provided by statute in New York that if the deceased shall have left him surviving a wife or a husband, but no children, the damages shall be for the sole benefit of such wife or husband, and that the damages shall be such sum as the jury deem to be a fair and just compensation for the pecuniary injuries resulting from decedent's death. The plaintiff married the decedent in good faith after his injury, which he survived only two days. The trial court instructed that the recovery was the value of the reasonable expectation of benefit from the

which is both penal and compensatory the dependence of the widow upon the deceased for support may be shown.[38] The recovery is not affected by the ability of the widow to support herself.[39]

Insurance received by a widow from a policy on her husband's life is not to be deducted from the damages assessed in her favor in an action to recover for his death,[40] nor a pension which she receives pursuant to law.[41] In England it has been said that the widow is benefited only by the accelerated receipt of the policy money, and that benefit, being represented by the interest on the money during the period of acceleration, may be compensated by deducting future premiums from the estimated future earnings of the deceased.[42] But Lord Campbell charged the jury that the amount due on an accident policy should be deducted, and that with regard to the policies upon the life of the deceased, other than accident, if you allow any deduction

continuance of life to be calculated upon the condition of the decedent at the time of the marriage. This was erroneous. "But for the fact that defendant negligently injured decedent the plaintiff would naturally have been entitled to receive from her husband her support and all the incidental pecuniary advantages of the marital relation. These advantages she has lost because of her husband's death. Their pecuniary value to her is the measure of her damages due to his death." Radley v. Leray P. Co., 156 App. Div. (N. Y.) 429.

38 Kettelkake v. American C. & F. Co., 171 Mo. App. 528.

39 Wavle v. Michigan United R. Co., 170 Mich. 81, 4 N. C. C. A. 729.

40 Deel v. Heiligenstein, 244 Ill. 239 (under the Dram-Shop Act); Illinois Cent. R. Co. v. Prickett, 109 App. 468; Houston & T. Cent. R. Co. v. Lemair, 55 Tex. Civ. App. 237; § 158; Galveston, etc. R. Co. v. Cody, 20 Tex. Civ. App. 520; Coulter v. Pine, 164 Pa. 543; Sherlock v. Alling, 44 Ind. 184, 199; Althorf v. Wolfe, 22 N. Y. 355, 16 Am. Neg. Cas. 749; Terry v. Jewett, 17 Hun 395; Harding v. Townshend, 43 Vt. 536, 5 Am. Rep. 304; Stahler v. Philadelphia & R. R. Co., 199 Pa. 383; Western & A. R. v. Meigs, 74 Ga. 857; Clune v. Ristine, 36 C. C. A. 450, 6 Am. Neg. Rep. 416, 94 Fed. 745; Lipscomb v. Houston, etc. R. Co., 95 Tex. 5, 55 L.R.A. 869.

The same rule applies where deceased had accident insurance. Tyler S. R. Co. v. Raspberry, 11 Tex. Civ. App. 185. But see San Antonio, etc. R. Co. v. Long, 87 Tex. 148, 24 L.R.A. 637, 47 Am. St. 87, as modified by Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 391, 1 Am. Neg. Rep. 378.

41 Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441; Devine v. Chicago, 172 Ill. App. 246.

42 Grand Trunk R. Co. v. Jennings, L. R. 13 App. Cas. 800.

(and I think you will probably consider that some deduction ought to be allowed), it will only be in respect, I should think, of the premiums that would be paid by the family, or which would have been paid by himself, if this fatal accident had not happened. I leave that, however, entirely in your hands.[43] The cases cited appear to establish the law of England as being that the defendant can mitigate the damages to the extent that pecuniary benefit results to the plaintiff from the death.[44] The English law has been changed by 8 Edw. VII., ch. 7. In Ontario when the action is under the Fatal Accidents Act insurance is to be taken into account, but the jury are not required to deduct the whole amount for which the life of the deceased was insured.[45] But there must be more than probability that benefit will inure to the widow because of the death of the husband. It has been held by the court of appeal of New Zealand that neither the probability, at the time of the death, that a fund will be raised by public subscription for the benefit of the families of a number of men killed by an accident, nor the facts that since the death and before action brought a more or less definite trust of the fund has been created, under which those for whom the action is brought will, in all probability, participate (though at the discretion of the trustee), are fit subjects for the consideration of the jury in estimating the damages to be allowed to the family of a person killed.[46] And it has been decided in Arkansas that a conditional provision made by government for the benefit of the widow and minor children of a deceased pensioner is not to be considered in mitigation of their damages.[47] Evidence of the defendant's generosity in taking up a collection for the benefit of the plaintiff and paying for medical and surgical assistance rendered the decedent should not be received.[48] Neither are the damages to be mitigated because the husband and father left an estate. "The contrary is true.

43 Hicks v. Newport, etc. R. Co., 4 B. & S. 403, note.

44 Bradburn v. Great Western R. Co., L. R. 10 Ex. 1, 3.

45 Dawson v. Niagara, etc. R. Co., 23 Ont. App. 670.

46 Greymouth-Point Elizabeth R. & C. Co. v. McIvor, 16 New Zeal. L. R. 258.

47 Railway Co. v. Maddry, 57 Ark. 306, 11 Am. Neg. Cas. 133.

48 Linden v. Anchor M. Co., 20 Utah 134.

If a man deserts his family, leaving nothing for their support, and has accumulated no property, these facts constitute evidence tending to show that very slight, if any, damage results to the family from his death. If, on the contrary, a man is of industrial and economical habits, of business sagacity, and has in the past supported his family and accumulated property, the natural presumption is that such habits will continue if his life be prolonged, and that the damage to his family by reason of his untimely death is enhanced by those very facts. The estate left to the family would presumably be not less productive in the hands of the husband and father himself had he lived, and its income would inure to the benefit of the family as much had he lived as after his death.[49] The possession of an estate by the widow is also immaterial to the liability of the defendant.[50] Evidence as to what the deceased would have done in any given case of business management is inadmissible because it does not afford a reliable basis for computing the damages.[51] If the earnings of the family have not decreased since the death of the husband the fact may be explained.[52] Under a civil damage statute the widow may recover, in addition to the value of the husband's support, the cost of necessary medical attendance and the funeral expenses incurred by her.[53]

Though the statutes of the state under which the action is brought do not limit the amount of the recovery in the par-

[49] Houston v. Gran, 38 Neb. 687; Sloss-S. S. & I. Co. v. Holway, 144 Ala. 280; Nilson v. Chicago, etc. R. Co., 84 Neb. 595; Chicago, etc. R. Co. v. Hambel, 2 Neb. (Unof.) 607; Same v. Bayfield, 37 Mich. 205. See Same v. Trippett, 50 Tex. Civ. App. 279; § 1267.

Under a statute giving the decedent's widow the right to recover the gross value of his life, without regard to what she had received from him, and aside from his personal expenses, the better condition of his family after his death is irrelevant. Boswell v. Barnhart, 96 Ga. 521.

In Yergy v. Helena L. & R. Co., 39 Mont. 213, the court seems to have been influenced by the size of the fortune left the widow and the disposition made of it by the decedent.

[50] Deel v. Heiligenstein, 244 Ill. 239.

[51] Indianapolis & M. R. T. Co. v. Reeder, 51 Ind. App. 533; Karau v. Pease, 45 Ill. App. 382.

[52] Horst v. Lewis, 71 Neb. 365.

[53] Keeling v. Pommer, 83 Neb. 510. The act provided for the recovery of all damages sustained by the wife and children on account of the traffic.

ticular action, they have been sometimes given weight in fixing the damages where that is done by the court, as in admiralty suits.[54] But in other actions the court will not pay attention to such statutes if that of the jurisdiction is later in date than they and contains no limitation as to the amount of the recovery.[55] It is apparent from what has preceded that there are so many considerations of a non-pecuniary nature which may be taken into account by the jury, that much must be left to their discretion in fixing the compensation in any case. The same aversion to interference with its conclusion prevails in cases of this nature as in others; and the fact that the court would have fixed the award at a considerably less sum is not ground for its interference with the verdict.[56]

[54] The Oceanic, 61 Fed. 338, 363.

[55] Redfield v. Oakland Con. St. R. Co., 110 Cal. 277.

[56] In a recent case a man aged thirty-five years and earning $1.25 a day left a wife and two small children. His chief qualifications for earning money were that he was "stout, healthy and sober." The jury gave a verdict for $10,000 compensatory damages. In reply to an objection that the award was excessive the court observed: "If it was our duty to calculate from these facts the pecuniary value of his life to his wife and children at the date of his death we would not be able to make it reach near the sum given by the verdict. While the law does not, in this character of action, intend to give compensation for anything but pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some but not to every extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the lawmaker. In some states an attempt has been made to remove them by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the valuation upon facts incapable of exact ascertainment, we think that the lawmaker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice or

§ 1266. Recovery by husband. The right of a husband to damages resulting from the death of his wife extends to all elements of his loss which have a pecuniary value. He cannot generally recover damages of a sentimental character,[57] as for loss of her society or companionship,[58] nor for anything which cannot be measured by money and satisfied by a pecuniary recompense;[59] but the loss of household service accustomed to

partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think that the law intends that the jury's estimate rather than the equally undefined one of the judges shall prevail." Missouri Pac. R. Co. v. Lehmberg, 75 Tex. 61. In St. Louis, etc. R. Co. v. Johnston, 78 Tex. 536, a verdict for $5,000 each in favor of a widow and a daughter seven years old was sustained, the deceased having been earning $125 per month.

[57] Denver, etc. R. Co. v. Gunning, 33 Colo. 280; Davis v. Guarnieri, 45 Ohio St. 470, 482, 4 Am. St. 548; Bolinger v. St. Paul, etc. R. Co., 36 Minn. 418, 12 Am. Neg. Cas. 140, 1 Am. St. 680; Chicago v. Major, 18 Ill. 349, 360, 68 Am. Dec. 553; Holton v. Daly, 106 Ill. 131, 138; Chicago, etc. R. Co. v. Morris, 26 id. 400; Gaither v. Kansas City, etc. R. Co., 27 Fed. 544; Little Rock, etc. R. Co. v. Barker, 39 Ark. 491; St. Louis, etc. R. Co. v. Freeman, 36 id. 41, 11 Am. Neg. Cas. 147; Au v. New York, etc. R. Co., 29 Fed. 72; Demarest v. Little, 47 N. J. L. 28, 16 Am. Neg. Cas. 643; Rains v. St. Louis, etc. R. Co., 71 Mo. 165, 36 Am. Rep. 459, 16 Am. Neg. Cas. 452; Nelson v. Lake Shore & M. S. R. Co., 104 Mich. 582. See § 1263.

[58] Bolinger v. R. Co. 36 Minn. 418, 12 Am. Neg. Cas. 140, 1 Am. St. 680; Tilley v. Hudson River R. Co., 24 N. Y. 474; McIntyre v. New York Cent. R. Co., 37 id. 295, 5 Am. Neg. Cas. 97; Telfer v. Northern R. Co., 30 N. J. L. 188; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Board of Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; International & G. N. R. Co. v. Boykin, 32 Tex. Civ. App. 72.

A recovery by the husband as personal representative for the death of his wife bars an action by him as husband to recover for the loss of her society from the time of her injury until her death. Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. 385.

There cannot be joined with an action for the death one for the physical and mental suffering of the deceased during the period between the accident and the death. Owensboro & N. R. Co. v. Barclay, 102 Ky. 16.

[59] Telfer v. R. Co., *supra*.

Under a statute of Virginia in an action by a husband for the death of his wife testimony is properly received to show that she was loving,

be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered,[60] as is also the loss to the children of the care and moral training of their mother.[61] In some states the pecuniary loss resulting from the deprivation of the services, society and comfort of the wife may be recovered.[62] In Texas there may be recovery of the expenses necessarily incurred by reason of the injuries sustained by a wife and which caused her death.[63] In Ohio the husband, suing in his individual capacity, may recover the funeral expenses, they not being recoverable by the administrator.[64] If the deceased had no descendants or next

tender, dutiful, thrifty, industrious, economical and prudent, and that after he married her there was a change for the better in his habits and pecuniary condition. These qualities constitute an element of damages in fixing the *solatium* to be awarded to him. Simmons v. McConnell, 86 Va. 494.

Among the important considerations in an action to recover for the loss of a wife and mother who was not engaged in earning money are the number and ages of her children, her efficiency and devotedness to her family. Valente v. R. Co., 158 Cal. 412.

60 Collins v. St. John, 38 New Bruns. 86; Moses v. Mathews, 95 Neb. 672; Craig v. Chicago, St. P., M. & O. R. Co., 97 Neb. 586.

Although in an action to recover for the death of a wife it is competent to show the expense of servants necessary to do the household work performed by the deceased, yet such evidence is not always a true index to the pecuniary loss suffered by the husband, and such question must be determined with regard to the circumstances of each case. Craig v. Chicago, St. P., M. & O. R. Co., 97 Neb. 586. To a similar effect see Moses v. Mathews, 95 Neb. 672.

61 McArdle v. Pittsburg R. Co., 41 Pa. Super. Ct. 162; Valente v. R. Co., Graysonia-N. L. Co. v. Carroll, *infra;* St. Lawrence, etc. R. Co. v. Lett, 11 Can Sup. Ct. 422, 26 Am. & Eng. R. Cas. 454; Pennsylvania R. Co. v. Goodman, 62 Pa. 332; Board of Com'rs v. Legg, *supra;* Redfield v. Oakland Con. St. R. Co., 112 Cal. 220, 228; Nelson v. R. Co., 101 Mich. 582; May v. West Jersey, etc. R. Co., 62 N. J. L. 63.

In Delaware, etc. R. Co. v. Jones, 128 Pa. 308, the court held that the husband in a suit for the negligent killing of his wife sixty-six years of age, he having shown that deceased had always been a healthy woman, was not bound to prove special damages, as if the subject of his loss had been a horse or other animal and was entitled to recover substantial damages for the pecuniary loss to him without making such proof.

62 Valente v. Sierra R. Co., 158 Cal. 412; Graysonia-N. L. Co. v. Carroll, 102 Ark. 460.

63 International, etc. R. Co. v. Boykin (Tex. Civ. App.), 74 S. W. 93.

64 Cincinnati, etc. R. Co. v. Taylor, 27 Ohio C. C. 757.

of kin and the husband would be entitled to the whole of her personal estate evidence of the amount of the work, earnings and probable profits of the deceased is competent, whether the business in which she was engaged was hers individually, in which the husband had an expectant pecuniary interest, or whether it was his business in which she rendered services.[65] Under a statute making the capacity of the deceased to earn money a consideration in the estimate of damages evidence of such capacity is competent though she had never earned money and probably would not have done so had life continued.[66] In arriving at the value of the services a wife would have rendered the cost of her maintenance must be deducted.[67]

The statute looks to prospective advantages of a pecuniary nature which have been cut off by the premature death; and the word "pecuniary" is used in distinction to those injuries to the affections and sentiments which arise from the death of relatives and which, though most fearful and grievous to be borne, cannot be measured or recompensed by money.[68] Evidence that the husband had married again and that his second wife performed like services and duties and contributed in like manner as the first to the support of the family and the accumulation of property is not admissible in mitigation of damages.[69] Nor is the fact that the life of the deceased was insured for the benefit of those in whose favor the action is brought.[70] If the jury may give such damages as they deem fair and just in reference to the pecuniary injury resulting to the plaintiff from the death, proof may be made of the husband's circumstances and financial condition.[71] Where correct instruc-

[65] Meyer v. Hart, 23 App. Div. (N. Y.) 131; Austin v. Metropolitan St. R. Co., 108 App. Div. (N. Y.) 249; Denver, etc. R. Co. v. Gunning, *infra*.

[66] Dillon v. Hudson, etc. R. Co., 73 N. H. 367.

[67] Gorton v. Harmon, 152 Mich. 473; Denver, etc. R. Co. v. Gunning, 33 Colo. 280.

[68] Tilley v. R. Co., *supra*.

[69] Davis v. Guarnieri, 45 Ohio St. 470, 482, 4 Am. St. 548; Gulf, etc. R. Co. v. Younger, 90 Tex. 387; Georgia R. & B. Co. v. Garr, 57 Ga. 277; Dimmey v. Wheeling & E. G. R. Co., 27 W. Va. 32, 7 Am. Neg. Cas. 111, 55 Am. Rep. 292.

[70] § 1265.

[71] Thoresen v. La Crosse City R. Co., 94 Wis. 129, 133, 12 Am. Neg. Cas. 657, and local cases cited.

tions concerning the elements of damages have been given there may be added thereto a statement that the jurors' observation, experience and knowledge, conscientiously applied to the facts and circumstances, are important considerations in fixing the sum to be awarded.[72] Under a statute providing for the distribution of the sum recovered among the husband and children in the same proportions as the personalty of the decedent would have been had she died intestate, the death of the husband pending an action instituted by him does not affect the recovery where his administrator is substituted as plaintiff and the action is prosecuted for the benefit of the children of both decedents.[73]

Expediting the death of a patient by carelessness, inhuman and cruel treatment on the part of the attending physician is more than a mere technical injury, and cannot be compensated for by the imposition of nominal damages.[74] In North Carolina the measure of damages to be recovered by a husband for the death of his wife is the net present value of the life taken,[75] and evidence of the number of deceased's children is incompetent.[76]

§ 1267. Children's loss from death of parent. During minority children may ask compensation for such loss on the same principles, by the same measure and ascertained by proof of the same facts as a widow for the death of her husband. There is a legal right to support,[77] and a like expectancy of

[72] Denver, etc. R. Co. v. Gunning, 33 Colo. 280; Rautman v. Chicago Con. T. Co., 156 Ill. App. 457; Chicago, etc. R. Co. v. Groner, 43 Tex. Civ. App. 264.

[73] McArdle v. Pittsburg R. Co., *supra.*

[74] Gray v. Little, 126 N. C. 385.

[75] Lynch v. Rosemary Mfg. Co., 167 N. C. 98; Bradley v. Ohio River & C. R. Co., 122 N. C. 972. Hence it was error to instruct the jury without qualification that it might take into consideration the amount of deceased's probable earnings for the balance of the wife's expectancy of life. Lynch v. Rosemary Mfg. Co., *supra.*

[76] Lynch v. Rosemary Mfg. Co., 167 N. C. 98; Bradley v. Ohio River & C. R. Co., 122 N. C. 972. In the last named case the reason of the rule is stated to be that as in that state the value of the life taken, as an industrious or idle mother, is the test, and not the necessities of the family, such evidence would tend to furnish the jury with a motive for assessing damages in an amount greater than the value of the life.

[77] McPherson v. St. Louis, etc. R.

benefit from the distribution of the parent's estate. The jury is not confined in estimating the damage to any exact mathematical calculation, but is vested with considerable discretion, with which the courts will not interfere unless it has been abused.[78] The rights of minor children are not affected by what it may cost to raise or educate them, but are measured by the pecuniary benefit they could reasonably expect to receive from their father during the probable continuance of his life.[79]

Co., 97 Mo. 253, 259, 16 Am. Neg. Cas. 500, 501; Goss v. Missouri Pac. R. Co., 50 Mo. App. 614, 627.

[78] Lane v. Northern Pac. R. Co., 119 Minn. 258; Stoher v. St. Louis, etc. R. Co., 91 Mo. 509, 16 Am. Neg. Cas. 500, 501; Countryman v. Fonda, etc. R. Co., 166 N. Y. 201; Douglass v. Northern Cent. R. Co., 59 App. Div. (N. Y.) 470; Rosenbaum v. Shaffner, 98 Tenn. 624; Pool v. Southern Pac. Co., 7 Utah 303, 311, 17 Am. Neg. Cas. 687, 693; White v. Australasian S. N. Co., 13 New South Wales L. R. (law) 177; St. Louis, etc. R. Co. v. McCain, 67 Ark. 377, 386; Redfield v. Oakland Con. St. R. Co., 110 Cal. 277; Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; O'Fallon C. Co. v. Laquet, 89 id. 13; Gulf, etc. R. Co. v. Delaney, 22 Tex. Civ. App. 427; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 378, 11 Am. Neg. Cas. 475; Phalen v. Rochester R. Co., 31 App. Div. (N. Y.) 448.

[79] Chicago, R. I. & P. R. Co. v. Gunn, 112 Ark. 401; McLaughlin v. United Railroads of San Francisco, 169 Cal. 494, L.R.A.1915E 1205; Chesapeake & P. Tel. Co. v. State, 124 Md. 527; Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Fisher v. Portland Railway, Light & Power Co., 74 Ore. 229; McClaugherty v. Rogue River Elec. Co., 73 Ore. 135; Texas & N. O. R. Co. v. Cunningham, — Tex. Civ. App. —, 168 S. W. 428; International, etc. R. Co. v. Kuehn, 2 Tex. Civ. App. 210, 12 Am. Neg. Cas. 602, 603; Baltimore & O. R. Co. v. Hottman, 25 Ohio C. C. 140.

In a late Texas case the rule stated in the text was said to apply to adult children as well as minors, where such adults had a resonable ground for expecting that the parent would, had he lived, rendered them pecuniary aid, thus showing a prospective financial loss due to the father's death. Damages recovered by such adult must be actual and for a pecuniary loss, which must be clearly, but not necessarily directly shown. Houston & T. C. R. Co. v. Walker, — Tex. —, 173 S. W. 208 [rev'g 167 S. W. 199].

An instruction in an action by children to recover for the death of a mother that the pecuniary value of the life of the mother was the "value in money" of such life was erroneous and therefore properly refused, for the reason that the requested instruction did not define the term "value in money." The reason given for the decision was that it might tend to confuse the jury, who unless fully advised, might not understand that the term includes elements having no real value in money, but which for want

The expense of education during minority may be regarded as well as the value of support.[80] The effect of a statute limiting the right of action for the benefit of minor children is to save the latter harmless during minority from the loss of benefits they would have received up to the time of their respective majorities had their father lived under as favorable conditions as would have existed had he not been killed. The loss of a minor who attained majority pending the suit is to be compensated for.[81]

The law will imply a pecuniary loss in some amount to the wife and children by the death of the husband and father who was at the time employed and presumably receiving wages, and therefore able to discharge his obligation to support them.[82] The presumption is in favor of substantial damages;[83] and some damage is presumed in favor of adult children who have lost their mother.[84]

Recovery may be had in behalf of a child *in ventre sa mère*

of a better method of compensation the law says shall be estimated in terms of money, such as the care of a daughter by her mother. McLaughlin v. United Railroads of San Francisco, 169 Cal. 494.

Evidence has been held competent that a father was wont to teach his little girl her Sunday school lessons, and wanted her to go to Sunday school, as well as making her practice her music lessons, as tending to show that the father had an affection for his children, took an interest in their welfare, and on that account would be likely to contribute to their support in the future. The father in this case did not reside with the children. Chicago, R. I. & P. R. Co. v. Gunn, 112 Ark. 401.

80 Delahunt v. United Tel. & T. Co., 215 Pa. 241, 20 Am. Neg. Rep. 727, 114 Am. St. 958.

81 Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712.

82 Texas Power & Light Co. v. Bird, — Tex. Civ. App. —, 165 S. W. 8; Bateman v. Illinois Cent. R. Co., 162 Ill. App. 125; Louisville, etc. R. Co. v. Buck, 116 Ind. 566, 9 Am. St. 883, 14 Am. Neg. Cas. 553, 11 Am. Neg. Cas. 508, 2 L.R.A. 520; McKeigue v. Janesville, 68 Wis. 50; Houghkirk v. Delaware & H. C. Co., 92 N. Y. 219, 12 Am. Neg. Cas. 313, 44 Am. Rep. 370; Countryman v. Fonda, etc. R. Co., *supra;* Hunt v. Conner, 26 Ind. App. 41, 50; Kelly v. Chicago, etc. R. Co., 50 Wis. 381, 17 Am. Neg. Cas. 905; Chicago v. Scholten, 75 Ill. 468; Chicago & N. R. Co. v. Swett, 45 Ill. 197; St. Louis, etc. R. Co. v. Haist, 71 Ark. 258; Cleveland, etc. R. Co. v. Dukeman, 130 Ill. App. 105.

83 Dukeman v. Cleveland, etc. R. Co., 237 Ill. 104.

84 Rautman v. Chicago Con. T. Co., 156 Ill. App. 457.

if it is born within due time,[85] and on behalf of all the children of a deceased father who had a legal claim upon him for support.[86] In an action by the next kin to recover for the death of a person, a brother or sister of the deceased born soon after his death is an heir and a necessary party.[87]

Ordinarily children are expected to survive their parents and to inherit whatever property they leave undisposed of, and to transmit their own property to their children. The mere fact that the children are all of age at the time of the parent's death does not everywhere [88] preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations had he not been injured,[89] especially if they are depend-

[85] The George & Richard, L. R. 3 Ad. & Ecc. 466; Roach v. Wolff, 96 Neb. 43; Zitnik v. Union Pac. R. Co., 95 Neb. 152; Arnold v. State, 163 App. Div. (N. Y.) 253; Texas & N. O. R. Co. v. Cunningham, — Tex. Civ. App. —, 168 S. W. 428; and cases cited in note to § 8. See Dietrich v. Northampton, 138 Mass. 14, 52 Am. Rep. 242.

[86] International, etc. R. Co. v. Culpepper, 19 Tex. Civ. App. 182, 1 Am. Neg. Rep. 370; Gulf, etc. R. Co. v. Delaney, 22 Tex. Civ. App. 427.

[87] Chicago & A. R. Co. v. Logue, 58 Ill. App. 142.

[88] If the deceased had not accumulated anything an expectation of inheritance by his children should not be considered. Wiest v. Electric T. Co., 200 Pa. 148, 58 L.R.A. 666.

[89] Valente v. Sierra R. Co., 158 Cal. 412; Hollingsworth v. Davis-D. Estates C. Co., 38 Mont. 143; Paris, etc. R. Co. v. Robinson, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622; Rochester v. Seattle R. & S. R. Co., 67 Wash. 545, 39 L.R.A.(N.S.) 1156 (under ch. 129, laws 1909); Tuteur v. Chicago, etc. R. Co., 77 Wis. 505; Galveston, etc. R. Co. v. Puente, 30 Tex. Civ. App. 246; Mansfield C. & C. Co. v. McEnery, 91 Pa. 185, 36 Am. Rep. 662, 17 Am. Neg. Cas. 237; Redfield v. Oakland Con. St. R. Co., 112 Cal. 220, 228; Chicago, etc. R. Co. v. Ptacek, 171 Ill. 9; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Phalen v. Rochester R. Co., 31 App. Div. (N. Y.) 448; Pennsylvania R. Co. v. Adams, 55 Pa. 499; Schnatz v. Philadelphia & R. R., 160 Pa. 602; Stahler v. Same, 199 Pa. 383; Tyler S. R. Co. v. Raspberry, 13 Tex. Civ. App. 185.

It is otherwise under the terms of the dramshop acts or civil damage laws of some states, the injury in person or property therein mentioned being such as is in violation of a legal right of which the plaintiff was in the actual enjoyment before and at the time of the injury thereto. Jury v. Ogden, 56 Ill. App. 100; Goode v. Towns, 56 Vt. 410, 48 Am. Rep. 799.

In Phalen v. R. Co., 31 App. Div. (N. Y.) 448, the deceased was aged sixty-eight at the time of her death and was living

ent.[90] On the other hand, where damages are claimed by an adult son on account of his mother's death the jury is to consider the likelihood that she might require care and expense from him, and the amount of property owned by each as bearing upon the question of his loss.[91]

Evidence of the financial condition of the head of the family at the time of the death of the wife is admissible upon the issue of the pecuniary injury sustained by a child. To the extent that the aid given by the mother to the child was derived from the income of property which the latter received at the mother's death, such aid was not lost by her death. But the fact of the receipt of property is not a defense to the child's action.[92] The last proposition is very satisfactorily dealt with in a Pennsylvania case, which is in harmony with cases elsewhere noted.[93] In the Pennsylvania case the fact that, as the

around among her children, some of whom afforded her pecuniary assistance. The court observed: The fact that they had dutifully done so does not detract from their right to recover damages in this action. It might well be that when sickness or misfortune should render the care or assistance of this mother necessary, she would be in a condition to render it, and this would certainly be a pecuniary benefit. But we will not indulge in anticipations of the many ways in which the jury might see how the deceased could render pecuniary aid to her sons and daughters. They had the right to that aid and to the preservation of her life as long as Providence should permit.

90 Young v. Beveridge, 81 Neb. 180, citing Rouse v. Detroit E. R. Co., 128 Mich. 149, 15 Am. Neg. Rep. 633; Carpenter v. Buffalo, etc. R. Co., 38 Hun 116; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296.

91 Lazelle v. Newfane, 70 Vt. 440.

92 Gulf, etc. R. Co. v. Younger, 90 Tex. 387, 1 Am. Neg. Rep. 378, modifying San Antonio, etc. R. Co. v. Long, 87 Tex. 148, 47 Am. St. 87, 24 L.R.A. 637; Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712; McLaughlin v. United Railroads of San Francisco, 169 Cal. 494, L.R.A. 1915E 1205.

Where a mother whose husband was living at the time of her death was accustomed to contribute regularly to each of her three children, and where the evidence tended to show that such contributions would have been continued but for her death, *prima facie* a basis for the estimation of damages is made out, and if the estate of the mother, from the income of which she made the contributions, is to come to plaintiffs at the death of the father, it is a matter of defense to show the fact in mitigation of damages, so that it was immaterial whether plaintiff proved the age of the father or not. Wescoat v. Decker, 85 N. J. L. 716.

93 § 1265.

result of the death of their father, adult children came into possession of an inheritance was held immaterial to the right or measure of recovery for his death. The question involved is similar to that which arises where the deceased had insurance on his life for the benefit of those who are entitled to recover for his death. As we have seen,[94] the courts in the United States are a unit in opposition to the idea that the wrong-doer's liability is thereby mitigated. On the question as to the effect of the inheritance upon the damages recoverable the court said: Conceding the right to recover if a loss is sustained, how do we ascertain what is a loss in the sense contemplated by the act? A son who is receiving nothing from his father living may be said to be pecuniarily benefited by the parent's death; but we have yet to learn that a railroad company by negligently causing death can in this way become the gratuitous and unsolicited benefactor of children who prefer their father living; and it is a novel proposition that a yearly allowance with a certainty of an inheritance of an estate constantly increasing in value by the parent's prudence and financial ability can be cut off by the killing of the parent, and the children be told that it is for their benefit. If that is the law, what security have the wealthy against the negligence of others? All inducements for the use of care and caution as to such are removed. The only reasons why a verdict in pure negligence cases can be justified are as an inducement appealing to self-interests to use care and caution; but these are taken away if we hold that no damages can be recovered by the children of wealthy people because they get the estate as a result of the unlawful act. As the jury were told, at request of defendant, that nothing could be allowed for the suffering of the deceased or the feelings of the surviving members of his family, and if in addition we hold that nothing can be recovered for the reason now urged, the defendant, although confessedly guilty of negligence resulting in death, suffers no loss or punishment for its unlawful act, simply because of the financial standing of the deceased. If this is law it might be well for the legislature to provide a new criminal

[94] Id.

offense and substitute imprisonment for damages, and thus induce the same degree of care and caution in the transportation of the rich as of the poor. It is not, however, absolutely correct to say that the mere fact of coming into the inheritance presently is a benefit peculiarly, for *non constat* that if the life had been prolonged but a week or month that the estate would not have been larger. The true question is what had these plaintiffs the right to receive from the parent during his life, and for the loss of this they are to be compensated; what they got after his death does not enter into the case. The loss spoken of is the taking away of that which they were receiving and would have received had he lived. It is the destruction of their expectations in this regard that the law deals with and for which it furnishes compensation. To say, "True it is we have taken from you his benefactions, but you get by law, not from us, but from his estate which we thus make available for you, something better," is to substitute the heirs' legal right under the law for the company's liability.[95] In Texas, as against adult children, seeking to recover for their mother's death, an inventory of her estate is competent to show what they inherited from her.[96]

It has been held that the jury may take into consideration the earnings of the deceased, and that the question whether the minor children had other means of support after his death is wholly immaterial;[97] but as to this the authorities are not in accord.[98] In estimating the probable savings the deceased would have accumulated but for his death the income received from his investments, if these go to his adult children, should not be considered because they are in the immediate enjoyment of such

[95] Stahler v. Philadelphia & R. R. Co., 199 Pa. 383, 85 Am. St. 791.

[96] Rader v. Galveston, etc. R. Co. (Tex. Civ. App.), 137 S. W. 718.

But it is otherwise in jurisdictions where a child's recovery for the death of a parent cannot be mitigated by proof that the child has thereby inherited property. McLaughlin v. United Railroads of San Francisco, 169 Cal. 494, L.R.A. 1915E 1205.

[97] Heyer v. Salsbury, 7 Ill. App. 93, 14 Am. Neg. Cas. 330; Duke v. St. Louis, etc. R. Co., 172 Fed. 684.

Evidence of the number, ages and sex of the children of a widowed child of the deceased, and that he had supported them is not competent. Cook v. Cleveland, etc. R. Co., 143 Ill. App. 109.

[98] Ronson v. Canadian Pac. R. Co., 18 Ont. L. R. 337 (Court of Appeal).

income.[99] The consideration of any prospective inheritance that might have been reasonably expected to be derived from the deceased has been considered too uncertain to be the basis of an award. Following the language of the supreme court of the United States[1] it has been held that the consideration of pecuniary benefits from the deceased must be limited to such as the next of kin had a reasonable expectation of receiving while he lived.[2] "The property, wealth, helplessness or dependence of the lineal next of kin is immaterial on the question of the amount of recovery."[3] Where the action must be brought for the benefit of the estate, the number and ages of the family are not material, where the relation is lineal, as the sole measure of damages is the pecuniary loss—that is, how much would the deceased, in all probability, have added to the estate had he lived, which amount would not be affected by the number or ages of such kindred, as each would only get his proportionate share as provided by law for the distribution of the personal property of an intestate without being increased or diminished as to any one of them on account of poverty, age, physical condition,[4] character or habits.[5]

The damages may, in some states, include compensation for the loss of physical care, moral and mental training, where the

[99] Denver, etc. R. Co. v. Spencer, 25 Colo. 9, citing Grand Trunk R. Co. v. Jennings, L. R. 13 App. Cas. 800; Pym v. Great Northern R. Co., 2 B. & S. 759, 4 id. 396.

[1] Baltimore & P. R. Co. v. Mackey, 157 U. S. 72, 39 L. ed. 624, 13 Am. Neg. Cas. 803.

[2] Baltimore & P. R. Co. v. Golway, 6 App. Cas. (D. C.) 143, 180; Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712. *Contra,* Baltimore & O. R. Co. v. Hottman, 25 Ohio C. C. 140; New York, etc. R. Co. v. Roe, id. 628, following Grotenkemper v. Harris, 25 Ohio St. 510. The statute authorizes such damages as the jury may think proportioned to the pecuniary injury resulting from the death.

[3] Chicago, etc. R. Co. v. Woolridge, 174 Ill. 330, 335; Fox v. Oakland Con. St. R. Co., 118 Cal. 55, 62 Am. St. 216. *Contra,* St. Louis S. R. Co. v. Bowles, 32 Tex. Civ. App. 118.

[4] Chicago, etc. R. Co. v. Woolridge, *supra;* Bradley v. Ohio River R. Co., 122 N. C. 972.

[5] McClaugherty v. Rogue River Elec. Co., 73 Ore. 135, holding that evidence of the drinking habits of plaintiff, a son suing for the death of a father, was incompetent as tending to prejudice the jury and influence the amount of recovery on account of the probable manner in which plaintiff would expend the amount recovered.

parent was fitted to furnish such training, for this is among the most important of parental duties.[6] But it should be shown that

[6] McLaughlin v. United Railroads of San Francisco, 169 Cal. 494, L.R.A. 1915E 1205; Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500; Wabash R. Co. v. Gretzinger, 182 Ind. 155; Texas Power & Light Co. v. Bird, — Tex. Civ. App. —, 165 S. W. 8; Texas & N. O. R. Co. v. Cunningham, — Tex. Civ. App. —, 168 S. W. 428; Cain v. Southern R. Co., 199 Fed. 211; Gentry v. Wabash R. Co., 172 Mo. App. 638; Missouri, etc. R. Co. v. West, 38 Okla. 581; St. Louis, etc. R. Co. v. Geer (Tex. Civ. App.), 149 S. W. 1178; Duke v. St. Louis, etc. R. Co., 172 Fed. 684 (ruled under the Federal Employers' Liability Act of 1908, providing that the recovery shall inure to the benefit of the family of the decedent); International, etc. R. Co. v. McVey (Tex. Civ. App.), 81 S. W. 991; St. Louis, etc. R. Co. v. Mathis, 76 Ark. 184, 113 Am. St. 85; Goddard v. Enzler, 123 Ill. App. 108; Gamache v. Johnston T. F. & M. Co., 116 Mo. App. 596; Wood v. Omaha, 87 Neb. 213 (in so far as the advice and companionship are of pecuniary value); Texas & N. O. R. Co. v. Walker, 58 Tex. Civ. App. 615; Omaha W. Co. v. Schamel, 78 C. C. A. 68, 147 Fed. 502; Hall v. North Pacific Coast R. Co., 134 Fed. 309; St. Louis, etc. R. Co. v. Standifer, 81 Ark 275; Peters v. Southern Pac. Co., 160 Cal. 48; Johnson v. Southern Pac. R. Co., 154 Cal. 285; Goddard v. Enzler, 222 Ill. 462 aff'g 123 Ill. App. 108; Cleveland, etc. R. Co. v. Starks, 174 Ind. 345; Indianapolis T. & T. Co. v. Romans, 40 Ind. App. 184; Eichorn v. New Orleans, etc. R., L. & P. Co., 114 La. 712; Sipple v. Laclede G. Co., 125 Mo. App. 81 (though the parents were divorced and the custody of the child was awarded the mother); Carter v. West Jersey & S. R. Co., 76 N. J. L. 602, 19 L.R.A.(N.S.) 128 (under a statute allowing such damages as shall seem fair and just with reference to the pecuniary injury there may be a recovery by children who lived with their parents for the death of their mother who performed the household duties without proof that they would probably have received financial aid from her); Pittsburgh, etc. R. Co. v. Dooley, 13 Ohio C. C. (N.S.) 225; Whaley v. Vidal, 27 S. D. 627; O'Grady v. Union Stock Yards Co., 90 Neb. 138; Gray v. Phillips, 54 Tex. Civ. App. 148; St. Lawrence & O. R. Co. v. Lett , 11 Can. Sup. Ct. 422 (two judges dissented); Houston, etc. R. Co. v. Davenport, 102 Tex. 369; St. Louis & S. F. R. Co. v. Duke, 112 C. C. A. 564, 192 Fed. 306; Ittner B. Co. v. Ashby, 198 Ill. 562; Board of Com'rs v. Legg, 93 Ind. 523, 47 Am. Rep. 390; McIntyre v. New York Cent. R. Co., 37 N. Y. 287, 5 Am. Neg. Cas. 97; Tilley v. Hudson River R. Co., 29 N. Y. 252; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431, 10 Am. Neg. Cas. 367, 26 Am. Rep. 384; Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Galveston, etc. R. Co. v. Puente, 30 Tex. Civ. App. 246; Redfield v. St. R. Co., 112 Cal. 220, 228; Baltimore & O. R. Co. v. Stanley, 54 Ill. App. 215; McGowan v. St. Louis O. & S. Co., 109 Mo. 518, 533; Hoadley v. International P. Co., 72 Vt. 79, 84; Hunt v. Conner, 26 Ind. App. 41; Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357, 11 Am. Neg. Cas. 475; Gulf, etc. R. Co. v. Younger, 90 Tex.

the father was capable of fulfilling this duty.[7] That is done by proof that he was careful, painstaking, industrious, temperate and trustworthy, and possessed good business qualifications.[8]

387; St. Louis, etc. R. Co. v. Haist, 71 Ark. 258; Pool v. Southern Pac. Co., 7 Utah 303, 17 Am. Neg. Cas. 687, 693; Chilton v. Union Pac. R. Co., 8 Utah 47, 17 Am. Neg. Cas. 695; Sternfels v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 494. *Contra,* Bradley v. Ohio River & C. R. Co., *supra.* See *infra,* this section for the rule in Michigan and New Jersey.

In Texas such loss need not be specially pleaded, and the general allegation of damages, with an allegation that the father supported and cared for the child, is sufficient. Texas Power & Light Co. v. Bird, — Tex. Civ. App. —, 165 S. W. 8.

"In every person's life are matters of actual value to him which form no part of his estate and have no market value. The education and training which children may reasonably expect to receive from a parent are of actual and commercial value to them as better fitting them to obtain an income or estate. The loss of that education and training through the death of the parent from the fault of a defendant would be in the statute sense a pecuniary injury." McKay v. New England D. Co., 92 Me. 454.

In Northern Pac. R. Co. v. Freeman, 27 C. C. A. 457, 83 Fed. 82, a charge that, in fixing the damages, the jury might regard the deceased's ability to earn money to support, maintain, care for, and protect his wife and children, and to educate and train the latter, "and the loss to the wife and children because of being deprived of the use and comforts of his society, and the loss of his experience, knowledge and judgment in managing his and their affairs," etc., was sustained as against an objection that it allowed a recovery for sentimental damages; it covered a loss of society in the material and pecuniary sense only.

But compare Fisher v. Portland Railway, Light & Power Co., 74 Ore. 229, holding that under the Oregon Employer's Liability Act [Laws 1911, p. 16] which creates a new cause of action, and does not revive a right, loss of the society of a father cannot be an element in the damages recovered by a son for the father's death.

[7] Illinois Cent. R. Co. v. Weldon, 52 Ill. 290; Chicago, etc. R. Co. v. Austin, 69 Ill. 426; Texas & P. R. Co. v. Gullett (Tex. Civ. App.), 134 S. W. 262.

[8] Railway Co. v. Sweet, 60 Ark. 550; St. Louis, etc. R. Co. v. Standifer, 81 Ark. 275. See Goddard v. Enzler, 123 Ill. App. 108. See Wabash R. Co. v. Gretzinger, 182 Ind. 155, where it is said that in the face of evidence that a father is sober and industrious, and has intelligence enough to enable him to hold a responsible position, together with the fact that he contributed the larger portion of his earnings to his family, the objection that it was not shown that he was able to give his child proper parental care, training, advice or guidance is hypercritical.

Evidence that deceased was a church member has been held competent on the question of damages for the loss of the parent's moral

Where the deceased was aged fifty-three years, and supported herself, as did her two adult children, the court said: It is for the jury to consider if the health of the daughter should fail whether the mother might not take her to her own home, nurse and care for her indefinitely. The same might be true of the son. In other words, they are permitted to consider in a reasonable way those prospective and indefinite damages arising from the death of a mother under these circumstances, in addition to the actual money damages as proved.[9] The compensation for loss of care and training should not extend beyond the period of the child's minority according to at least one court,[10] but the rule is not so limited in several states.[11] It has been adjudged that married minors may not recover for the loss of the advice and counsel of a parent after their marriage, though their right anterior thereto is recognized.[12] If the action is to be considered as brought for the benefit of the estate of the decedent, the loss of parental care is not an element of damage.[13] In Michigan and New Jersey a recovery for the loss of counsel and advice is confined to narrower limits than in most other states. It is said to be distinctly against the rule in the former state to allow the consideration of that element of damage on the ground that the jury might roam at large and draw upon their imagination as to the extent of the injury suffered.[14] Where the most that could be inferred was that the father rendered occasional assistance to his children in their studies, such as a

training of his children. White's Adm'x v. Central R. Co., 87 Vt. 330.

It is presumed in the absence of evidence to the contrary that the average father is of value to his children in this respect, but the value cannot be proved by expert testimony. The jury are as capable of estimating such value as any witness. Texas Power & Light Co. v. Bird, — Tex. Civ. App. —, 165 S. W. 8.

9 Countryman v. Fonda, etc. R. Co., 166 N. Y. 201, 209.

10 Baltimore & P. R. Co. v. Golway, 6 App. Cas. (D. C.) 143, 177.

11 Tilley v. R. Co., 29 N. Y. 252; Hollingsworth v. Davis-D. Estate C. C. Co., 38 Mont. 143; Butte E. R. Co. v. Jones, 18 L.R.A.(N.S.) 1205, 90 C. C. A. 240, 164 Fed. 308 (held competent to show that the deceased intended and was able to send her son to college); Redfield v. Oakland Con. St. R. Co., 110 Cal. 277.

12 Texas, etc., R. Co. v. Mills (Tex. Civ. App.), 143 S. W. 690.

13 McCabe v. Narragansett E. L. Co., 27 R. I. 272.

14 Walker v. Lake Shore, etc. R. Co., 104 Mich. 606, 617, 16 Am. Neg. Cas. 143, 1 Am. Neg. Rep. 267.

parent is supposed to render, but which, in its very nature, is as incapable of measurement by a pecuniary standard as is the loss of love, affection and sympathy, such assistance was not an element of the damage.[15] In New Jersey there cannot be a recovery because of the loss of the advice and counsel of the deceased unless it is shown they would have been given concerning the pecuniary affairs of the next of kin and would probably have resulted in a pecuniary benefit, and that the loss of the advice and counsel will probably result in a pecuniary injury.[16] Adult sons cannot recover for the loss of such benefit as they derived from the credit, capital, skill and reputation of their father as a member of a partnership with them. "The injury thus resulting is not within the scope of the statute, which gives damages for injuries resulting from the severance of a relation of kinship, and not of contract." [17] The loss of the services of a mother as a housekeeper is an element of pecuniary damage.[18] If some of the children of the deceased are in poor health the fact may be shown, although others of them who are in good health may be benefited by the evidence.[19] In Michigan only children legally entitled to support can recover damages.[20] In the absence of special circumstances adult, nondependent children can recover but little more than nominal damages unless proof of pecuniary loss is made.[21] In some cases it is held that it is for the jury to find whether, according to the evidence of parental affection for minor children, aid and support might be given after their majority was reached.[22] Under the Illinois dram-shop statute the recovery by minors for the death of their

[15] Same case, 111 Mich. 518.

[16] May v. West Jersey & S. R. Co., 62 N. J. L. 63, 5 Am. Neg. Rep. 417.

[17] Demarest v. Little, 47 N. J. L. 28, 16 Am. Neg. Cas. 643, 668.

In Louisiana a child may recover for the material and moral benefits which would have been received had the parent lived up to the time of her majority, including his training and advice and the pleasure and comfort of his society. Bourdier v. Louisiana W. R. Co., 133 La. 50.

[18] Cleveland, etc. R. Co. v. Dukeman, 130 Ill. App. 105.

[19] McKeigue v. Janesville, 68 Wis. 50; Hunt v. Conner, 26 Ind. App. 41, 55.

[20] Rouse v. Detroit E. R., 128 Mich. 149, 15 Am. Neg. Rep. 633.

[21] Rudon v. San Juan L. & T. Co., 4 Porto Rico Fed. 515 (the statute allows the recovery of such damages as may be just).

[22] Kansas City S. R. Co. v. Frost, 93 Ark. 183; Butte E. R. Co. v.

father is not affected because they have joined in an action therefor; it is immaterial to the defendant how the sum recovered is to be divided among them, and he cannot lessen his liability on the theory that the damages are limited until such time as the oldest plaintiff may become of full age.[23] It is immaterial to the rights of a child that his father had abandoned him, refused to support him and declared his purpose not to do so.[24] The measure of recovery is not affected because the action was barred as to one of the persons entitled to sue.[25] The loss of a home by a child dependent upon his mother's earnings for the means of his education and her intention to send him to college and the fact that she had earned money to do so may be shown under a statute allowing the recovery of such damages as may be just.[26] The computation of damages is to be made from the time of the death of the parent, though the injury which caused death totally disabled the parent some time before she died.[27] In Pennsylvania an adult son who had not been a member of his mother's household for several years may not recover for her death in the absence of evidence showing the amount and sources of her bounty, her manner of life and habits of expenditure. It is not otherwise because the persons who paid her funeral expenses expected him to reimburse them.[28]

§ 1268. Facts and circumstances to be considered in estimate of damages. These are the age, sex, health condition in life,

Jones, 164 Fed. 308, 18 L.R.A. (N.S.) 1205 (the statute provides for the recovery of such damages as may be just).

Though the statute provides for the forfeiture of a sum which the jury may fix within stated limits, evidence that a father had given and would continue to give support to his minor children is admissible. Williams v. Chicago, etc. R. Co., 169 Mo. App. 468.

23 Peters v. Kamiczaitis, 161 Ill. App. 575.

24 Gulf, C. & S. F. Ry. Co. v. Anderson (Tex. Civ. App.), 126 S. W. 928, citing local cases. See § 1265, and ch. 40, *post* relative to actions under the Federal Employers' Liability Act.

25 Paris, etc. R. Co. v. Robinson, 104 Tex. Civ. App. 482, 5 N. C. C. A. 622.

26 Butte E. R. Co. v. Jones, 164 Fed. 308, 18 L.R.A.(N.S.) 1205.

27 Atlanta & W. P. R. Co. v. Venable, 67 Ga. 697.

28 Vining v. Rexford, 201 Fed. 904.

occupation, habits of industry and sobriety, mental and physical capacity, disposition to frugality, opportunities and customary earnings of the deceased and the use made of them and his expectation of life.[29] In addition, the age, circumstances, con-

[29] Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241; Big Jack Min. Co. v. Parkinson, 41 Okla. 125; Louisville & N. R. Co. v. Morris, *infra;* Citizens' L., H. & P. Co. v. Lee, 182 Ala. 561; Bateman v. Illinois Cent. R. Co., 162 Ill. App. 125; McCoullough v. Chicago, etc. R. Co., 160 Iowa 524, 47 L.R.A.(N.S.) 23; Gulf, etc. R. Co. v. Beezley (Tex. Civ. App.), 153 S. W. 651; Serdan v. Falk Co., 153 Wis. 169; Pulaski G. L. Co. v. McClintock, 97 Ark. 576, 32 L.R.A.(N.S.) 825; Bond v. United R., 159 Cal. 270; Cleveland, etc. R. Co. v. Starks, 174 Ind. 345; Swanson v. Union S. Co., 89 Neb. 361; Freeman v. McElroy (Tex. Civ. App.), 126 S. W. 657; Brennen v. Chicago & C. C. Co., 241 Ill. 610 (disposition made of earnings); Woodstock I. Works v. Kline, 149 Ala. 391; Galveston, etc. R. Co. v. Harris (Tex. Civ. App.), 36 S. W. 776; Jones v. Kansas City, etc. R. Co., 178 Mo. 528, 20 Am. Neg. Rep. 674; Buck v. Maddock, 167 Ill. 219; Duke v. St. Louis, etc. R. Co., 172 Fed. 684 (in the last case the business ability and the health of the decedent are especially dealt with); Houston v. Quinn, 168 Ill. App. 593 (action under dram shop statute); Morton v. Smith H. Co., 152 App. Div. (N. Y.) 738 (emphasizing the absence of evidence as to the use made of decedent's earnings); Duke v. St. Louis, etc. R. Co., 172 Fed. 684; Ward v. Dampskibsselskabet Kjoebenhaven, 144 Fed. 524; The Charlotte, 124 Fed. 989; Kansas City S. R. Co. v. Frost, 93 Ark. 183; Choctaw, etc. R. Co. v. Doughty, 77 Ark. 1; St. Louis, etc. R. Co. v. Hitt, 76 Ark. 227; Denver, etc. R. Co. v. Gunning, 33 Colo. 280; Pittsburgh, etc. R. Co. v. Sudhoff, 173 Ind. 314; Falender v. Blackwell, 39 Ind. App. 121; Louisville & N. R. Co. v. Massie, 138 Ky. 449; Cox v. L. & N. R. Co., 137 Ky. 388; Louisville & N. R. Co. v. Daniel, 122 Ky. 256, 3 L.R.A. (N.S.) 1190 (habits of industry and sobriety or the converse thereof as held in Cleveland & P. R. Co. v. Sutherland, 19 Ohio St. 151); McVeigh v. Minneapolis, etc. R. Co., 113 Minn. 450; Williams v. Metropolitan St. R. Co., 141 Mo. App. 625; Nilson v. Chicago, etc. R. Co., 84 Neb. 595, 4 N. C. C. A. 651; O'Doherty v. Postal Tel.-C. Co., 134 App. Div. (N. Y.) 298; Hinsdale v. New York, etc. R. Co., 81 App. Div. (N. Y.) 617; Poe v. Railroad, 141 N. C. 525; Carter v. Railroad, 139 N. C. 499; Watson v. Seaboard A. L. R. Co., 133 N. C. 188; Buckman v. Philadelphia & R. R. Co., 227 Pa. 277; Memphis St. R. Co. v. Berry, 118 Tenn. 581; Galveston, etc. R. Co. v. Mitchell, *infra;* Ryan v. Oshkosh G. L. Co., 138 Wis. 466; Yeager v. Chicago, etc. R. Co., 156 Iowa 166; Barboza v. Pacific P. C. Co., 162 Cal. 36; St. Louis, etc. R. Co. v. Hutchinson, 101 Ark. 424, 4 N. C. C. A. 443; Railway Co. v. Sweet, 60 Ark. 550, citing the text; Marschall v. Laughran, 47 Ill. App. 29; Wright v. Crawfordsville, 142 Ind. 636 (evidence of specific intoxications of deceased admissible); Wheelan v. Chicago, etc. R. Co., 85 Iowa 167, 178, 14 Am. Neg. Cas. 656; Lowe v. Same, 89 Iowa 420, 14

dition and relation of the party or parties for whose benefit the

Am. Neg. Cas. 654; Spaulding v. Same, 98 Iowa 205, 219; Louisville & N. R. Co. v. Orr, 91 Ala. 548, 553, 13 Am. Neg. Cas. 60; Same v. Graham, 98 Ky. 688, 15 Am. Neg. Cas. 203 (applying the law of Alabama); Schaub v. Hannibal, etc. R. Co., 106 Mo. 74, 93, 16 Am. Neg. Cas. 494; McGowan v. St. Louis O. & S. Co., 109 Mo. 518, 533; Anderson v. Chicago, etc. R. Co., 35 Neb. 95; Richmond & D. R. Co. v. Hammond, 93 Ala. 181, 13 Am. Neg. Cas. 139; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Lustig v. Same, 65 Hun 547, 5 Am. Neg. Cas. 536; Coley v. Statesville, 121 N. C. 301, 307; Benton v. North Carolina R. Co., 122 N. C. 1007; Mendenhall v. Same, 123 N. C. 275; Carlson v. Oregon S. L. R. Co., 21 Ore. 450, 17 Am. Neg. Cas. 230; McHugh v. Schlosser, 159 Pa. 480, 39 Am. St. 699; English v. Southern Pac. Co., 13 Utah 407, 422, 12 Am. Neg. Cas. 626, 57 Am. St. 772, 35 L.R.A. 155; Louisville, etc. R. Co. v. Clarke, 152 U. S. 230, 242, 38 L. ed. 422, 425; Hunt v. Kile, 38 C. C. A. 641, 98 Fed. 49; Broughel v. Southern New England Tel. Co., 73 Conn. 614; Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458; note, 48 Am. Dec. 639; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 353, 17 Am. Neg. Cas. 443, 6 Am. St. 840: Holmes v. Oregon, etc. R. Co., 6 Sawyer 262, 5 Fed. 75; Taylor v. Western Pac. R. Co., 45 Cal. 323, 13 Am. Neg. Cas. 349; Macon, etc. R. Co. v. Johnson, 38 Ga. 409, 11 Am. Neg. Cas. 292; Central R. Co. v. Thompson, 76 Ga. 770, 782; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302, 14 Am. Neg. Cas. 362; Donaldson v. Mississippi & M. R. Co., 18 Iowa 280, 87 Am. Dec. 391; State v. Cecil County Com'rs, 54 Md. 426; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Roose v. Perkins, 9 Neb. 304, 31 Am. Rep. 409; Telfer v. Northern R. Co., 30 N. J. L. 188, 12 Am. Neg. Cas. 275; McIntyre v. New York Cent. R. Co., 37 N. Y. 287, 5 Am. Neg. Cas. 97; Kesler v. Smith, 66 N. C. 154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Catawissa R. Co. v. Armstrong, 52 Pa. 282; Mansfield C. & C. Co. v. McEnery, 91 id. 185, 36 Am. Rep. 662, 17 Am. Neg. Cas. 237; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431, 10 Am. Neg. Cas. 367, 26 Am. Rep 384; Atchison, etc. R. Co. v. Wilson, 48 Fed. 57; Oakes v. Maine Cent. R. Co., 95 Me. 103; Pittsburgh, etc. R. Co. v. Parish, 28 Ind. App. 189; Standlee v. St. Louis, etc. R. Co., 25 Tex. Civ. App. 340; Coffeyville M. & G. Co. v. Carter, 65 Kan. 565, 12 Am. Neg. Rep. 594. See § 455, as to life and annuity tables as evidence.

In an action by a child under a civil damage statute to recover for the loss of means of support caused by the death of the father the habits of the latter are quite material. Lee v. Hederman, 158 Iowa 719.

The earning capacity of the deceased is not the only matter to be weighed if his services were valuable in assisting in work about his home and premises. International, etc. R. Co. v. McVey (Tex. Civ. App.), 81 S. W. 991.

The age of the deceased, his life expectancy and earning capacity are ample facts on which to base a verdict. Archibald v. Lincoln County, 50 Wash. 55.

The value of the decedent's busi-

action was brought to the deceased are involved.[30] While the age and earnings of the decedent are to be the chief guide to the jury,[31] they may determine from other facts in evidence whether his ability to earn money would have increased or decreased, and may fix the amount of their verdict in the light of the probability.[32] It is not improper to consider the

ness as an insuranee agent may be shown. Wheeling, etc. R. Co. v. Parker, 9 Ohio C. C. (N.S.) 28.

There is a prima facie presumption that the deceased was able to support his family. Hall v. North Pac. Coast R. Co., 134 Fed. 309.

The inevitable death of the deceased from natural causes within a short time may be shown in mitigation. Meekins v. Railroad Co., 134 N. C. 217.

The fact that deceased had a father who was assisting him to get a start in life is incompetent in mitigating the damages to be recovered by the wife for his death, as such fact is an asset and not a liability. Roach v. Wolff, 96 Neb. 43.

[30] Ft. Worth & D. C. Ry. Co. v. Stalcup, — Tex. App. Div. —, 167 S. W. 279; Hovey v. New England N. Co., 83 Conn. 278; De Luna v. Union R. Co., 130 App. Div. (N. Y.) 386; Goodes v. Lansing & S. T. Co., 150 Mich. 494; The Dauntless, 121 Fed. 420.

[31] Korab v. Chicago, R. I. & P. R. Co., 165 Iowa 1; Zitnik v. Union Pac. R. Co., 95 Neb. 152; McDonnell v. Central D. Co., 170 Mich. 291; Cincinnati T. Co. v. Kettler, 11 Ohio C. C. (N.S.) 516; Wagner v. Clausen B. Co., 146 App. Div. (N. Y.) 70; Erie R. Co. v. McCormick, 3 Ohio C. C. (N.S.) 652, 15 Am. Neg. Rep. 162; Halverson v. Seattle E. Co., 35 Wash. 600; Freeman v. Grieve (Tex. Civ. App.), 143 S. W. 730.

In proving the amount of wages earned by decedent, where primary evidence is not shown to be available, it is competent to prove them by an estimate by a witness conversant with the earning capacity of deceased though such estimates were not based on any books, nor does it appear that deceased ever kept any books. Galveston, H. & S. A. Ry. Co. v. Pennington, — Tex. Civ. App. —, 166 S. W. 464.

[32] Graham v. Allen & Nelson Mill Co., 78 Wash. 589; Louisville & N. R. Co. v. Morris, 179 Ala. 239; Armstrong v. Union S. Y. Co., 93 Neb. 258; Savannah E. Co. v. Bell, 124 Ga. 663; Austin v. Metropolitan St. R. Co., 108 App. Div. (N. Y.) 249; Carter v. Railroad, 139 N. C. 499; Galveston, etc. R. Co. v. Mitchell, 48 Tex. Civ. App. 381; Texas & P. R. Co. v. Johnson, 48 Tex. Civ. App. 135; Diller v. Northern California P. Co., 162 Cal. 531; Whaley v. Vidal, 27 S. D. 642; Beecher v. Long Island R. Co., 53 App. Div. (N. Y.) 324; International & G. N. R. Co. v. Ormond, 64 Tex. 485; East Line, etc. R. Co. v. Smith, 65 id. 167; Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441. Compare Brown v. Chicago, etc. R. Co., 64 Iowa 652.

Where it is apparent that at the time of decedent's death he had reached his maximum earning power, a recovery of an amount which, if put at interest at the legal rate, would yield a greater annual income than decedent could earn if

decedent's fair prospects of promotion in his calling;[33] but evidence as to an advance in salary is not admissible if it is based on the future state of the business of the employer.[34] Evidence as to earnings is not necessarily confined to the sum being earned immediately before death, though such evidence is competent;[35] proof may be made of wages actually earned by an employee in a non-political position, for which he had demonstrated his fitness, which go to make up his average earnings within a reasonable period of time prior to his death.[36]

he worked every day in the year is excessive. Graham v. Allen & Nelson Mill Co., 78 Wash. 589.

The schedule of wages paid by the defendant for such services as the deceased rendered is admissible. Atlantic C. L. R. Co. v. Jones, 132 Ga. 189.

In the absence of evidence as to the earnings of the deceased the amount expended per year for the support of his family may be shown. Memphis C. G. & E. Co. v. Letson, 68 C. C. A. 453, 19 Am. Neg. Rep. 510, 135 Fed. 969.

An award of substantial damages may rest upon evidence showing that a physician engaged in the practice of his profession was strong and in the prime of life. Evarts v. Santa Barbara C. R. Co., 3 Cal. App. 712.

The number and the ages of the children cared for by a mother is evidence of her earning capacity. Lord v. Manchester St. R. Co., 74 N. H. 295.

A witness who knows what the average earnings of the decedent was may testify thereto. Chicago & E. R. Co. v. Ponn, 191 Fed. 682.

Opinions are admissible to show the decedent's earning capacity. Yergy v. Helena L. & R. Co., 39 Mont. 213.

Where the relation of the decedent to the plaintiff is shown and his obligation, disposition and ability to earn wages or conduct business, and care for, support, advise and protect him, the extent of the loss is for the jury. Pittsburgh, etc. R. Co. v. Burton, 139 Ind. 357; Indianapolis T. & T. Co. v. Romans, 40 Ind. App. 184.

[33] Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241; Korab v. Chicago, R. I. & P. R. Co., 165 Iowa 1; Meck v. Nebraska Tel. Co., 96 Neb. 539; Arnold v. State, 163 App. Div. (N. Y.) 253; Fort Worth & D. C. Ry. Co. v. Stalcup, — Tex. Civ. App. —, 167 S. W. 279; St. Louis, etc. R. Co. v. Jacks, 105 Ark. 347; Missouri, etc. R. Co. v. Henderson (Tex. Civ. App.), 148 S. W. 822; Warren, etc. R. Co. v. Waldrop, 93 Ark. 127; Choctaw, etc. R. Co. v. Doughty, 77 Ark. 1; Cox v. L. & N. R. Co., 137 Ky. 388; Douglass v. Northern Cent. R. Co., 59 App. Div. (N. Y.) 470; Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441.

[34] Fajardo v. New York Cent., etc. R. Co., 84 App. Div. (N. Y.) 354.

[35] Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192; Central R. Co. v. Alexander, 144 Ala. 257.

[36] Central R. v. Perkerson, 112 Ga. 923, 53 L.R.A. 210; Grimmelman v. Union Pac. R. Co., 101 Iowa 74, 1 Am. Neg. Rep. 237.

The testimony as to earnings and the capacity to earn may take a wide range, as the preceding notes show; the question may not be gone into fully here for obvious reasons. As further illustrating the scope the evidence may take, it will suffice to call attention to two cases: It may be shown that the decedent was skilled in trades other than the one in which he was engaged when killed, and what he could earn in the State in which he then was or elsewhere, at any of his several trades, if none of them were not permanently abandoned because of incapacity or for other reason;[37] it may also be shown that he had entered into an engagement for future service on the basis of a fixed compensation and a percentage of the profits, the testimony as to the latter being based upon his earnings in a like employment the previous year.[38]

Evidence as to the income of the deceased for a particular period is proper; it tends, in connection with other evidence, to show the extent of the loss sustained.[39] If the deceased lived on his income and his earning power is not proven, it is proper to consider his skill in the management of money, or his capacity to manage affairs so as to benefit an estate.[40] The custom-

The testimony may cover the health, character and earning capacity of the decedent back to his young manhood. Grand Trunk W. R. Co. v. Reddick, 88 C. C. A. 80, 160 Fed. 898.

[37] Alabama S. & W. Co. v. Griffin, 149 Ala. 423; Christian v. Columbus & R. R. Co., 90 Ga. 124.

[38] Puget Sound N. Co. v. Lavander, 87 C. C. A. 655, 160 Fed. 851.

[39] Louisville, etc. R. Co. v. Clarke, 152 U. S. 230, 242, 38 L. ed. 422, 425; Wrightsville & T. R. Co. v. Gornto, 129 Ga. 204; Peters v. Southern Pac. Co., 160 Cal. 48.

The jury must not be confined to the consideration of the earnings of the deceased in any particular period. Burns v. Pennsylvania R. Co., 219 Pa. 225.

[40] Skottowe v. Oregon S. L., etc. R. Co., 22 Ore. 430, 451, 16 L.R.A. 593, 10 Am. Neg. Cas. 44.

A similar rule was applied where deceased conducted a livery stable and where there was no definite evidence as to his earning capacity, or that he had been accustomed to work for wages. In such case evidence that deceased was industrious, and was not materially less capable of earning money than the average man of his age was held competent, together with the fact that he had accumulated property to the amount of $1,300, and had $2,500 in life insurance. Bettinger v. Loring, 168 Iowa 103.

"Income from investments alone cannot be considered, but every fact bearing upon the capacity of the deceased, whatever his occupation, is admissible and cannot be excluded

ary earnings of the deceased are not to be shown by proof of the profits of a partnership of which he was a member, and which employed several thousand dollars of capital,[41] especially if he did not give his personal attention to the firm business.[42] "The personal services of a skilled farmer are worth more than the mere manual labor he may perform. His judgment, skill and experience, gained by a long life of successful toil, should be also considered, and none are better qualified to give such an estimate than those who know him, and are themselves farmers of character and experience."[43] But it is not competent to show the minimum value of crops raised by a deceased farmer in any years or years.[44] It has been held that it is not essential to a recovery that evidence be offered of the pecuniary value of the services performed by the deceased or of the profits which he derived from his business, the other facts enumerated being shown, and, in addition, the age, sex, circumstances and condition in life of the next of kin.[45] But in the absence of proof showing the earning power or habits of industry of the deceased it is error to charge that the pecuniary loss may be estimated from his age, health and habits.[46] In Kentucky it is said to be the well settled doctrine that the single criterion by which to measure compensatory damages is the power of the deceased to earn money, inquiry as to the probable duration of his life being merely incidental.[47] Conceding the pertinency of the facts indicated the jury are not bound to decide what the

merely because the particular ability was to accumulate money by the use of money." Boyce v. New York City R. Co., 126 App. Div. (N. Y.) 248.

Accumulating capacity is not shown by proof of the amount realized from a policy on the life of the deceased. Nevers L. Co. v. Fields, 151 Ala. 367.

[41] McCracken v. Traction Co., 201 Pa. 384.

[42] Read v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 503. See § 1246.

[43] McLamb v. Wilmington & W. R. Co., 122 N. C. 862, 877.

And it will not detract from the value of such services that deceased had a wooden leg, if he did all of the usual work of a farm as well as ordinary people, and thereby supported a wife and eight children. Hays v. Hogan, 180 Mo. App. 237.

[44] Railway Co. v. Howard, 90 Tenn. 144, 150.

[45] Missouri Pac. R. Co. v. Moffatt, 60 Kan. 113, 72 Am. St. 343.

[46] McHugh v. Schlosser, 159 Pa. 480, 23 L.R.A. 574.

[47] Louisville & N. R. Co. v. Berry, 96 Ky. 604.

deceased would have earned during his expectancy of life and allow compensation measured by the loss of his earnings.[48] Proof of them, with the jurors' knowledge of his life expectancy, afford *data* for the computation of damages.[49] The cost of an annuity, free from all the contingencies of the loss of employment or earning power by sickness or other misfortune, has no relation to the benefit the survivor would have received if the decedent had continued to live.[50]

The evidence of pecuniary injury need not be very strong in order that the case may go to the jury[51] except as to damages made up of actual disbursements; these must be established.[52] Where the action was brought by a father for the death of an adult, but unmarried, son the testimony was to the effect that the former was fifty-nine years of age, nearly blind and was otherwise injured; he worked when he could; that some five or six years before the son's death he had assisted him pecuniarily, but had not done so since. It was held that there was evidence of pecuniary injury.[53] A reasonable probability of pecuniary benefit is all that is required.[54] A less liberal construction has

[48] Railroad v. Spence, 93 Tenn. 173, 189, 42 Am. St. 907.

[49] Louisville & N. R. Co. v. Morgan, 114 Ala. 449, 458, 2 Am. Neg. Rep. 294; Chicago v. Hesing, 83 Ill. 204, 25 Am. Rep. 378; Ohio & M. R. Co. v. Wangelin, 152 Ill. 138; Toledo St. R. Co. v. Mammet, 13 Ohio C. C. 591.

Though proof of decedent's earnings is not made there may be a recovery by his minor children of the value of his support and maintenance. "The jury should be left free to exercise a considerable discretion in arriving at the amount of the verdict." Gentry v. Wabash R. Co., 172 Mo. App. 638.

[50] Hinsdale v. New York, etc. R. Co., 81 App. Div. (N. Y.) 617; Mix v. Hamburg-A. S. Co., 85 App. Div. (N. Y.) 475; Fajardo v. New York Cent., etc. R. Co., 84 App. Div. (N. Y.) 354.

[51] Lustig v. New York, etc. R. Co., 65 Hun 547, 5 Am. Neg. Cas. 536; Omaha W. Co. v. Schamel, 78 C. C. A. 68, 147 Fed. 502; Ruppel v. United R., 1 Cal. App. 666, 19 Am. Neg. Rep. 303.

[52] Countryman v. Fonda, etc. R. Co., 166 N. Y. 201; Leeds v. Metropolitan G. L. Co., 90 N. Y. 26.

[53] Hetherington v. Northeastern R. Co., 9 Q. B. Div. 160; Runciman v. Star Line S. S. Co., 35 New Bruns. 123.

Testimony showing the pecuniary circumstances of the next of kin, calling for help from those upon whom they are dependent, is relevant as to the issue as to whether or not, by reason of the death, they have suffered pecuniary loss. St. Louis, etc. R. Co. v. Jacks, 105 Ark. 347.

[54] Harris v. McClintic-M. C. Co., 168 Mo. App. 724; Pym v. Great

been given the statute by the Irish court, which has held, in effect, that no injury is within its contemplation unless the deceased person has in fact rendered pecuniary assistance to the plaintiff.[55] And it has been ruled in some of the state courts

Northern R. Co., 4 B. & S. 406; Franklin v. Southeastern R. Co., 3 H. &. N. 213; Dalton v. Same, 4 C. B. (N.S.) 296; McKay v. New England D. Co., 92 Me. 454.

Where the death in question was that of a woman 81 years of age, but healthy, active and very vigorous, a recovery of $500 compensatory damages above the $2,000 penalty provided by the statute was held not excessive, where it appeared that deceased aided her niece in caring for the children, washing dishes and sewing. Maier v. Metropolitan St. R. Co., 176 Mo. App. 29.

"It is unnecessary where recovery is sought of the amount which deceased would have expended on dependents, had his expectancy of life not been disappointed, to prove more than that he had persons who would have been distributees, had he left an estate, dependent on him for support, and the amount he contributed to their support; and there is no legitimate occasion to show the ages of his minor children." Alabama M. R. Co. v. Jones, 121 Ala. 113, 119.

But it has been held in that state that if the only evidence relied upon to furnish *data* for ascertaining the damages is the statement by the widow of the deceased that at the time of his death "we were saving $35 a month," there is not a sufficient basis to support a verdict for damages. Louisville & N. R. Co. v. Pearson, 97 Ala. 211, 13 Am. Neg. Cas. 59.

[55] Bourke v. Cork & M. R. Co., 4 L. R. Ire. 682; Holleran v. Bagnell, 6 id. 333.

In Rowley v. London & N. R. Co., L. R. 8 Ex. 221, the mode of calculating damages under Lord Campbell's act was considered, the facts being that one of the persons who claimed compensation was the mother of the deceased, she being sixty-one at his death, and he forty. The mother held the son's personal covenant to allow her an annuity of 200*l.* a year during their joint lives. The jury were directed that they might allow her such a sum as would purchase such an annuity for a person of her age according to the average duration of human life. The elements for determining this sum were insurance tables showing such duration and a calculation of the value of such an annuity on government or other very good security. The majority of the court considered that the general rule of placing the injured party in the same pecuniary position as she would have occupied but for the casualty applied. An error was committed in calculating the annuity solely upon the probable duration of the mother's life, the contingency of the son dying before her being overlooked; and it was also error not to take into account the fact that the covenant was a personal one, and presumably of less value than a government obligation. The probable duration of the mother's life should have been calculated with reference to her health; but the facts concerning that ought to have been brought out by the party who would or might have been

that in the absence of a legal obligation resting upon the deceased to contribute to the support of his kinspeople they can maintain an action only upon making proof that he had contributed to them in some way, or recognized his family obligation to do so, and manifested a disposition to discharge it.[56] The age of the deceased, the probability of his being able, in view of advancing years, to continue to pursue his occupation, are matters concerning which the jury must be instructed.[57] In considering them the jury must take into account the constitution, habits, heredity and such experience of the effect of age on muscle and nerve and endurance as they may have had themselves,[58] and other contingencies affecting the gross earnings the decedent might have made.[59] It is not necessary to instruct the jury as to these matters unless request to so do is made; they may be considered in weighing the evidence, it being presumed the jurors are as cognizant of them as the judge.[60] The capacity of the deceased to earn money in his vocation may be proven, but the opinions of witnesses as to the amount he might earn in pursuits in which he had never engaged are not admissible.[61] The existence of disease in the deceased which would probably

benefited by them. In the absence of anything showing the contrary, it was not error to direct the jury to consider the life as an average one, and to value it upon the basis of the tables.

The amount expended by the decedent for the support of those dependent upon him need not be shown if the amount of his earnings appears and it is shown that a large portion of them were used for their benefit. Texas & P. R. Co. v. Johnson, 48 Tex. Civ. App. 135.

56 McCoullough v. Chicago, etc. R. Co., 160 Iowa 524, 47 L.R.A.(N.S.) 23; Atchison, etc. R. Co. v. Ryan, 62 Kan. 682; Texas, etc. R. Co. v. Mills (Tex. Civ. App.), 143 S. W. 690.

57 Meola v. Quincy M. Co., 174 Mich. 305; Kroll v. Chicago, etc. R. Co., 150 Ill. App. 438; Missouri, etc. R. Co. v. McLaughlin, 73 Kan. 248, citing the text; Little v. Bousfield & Co. 165 Mich. 654; Vowell v. Issaquah C. Co., 31 Wash. 103; Central R. & B. Co. v. Roach, 64 Ga. 635; Georgia R. v. Pittman, 73 Ga. 325, 14 Am. Neg. Cas. 188; Railway Co. v. Sweet, 60 Ark. 550; Conley v. Maine Cent. R. Co., 95 Me. 149.

58 Central R. v. Thompson, 76 Ga 770; Watson v. Seaboard A. L. R. Co., 133 N. C. 188.

59 Bussey v. Charleston & W. C. R. Co., 78 S. C. 352.

60 Central R. Co. v. Ray, 129 Ga. 349.

61 Atlantic, etc. R. Co. v. Newton, 85 Ga. 517; McLean v. Board, 7 Vict. L. R. (law) 239; Chicago, etc. R. Co. v. Sizer, 1 Neb. (Unof.) 32.

In Missouri it is not necessary

have shortened his life is a proper matter of proof.[62] Where damages proportioned to the injury may be given, funeral expenses may be recovered.[63] In England such expenses are not recoverable;[64] but generally in this country they may be recovered if the law imposes upon the relatives for whose benefit the action is brought the obligation to bear them.[65] It is otherwise under an act which provides for the recovery of the reasonable expectation of pecuniary advantage which would have resulted from the continuation of the decedent's life if his estate is liable for such expenses,[66] and where the action is brought for the benefit of the estate of the decedent; the rule extends to the expenses of his sickness.[67] In Tennessee the contributory negligence of the deceased must be regarded by the jury in mitigation of the recovery.[68] The same rule obtains in Mississippi.[69]

§ 1269. Same subject. Under the code of Georgia the plaintiff, whether widow or child, may recover the full value of the life of the deceased.[70] This excludes the wants and condition of the family before the husband's death as well as thereafter as an element of damages and leaves for the consideration of the jury the age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with the lapse of time, rate of wages, etc., and the necessary personal

either to prove or allege the amount of wages earned by a minor child. The reason given for the decision is that in many cases such proof is impossible, as the child may be of such tender years that he would not be earning wages. Dalton v. St. Louis Smelting & Refining Co., 188 Mo. App. 529.

62 Duke v. St. Louis, etc. R. Co., 172 Fed. 684; Columbus & W. R. Co. v. Bridges, 86 Ala. 448, 13 Am. Neg. Cas. 94; Schaidler v. Chicago & N. R. Co., 102 Wis. 564; Chicago, etc. R. Co. v. Groner, 51 Tex. Civ. App. 65.

63 Petrie v. Columbia & G. R. Co., 29 S. C. 303, 324.

64 Dalton v. Southeastern R. Co., 4 C. B. (N.S.) 296; Boulter v. Webster, 13 Week. Rep. 289.

65 Murphy v. New York Cent., etc. R. Co., 88 N. Y. 445; Pennsylvania R. Co. v. Banton, 54 Pa. 495; Owen v. Brockschmidt, 54 Mo. 285; The Mauch Chunk, 139 Fed. 747.

66 Consolidated T. Co. v. Hone, 60 N. J. L. 444.

67 Holland v. Brown, 35 Fed. 43.

68 Western & A. R. Co. v. Roberson, 9 C. C. A. 646, 61 Fed. 592, citing state cases.

69 Mississippi Cent. R. Co. v. Robinson, 106 Miss. 896, 64 So. 838.

70 Atlantic C. L. R. Co. v. McDonald, 135 Ga. 635; Act of 1878, p. 59; § 2971, Code of 1882.

expenses of the deceased as the elements entering into the damages.[71] A subsequent statute, which is recognized as harsh, and is to be strictly construed,[72] excludes a deduction from the value of the life on account of the necessary or personal expenses of the deceased had he lived.[73] The question was raised, but not decided, in an earlier case whether the damages recoverable by a child for the death of its parent might be reduced by the amount which the child could earn before becoming of age. Jackson, C. J., said: It is true that a parent may make the child, when able, work, but that is the privilege of the parent. It does not follow that the defendant may set off that ability against the duty to support the child and thus lessen her recovery. How much could she work? When would she be able to work? Is she now healthy? Will she be so a year or five years hence? The field of conjecture is too wide and too far off—too remote to be set off against that support which is the child's measure of damages.[74]

In an action by a child to recover for the loss of a parent the measure of damages has been held to be its support during minority; the computation should begin from the parent's death, not from the date of the injury which caused it.[75]

§ 1270. Same subject. The South Carolina statute provides that the "action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been caused, * * * and in every such action the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled

[71] Central R. v. Rouse, 77 Ga. 393; Roswell v. Barnhart, 96 Ga. 521.

[72] Smith v. Hatcher, 102 Ga. 160; Southern Bell Tel. & T. Co. v. Cassin, 111 Ga. 575, 50 L.R.A. 694; Atkinson v. Hardaway, 10 Ga. App. 389; §§ 2782, 4425, Civil Code of 1910; Southern R. Co. v. Decker, 5 Ga. App. 21.

[73] Clay v. Central R. & B. Co., 84 Ga. 345.

[74] Atlanta, etc. R. v. Venable, 67 Ga. 697.

[75] Id.; St. Louis, etc. R. Co. v. Johnston, 78 Tex. 536, 17 Am. Neg. Cas. 568.

to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." Claims on behalf of adult children who were not living with their parents are not excluded though they are not legal; the "injury" referred to is not restricted to the deprivation of a legal right.[76] The measure of damages is not the pecuniary loss or injury alone of the beneficiaries; the jury may give such damages as they think proportionate to the injury,[77] though no proof of damage is made in case of the death of an infant.[78] Punitive damages are not recoverable.[79]

§ 1271. **Same subject.** The Virginia statute authorizes the jury to award such damages as to it may seem fair and just. It is said to be remedial in its character and entitled to a liberal construction. Where nothing but compensation for pecuniary loss was claimed these rules were laid down: The damages were to be assessed with reference to the pecuniary loss sustained by the wife and children of the deceased. "First, by fixing them at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased during what would probably have been his life-time if he had not been killed. Second, by adding these to the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death. As was very propery said in Tilley v. Hudson River R. Co., [80] 'all these are elements of pecuniary success—component parts of that pecuniary capital of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful act of the defendants deprived them.' " [81] Under that statute the jury are not restricted to the consideration of pecuniary loss; they

[76] Petrie v. Columbia & G. R. Co., 29 S. C. 303.

[77] Strother v. South Carolina & G. R., 47 S. C. 375, 12 Am. Neg. Cas. 582.

[78] Mason v. Southern R., 58 S. C. 70.

[79] Garrick v. Florida Cent. & P. R., 53 S. C. 448, 69 Am. St. 874.

[80] 29 N. Y. 252.

[81] Baltimore & O. R. Co. v. Wightman, 29 Gratt. 431, 26 Am. Rep. 384; Same v. Noell, 32 Gratt. 394

may award punitive damages;[82] and, it seems, damages by way of solace and comfort to the family of the deceased.[83] Where punitive damages are not in issue the mitigating or aggravating circumstances connected with or leading up to the death are immaterial.[84] Evidence of the financial condition of deceased prior to his death is not competent.[85]

§ 1272. Recovery for death of child. Under the Georgia statute a parent cannot recover for the death of a child unless he or she "contributes to his or her support."[86] Though dependence is essential,[87] it need not have been absolute;[88] nor is it necessary that the contributions made to the support of the parent have been made in pursuance of a legal obligation.[89] There cannot be a recovery under that statute when the child whose death is sued for was so young that it was incapable of rendering service. In the case of a child aged one year and eight months judicial notice will be taken that it cannot render valuable services.[90] In such a case the father may recover the expense reasonably and necessarily incurred in the burial of the child, including compensation for the loss of his own time for the purpose.[91] A father who is self-sustaining is not a "dependent" because he has assumed the support of others and is legally chargeable therewith, though his earnings are inadequate to support them in the manner in which their circumstances made it proper for them to live, and the

82 Matthews v. Warner, 29 Gratt. 570, 26 Am. Rep. 396. See § 1263.

83 Baltimore & O. R. Co. v. Noell, *supra*. But see Norfolk & W. R. Co. v. Stevens, 97 Va. 631, 46 L.R.A. 367.

84 Dunnagan v. Briggs, 170 Mo. App. 691.

85 Chesapeake & O. R. Co. v. Ghee, 110 Va. 527.

86 Smith v. Hatcher, 102 Ga. 158; Clay v. Central R. & B. Co., 84 Ga. 345. See Western U. Tel. Co. v. Harris, 6 Ga. App. 260.

87 Trammell v. Southern R. Co., 105 C. C. A. 221, 182 Fed. 789.

88 Daniels v. Savannah, etc. R. Co., 86 Ga. 236; Savannah E. Co. v. Bell, 124 Ga. 663; Central R. Co. v. Henson, 121 Ga. 462.

89 Savannah E. Co. v. Bell, *supra*; United States E. L. Co. v. Sullivan, 22 App. Cas. (D. C.) 115.

90 Crenshaw v. Louisville & N. R. Co., 15 Ga. App. 182, holding that in Georgia it is conclusively presumed that a child less than two years of age is incapable of performing services of value.

91 Southern R. Co. v. Covenia, 100 Ga. 46, 62 Am. St. 312, 40 L.R.A. 253, 3 Am. Neg. Rep. 753; Ferreira v. Honolulu R. T. & L. Co., 16 Hawaii 615.

deceased minor son contributed of his earnings to the support of his father and family.[92] In an action by the mother evidence of the father's phyiscal disability to labor is admissible to show her partial dependence upon the deceased minor son. Where the parents and minor children all live together and are mutually dependent upon the family labors, a child of fifteen years, the proceeds of whose labor comes into the common stock, is to be regarded as contributing substantially to the mother's support.[93] Partial or total dependence upon a deceased child is necessary under the Porto Rico act.[94] The dependence required by the Washington statute must be substantial and arise from necessitous want.[95] It was found to exist where a six-year old son was killed, on the theory that his blind father expected to use him when he became old enough to aid in his business.[96] A case is not within that act because the son gave his father the benefit of his earnings, no necessity for so doing existing. It is not required that the dependency be absolute.[97] The California statute has been construed to require proof of actual dependency in case of those who are not, from their relationship to the decedent, presumed to be dependent upon him.[98]

Under statutes which proportion the damages to the injury resulting from the death it is not necessary that they be confined, in every case, to the time of the minority of the deceased child; they may or may not extend beyond that period.[99] In assessing damages more than ordinary discretion must be

92 Georgia R. & B. Co. v. Spinks, 111 Ga. 571.

93 Augusta R. Co. v. Glover, 92 Ga. 132, 2 Am. Neg. Cas. 466; Central R. Co. v. Henson, *supra*.

As to what constitutes a "dependent" under the Florida statute, see Louisville & N. R. Co. v. Jones, 45 Fla. 407.

A court may not say that a child aged six is incapable of contributing to his mother's support though the contribution be made in labor. Fuller v. Inman, 10 Ga. App. 680.

94 Vargas v. American R. Co., 1 Porto Rico Fed. 292; Bosakowski v. Same, id. 277.

95 Bortle v. Northern Pac. R. Co., 60 Wash. 552; Penoza v. Northern Pac. Ry. Co., 215 Fed. 200.

96 Tecker v. Seattle, etc. R. Co., 60 Wash. 570.

97 Kanton v. Kelly, 65 Wash. 614.

98 Balaklala Consol. Copper Co. v. Reardon, 136 C. C. A. 186, 220 Fed. 584.

99 Houston, etc. R. Co. v. Cowser, 57 Tex. 293; Texas & P. R. Co. v. Lester, 75 id. 56, 17 Am. Neg. Cas. 558; McAdory v. Louisville & N. R.

allowed the jury, yet, so far as possible, they should be aided by evidence. If in any case the damages may be estimated without evidence it can only be done where it is necessary, as where the child is of tender years. It is suggested that, in other cases, the nearest approximation to the necessary reasonable certainty for estimating damages is such sum as would purchase an annuity equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances which can reasonably be adduced and including the probable duration of his life.[1] This measure is not, however, conclusive upon the jury if they find from the circumstances that an adult son might have increased his earnings or that his parents' needs might have become greater and that his disposition would have been to supply them.[2] But the contingency that he might not continue to furnish a sum which would buy an annuity equal to the sum he had furnished must be considered in the light of the probabilities affecting his own health, employment and life,[3] as must the fact that his contributions to his parents were voluntary.[4] In an action to recover for the death of a son aged twenty years it was ruled that whether or not a less sum than that to which his whole contributions would have amounted, would compensate the plaintiffs for the loss of such contribu-

Co., 94 Ala. 272, 13 Am. Neg. Cas. 114.

[1] Houston, etc. R. Co. v. Cowser, 57 Tex. 293; St. Louis, etc. R. Co. v. Gordon, 92 Ark. 617; Texas, etc. R. Co. v. Kenny, 46 Tex. Civ. App. 297. *Contra,* Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438. See Brown v. Erie R. Co., — N. J. L. —, 91 Atl. 1023, where a somewhat similar instruction was held not erroneous.

[2] International, etc. R. Co. v. Kindred, 57 Tex. 491, 17 Am. Neg. Cas. 583; Texas & P. R. Co. v. Lester, *supra,* 17 Am. Neg. Cas. 558, sustaining a verdict of $4,200 in favor of a widow for the death of her only child, a son of twenty-six, who contributed $200 a year to her support, she being fifty-one years of age. In another case the mother was sixty; the deceased son twenty-two; his earnings were from $60 to $65 per month, about one-half of which was given her. A verdict for $3,550 was proper. Missouri Pac. R. Co. v. Henry, 75 Tex. 220, 17 Am. Neg. Cas. 596.

The suggested measure of damages controls. Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192.

[3] McKay v. New England D. Co., 92 Me. 454; Hackett v. Wisconsin Cent. R. Co., 141 Wis. 464.

[4] Hackett v. R. Co., *supra.*

tions as he would have made them, was for the jury, and it was error for the court to assume that the compensation must necessarily consist of a sum equal to such contributions.[5] In an action to recover for the death of an adult son the former's pecuniary condition may be shown for the purpose of establishing a reasonable expectation of financial aid from the deceased, but not to increase the amount of damages.[6] A more accurate statement of the rule is that any fact which tends to show the amount of the pecuniary loss to the beneficiary is competent, whether it tends to increase or diminish the damages.[7] If an adult son voluntarily assumes the support of an aged parent who is unable to maintain himself the latter is as much entitled to the protection of a civil damage statute as if the son had been compelled to perform the statutory duty of

[5] Ft. Worth & D. City R. Co. v. Morrison, 93 Tex. 527. See Galveston, etc. R. Co. v. Pigott, 54 Tex. Civ. App. 367.

[6] International, etc. R. Co. v. Kindred, 57 Tex. 491; Houston, etc. R. Co. v. White, 23 Tex. Civ. App. 280; Citizens' R. Co. v. Washington, 24 Tex. Civ. App. 422.

[7] Bodin v. Duluth St. R. Co., 117 Minn. 513 (previous contributions by adult son to support of mother); Murphy v. Gross, 118 Minn. 311 (financial aid by minor son); Reiter-C. Mfg. Co. v. Hamlin, 144 Ala. 192; Nordhaus v. Vandalia R. Co., 242 Ill. 166; Huff v. Peoria & E. R. Co., 127 Ill. App. 242; Storrs v. Northern Pac. R. Co., 148 App. Div. (N. Y.) 403; Pressman v. Mooney, 5 App. Div. (N. Y.) 121; Thompson v. Johnston, 86 Wis. 576, 586, 17 Am. Neg. Cas. 911; Elwood v. Addison, 26 Ind. App. 28, 35; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10, 18, 6 Am. Neg. Rep. 179, and cases cited.

Where it was shown that the father had received financial aid from a minor son it was proper to show that the deceased was survived by his mother and brothers and sisters. South Omaha W. W. Co. v. Vocasek, 62 Neb. 710, 10 Am. Neg. Rep. 580. See Terhune v. Cody C. Co., 72 App. Div. (N. Y.) 1.

The loss of prospective gifts by an adult son to his parents will ordinarily involve an inquiry into the means and earning capacity of the decedent on the one hand, and of the parents on the other. The extent of previous contributions for support is a proper matter for consideration, and the dependence of the parents upon the deceased, while not essential, is competent if it is shown to have been financially recognized by him. McCoullough v. Chicago, etc. R. Co., 160 Iowa 524, 47 L.R.A.(N.S.) 23.

It may be shown how much an adult son contributed to the support of his parents. Prendergast v. Chicago City R. Co., 114 Ill. App. 156.

The size of the plaintiff's family may be proved. Ferreira v. Honolulu R. T. & L. Co., 16 Hawaii 615.

furnishing support.[8] The loss of personal services rendered by a son to a parent who lives with him as a member of his family are to be compensated for.[9] A statement made by the deceased to his mother that he would support and take care of her during life is competent evidence to show her reasonable expectation of pecuniary aid from him.[10] A promise by an adult son

[8] Sneed v. Marysville G. & E. Co., 149 Cal. 704, citing the text; De Puy v. Cook, 90 Hun 43.

The mother of an adult son who does not live with her must show a pecuniary interest in the continuance of his life, in order to recover more than nominal damages for his death. Halbert v. Louisville & N. R. Co., 183 Ill. App. 483.

It is immaterial to the right to recover under a death statute for the death of an adult unmarried child that the support furnished her parents was voluntary. Richardson v. Detroit & M. R. Co., 176 Mich. 413.

[9] Valparaiso L. Co. v. Tyler, 177 Ind. 278; Smith v. Michigan Cent. R. Co., 35 Ind. App. 188.

It has been held that evidence was competent of the fact that after attaining majority the son contributed labor on the father's farm, although subsequently he became a railroad brakeman, which was his occupation at the time of death. It is said that this is something which can be measured in money, but the court does not intimate any reason for the decision, although there is an implication that the father had some expectation of further contributions of the same nature, of which he had been deprived. Southern Kansas Ry. Co. of Texas v. Barnes, — Tex. Civ. App. —, 173 S. W. 880.

A similar rule seems to have been applied where after leaving home a son frequently returned and while at home rendered services to his father in caring for the farm, and when killed was contemplating a permanent return to the farm, to take charge of it. Gulf, C. & S. F. Ry. Co. v. Hicks, — Tex. Civ. App. —, 166 S. W. 1190.

[10] St. Louis, etc. R. Co. v. Jacks, 105 Ark. 347; Missouri Pac. R. Co. v. Lee, 70 Tex. 496; Memphis, etc. R. Co. v. Buckley, 99 Ark. 422; St. Louis S. R. Co. v. Huey (Tex. Civ. App.), 130 S. W. 1017; Leuque v. Madison G. & E. Co., 133 Wis. 547; London & W. T. Co. v. Grand Trunk R. Co., 22 Ont. App. 262; Stephens v. Toronto R. Co., 11 Ont. L. R. 19; Houston, etc. R. Co. v. White, 23 Tex. Civ. App. 280; Bright v. Barnett, 88 Wis. 299, 26 L.R.A. 524.

Statements of an adult son to third persons to the effect that he intended to send money to his mother are incompetent as hearsay, but the testimony of a witness that he gave decedent's mother money which decedent sent her is competent. Halbert v. Louisville & N. R. Co., 183 Ill. App. 483.

In an action to recover for the death of a son where a mother is one of the plaintiffs it is competent to show that the son promised his mother that he would not marry during her lifetime so as to be able the more effectually to look after and care for her. Gulf, C. & S. F. Ry. Co. v. Hicks, — Tex. Civ. App —, 166 S. W. 1190.

to reimburse his father for the expense of his education by assisting in the education of his sisters is relevant to show pecuniary loss by the father;[11] and so of the loss by the father of the prospect and expectation of the payment of a debt due him by the decedent.[12] The fact that a son who had left home and who had not aided his parents was capable of earning money and had shown a purpose to assist them is ground for a recovery.[13] But in Ontario the financial ability to give the aid which the expressions of the decedent indicated it was his purpose to give must be shown as a basis for a reasonable expectation of pecuniary aid from him.[14]

In the case of the death of a minor child the pecuniary benefit its parents had a reasonable expectation of receiving from him, had he lived, is the measure of damages;[15] and, in

Evidence that the deceased had purchased a home for his mother is competent on the issue of her reasonable expectancy of pecuniary benefits to be received from him had he lived. Ft. Worth & R. G. Ry. Co. v. Keith, — Tex. Civ. App. —, 163 S. W. 142.

Where the deceased has recognized his duty to his parents by giving them financial aid and it is reasonably probable he would have continued to do so had he lived, it is proper to consider that their need and his ability to assist them might increase. McCoullough v. Chicago, etc. R. Co., 160 Iowa 524 (ruled under the Federal Employers' Liability Act).

[11] Huff v. Peoria & E. R. Co., 127 Ill. App. 242.

The promise of an adult child to repay what had been expended for his education, some payments having been made, may be considered though the amount unpaid is not shown. Palmer v. New York Cent., etc. R. Co., 153 App. Div. (N. Y.) 296.

[12] Stangeland v. Minneapolis, etc. R. Co., 105 Minn. 224, ruled under the North Dakota statute.

[13] Dean v. Oregon R. & N. Co., 38 Wash. 565.

[14] Stephens v. Toronto R. Co., 11 Ont. L. R. 19.

[15] Trapp v. Rockford Elec. Co., 186 Ill. App. 379; Swengel v. La Salle County Carbon Coal Co., 182 Ill. App. 623; Vandalia Coal Co. v. Bland, — Ind. App. —, 108 N. E. 176; Standard Forgings Co. v. Holmstrom, 58 Ind. App. 306; American Motor Car Co. v. Robbins, 181 Ind. 417; Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, L.R.A. 1915C 632: Curran v. Lewiston, A. & W. St. R. Co., 112 Me 96; Toledo Rys. & Light Co. v. Wettstein, 33 Ohio Cir. Ct. 15 [aff'd 79 Ohio St. 439]; McFarland v. Oregon Elec. R. Co., 70 Ore. 27.

In Indiana the rule of damages in such a case is "the present worth of the amount which it is reasonably probable the deceased would have contributed to the support of the parent during the latter's expectancy of life in proportion to the

addition thereto, the cost of medical aid and other like expenses necessarily incurred [16] were held recoverable, but those were not items of pecuniary injury resulting from the death.[17] In Idaho, Missouri and Porto Rico, there may also be a recovery for the loss of the companionship and society of a child.[18] The funeral expenses and the cost of transporting the corpse of a child to its home are recoverable.[19] "The attentions and kind-

amount he was contributing at the time of his death, not exceeding his expectancy of life." Standard Forgings Co. v. Holmstrom, 58 Ind. App. 306.

[16] Fox v. Barekman, 178 Ind. 572; Johnson v. Industrial L. Co., 131 La. 897; Deninger v. American Locomotive Co., 107 C. C. A. 126, 185 Fed. 22, applying Pennsylvania law; Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Galveston v. Barbour, 62 Tex. 172, 50 Am. Rep. 519; Brunswig v. White, 70 Tex. 504. See § 1278.

In McKeown v. Toronto R. Co., 19 Ont. L. R. 361, the Court of Appeal laid down the rule that the age of the child, the probability of its continued life to a period when it would become useful to a parent in the performance of services or in earning money which would benefit the parent are matters for the jury to consider, in connection with all the circumstances which may in any case terminate or shorten their performance. It need not be shown that any benefit has been derived from the child.

[17] Hutchinson v. West Jersey & S R. Co. (N. J.), 170 Fed. 615. See Murray v. Usher, 117 N. Y. 542. *Contra*, Leahy v. Davis, 121 Mo. 227; § 1273.

"The age of the deceased, the probable value of his service, his habits, the probability that he would aid and assist are all to be taken into consideration." Knife & S. Co v. Hathaway, 27 Ohio C. C. 745, affirmed without opinion, 72 Ohio 623.

[18] Anderson v. Great Northern R. Co., 15 Idaho 513; Sharp v. National B. Co., 179 Mo. 553 (the statutes of these states provide for the recovery of all the damages which under the circumstances may be just); Morales v. San Juan L. & T. Co., 4 Porto Rico Fed. 361. *Contra*, McFarland v. Oregon Elec. R. Co., 70 Ore. 27; Standard Forgings Co. v. Holmstrom, 58 Ind. App. 306; Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, L.R.A.1915C 632.

[19] American Motor Car Co. v. Robbins, 181 Ind. 417; Carnego v. Crescent Coal Co., 164 Iowa 552; Kelly v. City of Higginsville, 185 Mo. App. 55; Fox v. Barekman, 178 Ind. 572; Hedrick v. R. & N. Co., 4 Wash. 400; Southern Indiana R. Co. v. Moore, 34 Ind. App. 154; Calcaterra v. Iovaldi, 123 Mo. App. 347; Coleman v. Himmelberger-H. L. & L. Co., 105 Mo. App. 254; Leahy v. Davis, 121 Mo. 227; Esher v. Mineral R. & M. Co., 28 Pa. Super. Ct. 393; Dean v. Oregon R. & N. Co., 44 Wash. 564; Secard v. Rhinelander L. Co., 147 Wis. 614 (the act provides for the recovery of the "pecuniary loss"). But see Pittsburgh, etc. R. Co. v. Brown, 178 Ind. 11. See § 1265.

The funeral expenses of an adult child, a member of her father's household, and who had no estate,

ness of children to parents though adding nothing to their estate may add much to the physical comfort or ease of their life, independent of the affections or of the joy of companionship. The loss of these might under some circumstances be a pecuniary injury." [20]

Under the Texas statute "the jury may give such damages as they may think proportioned to the injury resulting from" the death. In an action to recover for the death of a child of six years the court say: "First, where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages. Second, where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services, the mode in which such faculties are exercised, as in useful labor or otherwise; and when, from the age and undeveloped state of the child, any estimate of the value of the services until majority would be matter of opinion in which no particular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine the value without any witness naming a sum.[21] Third, as the age of the child increases

may be recovered regardless of whether he could be compelled to meet them. "His relation to the child compelled it. His failure would have been abhorrent to his sense of duty, and to parental affection, and would have invited and received the contempt of all knowing of it." Palmer v. New York Cent., etc. R. Co., 153 App. Div. (N. Y.) 296.

Testimony as to the amount actually expended for funeral expenses is not in itself sufficient to show the reasonableness thereof. Carnego v. Crescent Coal Co., 164 Iowa 552.

20 McKay v. New England D. Co., 92 Me. 454.

The services a child might have rendered are not limited to those having a money value, but include all he might have performed as shown by the evidence. Southern Indiana R. Co. v. Moore, 34 Ind. App. 154.

21 See Golden v. Spokane, etc. R. Co., 20 Idaho 526.

The probable increase in the earnings of a minor may be regarded, and a verdict based thereon will not be set aside because it does not reduce the earnings he was making before death to their present value. Kalis v. Detroit United R., 155 Mich. 485.

and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss.[22] Fourth, the circumstances of the parents suing, as in this case, often become necessary as evidence; not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case the parents kept a dairy; all the family worked. The child, by attending to some duties, relieved the mother so that she could engage in other necessary labor."[23] The character of a minor child for industry, economy and sobriety and his devotion to his parents may be considered in determining the pecuniary benefit they would have derived from him,[24] as may his aptitude for a special

[22] It may be assumed that had the deceased lived and continued in his employment he would, as he progressed in skill, be entitled to an increase in salary from time to time until he would have received the highest rate paid for such services. Clark v. Tulare Lake D. Co., 14 Cal. App. 414.

[23] Brunswig v. White, 70 Tex. 504, quoted from approvingly as to the discretion of the jury in Waters-P. O. Co. v. Deselms, 212 U. S. 159, 53 L. ed. 453; St. Louis, etc. R. Co. v. Bolen (Tex. Civ. App.), 129 S. W. 860; San Antonio T. Co. v. Young (Tex. Civ. App.), 141 S. W. 572.

Similarly it was held that where decedent, a boy 8 years old, was accustomed to "do chores" for his mother, who was somewhat of an invalid, and walked with difficulty, the services thus rendered by the child were an element of value to be taken into account in assessing damages for his death. The decision went in part at least on the ground that the services of the child obviated the necessity of hired help to perform the same services. American Motor Car Co. v. Robbins, 181 Ind. 417.

[24] Kelly v. City of Higginsville, 185 Mo. App. 55; St. Louis, etc. R. Co. v. Jacks, 105 Ark. 347; Ohio Valley T. Co. v. Wernke, 179 Ind. 49; Memphis, etc. R. Co. v. Buckley, 99 Ark. 422; Commerce C. O. Co. v. Camp (Tex. Civ. App.), 129 S. W. 852; St. Louis, etc. R. Co. v. Scott, 102 Ark. 417; Missouri Pac. R. Co. v. Lee, 70 Tex. 496, 12 Am. Neg. Cas. 598; Pierce v. Conners, 20 Colo. 178, 37 Pac. 721.

The services which a strong, bright, well reared boy may render to his parents may have a value apart from the amount of wages he may earn from strangers and turn over to them, which is competent to be considered by the jury. Kelly v. City of Higginsville, *supra.*

It may be shown that a minor child had contracted for a home for his parent and was paying for it. Southern Indiana R. Co. v. Moore, *supra.*

The value of a son to his mother as an adviser and comforter may be considered. Williams v. Bishop, 12 Ohio N. P. (N.S.) 7.

"Where a child is killed all the proof that ordinarily can be offered is the age, sex, health, habits, dis-

calling;[25] the prospective increase in his earning capacity,[26] as well as any competent evidence tending to enhance or diminish the value of the child's services.[27] This may be predicated upon the possession of good qualities; but if the decedent "was wearing the swaddling clothes of apprenticeship" the earning capacity of a proficient man in the trade may not be shown.[28] In addition to the disposition manifested towards his parents, the state of the health and intelligence of a child may be gone into.[29] The amount contributed by a minor to his parents is a relevant fact, and a general description may be given of the family; but the wealth or poverty of the plaintiff may not be shown except as it may aid in determining the future conduct of the deceased had he continued in life.[30] But the age, health and poverty of the plaintiff may be shown to aid the jury in fixing the amount

position and temperament of the child, together with its mode of life, and the relatives who survived it, and, possibly," its service in some little employment. Whitmer v. El Paso, etc. R. Co., 201 Fed. 193.

25 Snyder v. Lake Shore, etc. R. Co., 131 Mich. 418.

26 St. Louis, etc. R. Co. v. Scott, *supra*.

27 Lake Erie & W. R. Co. v. Chriss, 57 Ind. App. 145, citing this section; Curran v. Lewiston, A. & W. St. R. Co., 112 Me. 96; Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, L.R.A. 1915C 632.

Thus it was competent to show that the law required that deceased, a boy 11 years of age, be sent to school for nearly five years longer, as tending to show that during such time his services would have been worth little to his mother. Graffam v. Saco Grange, *supra*. To the same effect see Curran v. Lewiston, A. & W. St. R. Co., *supra*.

In an action for the death of an 8 year old boy, where the circumstances of his parents are shown, it is competent to show what opportunities are available for the employment of such a boy, and what wages he might have earned. Firestine v. Philadelphia, etc. R. Co., 56 Pa. Super. Ct. 42.

28 Central F. Co. v. Bennett, 144 Ala. 574; Ohio Valley T. Co. v. Wernke, 42 Ind. App. 326.

29 Black v. Michigan Cent. R. Co., 146 Mich. 568.

The fact that deceased, an adult, whose life insurance policy had been made payable to his mother as beneficiary, changed the beneficiary therein after her death and made his brother beneficiary is competent as tending to show his relations with his father, and as tending to show that he did not intend to contribute to the father's support, but hearsay evidence that such change to the brother instead of the father was at the request of the mother in order to provide for the education of the brother is incompetent, it not being part of the *res gestæ*. St Louis, B. & M. Ry. Co. v. Jenkins, — Tex. Civ. App. —, 172 S. W. 984 [rev'g 163 S. W. 621].

30 Kerling v. Van Dusen, 109

he would probably have received from the deceased.[31] The fact that there are other children older than the deceased, their ages as compared with that of the parent and the probability that they would care for the parent are probably too remote to be weighed in assessing the compensation.[32] The wages being earned when the injury causing death was sustained are persuasive as to the then earning capacity of the deceased.[33] The value of the services a child might have rendered to the family cannot be shown by opinion evidence.[34] In the absence of evidence as to services rendered or which might have been rendered, evidence of the age of a minor child, his intelligence, habits, disposition towards his parents and their situation are facts upon which a finding of a reasonable expectation of benefits may rest and support a verdict for substantial damages.[35]

Minn. 481; Love v. Detroit, etc. R. Co., 170 Mich. 1 (the present and prospective ability of the father to educate the deceased child may be shown in an action under the survival act).

The admissibility of evidence to show the financial circumstances of the family of a deceased child is argued in Crabtree v. Missouri Pac. R. Co., 86 Neb. 33, 136 Am. St. 663, which distinguishes other local cases.

Although there is doubt whether the father will ever be situated so that he will require support or assistance from his son, the question whether he had a reasonable expectation of such assistance is for the jury. Gulf, C. & S. F. Ry. Co. v. Hicks, — Tex. Civ. App. —, 166 S. W. 1190.

31 Birmingham R., L. & P. Co. v. Mosely, 164 Ala. 111; United States E. L. Co. v. Sullivan, 22 App. Cas. (D. C.) 115.

The ages of the parents of the deceased, their state of health and financial condition and the number of children dependent upon them have been referred to in connection with objections to the allowances made by juries. Hayes v. Chicago, etc R. Co., 131 Wis. 399; Leque v. Madison G. & E. Co., 133 Wis. 547.

In a late New Jersey case, it is intimated that the amounts contributed to plaintiff's support by her second husband may be competent on the amount of her recovery for the death of a son by the former husband, which son also contributed thereto. Brown v. Erie R. Co., — N. J. L. —, 91 Atl. 1023.

32 See Golden v. Spokane, etc. R. Co., 20 Idaho 526.

33 Gulla v. Lehigh Valley C. Co., 28 Pa. Super. Ct. 11.

34 Cincinnati T. Co. v. Stephens, 75 Ohio St. 171, reversing s. c., 7 Ohio C. C. (N. S.) 454.

35 Atchison, etc. R. Co. v. Fajardo, 74 Kan. 314, 6 L.R.A.(N.S.) 681. To the same effect see Lake Erie & W. R. Co. v. Chriss, 57 Ind. App. 145 (where decedent was a 12-year-old school girl).

Where decedent was a 10-year-old boy, it appeared that he was bright, healthy, strong and energetic, at-

The Mississippi statute authorizes the recovery of such damages as the jury shall assess, taking into consideration all damages of every kind to any and all parties. It covers the value of the services of a child from death until majority; its physical and mental suffering intermediate the injury and death; such gratuities as there may be reasonable ground for expecting the parent would have received and such sum as the child could have recovered as the present value of its life expectancy. The recovery of gratuities must be based on their receipt by the parent before the death of the child.[36]

In Colorado the father and mother of a deceased child may join in a suit to recover for its death. Their failure to do so does not prejudice the defendant, affect the elements of damage, the measure of recovery, nor justify a second suit.[37] The right of the father to recover burial expenses is not affected because his wife was improperly joined in the action.[38] Where burial expenses are a charge against the estate of the decedent they may be recovered only by such relatives as have the duty of interment cast upon them.[39] It has been held proper in an action to recover for the death of a girl aged eight years to show that her step-father was a school teacher and the compensation paid women teachers in the vicinity where deceased resided;

tending school, but working after school, going on errands and selling Sunday papers. He earned a small amount of money in this way and turned it over to his mother. A verdict of $5,000 was held not excessive. Meehan v. Adirondack Elec. Power Corp., 88 Misc. (N. Y.) 235.

36 Cumberland Tel. & T. Co. v. Anderson, 89 Miss. 732.

Under this statute one suit may be brought by one of those interested in the name of all, and one suit shall determine the recovery of all if decided on its merits. A suit being instituted by a father, the damages recovered for the death of an 18-year-old son were $200, an amount, said the court, which was less than the market price of a good mule. The court inferred collusion between the father and an insurance company on the one hand, and defendant on the other, and allowed a recovery by the mother and sister separately, on the ground that the action had not been decided on its merits. Sutberry v. Meridian Fertilizer Factory, — Miss. —, 64 So. 723.

37 Pierce v. Conners, 20 Colo. 178, 46 Am. St. 279.

38 Missouri, etc. R. Co. v. Evans, 16 Tex. Civ. App. 68.

39 Herning v. Holt L. Co., 153 Wis. 101.

there was no presumption the child would follow the employment of her mother—that of housewife.[40] As tending to show what vocation a young son might have followed it may be shown in what occupations his father had engaged.[41]

§ 1273. **Same subject.** The principal element of damage to a parent as the result of the death of a child is the loss of its services during minority,[42] considering the cost of support and maintenance during the helpless part of its life,[43] and education, taking into consideration the uncertainties of health and sickness and of life and death,[44] which is coincident with its minority when compensation for loss of services is demanded.[45] Sub-

[40] Eginorie v. Union County, 112 Iowa 558. See Brown v. St. Louis & S. R. Co., 127 Mo. App. 499.

[41] Meggison v. Maine & Sons Co., 160 Iowa 541.

[42] Florida East Coast R. Co. v. Hayes, 66 Fla. 589; Toledo R. & L. Co. v. Wettstein, 14 Ohio C. C. (N. S.) 441, affirmed without opinion, 79 Ohio St. 439.

[43] Lake Erie & W. R. Co. v. Chriss, 57 Ind. App. 145; Graham v. Consolidated T. Co., 62 N. J. L. 90; Terre Haute, etc. T. Co. v. Maberry, 52 Ind. App. 114; Hollenback v. Stone & W. E. Co., 46 Mont. 559; Chicago, R. I. & G. Ry. Co. v. Loftis, — Tex. Civ. App. —, 168 S. W. 403; Hedrick v. Ilwaco R. & N. Co., 4 Wash. 400; Morgan v. Southern Pac. Co., 95 Cal. 510, 20 Am. St. 143, 17 L.R.A. 71; Southern R. Co. v. Covenia, 100 Ga. 46, 3 Am. Neg. Rep. 753, 62 Am. St. 312, 40 L.R.A. 253; Hopkinson v Knapp, 92 Iowa 328, 14 Am. Neg. Cas. 568; Leahy v. Davis, 121 Mo. 227, 233; Schaffer v. Baker T. Co., 29 App. Div. (N. Y.) 459; Ft. Worth & D. City R. Co. v. Hyatt, 12 Tex. Civ. App. 435, 10 Am. Neg. Cas. 299; Elwood v. Addison, 26 Ind. App. 28, 35; Murphy v. Willow Springs B. Co., 81 Neb. 219; Smith v. Cissel, 22 App. Cas. (D. C.) 318; McDonald v. Champion I. & S. Co., 140 Mich. 401; Calcaterra v. Iovaldi, 123 Mo. App. 347; Coleman v. Himmelberger-H. L. & L. Co., 105 Mo. App. 254; Barretto v. Moquin-O.-W. C. Co., 142 App. Div. (N. Y.) 504; Scherer v. Schlaberg, 18 N. D. 421, 24 L.R.A.(N.S.) 520, citing the text; Tecker v. Seattle, etc. R. Co., 60 Wash. 570. See Byrd v. Southern Exp. Co., 139 N. C. 273.

Where there is no evidence of such expense, it is error to instruct the jury that they may take such fact into consideration in assessing damages for the death of a minor child. Dalton v. St. Louis Smelting & Refining Co., 188 Mo. App. 529. But compare Chicago, R. I. & G. Ry. Co. v. Loftis, — Tex. Civ. App. —, 168 S. W. 403, holding that proof of the expense of maintenance must be made in order to maintain the action.

[44] Kost v. Ashland, 236 Pa. 164.

[45] Cleveland, etc. R. Co. v. Miles, 162 Ind. 646.

A late Missouri case states the rule of damages in such case to be the pecuniary value to the parent of the child's services during his minority, and the burial and other expenses incurred by his death, less

ject to exceptions, elsewhere noted, the recovery must be limited to the actual pecuniary injury sustained.[46] In Louisiana the expense of recovering the body of a child is an element of damage, as is the loss of services and filial offices; the amount the deceased might have recovered at the moment of death may also be recovered.[47] In that state the parents may recover as actual damages for their sorrow, for the present and future deprivation of the society of the deceased and the prospective aid and comfort which they might rightfully have expected from him had his life continued.[48] There may not be added to the recovery for mental suffering and for the loss of society and filial affection the *usufruct* to any estate which the child during minority might acquire by his own efforts in the absence of need by the parent.[49]

The right to recover for the loss of a minor son's services is not affected by a probability that, had he lived, the parent might have given him his time or allowed him to spend it in idleness;[50] nor is the measure of recovery affected because the

the expense to his parents for his support and maintenance during minority. Kelly v. City of Higginsville, 185 Mo. App. 55.

[46] Kost v. Ashland, 236 Pa. 164 Aaron v. Missouri & K. Tel. Co., 89 Kan. 186; Speight v. Seaboard A. L. R., 161 N. C. 80; Cases cited in note 1 this section; Esher v. Mineral R. & M. Co., 28 Pa. Super. Ct. 293; Pepper v. Southern Pac. Co., 105 Cal. 389, 11 Am. Neg. Cas. 200; Lange v. Schoettler, 115 Cal. 388; Wales v. Pacific Elec. M. Co., 130 Cal. 521; Pierce v. Conners, 20 Colo. 178, 46 Am. St. 279; Diebold v. Sharp, 19 Ind. App. 474; Decker v. McSorley, 111 Wis. 91, 13 Am. Neg. Rep. 631; Fowler v. Chicago, etc. R. Co., 234 Ill. 619; Illinois Cent. R. Co. v. Johnson, 221 Ill. 42; Grayhek v. Stern, 154 Ill. App. 385; Ohio Valley T. Co. v. Wernke, 42 Ind. App. 326; Cook v. American, etc. G. Co., 70 N. J. L. 65; Renwick v. Galt, etc. St. R. Co., 12 Ont. L. R. 35. *Contra*, Anderson v. Great Northern R. Co., 15 Idaho 513. See Lomoe v. Superior W., L. & P. Co., 147 Wis. 5.

Anticipated pecuniary injury has been made a basis for a recovery under a statute providing for the recovery of such damages as the jury may deem just. It was said that the father was a workingman, and might come to great age and want, might be a paralytic. Thomas v. Electrical Co., 54 W. Va. 395. See O'Hara v. Laclede G. L. Co., 131 Mo. App. 428.

[47] Le Blanc v. Sweet, 107 La. 355.

[48] Roby v. Kansas City S. R. Co., 130 La. 896; Johnson v. Industrial L. Co., 131 La. 897.

[49] Bourg v. Brownell-D. L. Co., 120 La. 1009, 124 Am. St. 456; Cherry v. Louisiana & A. R. Co., 121 La. 471, 17 L.R.A.(N.S.) 505.

[50] Luessen v. Oshkosh E. L. & P. Co., 109 Wis. 94.

parent had received a sum of money from an insurance company or the relief department of the employer of the deceased.[51] A father who has deserted his family and has not communicated with them for years or furnished them support has no claim upon them for their earnings, and cannot recover for the death of one of them.[52]

In several states the damages for the death of a child have been limited to the pecuniary benefits the parent had a legal right to claim from the child's services, and therefore the courts have confined the estimate to the period of minority.[53] An adult

[51] Boulden v. Pennsylvania R. Co., 11 Pa. 264; North Pennsylvania R. Co. v. Kirk, 90 Pa. 15.

[52] Thompson v. Chicago, etc. R. Co., 104 Fed. 845; Swift v. Johnson, 1 L.R.A.(N.S.) 1161, 71 C. C. A. 619, 138 Fed. 867; Chaloux v. International P. Co., 75 N. H. 281, 139 Am. St. 690.

[53] Wallace v. Grand Trunk W. R. Co., 179 Mich. 277; Lincoln v. Detroit & M. R. Co., 179 Mich. 189, 51 L.R.A.(N.S.) 710; Chicago, R. I. & G. Ry. Co. v. Loftis, — Tex. Civ. App. —, 168 S. W. 403; Deninger v. American Locomotive Co., 107 C. C. A. 126, 185 Fed. 22 (Pa.); State v. Miller, 180 Fed. 796 (Md.); Golden v. Spokane & I. E. R. Co., 20 Idaho 526; Barnes v. Columbia L. Co., 107 Mo. App. 608; Esher v. Mineral R. & M. Co., 28 Pa. Super. Ct. 393; State v. Baltimore, etc. R. Co., 24 Md. 84, 107, 87 Am. Dec. 600; Agricultural, etc. Ass'n v. State, 71 Md. 86, 17 Am. St. 507; Hurst v. Detroit City R. Co., 84 Mich. 539; Cooper v. Lake Shore, etc. R. Co., 66 Mich. 261, 12 Am. Neg. Cas. 130, 11 Am. St. 482; Pennsylvania Co. v. Lilly, 73 Ind. 252; Chicago v. Scholten, 75 Ill. 468; Rockford, etc. R. Co. v. Delaney, 82 id. 198, 25 Am. Rep. 308; Caldwell v. Brown, 53 Pa. 453, 12 Am. Neg. Cas. 533, 17 Am. Neg. Cas. 236; Mobile & O. R. Co. v. Watty, 69 Miss. 145, 12 Am. Neg. Cas. 186; Leahy v. Davis, 121 Mo. 227; Schnable v. Providence Public Market, 24 R. I. 477.

The ground upon which the recovery is so limited is indicated by the opinion in Cooper v. R. Co., *supra*: Here was a broad field of chance and probabilities laid open before the jury through which they could roam without limit. They were permitted to speculate upon the future, and consider the probabilities or the possibilities of its unknown and unknowable contingencies; to consider and guess at what might occur had the daughter not been killed, and had lived to an age measured by the probable duration of the life of a person 11 years of age. They were given the *data* of a healthy girl of 11 years of age, born of poor parents, living with and being cared for by her grandmother; and from this they were required to solve the mighty problem of a life whose future was unknown, and from its unfathomable depths to figure out the chances of pecuniary benefits the parents of that child would have received had she lived past the age of majority.

On the other hand, in Birkett v.

child is under no legal obligation to support his parents, and it is not be to presumed they would have survived him, and he would have remained unmarried. Hence, they are not entitled to recover a sum equal to that he might have earned had his life not been cut short.[54] A distinction has been made between the probability that a minor might become of pecuniary benefit to his parents after attaining his majority and the case of an adult where the family relation continued to exist between the latter and his parents and they had a reasonable expectation of pecuniary advantage from him or were being benefited by him; in such cases there is a lessening of the elements of uncertainty.[55] On the other hand, if the adult does not sustain the relation of a member of the family to his parents, but has a home of his own, the uncertainties as to the probability of financial aid to them is broadened.[56] Where the deceased was married and contributed her personal earnings to the support of her mother and the latter's young children these considerations were material

Knickerbocker Ice. Co., 110 N. Y. 504, 12 Am. Neg. Cas. 306, it was said: The jury were not bound, in estimating the compensation to be made for the death of the child, to confine their considerations to her minority. It is true that the plaintiff, as father, could command her services only during minority. But in certain circumstances she might after her majority owe him the duty of support, which could, by legal proceedings, be enforced; and after that event she might, in many ways, be of great pecuniary benefit to him. In estimating the pecuniary value of this child to her next of kin the jury could take into consideration all the probable, or even possible, benefits which might result to them from her life, modified, as in their estimation they should be, by all the chances of failure and misfortune. There is no rule but their own good sense for their guidance, and they were not in this case bound to assume that no pecuniary benefits would come to the next of kin from this child after her majority. See § 1275.

There is no presumption, from the mere relation of the parties that a parent is a pecuniary loser by the death of a child, except as to the period of minority. Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170.

[54] Louisville, etc. R. Co. v. Wright, 134 Ind. 509.

[55] Deninger v. American L. Co., *supra;* Hillebrand v. Standard B. Co., 139 Cal. 233; Missouri Pac. R. Co. v. Lee, 70 Tex. 496.

[56] Evidence that an adult son may have personal family needs in the future is competent on the question of the probable financial assistance he would have rendered his parents had he lived. Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170.

in ascertaining the recovery: that she might bear children; was under no legal obligation to support her next of kin; that her husband might require her services; that her infant brother and sister would, in a few years, be able to support their mother.[57] It has been observed in a California case, the deceased having attained his majority, that it is doubtful whether the jury should consider at all as an element of damage the parent's loss of his comfort, society and protection. The right to change his residence rendered the consideration of that consequence too remote.[58] The counsel and advice of an adult child to his parent may be regarded,[59] and, in addition, that such a son who had been absent from his father's house had returned thereto and had rendered services in the father's business without being compensated therefor.[60] If the damages recovered are required to be distributed as if the deceased had died intestate, leaving personalty, the fact that some of the plaintiffs can recover only nominal damages, because of their lack of pecuniary interest in the life of the deceased, does not justify an increase of the award above the actual loss in order that the parent may receive such sum as the jury think proper,[61] nor does the fact that the suit is brought on behalf of collateral kindred who have not received pecuniary aid and from the deceased affect the recovery by lineal kindred who have been so aided; in other words, the apportionment of the damages is not a matter of concern to the defendant.[62] The restriction of the recovery to the pecuniary benefit

[57] Commercial Club v. Hilliker, 20 Ind. App. 239.

[58] Pepper v. Southern Pac. Co., 105 Cal. 389, 11 Am. Neg. Cas. 200.

But it is said in a later case that the pecuniary loss suffered by the parents' deprivation of the comfort and society of the child is not limited to the minority of the child or until such time as he might become married. Quill v. Southern Pac. Co., 140 Cal. 268, 15 Am. Neg. Rep. 692.

It is settled law in California that a parent is entitled to recover, under a general allegation of damages, for not only the loss of service, but also for the loss of the comfort, society and protection of the child. Young v. Fresno Flume & Irrigation Co., 24 Cal. App. 286 (son 18 years old).

[59] Missouri Pac. R. Co. v. Lee, 70 Tex. 496.

[60] North Pennsylvania R. Co. v. Kirk, 90 Pa. 15.

[61] Faulkenau v. Dowland, 70 Ill. App. 20.

[62] Smiley v. East St. Louis & S. R. Co., 169 Ill. App. 29.

the parent had a legal right to demand from the deceased, though strictly accurate so far as legal right is concerned,[63] has not generally been given controlling force in actions for the recovery of pecuniary damages sustained by the next of kin to the deceased. The principle which usually governs is that the jury should calculate the damages in reference to a reasonable expectation of benefits as of right or otherwise from the continuance of the life.[64] Legal liability alone is not the test of the injury in respect of which damages may be recovered; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into acocunt.[65] It is not

[63] Keenan v. Brooklyn City R. Co., 145 N. Y. 348, 12 Am. Neg. Cas. 328; Southern Kansas Ry. Co. of Texas v. Barnes, — Tex. Civ. App. —, 173 S. W. 880.

[64] Southern Kansas Ry. Co. of Texas v. Barnes, — Tex. Civ. App. —, 173 S. W. 880; Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170; Carlin v. Deahl, 172 Ill. App. 197; Krueger v. Union G. & E. Co., 163 Ill. App. 486; Hegberg v. St. Louis, etc. R. Co., 164 Mo. App. 514; Freeman v. Morales (Tex. Civ. App.), 151 S. W. 644; Missouri, etc. R. Co. v. Henderson (Tex. Civ. App.), 148 S. W. 822; Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438; Hillebrand v. Standard B. Co., 139 Cal. 233; Chicago & A. R. Co. v. Louderback, 125 Ill. App. 323; Consolidated C. Co. v. Stein, 122 id. 310; Gilman v. Dart H. Co., 42 Mont. 96; Polo v. Palisade C. Co., 75 N. J. L. 873; Predmore v. Consumers' L. & P. Co., 99 App. Div. (N. Y.) 551; Missouri, etc. R. Co. v. Snowden, 44 Tex. Civ. App. 509; Chicago v. Keefe, 114 Ill. 222; Sieber v. Great Northern R. Co., 76 Minn. 269, 7 Am. Neg. Rep. 107.

While there is a difference between a gift and a contribution for support, yet where the child is under no legal obligation to support the parent both are gratuities, and evidence of either is competent, if accompanied with evidence of reasonable expectation of further gratuities, as tending to show something of which the parent is deprived by the death. Southern Kansas Ry. Co. of Texas v. Barnes, — Tex. Civ. App. , 173 S. W. 880.

[65] St. Louis, B. & M. Ry. Co. v. Jenkins, — Tex. Civ. App. —, 172 S. W. 984; Whitmer v. El Paso & S. W. Co., (New Mexico), 119 C. C. A. 637, 201 Fed. 193; Aaron v. Missouri & K. Tel. Co., 89 Kan. 186; Hollenback v. Stone & W. E. Co., 46 Mont. 559; Rober v. Northern Pac. R. Co., 25 N. D. 394; McKay v. New England D. Co., 92 Me. 454; North Pennsylvania R. Co. v. Kirk, 90 Pa. 15; Pennsylvania Co. v. Scofield (Pa.), 88 C. C. A. 602, 161 Fed. 911; Hopper v. Denver, etc. R. Co., 84 C. C. A. 21, 155 Fed. 273; Baker v. Philadelphia & R. R. Co., 149 Fed. 882; Egan v. Southern T. Co., 189 Fed. 543; United States E. L. Co. v. Sullivan, 22 App. Cas. (D. C.) 115; Peters v. Southern Pac. Co., 160 Cal. 48; Bond v. United R., 159 Cal. 270; Sneed v. Marysville G. & E. Co., 149 Cal. 704, citing the text; Grayhek v. Stein, 154 Ill. App. 385;

essential to the recovery of substantial damages by the father of an adult son that the latter had accumulated property or given

Chicago, etc. R. Co. v. Fowler, 138 id. 352; Chicago City R. Co. v. Reddick, 139 id. 160 (the damages must be left largely to the discretion of the jury); United States B. Co. v. Stoltenberg, 113 id. 435; Prendergast v. Chicago City R. Co., 114 id. 156; Ferreira v. Honolulu R., T. & L. Co., 16 Hawaii 615; Louisville & N. R. Co. v. Gollihur, 40 Ind. App. 480; Fidelity L. & I. Co. v. Buzzard, 69 Kan. 330; Youngquist v. Minneapolis St. R. Co., 102 Minn. 501; McVeigh v. Minneapolis, etc. R. Co., 113 Minn. 450; Smith v. Coon, 89 Neb. 776; Crabtree v. Missouri Pac. R. Co., 86 Neb. 33, 136 Am. St. 663; Greenwood v. King, 82 Neb. 17; Draper v. Tucker, 69 Neb. 434; Leque v. Madison G. & E. Co., 133 Wis. 547; Hayes v. Chicago, etc. R. Co., 131 Wis. 399; Cox v. Kansas City, 86 Kan. 298; Dalton v. Southeastern R. Co., 4 C. B. (N. S.) 296; Franklin v. Same, 3 H. & N. 211; Pym v. Great Northern R. Co., 2 B. & S. 759; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291, 9 Am. Neg. Cas. 491; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5; Shaber v. Same, 28 Minn. 103; Robel v. Chicago, etc. R. Co., 35 Minn., 84, 16 Am. Neg. Cas. 280; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518; Hall v. Galveston, etc. R. Co., 39 Fed. 18; Gunderson v. Northwestern E. Co., 47 Minn. 161; Paulmier v. Erie R. Co., 34 N. J. L. 151; 16 Am. Neg. Cas. 643; Johnson v. Chicago, etc. R. Co., 64 Wis. 425; Tuteur v. Chicago, etc. R. Co., 77 Wis. 505; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569; Lehigh I. Co. v. Rupp, 100 Pa. 95; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Pennsylvania R. Co. v. Adams, 55 id. 499; Birkett v. Knickerbocker I. Co., 110 N. Y. 504, 12 Am. Neg. Cas. 306; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296; St. Joseph, etc. R. Co. v. Wheeler, 35 Kan. 185; Walters v. Chicago, etc. R. Co., 36 Iowa 458; Munro v. Pacific Coast D. & R. Co., 84 Cal. 515, 18 Am. St. 248; Pennsylvania Co. v. Lilly, 73 Ind. 252; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Illinois Cent. R. Co. v. Reardon, 157 Ill. 372, 14 Am. Neg. Cas. 349; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535; Chicago, etc. R. Co. v. Branyan, 10 Ind. App. 570, 14 Am. Neg. Cas. 542; Atchison, etc. R. Co. v. Cross, 58 Kan. 424, 3 Am. Neg. Rep. 26; Graham v. Consolidated T. Co., 64 N. J. L. 10; Armour v. Czischki, 59 Ill. App. 17, 14 Am. Neg. Cas. 332; Boyden v. Fitchburg R. Co., 70 Vt. 125, 5 Am. Neg. Rep. 1; Thompson v. Johnston, 76 Wis. 576, 17 Am. Neg. Cas. 911, 23 L.R.A. 524; Bright v. Barnett & R. Co., 88 Wis. 299, 26 L.R.A. 524; Texas & P. R. Co. v. Wilder, 35 C. C. A. 105, 92 Fed. 953, quoting the text; Houston City St. R. Co. v. Sciacca, 80 Tex. 350; Rombough v. Balch, 27 Ont. App. 32, 44; West Chicago St. R. Co. v. Dooley, 76 Ill. App. 424; Decker v. McSorley, 111 Wis. 91, 13 Am. Neg. Rep. 631; Chicago, etc. R. Co. v. Beaver, 199 Ill. 34; Draper v. Tucker, 69 Neb. 434.

The scope of a promise made by the decedent to his father must be given effect. Scofield v. Pennsylvania Co., 149 Fed. 601.

There must be substantial evidence of a reasonable expectation of pecuniary benefit to the parent. The conditions surrounding the bene-

pecuniary aid to the former after attaining his majority, other facts being proved which justify the conclusion of substantial loss.[66] There is not, however, entire agreement on this question. In some courts the award must be predicated upon conditions existing and the contributions being made by an adult son at the time of and prior to his death.[67] This element of damage must be limited to such pecuniary benefits as might be reasonably expected to have been received after the child attained his majority;[68] it is error to extend it to such benefits as might be conferred.[69] The restrictive view has been sanctioned in the case of a child of such tender years as to be unable to render service or afford any evidence of an intention to render pecun-

ficiary and the deceased at the time of the death, their past relations and the law of human experience are the sole *criteria* of the expectation and of its reasonableness. Swift v. Johnson, 71 C. C. A. 619, 138 Fed. 867, 1 L.R.A.(N.S.) 1161.

Sufficient *data* for the assessment of damages in favor of the nondependent parents of an adult son is furnished by proof of the relationship, a willing disposition to contribute, a capability to do so, which was likely to increase, actual contributions and a definite plan from which further contributions were likely to result. Pittsburg Vitrified P. & B. Co. v. Fisher, 79 Kan. 576.

In a late Texas case the appellate court approved an issue submitted by the trial court to the jury as follows: "Say what sum of money, if paid now, would be equal to the pecuniary benefit, if any, that plaintiff had a reasonable expectation of receiving from his deceased son, had he lived." It was further held that this involved the ascertainment of the total sum to be paid by the son, which when discounted at the legal rate of interest, would show the present worth of the sum found. St. Louis, B. & M. Ry. Co. v. Jenkins, — Tex. Civ. App. —, 172 S. W. 984.

66 Sieber v. Great Northern R. Co., 76 Minn. 269, 7 Am. Neg. Rep. 107; Huff v. Peoria & E. R. Co., 127 Ill. App. 242. Compare Standard L. & P. Co. v. Muncey, 33 Tex Civ. App. 416.

In Illinois it is not material to the right of a parent whether or not the deceased had contributed to his support; that is material only when the recovery is sought by collateral kindred. The rule that actual damages are presumed in favor of lineal kindred extends to the death of an adult child. Huff v. Peoria & E. R. Co., 127 Ill. App. 242; Smiley v. East St. Louis & S. R. Co., 169 id. 29.

67 Chicago, etc. R. Co. v. Vester, 47 Ind. App. 141; Standard L. & P. Co. v. Muncey, 33 Tex. Civ. App. 416; Swanson v. Oakes, 93 Minn. 404.

68 Stockton v. Pennsylvania R. Co., 182 Fed. 282 (New Jersey); Griffin v. Fredonia B. Co., 90 Kan. 375.

69 Ft. Worth & D. City R. Co. v. Hyatt, 12 Tex. Civ. App. 435; London & W. T. Co. v. Grand Trunk R. Co., 22 Ont. App. 262.

iary aid after its majority to its parents,[70] though it has been disapproved where the minor is of such age as to be capable of indicating an intention to aid his parents after his majority.[71] In most of the cases dealing with this question no distinction is made on account of the age of the minors, the courts proceeding on the theory that the laws of nature will secure to parents assistance from their adult children in case the need therefor and the ability to meet the need exist.[72] Unless the financial condition of the parents is proven there should be no allowance for services after the majority of the infant.[73] The damage resulting to parents from the death of a son in consequence of the nonfulfilment of a contract on his part to support them is too remote to be an element of loss.[74] Where the only evidence of damage to the father consisted of the loss of the son's aid in carrying out a contract a recovery was denied.[75]

The probable life of the beneficiary is to be regarded in awarding damages as well as that of the deceased but for his untimely death.[76] But the absence of direct testimony on this point may be supplied by other evidence, as where the parent

[70] Little Rock, etc. R. Co. v. Barker, 33 Ark. 350, 34 Am. Rep. 44, 11 Am. Neg. Cas. 147; St. Louis, etc. R. Co. v. Freeman, 36 Ark. 41, 11 Am. Neg. Cas. 147.

[71] Railway Co. v. Davis, 55 Ark. 462, 13 Am. Neg. Cas. 229, 230.

[72] Birkett v. Knickerbocker I. Co., 110 N. Y. 504, 12 Am. Neg. Cas. 306; Illinois Cent. R. Co. v. Warriner, 229 Ill. 91; United B. Co. v. Stoltenberg, 211 Ill. 531, 17 Am. Neg. Rep. 193.

[73] Potter v. Chicago & N. R. Co., 21 Wis. 372, 376, 94 Am. Dec. 548, 7 Am. Neg. Cas. 157; Fidelity L. & I. Co. v. Buzzard, 69 Kan. 330; Gilman v. Dart H. Co., 42 Mont. 96.

[74] Brink v. Wabash R. Co., 160 Mo. 87, 53 L.R.A. 811; Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 262, 65 Am. Dec. 571.

[75] Sykes v. Northeastern R. Co., 44 L. J. (C. P.) 191, 32 L. T. 199, 23 Week. Rep. 483.

[76] Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170; Swift v. Gaylord, 229 Ill. 330; Fidelity L. & I. Co. v. Buzzard, *supra;* Vargas v. American R. Co., 1 Porto Rico Fed. 292; Duval v. Hunt, 24 Fla. 85, 13 Am. Neg. Cas. 848; Fordyce v. McCants, 51 Ark. 509, 14 Am. St. 69, 4 L.R.A. 296; Jackson v. Consolidated T. Co., 59 N. J. L. 25; Carpenter v. Buffalo, etc. R. Co., 38 Hun 120. See § 1268.

Under a statute making the amount recovered the absolute property of the beneficiary his age is not material. Trimmier v. Atlanta & C. R. Co., 81 S. C. 203; Turbyfill v. Same, 86 S. C. 279; Alabama S. & W. Co. v. Griffin, 149 Ala. 423.

is a witness and fully examined as to her circumstances in life, including the fact that she was the mother of four children.[77] Where there are several plaintiffs the expectancy of life of the older of them controls, and if proof thereof is not made the probable earnings of the decedent cannot be recovered.[78] The death of the plaintiff intermediate the death of the decedent and the trial limits the damages to such as were sustained during the *interim* between their respective deaths.[79]

§ 1274. Same subject. Statutes which give the right to recover for the benefit of the next of kin permit parents to recover for the death of adult children on the principle just stated. Why, therefore, when a minor is killed should the estimate of damages stop arbitarily at majority? It is true that in the former case there may be evidence to support the expectation of benefit, and none in the latter except such as is afforded by the fact of relationship and the general experience. Where the deceased is a minor and leaves a parent entitled to his services the law presumes there has been a pecuniary loss for which compensation under the statute may be given.[80] In such cases the loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by

[77] Florida E. C. R. Co. v. Jackson, 65 Fla. 393; Hegberg v. St. Louis, etc. R. Co., 164 Mo. App. 514; Moskovitz v. Lighte, 68 Hun 102; Groves v. McNeil, 226 Pa. 345.

[78] Mississippi O. Co. v. Smith, 95 Miss. 528.

[79] Pitkin v. New York Cent., etc. R. Co., 94 App. Div. (N. Y.) 31, 16 Am. Neg. Rep. 321.

[80] Savage v. Hayes, 142 Ill. App. 316; Adams Exp. Co. v. Byers, 177 Ind. 33. See Graham v. Consolidated T. Co., 62 N. J. L. 90.

Where the child was less than three years old the court refused to set aside a verdict for six cents. Silberstein v. Wicke Co., 29 Abb. N. C. 291.

In Southern R. Co. v. Covenia, 100 Ga. 46, 3 Am. Neg. Rep. 753, 62 Am. St. 312, 40 L.R.A. 253, judicial notice was taken of the fact that a child less than two years of age could not render service which could be valued in money.

In Atlanta Con. St. R. Co. v. Arnold, 100 Ga. 566, 3 Am. Neg. Rep. 753, the same conclusion was arrived at as to a child less than three years old.

In Crawford v. Southern R. Co., 106 Ga. 870, 6 Am. Neg. Rep. 459, it was ruled that it was for the jury to find whether a child of four and a half years could render valuable service.

In The Oceanic, 61 Fed. 338, 364, the court allowed $1,000 to a mother for the death of a daughter four and one-half years old.

all persons in relation to matters of common observation.[81] No doubt the estimate of damages may be aided by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his parent, his past earnings, habits of industry and sobriety, where the deceased is old enough to have established a character, are all facts to be considered in calculating the pecuniary loss sustained;[82]

[81] Trapp v. Rockford Elec. Co., 186 Ill. App. 379; Lake Erie & W. R. Co. v. Chriss, 57 Ind. App. 145; Dalton v. St. Louis Smelting & Refining Co., 188 Mo. App. 529; Arnold v. State, 163 App. Div. (N. Y.) 253; Cosgrove v. Hay, 54 Pa. Super. Ct. 175; Illinois Cent. R. Co. v. Warriner, 229 Ill. 91.

[82] Roberts v. Louisiana R. & N. Co., 132 La. 446; Woodstock I. Works v. Kline, 149 Ala. 391; Alabama S. & W. Co. v. Griffin, 149 Ala. 423; Central F. Co. v. Bennett, 144 Ala. 184, 1 L.R.A.(N.S.) 1150, 113 Am. St. 32; Fowler v. Chicago, etc. R. Co., 234 Ill. 619; Ross v. Same, 149 Ill. App. 286; Ferreira v. Honolulu R. T. & L. Co., 16 Hawaii 615; Jackson K. & S. Co. v. Hathaway, 7 Ohio C. C. (N.S.) 242; Rockford, etc. R. Co. v. Delaney, 82 Ill. 198, 25 Am. Rep. 308; Stafford v. Rubens, 115 Ill. 196; Birkett v. Knickerbocker Ice Co., 41 Hun 404; Russell v. Sunbury, 37 Ohio St. 372, 41 Am. Rep. 523; Houghkirk v. Delaware, etc. C. Co., 92 N. Y. 219, 44 Am. Rep. 370, 12 Am. Neg. Cas. 313; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Robel v. Chicago, etc. R. Co., 35 Minn. 84, 16 Am. Neg. Cas. 280; Vicksburg v. McLain, 67 Miss. 4; Johnson v. Chicago, etc. R. Co., 64 Wis. 425; Cook v. Clay St. Hill R. Co., 60 Cal. 604; Munroe v. Pacific Coast D. & R. Co., 84 id. 515, 18 Am. St. 248; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569; Paulmier v. Erie R. Co., 34 N. J. L. 151, 16 Am. Neg. Cas. 643; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291, 9 Am. Neg. Cas. 491; Van Brunt v. Cincinnati, etc. R. Co., 78 Mich. 530, 16 Am. Neg. Cas. 156; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518; Opsahl v. Judd, 30 Minn. 126; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Hall v. Galveston, etc. R. Co., 39 Fed. 18; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5, 16 Am. Neg. Cas. 294; Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Pineo v. New York, etc. R. Co., 34 Hun 80; Quinn v. Power, 29 id. 183; Bowles v. Rome, etc. R. Co., 46 id. 324; Johnson v. Missouri Pac. R. Co., 18 Neb. 690; Pierce v. Conners, 20 Colo. 178, 46 Am. St. 279; Mollie Gibson Con. M. & M. Co. v. Sharp, 5 Colo. App. 321, 13 Am. Neg. Cas. 639; Duval v. Hunt, 34 Fla. 85, 13 Am. Neg. Cas. 848; Bradley v. Sattler, 156 Ill. 603, 14 Am. Neg. Cas. 321; Chicago, etc. R. Co. v. Huston, 196 Ill. 480; Callaway v. Spurgeon, 63 Ill. App. 571; West Chicago St. R. Co. v. Scanlan, 68 id. 626; New York, etc. R. Co. v. Mushbrush, 11 Ind. App. 192, 9 Am. Neg. Cas. 314; Andrews v. Chicago, etc. R. Co., 86 Iowa 677; Atrops v. Costello, 8 Wash. 149; Luessen v. Oshkosh E. L. & P. Co., 109 Wis. 94; Cincinnati St. R. Co. v. Altemeier, 60 Ohio St. 10; Kellogg v. Albany & H. R. & P. Co., 72 App. Div. (N. Y.) 321.

as is the expense of the education and maintenance of a minor.[83] The elements of pecuniary loss sustained by a father in the death of a minor son are the latter's probable earnings during his minority[84] over and above his support, clothing[85] and education; the probability of his living, and becoming of sufficient ability to support his father in case of his becoming aged, poor and unable to support himself, at least where liability for such support is imposed by statute if the son is of sufficient ability to furnish it, and the amount he would have brought to his next of kin while living, and their prospect of inheriting from him after his death.[86] When the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury by stating the reasonable limits within which these calculations should be confined; if such standard is disregarded the verdict will either be reduced or set aside.[87] Where no reliable standard can

[83] Atrops v. Costello, *supra*.

If the deceased was within the terms of a compulsory education statute the jury should be instructed that his attendance at school would have been required in accordance with it. Bracken v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22.

[84] Carnego v. Crescent Coal Co., 164 Iowa 552.

Evidence of the cost of support and maintenance of the deceased child during minority is competent on the question of damages for her death, including board, clothing, schooling and medical attention. Lake Erie & W. R. Co. v. Chriss, 57 Ind. App. 145.

[85] Welch v. Maine Cent. R. Co., 86 Me. 552, 25 L.R.A. 658, 15 Am. Neg. Cas. 328.

The wages received by a son who had run away from home just prior to his death afford a basis for the recovery of damages in the absence of proof of what he might have earned there or of his aid in supporting his parents. Dean v. Oregon R. & N. Co., 44 Wash. 564.

It is open to the jury to infer that a boy might resume the vocation for which he was trained and, during minority, earn more than he had received. Knight v. Donnelly, 131 Mo. App. 152.

[86] Keenan v. Brooklyn City R. Co., 145 N. Y. 348, 12 Am. Neg. Cas. 328; Johnson v. Long Island R. Co., 80 Hun 306, affirmed without opinion, 144 N. Y. 719.

[87] Scofield v. Pennsylvania Co., 149 Fed. 601; Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438; Reiter-S. Mfg. Co. v. Hamlin, 144 Ala. 192; Illinois Cent. R. Co. v. Johnson 221 Ill. 42; Barnes v. Columbia L. Co., 107 Mo. App. 608; Greenwood v. King, 82 Neb. 17; Christensen v. Floriston P. & P. Co., 29 Nev. 552; Cook v. American, etc. G. Co., 70 N. J. L. 65; Coolidge v. New York, 99 App. Div. (N. Y.) 175; Hackett v. Wisconsin Cent. R. Co., 141 Wis. 464; Jackson v. Consolidated T. Co.,

be laid down for the measurement of damages much must be left to the judgment of the jury, and their finding will not be disturbed unless it is such as to show that it is the result of mistake, prejudice or passion.[88] Where the jury may award such damages as they deem fair and just their discretion will not be interfered with so long as the verdict is within the limit fixed by the statute.[89]

§ 1275. Same subject. In Ihl v. Forty-second St., etc. R. Co.,[90] Rapallo, J., said: "It is within the province of the jury

59 N. J. L. 25; Seeley v. New York Cent. & H. R. R. Co., 8 App. Div. (N. Y.) 402; Dinnihan v. Lake Ontario Beach I. Co., 8 App. Div. (N. Y.) 509; Graham v. Consolidated T. Co., 64 N. J. L. 10; Rowe v. New York, etc. Tel. Co., 66 N. J. L. 19, 9 Am. Neg. Rep. 528; Kellogg v. Albany & H. R. & P. Co., 72 App. Div. (N. Y.) 321.

88 Swan v. Boston Store, 177 Ill. App. 349; Missouri, etc. R. Co. v. Henderson (Tex. Civ. App.), 148 S. W. 822; Clark v. Tulare Lake D. Co., 14 Cal. App. 414; Illinois Cent. R. Co. v. Warriner, 132 Ill. App. 301; Chicago Great Western R. Co. v. Root, 106 id. 164; Indianapolis T. & T. Co. v. Beckman, 40 Ind. App. 100, quoting the preceding propositions; Ellis v. Republic O. Co., 133 Iowa 11; Draper v. Tucker, 69 Neb. 434; Knife & S. Co. v. Hathaway, 27 Ohio C. C. 745, affirmed without opinion, 72 Ohio 623; Abby v. Wood, 43 Wash. 379; Boucher v. Wisconsin Cent. R. Co., 141 Wis. 160; McCleary v Pittsburg R. Co., 47 Pa. Super. Ct. 366; Parsons v. Missouri Pac. R. Co., 94 Mo. 286, 6 Am. Neg. Cas. 458; Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Ohio & M. R. Co. v. Wangelin, 152 Ill. 138; Baltimore & O. S. R. Co. v. Then, 159 Ill. 535; Terre Haute & I. R. Co. v. Eggmann, 58 Ill. App. 21; Andrews v. Chicago, etc. R. Co., 86 Iowa 677, 686; St. Louis, etc. R. Co. v. French, 56 Kan. 584, 15 Am. Neg. Cas. 127; Atchison, etc. R. Co. v. Cross, 58 Kan. 42, 3 Am. Neg. Rep. 26; Sieber v. Great Northern R. Co. 76 Minn. 269, 274, 7 Am. Neg. Rep. 107; Leahy v. Davis, 121 Mo. 227; Post v. Olmsted, 47 Neb. 893; Reger v. Rochester R. Co., 2 App. Div. (N. Y.) 5; Werner v. Brooklyn E. R. Co., 11 App. Div. (N.Y.) 86; Purcell v. Lauer, 14 App. Div. (N. Y.) 33, 2 Am. Neg. Rep. 57; Manufacturing Co. v. Morris, 105 Tenn. 654; Houston City St. R. Co. v. Sciacca, 80 Tex. 350; Cicero & P. St. R. Co. v. Boyd, 95 Ill. App. 510; Chicago & E. R. Co. v. Branyan, 10 Ind. App. 570, 586, 14 Am. Neg. Cas. 542, citing the text; Kane v. Mitchell T. Co., 90 Hun 65, affirmed without opinion, 153 N. Y. 680.

The damage resulting from the death of a child aged three months and dangerously ill from uræmic poisoning are so problematical that no recovery can be allowed. Scherer v. Schlaberg, 18 N. D. 421, 21 Am. Neg. Rep. 338, 24 L.R.A.(N.S.) 520.

89 Chesapeake & O. R. Co. v. Hawkins, (W. Va.) 98 C. C. A. 443, 174 Fed. 597, 5 N. C. C. A. 156, 26 L.R.A.(N.S.) 309; Wabash R. Co. v. McDoniels, — Ind. —, 107 N. E. 291.

90 47 N. Y. 321, 7 Am. Rep. 450.

who had before them the parents, their position in life, the occupation of the father and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years [three years and two months]; and to hold without such proof the plaintiff cannot recover would in effect render the statute nugatory in most cases of this description. It cannot be said as matter of law that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exclude any pecuniary advantage which the parent could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents,[91] or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical and would not aid the jury in arriving at a conclusion. It has been held by this court in several similar cases that the statute does not limit the recovery to the actual pecuniary loss proved on the trial." [92] Damages should be no more and no less than the next of kin have suffered. Where there is no dependent connection between the deceased and them their poverty and his wealth should not be considered. But where as head of the family he is the family support the jury

[91] Ewen v. Chicago, etc. R. Co., 38 Wis. 625, 12 Am. Neg. Cas. 658.

Substantially the same argument has been made where the action was for the death of an adult son. Predmore v. Consumers' L. & P. Co., 99 App. Div. (N. Y.) 551.

It is a matter of common observation that the children of parents in humble circumstances usually give more pecuniary aid to their parents than children of parents in better circumstances. Swan v. Boston Store, 177 Ill. App. 349.

[92] Citing Oldfield v. New York, etc. R. Co., 14 N. Y. 310, 319, 12 Am. Neg. Cas. 326; O'Mara v. Hudson River R. Co., 38 N. Y. 445, 450, 12 Am. Neg. Cas. 312. To the same effect see Grogan v. Broadway F. Co., 87 Mo. 321; Nagel v. Missouri Pac. R. Co., 75 id. 653, 42 Am. Rep. 418; Owen v. Brockschmidt, 54 Mo. 289; Atkeson v. Jackson Est., 72 Wash. 233; Atrops v. Costello, 8 Wash. 149.

are entitled to the fullest insight into the family circumstances, and in the absence of special instructions are at liberty to use their best judgment in arriving at results.[93] The health of the father of the deceased and the number and ages of his surviving children and the extent to which deceased aided in the support of the family are relevant matters.[94] In estimating a parent's damages the condition of the family at the time of the accident may be considered, as may the pecuniary value of all acts of kindness and attention which it might reasonably be anticipated the deceased would have performed until he reached his majority.[95] A parent's recovery is not limited to a nominal sum because his circumstances are such that his need of assistance from the deceased is improbable, nor because his intention as to the education of the deceased was such as to make it probable that the expenditure on his account would have exceeded any pecuniary returns that might reasonably have been expected during minority. The probability of a change in the circumstances of the parent may be taken into consideration.[96] Payments made by the defendant to the parents of the deceased on account of the death will be deducted; it is otherwise as to insurance money received by them from the defendant's relief department.[97]

[93] Staal v. Grand Rapids, etc. R. Co., 57 Mich. 239; Sorensen v. Northern Pacific R. Co., 45 Fed. 407; Gill v. Rochester, etc. R. Co., 37 Hun 107; Phelps v. Winona, etc. R. Co., 37 Minn. 485, 5 Am. St. 867; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Opsahl v. Judd, 30 Minn. 126.

In Lockwood v. New York, etc. R. Co., 98 N. Y. 526, Earl, J., said: "In but few cases arising under this act is the plaintiff able to show direct specific pecuniary loss suffered by the next of kin from the death, and generally the basis of the allowance of damages has to be found in proof of the character, qualities, capacity and condition of the deceased and in the age, circumstances and condition of the next of kin. The proof may be unsatisfactory and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can."

[94] Fitzgerald v. Union S. Co., 91 Neb. 493.

[95] Ohio Valley T. Co. v. Wernke, 179 Ind. 49, and local cases cited; Fox v. Barekman, 178 Ind. 572.

[96] Atkeson v. Jackson Est., 72 Wash. 233.

[97] Fitzgerald v. Union S. Co., 91 Neb. 493.

§ 1276. Damages recoverable by collateral kindred. The general principle which underlies all recoveries under the statutes applies with force and is especially emphasized in actions by collateral kindred, that the recovery extends to the value of the reasonable expectation of what they might have received from the deceased had he lived.[98] In Chicago & A. R. Co. v. Shannon[99] the court said: "If the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages[1] can be given, because there has been no pecuniary injury.[2] If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss, for which compensation under the statute must be given."[3] This reasoning is correct if no benefit

[98] Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508, L.R.A. 1915C 632; Barnett v. Atlantic City Elec. Co., — N. J. L. —, 93 Atl. 108; Louisville & N. R. Co. v. Summers, 60 C. C. A. 487, 125 Fed. 719; Devine v. Chicago City R. Co., 153 Ill. App. 382; Cleveland, etc. R. Co. v. Drumm, 32 Ind. App. 547; Missouri, etc. R. Co. v. McLaughlin, 73 Kan. 248; Husted v. Missouri Pac. R. Co., 143 Mo. App. 623 (ruled under the Kansas statute); De Luna v. Union R. Co., 130 App. Div. (N. Y.) 386; Steel v. Kurtz, 28 Ohio St. 191; Davis v. Guarnieri, 45 id. 470, 481, 4 Am. St. 548; Opsahl v. Judd, 30 Minn. 126; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Phelps v. Winona, etc. R. Co., 37 Minn. 485, 5 Am. St. 867, 13 Am. Neg. Cas. 848; Duval v. Hunt, 34 Fla. 85, 113; Burk v. Arcata & Mad River R. Co., 125 Cal. 364, 73 Am. St. 52.

The proceeds of the decedent's labor, used with his consent for the benefit of sisters with whom he lived, though there was no contract or stipulation on either side for compensation, are a basis on which to award damages if the continuance of the benefit might be expected. Henry v. Prendergast, 51 Ind. App. 43.

[99] 43 Ill. 346.

[1] Rhoads v. Chicago & A. R. Co., 227 Ill. 328; Chicago B. & I. Co. v. La Mantia, 112 Ill. App. 43. See § 1264.

[2] Romeo v. Western C. & M. Co., 157 Ill. App. 67; In re California N. & I. Co., 110 Fed. 670.

[3] Rhoads v. Chicago & A. R. Co., 130 Ill. App. 145; Holton v. Daly, 106 Ill. 131, 138; Chicago v. Scholten, 75 id. 469; Chicago, etc. R. Co. v. Swett, 45 id. 197, 204, 14 Am. Neg. Cas. 358.

If collateral kindred were accustomed to receive support and assistance to a considerable extent from the deceased a pecuniary loss is

from the eventual distribution of the estate of the deceased, had he lived, is to be taken into account. Any such benefit depends on three contingencies: that he would have increased his estate, that he would not have made a will to disinherit the widow and next of kin, and that they would survive him.[4] These contingencies are so important as to preclude the recovery of more than nominal damages where the principal fact in favor of the plaintiff is his heirship to the decedent.[5] If the collateral kindred are minors the estimate of their damages must not extend beyond their majority.[6] No presumption of pecuniary loss arises in favor of collateral kindred.[7] If any of the beneficiaries within the statute who are named in the complaint have sustained such loss their recovery is not limited to a nominal sum.[8] Where relatives have rendered services to each other and lived together as members of one family there is such dependence as will justify a recovery for the death of one or them though there was no legal obligation to render the services.[9] The plaintiff in an action under the Illinois Dram-Shop Act may show her financial condition and that of the

shown, the extent of which is largely left to the discretion of the jury. Terminal R. R. Ass'n v. Condon, 128 Ill. App. 335.

Where the decedent for several years resided with a widowed sister, paying her for his board, assisting her in buying clothing, giving her money and aiding her in other ways, it was held that the evidence would support a verdict for more than nominal damages. Whitney v. Chicago Rys. Co., 185 Ill. App. 211.

[4] Railroad Co. v. Barron, 5 Wall. 96; Howard v. Delaware & H. C. Co., 6 L.R.A. 75, 40 Fed. 195; Conklin v. Central New York Tel. & T. Co., 130 App. Div. (N. Y.) 308.

[5] Burk v. R. Co., 125 Cal. 364, 73 Am. St. 52; In re California N. & I. Co., 110 Fed. 670; Rhoads v. Chicago & A. R. Co., 130 Ill. App. 145; Buzo v. San Juan L. & T. Co., 4 Porto Rico Fed. 520. See Missouri, etc. R. Co. v. McLaughlin, 73 Kan. 248.

[6] Duval v. Hunt, 34 Fla. 85, 113.

[7] Cleveland, etc. R. Co. v. Drumm, 32 Ind. App. 547; McCoullough v. Chicago, etc. R. Co., 160 Iowa 524, 47 L.R.A.(N.S.) 23 (ruled under the Federal Employers' Liability Act); § 1264.

[8] Pittsburgh, etc. R. Co. v. Reed, 44 Ind. App. 635.

The absence of pecuniary loss on the part of some of the collateral kindred is not cause for denying a recovery to other beneficiaries, who have sustained such a loss though the money recovered is to be distributed according to the statute of descent. Hegberg v. St. Louis, etc. R. Co., 164 Mo. App. 514.

[9] Smith v. Michigan Cent. R. Co., 35 Ind. App. 188.

decedent.[10] In Louisiana the recovery may be for mental suffering and moral loss as well as for the material injury.[11] A promise made by the decedent to take his self-supporting next of kin to the country of their birth at his expense is a sufficient basis on which to award them damages.[12] If the sum recovered is to be distributed to the persons and in the proportion provided by law in relation to the distribution of personalty only the persons entitled to share in such distribution are to be considered, regardless of whether voluntary assistance has been rendered others by the deceased.[13]

§ 1277. Damages to the deceased's estate. Under statutes like those of Oregon and some other states which authorize the recovery of such damages as result from the death to the estate of the decedent the damages assessed are confined to the pecuniary loss to the estate.[14] If the decedent be a minor no loss on account of his earnings during minority can be taken into account for they would not belong to his estate,[15] and so of a married woman unless she was or had been engaged in an independent occupation.[16] In Kentucky the parents' right to

[10] Nagle v. Keller, 141 Ill. App. 444.

[11] Underwood v. Gulf Ref. Co., 128 La. 968.

[12] The O. L. Hallenbeck, 119 Fed. 468.

[13] Richardson v. Detroit & M. R. Co., 176 Mich. 413.

[14] Nicoll v. Sweet, 163 Iowa 683; Louisville & N. R. Co. v. Stewart, 131 Ky. 665.

[15] Carney v. Concord St. R. Co., 72 N. H. 364, 16 Am. Neg. Rep. 212; De Amado v. Friedman, 11 Ariz. 56; Putnam v. Southern Pac. Co., 21 Ore. 230, 12 Am. Neg. Cas. 700; Craft v. Northern Pac. R. Co., 25 Ore. 275; Tutwiler C. C. & I. Co. v. Enslen, 129 Ala. 336; Morris v. Chicago, etc. R. Co., 26 Fed. 23. In the last case a married woman was also killed, and an action was brought to recover damages to her estate on account of her death. The right of the husband to her earnings was not mentioned as affecting the question of damages.

[16] Myers v. Chicago, etc. R. Co., 152 Iowa 330; Nolte v. Chicago, R. I. & P. R. Co., 165 Iowa 721.

Where the decedent up to the time of her marriage was a trained nurse, there was no presumption that she had thereby permanently abandoned her profession, and the jury may properly consider her probable earnings thereby if she should in the future engage actively in such profession; but they must also consider the fact that her family duties will naturally interfere somewhat with her earnings in her profession if she engages in it after marriage. Nolte v. Chicago, R. I. & P. R. Co., 165 Iowa 721.

the services of a minor ceases with his death. His life expectancy is his own. The award of compensation does not proceed upon the basis of the value of his labor, but for the loss of the power to earn money after attaining his majority, which was the decedent's alone.[17] Though the damages recoverable for the loss of such power are difficult of proof, they are of certain and substantial value.[18] Where the general rule prevails, the age, health, habits of industry, economy and sobriety, the mental and physical skill of the deceased and his character, so far as they affect his capacity for rendering useful service to others or acquiring property, must be considered.[19] The capacity of the deceased to earn money is not the sole consideration upon which the assessment of compensation is to be made; the test is such sum as will reasonably remunerate his estate for the destruction of his earning power in view of all the facts.[20] The age of the

[17] Louisville & N. R. Co. v. Engleman, 146 Ky. 19.

[18] Louisville & N. R. Co. v. Kimble, 140 Ky. 759, sustaining a judgment for $6,000 in favor of the administrator of a girl aged nine years.

[19] Clark v. Iowa Cent. R. Co., 162 Iowa 630; Hough v. Illinois Cent. R. Co., 169 Iowa 224; Carter v. Sioux City S. Co., 160 Iowa 78 (emphasizing age and earning capacity); Gray v. Chicago, etc. R. Co., 160 Iowa 1; Jennings v. Alaska Treadwell G. M. Co., 95 C. C. A. 388, 170 Fed. 146; Phoenix R. Co. v. Landis, 13 Ariz. 80; De Amado v. Friedman, *supra;* Skonieczny v. Churchman, 7 Pennew. (Del.) 226; Jacksonville E. Co. v. Bowden, 54 Fla. 461, 15 L.R.A.(N.S.) 451 (also means and business); Hammer v. Janowitz, 131 Iowa 20, 20 Am. Neg. Rep. 324; Farrell v. Chicago, etc. R. Co., 123 Iowa 690, 16 Am. Neg. Rep. 318 (sustaining a judgment for $3,000 for the death of a girl of eight years); Cincinnati, etc. R. Co. v. Lovell, 141 Ky. 249; Holmes v. Oregon, etc. R. Co., 6 Sawyer 293, 5 Fed. 528; Andrews v. Chicago, etc. R. Co., 86 Iowa 677; McGhee v. Willis, 134 Ala. 281; Louisville & N. R. Co. v. Millett, 20 Ky. L. Rep. 532; Carlson v. Oregon S. L., etc. R. Co., 21 Ore. 450; Ladd v. Foster, 12 Sawyer 547, 31 Fed. 827; Holland v. Brown, 13 Sawyer, 284, 35 Fed. 43; Tutwiler C., etc. Co. v. Enslen, *supra.*

A female school teacher 44 years of age is likely to be of good habits. Clark v. Iowa Cent. R. Co., 162 Iowa 630.

The fact that decedent could not obtain life insurance on account of his health is competent on the question of his expectancy of life and ability to labor, though of small importance. Nicoll v. Sweet, 163 Iowa 683.

Habits of economy and the disposition made by the deceased of his earnings are material, if not controlling, factors. Central R. Co. v. Alexander, 144 Ala. 257.

[20] Louisville & N. R. Co. v. Kenney's Adm'r, 162 Ky. 403; Louis-

deceased will not prevent a recovery for loss of earning capacity unless there is affirmative evidence of the absence of it; the jury may infer its existence to some degree.[21] In Connecticut the damages recoverable are based on the injury to the deceased, and not on the loss to his wife and children.[22] The principal element of damage is the loss of earning capacity resulting to the deceased, and thus, in a sense to his estate. On this question, evidence as to his age, character and health is admissible,[23] as is evidence of the employment he had been engaged in. It may be assumed that his earnings after attaining majority would have been much more than the cost of his personal support. Judicial notice has been taken of the expectation of life as disclosed by mortality tables.[24]

ville & N. R. Co. v. Stewart's Adm'x, 156 Ky. 550, [modified on rehearing on other grounds, 157 Ky. 642]; Bettinger v. Loring, 168 Iowa 103; Hough v. Illinois Cent. R. Co., 169 Iowa 224: Illinois Cent. R. Co. v. Dallas, 150 Ky. 442; Cincinnati, etc. R. Co. v. Lovell, *supra;* Louisville & N. R. Co. v. Simrall, 127 Ky. 55; Louisville & N. R. Co. v. Eakin, 103 Ky 465, 479; Smith v. Middleton, 23 Ky. L. Rep. 2010.

In a late Kentucky case it was held that an instruction that loss of power of the deceased was the only fact to be considered in assessing damages in an action brought by an administrator for the death of the deceased, though differing from the usual form of instruction approved in Kentucky, which followed the rule laid down in the text, was held not sufficiently erroneous to be prejudicial. Louisville & N. R. Co. v. Kenny's Adm'r, 162 Ky. 403. An instruction following the rule in the text was approved in Chesapeake & O. R. Co. v. Dwyer's Adm'x, 157 Ky. 590.

What one whose life is prematurely taken might have saved had he lived is the test given by all the books. It has reference primarily to ability or power and not to amount. Hough v. Illinois Cent. R. Co., 169 Iowa 224.

[21] Chesapeake & O. R. Co. v. Bank, 153 Ky. 625.

[22] McElligott v. Randolph, 61 Conn. 157.

[23] Broughel v. Southern New England Tel. Co., 73 Conn. 614, 29 Am. St. 181; Florida Cent. & P. R. Co. v. Sullivan, 57 C. C. A. 167, 120 Fed. 799, 61 L.R.A. 410; Callison v. Brake (Fla.), 63 C. C. A. 354, 129 Fed. 196.

[24] Nelson v. Branford L. & W. Co., 75 Conn. 548, 13 Am. Neg. Rep. 490.

In the case of a young man it is not to be assumed that there would not be an increase in his earning capacity, or that he would not make and save more than he was doing just previous to his death. "In dealing with the wrongdoer the law requires him to give the injured person or his estate such a sum as under the most favorable conditions will compensate him or his estate for the loss occasioned by his wrongful act." Cincinnati, etc. R. Co. v. Lovell, 141 Ky. 249.

The only element of damage where the recovery is for the benefit of the estate of the decedent is the present value of his earning power.[25] There has been some divergence of decision concerning the taking into account of the living expenses of the deceased. It has been said that "a court could not well enter into such an inquiry. It would at least involve an investigation of the condition in life of the decedent, and it seems to us embark the court upon a sea of speculation almost without limit."[26] In a later case the court said that, if the question were new, it would hold that there ought to be an instruction to consider the necessary and economical living expenses of the deceased had he not been killed; but as instructions not containing such language had been approved and under them the jury might consider such expenses, it refused to reverse the judgment for the failure to specifically instruct to that effect.[27] A more recent case clearly recognizes that the net gain to the estate is the test, and that in determining what that might be the extra-hazardous employment of the deceased is a factor.[28] In Kentucky it is not competent to prove that the decedent had a wife and children depending upon him for support.[29] But in New Hampshire it is said: The amount to be recovered is not lessened by the fact that the person had a family dependent upon him for support. It is true that such a man might have less opportunity to save than one who had no family. But this statute is to have a reasonable construction. It does not mean that, when two men of equal earning capacity are killed, there is to be no substantial recovery for the benefit of the ten orphans left by the one, while a large sum is distributed to the cousins

[25] Louisville, etc. R. Co. v. Case, 9 Bush 728; Louisville & N. R. Co. v. Milett, 20 Ky. L. Rep. 532; Hammer v. Janowitz, 131 Iowa 20; Helena G. Co. v. Rogers, 104 Ark. 59; Louisville & N. R. Co. v. Setser, 149 Ky. 162.

[26] Louisville & N. R. Co. v. Morris, 14 Ky. L. Rep. 466; Imbriani v. Anderson, 76 N. H. 491.

[27] Chesapeake & O. R. Co. v. Lang, 100 Ky. 221, 19 Ky. L. Rep. 65; Louisville & N. R. Co. v. Kelly, 100 Ky. 421, 19 Ky. L. Rep. 69; Same v. Eakin; Cincinnati, etc. R. Co. v. Lovell, *supra*.

[28] Stewart v. L. & N. R. Co., 136 Ky. 717; Linge v. Alaska Treadwell Co., 3 Alaska 9.

[29] Louisville & N. R. Co. v. Eakin, *supra;* Same v. Shumaker, 21 Ky. L. Rep. 803.

of the other.[30] And in Iowa if it is shown that deceased had not saved anything from his earnings the fact may be explained by showing that he had supported a dependent family.[31] In some states the jury may regard the fact whether the deceased was married or single, as well as the number of decedent's children,[32] and the recovery is limited to the present worth of his life. In fixing that the living expenses of the deceased are to be regarded and also future impairment of his earning ability.[33] The rule in Oregon is to much the same effect, with the exception that the damages, because they are required to be administered as other personal property of the deceased, are not to be measured by a sum which, if put at interest, would yield a sum equivalent to the annual savings of the deceased during the probable length of his life. The opinion was expressed that no rule can be laid down by which the damages can be ascertained with even approximate mathematical certainty; the amount must depend upon the good sense and judgment of the jury with regard to the facts of each case.[34] The decreased purchasing power of money has been said to be a reason for looking upon verdicts for large sums with more favor than formerly.[35] Nominal damages are a sufficient compensation only when the estate has no distributees. The presumption is that an infant has a father who supports his child and receives his earnings.[36] In Missouri there can be no recovery at all by an

30 Imbriani v. Anderson, 76 N. H. 491.

31 Dupree v. Wabash R. Co., 155 Iowa 544.

32 Nicoll v. Sweet, 163 Iowa 683. The evidence is competent only as tending to show an incentive to thrift and accumulation. Nicoll v. Sweet, *supra*.

33 Wheelan v. Chicago, etc. R. Co. 85 Iowa 167; Lowe v. Same, 89 Iowa 420; Florida Cent. & P. R. Co. v. Sullivan, Callison v. Brake, *supra*.

The cost of living is a matter of such common observation that a jury would have some reasonable idea about it, so that if evidence is offered as to the cost of board, etc., the jury would not have been bound to follow the evidence, but might use their own judgment in connection with it. Clark v. Iowa Cent. R. Co.. 162 Iowa 630.

34 Carlson v. Oregon S. L., etc. R. Co., 21 Ore. 450; De Amado v. Friedman, 11 Ariz. 56; Louisville & N. R. Co. v. Kimble, 140 Ky. 759. See Cincinnati, etc. R. Co. v. Lovell, 141 Ky. 249.

35 Louisville & N. R. Co. v. Engleman, 146 Ky. 19.

36 Tutwiler C., etc. Co. v. Enslen, 129 Ala. 336.

administrator for the death of his intestate where there is no proof of any known persons capable of receiving the amount to be recovered, for whose benefit the action may be prosecuted.[37]

§ 1278. **Special damages.** If some special injury results proximately from the death to any or all of the beneficiaries recovery may be had therefor. Thus, in Pym v. Great Northern R. Co.,[38] a change in the mode of distributing property among the members of a family, produced by the death complained of, although no pecuniary loss to the family in the aggregate would result and none would have arisen from the injury to the decedent had he lived, yet it being an injury resulting from the death, it was an injury to be compensated. So in a Wisconsin case where a widow's pension was reduced by the death of her child, in an action under the statute for damages resulting to her from the death of that child she was entitled to have this loss included in her recovery.[39] But in a New Jersey case the damages resulting from the dissolution of a valuable partnership, by the death complained of, was not within the scope of the statute, which was held to give damages resulting from the severance of a relation of kinship, and not of contract.[40] It has also been ruled that funeral expenses, if recoverable at all, must be claimed in the pleadings as special damages.[41] The medical expenses incurred by or on behalf of the deceased cannot be recovered.[42]

§ 1279. **Contracts exempting from liability.** The cases bearing upon the validity of contracts between master and servant which affect the liability of the former to the family of the latter for damages under Lord Campbell's act and the American statutes modeled upon it are collected elsewhere.[43]

[37] Troll v. Laclede Gas Light Co., 182 Mo. App. 600. The fact of the existence of such persons must be alleged as well as proved, and a petition not containing such allegations was properly held bad on demurrer. Troll v. Laclede Gas Light Co., *supra*.

[38] 2 B. & S. 759, 4 id. 396.

[39] Ewen v. Chicago, etc. R. Co., 38 Wis. 613, 12 Am. Neg. Cas. 658; Rowley v. London, etc. R. Co., L. R. 8 Ex. 221.

[40] Deamarest v. Little, 47 N. J. L. 28, 16 Am. Neg. Cas. 643, 668.

[41] Gay v. Winter, 34 Cal. 153.

[42] Pulling v. Great Eastern R. Co., 9 Q. B. Div. 110; Pittsburgh, etc. R. Co. v. Brown, 178 Ind. 11.

[43] See § 6.

§ 1280. **Where the injury is done in another state.** These statutes have no extra-territorial effect. It is, however, a general principal that where, either by common law or statute, a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any state in which jurisdiction of the defendant can be obtained, provided it is not against the public policy of the state where it is sought to be enforced. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action,[44] while all that pertains merely to the

[44] Missouri Pac. R. Co. v. Larussi, 88 C. C. A. 230, 161 Fed. 66; Keep v. National T. Co., 154 Fed. 121; St. Louis, etc. R. Co. v. Hesterly, 98 Ark. 240; Harrill v. South Carolina, etc. R. Co., 132 N. C. 655, 16 Am. Neg. Rep. 155; Whitlow v. Nashville, etc. R. Co., 114 Tenn 344, 68 L.R.A. 503; Texas, etc. R. Co. v. Miller (Tex. Civ. App), 128 S. W. 1165; In re Lowham's Est., 30 Utah 436; Stone v. Union Pac. R. Co., 32 Utah 185; Norfolk & W. R. Co. v. Denny, 106 Va. 383; Suth. on Stat. Const., § 14; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 16 Am. Neg. Cas. 292, 47 Am. Rep. 771; Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439; Wooden v. Western, etc. R. Co., 126 N. Y. 10, 16 Am. Neg. Cas. 806, 22 Am. St. 803, 13 L.R.A. 458; Leonard v. Columbia St. N. Co., 84 N. Y. 48, 38 Am. Rep. 491, 9 Am. Neg. Cas. 587; Knight v. West Jersey R. Co., 108 Pa. 250, 56 Am. Rep. 200; Central R. Co. v. Swint, 73 Ga. 651; Morris v. Chicago, etc. R. Co., 65 Iowa 727, 54 Am. Rep. 39; Shedd v. Moran, 10 Ill. App. 618, 14 Am. Neg. Cas. 334; Hanna v. Grand Trunk R. Co., 41 Ill. App. 116; Ramsey v. Glenn, 33 Kan. 271; Boyce v. Wabash R. Co., 63 Iowa 70, 50 Am. Rep. 730; Keenan v. Stimson, 32 Minn. 377; Bishop v. Globe Co., 135 Mass. 132; Taylor v. Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244; Chicago & E. I. R. Co. v. Rouse, 178 Ill. 132, 5 Am. Neg. Rep. 549, 44 L.R.A. 410; Nicholas v. Burlington, etc. R. Co., 78 Minn. 43; Northern Pac. R. Co. v. Babcock, 154 U. S. 190, 38 L. ed. 958; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 42 L. ed. 537; Van Doren v. Pennsylvania R. Co., 35 C. C. A. 282, 93 Fed. 260. See Willis v. Missouri Pa. R. Co., 61 Tex. 432, 48 Am. Rep. 301; Vawter v. Missouri Pac. R. Co., 84 Mo. 679, 54 Am. Rep. 105; Martin v. Kansas City, etc. R. Co., 77 Miss. 720; Thorpe v. Union Pac. Coal Co., 24 Utah 475; Usher v. West Jersey R. Co., 126 Pa. 206, 4 L.R.A. 261, 12 Am. St. 863; Boulden v. Pennsylvania R. Co., 205 Pa. 264.

The statutes of one state giving a right of action for wrongful death may be enforced in the federal courts of another state if not inconsistent with the statutes and policy thereof. Texas & P. R. Co. v. Cox, 145 U. S. 593, 36 L. ed. 829.

There was formerly some hesitation about entertaining such actions because of the view that they were penal in their nature; later, the view was held that the statutes giving the right of action were remedial, and actions based upon them

remedy will be controlled by the law of the state where the action is brought.[45] This rule applies in some states to the amount recoverable if a limitation is fixed by the law of the forum;[46] but it may be otherwise if the action is brought upon the statute of the state in which the death occurred.[47] As the remedy given by these statutes is one for a loss which the common law is generally regarded as defective in not providing compensation for, it would seem to come within this comity to permit a recovery for such a cause accruing in another state under the laws thereof, though in the state where the action is brought no such correction of the common law had been adopted, or a law for that purpose had been enacted which was materially different from that under which the alleged cause of action arose.[48] But in a majority of the cases decided in the state courts it is regarded as necessary, where the action is brought

were maintainable in another jurisdiction if there was in force therein a substantially similar statute. "The present tendency of the more recent decisions is to advance still further towards liberality and to throw open the courts to litigants whose cause of action has arisen in other states and under the laws thereof, even though not actionable at common law if it had arisen in the *forum*, provided the enforcement of the *lex delicti* would not seriously contravene the established policy of the *forum*. The presumption is in favor of the right to sue, and the burden rests upon the party objecting to show that the enforcement of the 'proper law' would be inconsistent with the domestic policy." Minor on Conf. of Laws, § 200.

[45] Id.; Burlington, etc. R. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497; Mooney v. Union Pac. R. Co., 60 Iowa 346.

[46] Wooden v. R. Co., 126 N. Y. 10; Northern Pac. R. Co. v. Babcock, *supra*.

[47] Howey v. New England N. Co., 83 Conn. 278. See Christensen v. Floriston P. & P. Co., 29 Nev. 552.

If the contributory negligence of the deceased will mitigate the damages in the state in which his death occurred the same consequence will follow in an action brought in another state. Louisville & N. R. Co. v. Whitlow, 105 Ky. 1.

[48] Dennick v. Railroad Co., 103 U. S. 11, 26 L. ed. 439; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11, 47 Am. Rep. 771; Burrell v. Fleming, 47 C. C. A. 598, 109 Fed. 489, 14 Am. Neg. Rep. 701; St. Louis, etc. R. Co. v. Haist, 71 Ark. 258; The E. B. Ward, Jr., 16 Fed. 255; King v. Sarria, 69 N. Y. 24, 25 Am. Rep. 128; Wall v. Hoskins, 5 Ired. 177; Lowry v. Inman, 46 N. Y. 119; Stewart v. Baltimore & O. R. Co., 168 U. S. 445, 42 L. ed. 537; Wooden v. R. Co., 126 N. Y. 10, 16 Am. Neg. Cas. 806, 13 L.R.A. 458, 22 Am. St. Rep. 803; Southern R. Co. v. Decker, 5 Ga. App. 21.

in another state than that where the death was caused, that the laws of the latter be shown and that they provide a remedy substantially the same as do the laws of the state where the action is brought.[49] This rule governs though the deceased was a resident of the jurisdiction of the forum and died therein, if the injury was sustained in another jurisdiction.[50] The courts of Ohio will not determine a case brought by an administrator of one killed in another state unless it be shown that such state allows the enforcement in its courts of Ohio statutes of like character. It is not enough to show merely that the courts of that state entertain actions to recover for wrongful killing in another state,[51] and an action cannot be maintained

[49] Zeikus v. Florida E. C. R. Co., 153 App. Div. (N. Y.) 345; Strauss v. New York, etc. R. Co., 91 App. Div. (N. Y.) 583; Vawter v. Missouri Pac. R. Co., 84 Mo. 679, 54 Am. Rep. 105; Richardson v. New York Cent. R. Co., 98 Mass. 85; St. Louis, etc. R. Co. v. McCormick, 71 Tex. 660, 1 L.R.A. 804; McCarthy v. Chicago, etc. R. Co., 18 Kan. 46, 26 Am. Rep. 742; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848, 2 L.R.A. 67; Selma, etc. R. Co. v. Lacy, 43 Ga. 461, 14 Am. Neg. Cas. 111; State v. Pittsburgh, etc. R. Co., 45 Md. 41; Oates v. Union Pac. R. Co., 104 Mo. 514, 16 Am. Neg. Cas. 487; Barker v. Hannibal, etc. R. Co., 91 Mo. 86; Woodard v. Michigan, etc. R. Co., 10 Ohio St. 121; Wooden v. Western, etc. R. Co., 126 N. Y. 10, 16 Am. Neg. Cas. 806, 13 L.R.A. 458, 22 Am. St. Rep. 803; Cincinnati, etc. R. Co. v. McMullen, 117 Ind. 439, 14 Am. Neg. Cas. 558, 10 Am. St. 67; O'Reilly v. New York, etc. R. Co., 16 R. I. 388, 5 L.R.A. 364; Hover v. Pennsylvania Co., 25 Ohio St. 667; Whitford v. Panama R. Co., 23 N. Y. 465; Nashville, etc. R. Co. v. Eakin, 6 Cold. 582; Vanderwerkin v. New York, etc. R. Co., 6 Abb. Pr. 239; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Needham v. Grand Trunk R. Co., 38 Vt. 294; Mackay v. Central R. Co., 4 Fed. 617; Taylor v. Pennsylvania Co., 78 Ky. 348, 39 Am. Rep. 244 (compare Bruce v. Cincinnati R. Co., 83 Ky. 174); Western, etc. R. Co. v. Strong, 52 Ga. 461; Chicago, etc. R. Co. v. Doyle, 60 Miss. 977; Nashville, etc. R. Co. v. Sprayberry, 8 Baxter 341; Patton v. Pittsburgh, etc. R. Co., 96 Pa. 169; Knight v. West Jersey R. Co., 108 id. 250; Mexican Nat. R. Co. v. Slatter, 53 C. C. A. 239, 115 Fed. 593.

The policy of the state in which a federal court sits will govern it in enforcing a cause of action arising under the statutes of another state. Gallagher v. Florida E. C. R. Co., 196 Fed. 1000.

[50] De Harn v. Mexican National R. Co., 86 Tex. 68; Needham v. Grand Trunk R. Co., 38 Vt. 294; McCarthy v. Chicago, etc. R. Co., 18 Kan. 46; Van Doren v. Pennsylvania R. Co., 35 C. C. A. 282, 93 Fed. 260; Hegerich v. Keddie, 99 N. Y. 258, 267.

[51] Wabash R. Co. v. Fox, 64 Ohio St. 133, 9 Am. Neg. Rep. 593, ruled under § 6134*a*, R. S.; St. Bernard v. Shane, 201 Fed. 453 (the federal

in Ohio where the death occurs in another state unless the decedent was a citizen of Ohio.[52] A statute providing for the bringing of an action for a death caused in the state in some court thereof, does not bar the right to maintain an action for a death which occurred in another state as the result of a wrongful act done in the state in which it was in effect.[53] A statute which imposes liability to the extent of a fixed sum for the loss of life is in part penal in its nature, and will not be enforced by the courts of another jurisdiction than that which enacted it.[54] That part of it which is compensatory cannot be enforced in a foreign jurisdiction because the liability would rest on the statute and the measure of it would be determined by the law of the forum.[55] A non-resident may recover compensatory damages though the laws of the state in which the death occurred allowed punitive damages, the latter not being asked for.[56]

If a foreign corporation extends its railroad into an adjoining state on condition that suit may be brought against it in the state into which it goes on all claims upon it, suits may be brought there by citizens of the state of its domicile upon a cause of action arising in the latter under its statute. If such statute does not require a prosecution as a condition precedent to recovery for the death it will not be required by the court of the state in which the action is brought.[57] The homicide of a person in another state on a line of railroad owned and oper-

courts will follow the rule of the court of the state in which they sit).

52 Baltimore & O. R. Co. v. Chambers, 73 Ohio St. 16, 19 Am. Neg. Rep. 478, 11 L.R.A.(N.S.) 1012.

53 Rudiger v. Chicago, etc. R. Co., 94 Wis. 191; Crane v. Chicago, etc. R. Co., 233 Ill. 259.

54 Raisor v. Chicago & A. R. Co., 215 Ill. 47, 106 Am. St. 153.

55 Dale v. Atchison, etc. R. Co., 57 Kan. 601, 1 Am. Neg. Rep. 46; Matheson v. Kansas City, etc. R. Co., 61 Kan. 667, 7 Am. Neg. Rep. 630.

56 Rochester v. Wells Fargo & Co. Exp., 87 Kan. 164, 40 L.R.A.(N.S.) 1095.

Where the right of action accrued in a state where by statute punitive damages might have been recovered, and the action is in a state where the statute does not permit such recovery, only compensatory damages may be recovered. The decision is put on the ground of a waiver by bringing action in another state. Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155.

57 South Carolina R. Co. v. Nix, 68 Ga. 572.

ated by a Georgia company is actionable in the latter state.[58] A right of action given by the laws of one state will not be enforced in the courts of another if it is denied by the common law and is not given by the statutes of the latter.[59] It is presumed that the common law is in force in a sister state; if rights are claimed under the statutes thereof they must be proved.[60]

[58] Central R. v. Swint, 63 Ga. 651.

[59] Texas & P. R. Co. v. Richards, 68 Tex. 375.

[60] Murray v. Louisville & N. R. Co., 132 Ky. 336.

CHAPTER XXXVIII.

SEDUCTION, CRIMINAL CONVERSATION AND ALIENATION OF AFFECTIONS.

§ 1281. The technical not the real gist of the action for seduction.
1282 Who may maintain the action.
1283. Evidence for plaintiff, and damages recoverable.
1284. Evidence for defendant in mitigation.
1285. Criminal conversation and alienation of affections.

§ 1281. The technical not the real gist of the action for seduction. At common law the action for seduction rests on the relation of master and servant, and proceeds in form for loss of service. Trespass *vi et armis* is deemed proper where the servant resides with the master or parent; case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service.[1] Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages.[2] The allegations and proof on these points are almost an unmeaning formula—an obeisance to a shadow of the past—to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing *in loco parentis* for the dishonor and degradation suffered by the family in consequence of the seduction.[3] And large damages, which the court will seldom relieve against,[4] are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the

[1] Briggs v. Evans, 5 Ired. 16; Parker v. Meek, 3 Sneed 29; Mercer v. Walmsley, 5 Har. & J. 27, 9 Am. Dec. 486; Magninay v. Saudek, 5 Sneed 146; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 369; Bartley v. Richtmyer, 4 N. Y. 38; Cooley on Torts, 232, 233; Emery v. Gowen, 4 Me. 33, 16 Am. Dec. 233; Clough v. Tenney, 5 Me. 446.

[2] Coon v. Moffett, 3 N. J. L. (*583) 169; Badgley v. Decker, 44 Barb. 577; Holliday v. Parker, 23 Hun 72, 73; Bayles v. Burgard, 48 Ill. App. 371; Garretson v. Becker, 52 id. 255.

[3] Willeford v. Bailey, 132 N. C. 402.

[4] Id.; Bennett v. Beam, 42 Mich. 346; Sargent v. —, 5 Cow. 106; Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text.

ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the father must prove some service in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while practically, the right to recover rests on far higher grounds, that is, the relation of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages.[5] But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient."[6] Even in England, where stricter proof of service is required, Blackburn, J., said: "In effect the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded."[7] This is according to the general current of authority.[8] While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction they do not require strict proof; very slight evidence of loss of service suffices in favor of one standing *in loco parentis* and who is affected by the graver consequences of the seduction.[9] The actual loss sustained by the plaintiff,

[5] See § 1282.

[6] Doyle v. Jessup, 29 Ill. 462; Cook v. Bartlett, 179 Mass. 576; Willeford v. Bailey, *supra;* Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Hewit v. Prime, 21 Wend. 79; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Herring v. Jester, 2 Houst. 66.

[7] Terry v. Hutchinson, L. R. 3 Q. B. 602.

[8] Ellington v. Ellington, 47 Miss. 329; Patterson v. Thompson, 24 Ark. 55; Keller v. Donnelly, 5 Md. 211; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Phillips v. Hoyle, 4 Gray 568; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

[9] Davidson v. Goodall, 18 N. H. 427; Hewit v. Prime, 21 Wend. 79; Clark v. Fitch, 2 id. 459, 20 Am. Dec. 639; Gray v. Durland, 51 N. Y.

through the diminished ability of his daughter, relative or ward to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one by the aid of the discretion which courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so.[10]

§ 1282. Who may maintain the action. The person seduced, whether a minor or of full age, cannot ordinarily maintain an action for her own seduction; she, being a partaker in the offense, cannot, it is said, come into court to obtain satisfaction for a supposed injury to which she consented.[11] The only mode in which the action has ever been maintained, except in pursuance of some statute,[12] unless it was against the general guardian of the ward who was seduced, in which case it has been ruled that she might maintain an action against him to recover for her seduction while she was under the age of consent and a member of his household,[13] has been by bringing it in the name

424; Anderson v. Rigg, 64 N. J. L. 407; Snider v. Newell, 132 N. C. 614.

10 Davidson v. Goodall, 18 N. H. 427.

11 Larocque v. Conheim, 42 N. Y. Misc. 613; Oberlin v. Upson, 84 Ohio 111; Oleszefski v. Taylor, 19 Pa. Dist. 145; Paul v. Frazier, 3 Mass. 71, 3 Am. Dec. 95; Woodward v. Anderson, 9 Bush 624; Hamilton v. Lomax, 26 Barb. 615; Smith v. Richards, 29 Conn. 232, 240; Buckles v. Ellers, 72 Ind. 220; Weaver v. Bachert, 2 Pa. 80; Ellington v. Ellington, 47 Miss. 329; Ingwaldson v. Skrivseth, 7 N. D. 388; Conlon v. Cassidy, 17 R. I. 518. See Fidler v. McKinley, 21 Ill. 308.

12 Provision has been made by statute in Michigan, Indiana, California, Alabama, Iowa, Oregon, Tennessee, and perhaps other states, for actions by the female seduced, in which she is permitted to recover such damages as juries may allow her. See 4 Am. Rep. 406; Breon v. Henkle, 14 Ore. 494; Franklin v. McCorkle, 16 Lea 609, 57 Am. Rep. 244, and Harrison v. Prentice, 28 Ont. App. 140, 24 Ont. App. 677, as to the loss of service under the statute of Ontario.

In Iowa if the plaintiff yields because of any seductive arts the fact that some force was used does not defeat a recovery. Verwers v. Carpenter, 166 Iowa 273.

13 Graham v. Wallace, 50 App. Div. (N. Y.) 101. See Brattain v. Cannady, 96 Ind. 266.

of some person having a right to the services of the person seduced; and in that action damages are recoverable, not only for actual loss of service, but for a sum sufficient to punish the seducer.[14] The action cannot be maintained by the fiancée of the person seduced.[15] The cause of action given an infant female by statute does not bar an action by her father for the same act for which she may sue.[16] He has a right to the services of his minor daughter, and may maintain the action without proof of actual service, and, although she were at service away from home, if he had not divested himself of the right to recall her to his service.[17] He will not be deprived of his remedy though death results from the pregnancy following the seduction.[18] If the daughter marries another person than her seducer, prior to her father's loss of service or expenditure on account of the seduction, he cannot maintain an action, because he has no claim to her services after marriage,[19] unless his consent thereto was obtained by fraud.[20] A mother in case of the father's death has the same right to the services of her child as the father would have if living,[21] and may sue for her seduction.

[14] Hamilton v. Lomax, 26 Barb. 615.

[15] Case v. Smith, 107 Mich. 416, 61 Am. St. 341, 31 L.R.A. 282.

[16] Watson v. Watson, 49 Mich. 540, 544; Bartlett v. Kochel, 88 Ind. 425; Anderson v. Aupperle, 51 Ore. 556, citing the text.

[17] Simpson v. Grayson, 54 Ark. 404, 26 Am. St. 52; Lawyer v. Fritcher, 130 N. Y. 239, 27 Am. St. 521, 14 L.R.A. 700; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Milward, 11 id. 343; Dain v. Wyckoff, 7 id. 191; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Hewit v. Prime, 21 Wend. 79; Greenwood v. Greenwood, 28 Md. 369; Boyd v. Byrd, 8 Blackf. 113, 44 Am. Dec. 740; Keller v. Donnelly, 5 Md. 211; Kendrick v. McCrary, 11 Ga. 603; Vassel v. Cole, 10 Mo. 634, 47 Am. Dec. 136; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Mohry v. Hoffman, 86 Pa. 358; Garretson v. Becker, 52 Ill. App. 255; Beaudette v. Gogne, 87 Me. 534; Scarlett v. Norwood, 115 N. C. 284; Ingwaldson v. Skrivseth, 7 N. D. 388; Middleton v. Nichols, 62 N. J. L. 636.

[18] Ingerson v. Miller, 47 Barb. 47.

[19] Humble v. Shoemaker, 70 Iowa 223.

[20] Lawyer v. Fritcher, *supra*.

[21] Gray v. Durland, 50 Barb. 100, 50 N. Y. 424; Furman v. Van Sise, 56 id. 435, 15 Am. Rep. 441; Dedham v. Natick, 16 Mass. 135; Blanchard v. Ilsley, 120 id. 487, 21 Am. Rep. 535; Matthewson v. Perry, 37 Conn. 435, 9 Am. Rep. 339; Keller v. Donnelly, 5 Md. 211; Villipique v. Shuler, 3 Strobh. 462.

There are, however, some adverse decisions.[22] In North Carolina the mother may maintain the action in lieu of the father if the latter was living out of the state,[23] and if he is insane she may sue as his next friend, having been appointed such.[24] In an Irish case the seduction and pregnancy occurred during the life-time of the woman's father; the confinement, after his death. A recovery was denied the mother because the daughter was not her servant when the seduction took place.[25] In some cases in this country the injustice of such a rule has been avoided by making the relation at the time of the confinement the test of liability;[26] but there has been dissent from this view.[27]

If it is alleged that the daughter was the servant of the wife and that the wife was deprived of her services the right of action is in the wife alone; but the husband may be joined as a plaintiff. Anderson v. Rigg, 64 N. J. L. 407.

[22] South v. Denniston, 2 Watts 474; Bartley v. Richtmyer, 4 N. Y. 38.

In Badgley v. Decker, 44 Barb. 577, it was held that at common law the mother could not maintain an action for the seduction of the daughter while the father was living. But since the recent statutes of that state respecting married women, where a husband has abandoned his wife and family and resides in another state, the wife, owning a house and being engaged in the business of keeping boarders on her sole and separate account may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with and performs service for her about the house.

In George v. Van Horn, 9 Barb. 523, it was held that an action cannot be maintained by a mother, after the death of her husband, for seduction of their daughter in his life-time, when the daughter at the time of the seduction was over twenty-one years of age and was residing with her brother at his residence and had charge of his family. The court also held that the executors and administrators of a deceased father or mother cannot maintain this action for the seduction of their daughter in their life-time. As well might the action lie, say the court, for criminal conversation with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and like assaults, libel and slander die with the person. Logan v. Murray, 6 S. & R. 175, 9 Am. Dec. 422. See Holliday v. Parker, 23 Hun 71; Noice v. Brown, 39 N. J. L. 569; Coon v. Moffett, 3 id. 436.

[23] Abbott v. Hancock, 123 N. C. 99; Gould v. Erskine, 20 Ont. 347.

[24] Abbott v. Hancock, *supra*.

[25] Hamilton v. Long, 36 Irish L. T. Rep. 189, [1903] 2 Irish 407.

[26] Coon v. Moffett, 3 N. J. L. 436; Parker v. Meek, 3 Sneed 29.

[27] Bartley v. Richtmyer, 4 N. Y. 38; South v. Denniston, 2 Watts 474.

A father loses the right to his daughter's service when she arrives at age; but if afterwards she still continues to reside with him and is to some extent in his service he may sue for her seduction happening during the time of such service.[28] The mere relation of parent and child will not give a right of action for the seduction of an unmarried female; that of master and servant, either actual or constructive, must exist. She must be under his actual or constructive control and dominion. If such a relation exists, it matters not to the cause of action whether the plaintiff be the parent, or merely stands in the relation of parent. An uncle, an aunt, a step-father, a brother, or one having no relationship or affinity to the injured female can sustain the action.[29] It is not necessary that the arrange-

[28] Nickleson v. Stryker, 10 Johns. 115, 6 Am. Dec. 318; Briggs v. Evans, 5 Ired. 21; Miller v. Thompson, 1 Wend. 447; Lee v. Hodges, 13 Gratt. 726; Sutton v. Huffman, 32 N. J. L. 58; Wilhoit v. Hancock, 5 Bush. 567; Dain v. Wyckoff, 7 N. Y. 191; Patterson v. Thompson, 24 Ark. 55; Bayles v. Burgard, 48 Ill. App. 371; Beaudette v. Gayne, 87 Me. 534; Cumber v. Morley, 4 Vict. L. R. (law) 3; Griffiths v. Teetgen, 15 C. B. 344; Koenke v. Bauer, 162 Mo. App. 718; Palmer v. Baum, 123 Ill. App. 584, applying the rule to a case of carnal assault.

This rule is not altered by a statute which provides in one section that a father, or in case of his death or desertion of his family, the mother, may prosecute as plaintiff for the seduction of the daughter, and the guardian for the seduction of the ward, though the daughter or ward is not living with or in the service of the plaintiff at the time of the seduction, or afterward, and there is no loss of service; and in another that a father, or in case of his death, or desertion of his family, the mother, may maintain an action for the injury of the child, and the guardian for the injury of the ward, notwithstanding the word "child" in the latter section has been interpreted to mean minor child. Schmit v. Mitchell, 59 Minn. 251.

In answer to the contention that a father was only entitled to recover nominal damages because the daughter was an adult and away from home, the court said it must consider that the father had lost the comfort of his daughter, and that he is the parent of other children who may be corrupted by her example. As to the woman being away from home, nothing could be said on that head, because she was in an age and in a position where it was proper she should earn her own livelihood. The only effect of a statute dispensing with allegation or proof of loss of service was to leave the rights of the plaintiff as they were before it was enacted. Clapp v. De La Perrelle, 17 Vict. L. R. 413.

[29] Anderson v. Aupperle, 51 Ore. 556, citing the text: Furman v. Van Sise, 56 N. Y. 441; Clark v. Fitch,

ment by which the relation of master and servant is established should have any permanent binding force between the parties to it. If it exists in fact and the immediate parties are acting under it at the time of the seduction, however imperfect its obligation may be, the defendant, who by his wrongful act has interrupted it, cannot set up that it was liable to be revoked at any time without the assent of the master.[30] An imbecile adult daughter is to be regarded as a minor, for the loss of whose services by reason of seduction the father may recover so long as she remains at his home or under his control.[31]

There is a tendency on the part of some courts to overthrow the legal fiction that the action for seduction is based on the loss of service. In Kansas it has been held that the action may be maintained upon the mere relation of parent and daughter alone, the latter being of age and living with her mother. This view is based upon the provisions of the code which abolish the distinction between actions at law and suits in equity and the forms of all such actions and suits heretofore existing, including the abolishment of feigned issues, and the declaration that the petition must contain a statement of the facts constituting the cause of action.[32] In North Carolina an adult woman who has been seduced may sue in her own name to recover therefor by virtue of a provision of the constitution abolishing feigned issues, supplemented by the declaration of the code that an action must be brought by the real party in interest. There the action is for an injury to person or character; it also involves fraud and deceit.[33]

2 Wend. 459, 20 Am. Dec. 639; Martin v. Payne, 9 Johns. 387, 6 Am. Dec. 288; Millar v. Thompson, 1 Wend. 447; Davidson v. Goodall, 18 N. H. 423; Ball v. Bruce, 21 Ill. 161; Roberts v. Connelly, 14 Ala. 235; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wyckoff, 18 id. 45, 72 Am. Dec. 493; Fernsler v. Moyer, 3 W. & S. 416, 39 Am. Dec. 33; Coon v. Moffett, 3 N. J. L. 436; Manwell v. Thomson, 2 C. & P. 303; Edmunson v. Machell, 2 T. R. 4; Irwin v. Dearman, 11 East 23; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Magninay v. Saudek, 5 Sneed 146.

30 Lipe v. Eisenlerd, 32 N. Y. 229, 234; Gray v. Durland, 51 id. 124; Riddle v. McGinnis, 22 W. Va. 253.

31 Hahn v. Cooper, 84 Wis. 629, citing Lipe v. Eisenlerd, 32 N. Y. 229.

32 Anthony v. Norton, 60 Kan. 341, 44 L.R.A. 757, 72 Am. St. 360.

33 Hood v. Sudderth, 111 N. C. 215.

§ 1283. Evidence for plaintiff, and damages recoverable. The rule as to damages is the same whether the daughter be a minor or of full age; the plaintiff is not limited in his recovery to such as are merely compensatory. He may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor,[34] regardless of whether malice existed; the act of seduction is necessarily wilful.[35] The wealth of the defendant is a proper subject of inquiry in respect to exemplary damages.[36] In estimating the injury the jury may take into consideration, besides the loss of services and the disbursements for medical treatment and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in consequence of it, and give damages accordingly.[37] If the action is brought by any other than a person standing in the relation of parent it will be governed by the same principles and rules of evidence; and the court and jury will make the proper discrimination as

[34] Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; Russell v. Chambers, 31 Minn. 54; Lawyer v. Fritcher, 130 N. Y. 239, 27 Am. St. 521, 14 L.R.A. 700; Lipe v. Eisenlerd, 32 N. Y. 229; Wilson v. Sproul, 3 P. & W. 49; Hornketh v. Barr, 8 S. & R. 36, 11 Am. Dec. 568; Kerns v. Hagenbuchle, 60 N. Y. Super. 228: Ingwaldson v. Skrivseth, 7 N. D. 388, 393; Scarlett v. Norwood, 115 N. C. 284; Willeford v. Bailey, 132 N. C. 402.

[35] Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; Anderson v. Aupperle, 51 Ore. 556; Stowers v. Singer, 24 Ky. L. Rep. 395.

[36] Willeford v. Bailey, *supra;* Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85.

[37] Russell v. Chambers, *supra;* Morgan v. Ross, 74 Mo. 318; Riddle v. McGinnis, 22 W. Va. 253; Barbour v. Stephenson, 32 Fed. 66; Herring v. Jester, 2 Houst. 66; Taylor v. Shelkett, 66 Ind. 297; Fox v. Stevens, 13 Minn. 272; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Wilson v. Sproul, Hornketh v. Barr, *supra;* Coon v. Moffett, 3 N. J. L. 436; Pruitt v. Cox, 21 Ind. 15; Phillips v. Hoyle, 4 Gray 568; Hatch v. Fuller, 131 Mass. 574; Felkner v. Scarlet, 29 Ind. 154; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Kendrick v. McCrary, 11 Ga. 603; Blagge v. Ilsley, 127 Mass. 198; Garretson v. Becker, 52 Ill. App. 255; French v. Deane, 19 Colo. 504, 24 L.R.A. 387; Mighell v. Stone, 175 Ill. 261; Middleton v. Nichols, 62 N. J. L. 636, 640; Milliken v. Long, 188 Pa. 411; Cook v. Bartlett, 179 Mass. 576; Palmer v. Baum, 123 Ill. App. 584, carnal assault.

respects the *quantum* of compensation.[38] The person who stands in *loco parentis* to an illegitimate child may recover according to the same standard as a natural parent.[39] Damages for wounded feelings, including a sense of personal and family disgrace, are inferred as a natural and necessary consequence of the seduction, and need not be specially alleged.[40] There cannot be a recovery of damages based on the future condition of the daughter and the offspring of the seduction, or for the former's loss of marriage.[41] In an action by the seduced woman the publicity given to the fact of seduction by the defendant may be proven in aggravation of damages if it has been pleaded,[42] and in such action the plaintiff may recover for her anguish of mind, and the pain and suffering incident to the birth of a child, the fruit of the seduction.[43] Under the California statute the person seduced may recover exemplary damages regardless of whether she was rendered unconscious because of the conduct of the defendant and he committed the act under circumstances which made him guilty of rape, or whether she consciously consented thereto.[44]

As the action is not generally maintainable on the mere relation of parent and child, there must be some proof of loss of service, or other loss resulting from the seduction. Proof of sexual intercourse, or even of seduction, will not sustain the action.[45] The plaintiff must show that there resulted therefrom some direct injury to his rights as master.[46] It will be assumed that there is a loss of service if pregnancy follows, or sickness, or the communication of any disease.[47] So if the sense of

[38] Anderson v. Aupperle, 51 Ore. 556, quoting the text; Magninay v. Saudek, 5 Sneed 146.

The recovery for loss of time is governed by what the plaintiff has earned in her vocation. The physician's fee may be recovered without showing it has been paid. Lampman v. Brunning, 120 Iowa 167.

[39] Tittlebaum v. Boehmeke, 81 N. J. L. 697, 35 L.R.A.(N.S.) 1062.

[40] Lunt v. Philbrick, 59 N. H. 59; Willeford v. Bailey, 132 N. C. 402.

[41] Comer v. Taylor, 82 Mo. 341.

[42] Simons v. Busby, 119 Ind. 13.

[43] Gemmill v. Brown, 25 Ind. App. 6.

[44] Marshall v. Taylor, 98 Cal. 55, 35 Am. St. 144.

[45] Comer v. Taylor, 82 Mo. 341; Kinney v. Laughenour, 89 N. C. 365; Delvee v. Boardman, 20 Iowa 446; Hill v. Wilson, 8 Blackf. 123.

[46] White v. Nellis, 31 N. Y. 405, 88 Am. Dec. 282.

[47] Anderson v. Ryan, 8 Ill. 583; Leucker v. Steileu, 89 id. 545, 31

shame and wrong-doing diminish the servant's ability to work.[48] Pregnancy or the birth of a child is not essential. It is sufficient if there be illness of the daughter, resulting from the seduction, and a consequent inability or reduced ability to labor, or if there be expenses necessitated by the same cause.[49] It is not important to the right of action that the loss should result from the seduction in any particular way. It will be enough if a loss has been occasioned which is a legal, natural and direct consequence of the wrong.[50] The parent need not, in order to recover damages, including those which are exemplary, show that his daughter's debauchment was accomplished by seductive arts.[51] The age of the daughter and the circumstances under which she was debauched may aggravate or mitigate the damages, but they do not afford any basis for limiting, as matter of law, the father's damages to his actual

Am. Rep. 104; Hewit v. Prime, 21 Wend. 79; Hogan v. Cregan, 6 Robert. 138; Mohelsky v. Hartmeister, 68 Mo. App. 318, 324.

48 In Blagge v. Ilsley, 127 Mass. 191, Colt, J., said: "There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself. Upon this part of the case the jury were told that the plaintiff might recover if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work. In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline in the daughter's health and spirits directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down as a matter of law that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure."

49 Id.; Night v. Wilcox, 18 Barb. 212; White v. Nellis, 31 id. 279; Abraham v. Kidney, 104 Mass. 222, 6 Am. Rep. 620; Stiles v. Tilford, 10 Wend. 339.

50 Night v. Wilcox, 15 Barb. 279.

51 Hein v. Holdridge, 78 Minn. 468. Compare Palmer v. Baum, 123

money loss.[52] Where the illness of the daughter, following seduction, is not the consequence thereof, but of the publication of her shame, it is not a proximate result of the wrong.[53]

It is competent to show the circumstances under which the female was seduced and the means used for corrupting her mind,—the promises, flattery or deception employed.[54] An exception has been made of promises of marriage by some courts because the damages for the breach of it belong to the daughter seduced.[55] When such evidence is admitted the jury should be cautioned to give no damages for breach of such promise.[56] It may be proved in what manner and on what terms the defendant visited her, the family and her relations.[57] Evidence in a father's action of a promise of marriage is not admissible as a ground of damage,[58] nor can he recover compensation for the support and maintenance of the illegitimate

Ill. App. 584, a case of carnal assault.

[52] Id., citing Fox v. Stevens, 13 Minn. 252; Russell v. Chambers, 31 Minn. 54; Stoudt v. Shepherd, 73 Mich. 558; McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427; Kennedy v. Shea, 110 Mass. 147, 14 Am. Rep. 584; Barbour v. Stephenson, 32 Fed. 66; Lawrence v. Spence, 99 N. Y. 669; White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100.

[53] Night v. Wilcox, 14 N. Y. 413.

[54] Watson v. Watson, 53 Mich. 168; Bracey v. Kibbe, 31 Barb. 273; Phelin v. Kenderdine 20 Pa. 354; White v. Campbell. 13 Gratt. 573; Fox v. Stevens, 13 Minn. 272; Kahn v. Freytag, 2 Robert. 678; Parker v. Monteith, 7 Ore. 277.

[55] Comer v. Taylor, 82 Mo. 341; Foster v. Schofield, 1 Johns. 297; Clark v. Fitch, 2 Wend. 459, 20 Am. Dec. 639; Gillett v. Mead, 7 Wend. 193; Brownell v. McEwen, 5 Denio 367; Kip v. Berdan, 20 N. J. L. 239.

In Pennsylvania, if the intercourse is admitted, the seduction being denied, the father may show, in aggravation of damages, that the defendant, after discovering the woman was pregnant, had agreed to marry her. Milliken v. Long, 188 Pa. 411.

[56] Phelin v. Kenderdine, 20 Pa. 354.

[57] Herring v. Jester, 2 Houst. 66; Parker v. Monteith, 7 Ore. 277; Davidson v. Goodall, 18 N. H. 423; Brownell v. McEwen, 5 Denio 367.

If the defendant held out expectations to the plaintiff and induced the reasonable belief that he intended to marry his daughter the insult done in the abuse of his hospitality and the betrayal of his confidence may be considered in awarding compensation for his injured feelings. Lunt v. Philbrick, 59 N. H. 59.

[58] Robinson v. Burton, 5 Harr. 335; Gillett v. Mead, 7 Wend. 193; Odell v. Stephens, 12 Ind. 384; Herring v. Jester, 2 Houst. 66; Kip v. Berdan, 20 N. J. L. 239; Hines v. Sinclair, 23 Vt. 108.

child.[59] But where the seduced may sue in her own name she may allege and prove both the promise of marriage and seduction with a view to damages for the double wrong,[60] and may prove many acts on the part of the defendant though they extend over a considerable period of time, as well as all the consequences of the seduction.[61] In an action by the party seduced exemplary damages may be recovered regardless of the existence or non-existence of malice on the part of the defendant, and regardless of whether such damages are alleged.[62] In such an action the use of force is an aggravation of the wrong,[63] and the jury may regard any indignities offered her during the trial, any false imputations against her character or virtue, in which event they will be considered as wantonly made.[64] The plaintiff may show his relationship to the seduced and the situation of the family,[65] and that the defendant aggravated his wrong-doing by producing an abortion.[66] There cannot be a recovery for an abortion and the attendant indignities unless damages therefor are specially pleaded, particularly if another suit be pending against the defendant.[67]

There is some conflict of decision on the question of proving the character and social standing of the plaintiff; but it is believed that where he sustains such relation to the seduced as to suffer injury to his feelings through her dishonor it is, according to the weight of authority, competent for him to show, to affect damages, the character and social standing of

59 Hitchman v. Whitney, 9 Hun 512; Sargent v. ——, 5 Cow. 106; Haynes v. Sinclair, 23 Vt. 108.

The rule applies where pregnancy follows a carnal assault. Palmer v. Baum, 123 Ill. App. 584.

60 §§ 983, 984; Lee v. Hefley, 21 Ind. 98; Fleetford v. Barnett, 11 Colo. App. 77.

61 McCoy v. Trucks, 121 Ind. 292; Shewalter v. Bergman, 124 Ind. 155; Russell v. Chambers, 31 Minn. 54; Badder v. Keefer, 91 Mich. 611; Baird v. Boehner, 77 Iowa 622; Breiner v. Nugent, 136 Iowa 322.

62 Verwers v. Carpenter, 166 Iowa 273.

63 Marshall v. Taylor, *supra*.

64 Ferguson v. Moore, 98 Tenn. 342.

65 Wilson v. Sproul, 3 P. & W. 49.

66 White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Klopfer v. Bromme, 26 Wis. 372; Gunder v. Tibbits, 153 Ind. 591, 600; Nolan v. Glynn, 163 Iowa 146, citing the text.

67 Ferguson v. Moore, *supra*.

his own family and the defendant's pecuniary circumstances.[68] It is held in Indiana that in an action by the seduced female the defendant's financial standing may be shown;[69] but in Iowa neither the plaintiff's financial circumstances nor that of her family is a proper subject of proof if the defendant did not avail himself of it to effect the seduction.[70] The measure of damages in this action is peculiarly within the province of the jury.[71] It was long ago remarked by Wilmot, C. J., that "actions of this sort are brought for example's sake, and although plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."[72] "It is believed," said Sherwood, C. J., "that no case can be found in the books where the verdict in an action such as this has been set aside upon the sole ground of awarding excessive damages."[73] There is especial reason why verdicts will not be interfered with where the seduced is the plaintiff.[74]

Debauchment with seduction is one injury, and debauchment without it is another. The rule for the admeasurement of the damages in the one case differs from that in the other. In the former, exemplary damages are allowable; but if sexual intercourse takes place without seduction—without the aid of flattery and artifice—no recovery can be had by the father beyond the loss of services and incidental expenses, unless the debauchment is accomplished with force and violence, or under circum-

[68] McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427; Grable v. Margrave, 4 Ill. 372, 38 Am. Dec. 88; Peters v. Lake, 66 Ill. 206; Herring v. Jester, 2 Houst. 66; White v. Murtland, *supra;* Clem v. Holmes, 33 Gratt. 722, 36 Am. Rep. 793; Parker v. Monteith, 7 Ore. 277; Applegate v. Ruble, 2 A. K. Marsh. 128; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768; Riddle v. McGinnis, 22 W. Va. 253. *Contra,* Hodsoll v. Taylor, L. R. 9 Q. B. 79; Dain v. Wyckoff, 7 N. Y. 191; Watson v. Watson, 53 Mich. 168. See Haynes v. Sinclair, 23 Vt. 108.

[69] Shewalter v. Bergman, *supra;* Wilson v. Shepler, 86 Ind. 275; Gemmill v. Brown, 25 Ind. App. 6.

[70] West v. Druff, 55 Iowa 335.

[71] Riddle v. McGinnis, 22 W. Va. 253, 280.

[72] Tullidge v. Wade, 3 Wils. 18 Kerns v. Hagenbuehle, 60 N. Y. Super. 228.

[73] Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85, citing the text; Morgan v. Ross, 74 Mo. 318; Marshall v. Taylor, 98 Cal. 55, 35 Am. St. 144; Mighell v. Stone, 74 Ill. App. 129; Gunder v. Tibbits; Baird v. Boehmer, *supra.*

[74] Marshall v. Taylor, *supra.*

stances constituting the crime of rape. In that event exemplary damages may be recovered,[75] and the compensatory damages are measured by the same standard as in other cases.[76]

In an action by a wife to recover damages for the seduction of her husband evidence is admissible to prove the affectionate feeling entertained by him for her before the defendant intervened, and to show a subsequent change of feeling; and for the same purpose, and to show the mental suffering of the plaintiff, proof may be made of manifestations of remorse by him in interviews with her, and of grief by her after the intimacy between him and the defendant began.[77]

§ 1284. Evidence for defendant in mitigation. The bad moral character of the plaintiff and his character for chastity, it is held in New York, cannot be proved in reduction of damages. Comstock, J., speaking for the court, said: "It is true that in actions of this kind compensation is given for injured sensibilities of the parent, and that a pecuniary value is placed upon the society and attentions of a virtuous daughter. But to justify evidence of bad reputation in general, or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law." [78] The defendant will not be permitted to show that the plaintiff is devoid of natural sensibilities.[79] In Delaware the defendant may show the plaintiff's dissolute habits, though not his general reputation in respect to virtue; [80] and in Tennessee it may be shown by general reputation that the plaintiff is a person of profligate principles and dissolute habits, but evidence of particular acts should not be received.[81] It is no defense to the parent's action that the daughter consented willingly to the seduction, for her consent

[75] Mohelsky v. Hartmeister, 68 Mo. App. 318; De Haven v. Helvie, 126 Ind. 82.

[76] Koenke v. Bauer, 162 Mo. App. 718.

[77] Ash v. Prunier, 44 C. C. A. 675, 105 Fed. 722.

[78] Dain v. Wyckoff, 18 N. Y. 47.

[79] Grider v. Dent, 22 Mo. 490.

[80] Robinson v. Burton, 5 Harr. 335.

[81] Reed v. Williams, 5 Sneed 580; Thompson v. Clendening, 1 Head 287.

will not deprive him of his action;[82] neither is the defendant's responsibility lessened because he accomplished his purpose by force.[83] In an action by the woman for breach of promise and seduction her criminal misconduct, known to the defendant before he made the promise to marry and participated in by him, cannot lessen his liability.[84]

It is presumed, in the absence of evidence to the contrary, that the person seduced was virtuous at the time of the seduction, and was a comfort and help to her parents if she lived at home.[85] But her general character is in issue on the question of damages. It may be impeached by general evidence,[86] and specific acts of lewdness and immorality may in some states be shown[87] if the seduced is the plaintiff.[88] Not only may want of previous chastity be proved by general reputation and specific acts of unchastity, but it may be proved by evidence which tends to show impure conversation and improper and familiar association with men.[89] In some states the evidence to impeach character for chastity must be confined to general reputation.[90] Previous chastity is not essential to the cause of action, but antecedent misconduct may have much influence on the question of damages for the parent's shame and disgrace,[91] or for that

[82] Bartlett v. Kochel, 88 Ind. 425; Barbour v. Stephenson, 32 Fed. 66; McAuley v. Birkhead, 13 Ired. 28, 55 Am. Dec. 427.

[83] Dalman v. Koning, 54 Mich. 320; Bradshaw v. Jones, 103 Tenn. 331.

[84] Fleetford v. Barnett, 11 Colo. App. 77.

[85] People v. Brewer, 27 Mich. 137; Gemmill v. Brown, 25 Ind. App. 6; Robinson v. Powers, 129 Ind. 480.

[86] Reed v. Williams, Robinson v. Burton, *supra;* Smith v. Milburn, 17 Iowa 30; Lea v. Henderson, 1 Cold. 146; Bamfield v. Massey, 1 Camp. 461; Dodd v. Norris, 3 id. 519; West v. Druff, 55 Iowa 335; Dalman v. Koning, *supra;* Parker v. Coture, 63 Vt. 155, 25 Am. St. 750. See Wallace v. Clark, 2 Overt. 93, 5 Am. Dec. 654.

[87] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Love v. Masoner, 6 Baxter 24, 32 Am. Rep. 522; Verry v. Watkins, 7 C. & P. 308; Hogan v. Cregan, 6 Robert. 138; Kahn v. Freytag, 2 id. 678. See Ford v. Jones, 62 Barb. 484.

[88] Gemmill v. Brown, *supra.*

[89] West v. Druff, *supra;* Stewart v. Smith, 92 Wis. 76.

[90] Shattuck v. Myers, 13 Ind. 46; Hoffman v. Kermerer, 44 Pa. 452; Smith v. Yaryan, 69 Ind. 445, 35 Am. Rep. 232; Doyle v. Jessup, 29 Ill. 460.

[91] Hill v. Wilson, 8 Blackf. 123; Comer v. Taylor, 82 Mo. 341; Simpson v. Grayson, 54 Ark. 404, 26 Am.

of the person seduced when she is the plaintiff.[92] "Proof of former unchastity may be considered in mitigation of damages, and to show that the sexual intercourse was without enticement, artifice, persuation or solicitation, but is not of itself a defense if the plaintiff had, for a reasonable time before the alleged seduction, been leading a virtuous life." [93] Where the person seduced brings the action she may not recover for loss of character, or for shame or disgrace if no evidence of her previous character is given.[94]

The consent or connivance of the parent or one suing in the character of master to the seduction will be a bar to the action. And conduct, not amounting thereto, but only to negligence or want of ordinary prudence, may be shown as tending to mitigate damages.[95] In such action it has been ruled that a marriage between the seducer and the seduced and his acquittal on an indictment for the seduction may be proved for the same pur-

St. 52; Smith v. Milburn, 17 Iowa 30; Milliken v. Long, 188 Pa. 411. See Lea v. Henderson, 1 Cold. 146, holding that the fact that another person had had intercourse with the person seduced before her alleged seduction by the defendant, this being unknown to him or to the public at the time of the seduction, is not to be considered in mitigation.

The unchaste conduct of the female is provable in mitigation under a general denial without being otherwise pleaded. Wandell v. Edwards, 25 Hun 498.

One who injures the reputation of another cannot reap a benefit from his wrong; hence the defendant cannot show that after the seduction the plaintiff's character was bad. Shewalter v. Bergman, 123 Ind. 155; Ayer v. Colgrove, 81 Hun 322. Nor that the female was guilty of specific unchaste acts. McKern v. Calvert, 59 Mo. 243; Morgan v. Ross, 74 id. 318.

92 Olson v. Rice, 140 Iowa 630.

93 Stowers v. Singer, 24 Ky. L. Rep. 395, and cases cited; Patterson v. Hayden, 17 Ore. 238.

94 Wilson v. Mangold, 154 Iowa 352.

95 Travis v. Barger, 24 Barb. 614; Richards v. Fouts, 11 Ired. 466; Graham v. Smith, 1 Edm. Sel. Cas. 267; Sherwood v. Tetman, 55 Pa. 77; Parker v. Elliott, 6 Munf. 587; Smith v. Masten, 15 Wend. 270.

In an action for the seduction of the plaintiff's daughter the fact of the seduction of another of his daughters three years previously by other than the defendant, and the circumstances connected therewith, is not admissible in mitigation as tending to show that plaintiff was chargeable with careless indifference in affording opportunities for criminal intercourse between the defendant and the daughter whose seduction he is alleged to have accomplished. Tourgee v. Rose, 19 R. I. 432.

pose.[96] In Illinois and elsewhere it has been held that an offer of marriage made by the defendant after the seduction cannot be considered in mitigation.[97] Evidence of the defendant's general reputation for chastity and purity of life is not admissible.[98] If money furnished by the defendant to the plaintiff's daughter is not shown to have been applied to plaintiff's benefit or in reduction of his damages such payments cannot be proved.[99] That the female seduced has in a previous action for breach of promise of marriage recovered punitive damages cannot be considered in mitigation or bar of the action.[1]

§ 1285. Criminal conversation and alienation of affections. The husband's injury by the wrong of criminal conversation consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary injury from loss of her services. The loss of "services" in this connection does not ordinarily involve a loss measurable by pecuniary standards; the term implies, rather, whatever of aid, assistance, comfort and society the wife would be expected to render or bestow upon her husband under the circumstances in which they lived.[2] It is immaterial that the wife is entitled to her own earnings,[3] or that she owned property if it was not used or there was not a reasonable expectation that it would be used for the benefit of the husband.[4] The extent of the actual injury

[96] Eichar v. Kistler, 14 Pa. 282, 53 Am. Dec. 551.

[97] White v. Murtland, 71 Ill. 250, 22 Am. Rep. 100; Ingersoll v. Jones, 5 Barb. 661.

[98] Watson v. Watson, 53 Mich. 168.

The Minnesota court admits that the generally accepted rule is that evidence of the general character of parties to civil actions, where character is not a part of the issue, is inadmissible. But, on the ground of *stare decisis*, held that evidence of the general reputation for chastity of the defendant in an action for seduction is admissible. Hein v. Holdridge, 78 Minn. 468.

[99] Russell v. Chambers, 31 Minn. 54; Sellars v. Kinder, 1 Head 133; Pruitt v. Cox, 21 Ind. 15.

[1] Luther v. Shaw, 157 Wis. 234, 52 L.R.A.(N.S.) 85.

[2] Long v. Booe, 106 Ala. 570; Yundt v. Hartrunft, 41 Ill. 9 (injury to family reputation).

[3] Id.; Cross v. Grant, 62 N. H. 675, 13 Am. St. 607; Stark v. Johnson, 43 Colo. 243, 127 Am. St. 114; Shannon v. Swanson, 208 Ill. 52; Jenness v. Simpson, 84 Vt. 127.

[4] Jenness v. Simpson, *supra*.

will, of course, depend on their prior relations and the practical consequences between them of her defection. In this class of cases an actual marriage must be proved,[5] and the *gravamen* of the action is that the defendant has committed adultery with the wife.[6] The right of action is not affected if the wrong was committed by force,[7] nor by the fact that the plaintiff obtained a divorce from his wife a short time before suit was brought,[8] or condoned her wrong,[9] or had not lived with her for a considerable time.[10] The amount of damages is left to the discretion of the jury, and the same considerations prevail in their assessment as when they are awarded in favor of a plaintiff who can feel the dishonor of other seductions;[11] courts will seldom set aside verdicts for excess,[12] or because they award insufficient

[5] Hutchins v. Kimmel, 31 Mich. 126, 18 Am. Rep. 164; Browning v. Jones, 52 Ill. App. 597; Stark v. Johnson, *supra;* Frederick v. Morse, 88 Vt. 126; Jowett v. Wallace, 112 Me. 389; Vollmer v. Stregge, 27 N. D. 579.

[6] Wood v. Mathews, 47 Iowa 409; Prettyman v. Williamson, 1 Pennew. (Del.) 224; Evans v. O'Connor, 174 Mass. 287; Jowett v. Wallace, 112 Me. 389.

[7] Egbert v. Greenwalt, 44 Mich. 245, 38 Am. Rep. 260.

[8] Wales v. Miner, 89 Ind. 118; Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 548.

[9] Macdonald v. Macdonald, 12 Rettie (Scotch) 1327; Verholf v. Van Houwenlengen, 21 Iowa 429; Sikes v. Tippins, 85 Ga. 231; Stumm v. Hummell, 39 Iowa 483; Smith v. Meyers, 52 Neb. 70; Shannon v. Swanson, *supra.*

[10] Bailey v. King, 27 Ont. App. 703; Winter v. Henn, 4 C. & P. 494; Evans v. Evans, [1899] Prob. 195.

[11] A verdict in favor of the plaintiff, though it is silent as to compensatory, if it awards exemplary, damages may be corrected by the court so as to carry nominal damages. Mills v. Taylor, 85 Mo. App. 111.

[12] Johnson v. Allen, 100 N. C. 131; Wales v. Miner, 89 Ind. 118; Sikes v. Tippins, *supra;* Torre v. Summers, 2 Nott & McC. 367; Johnston v. Disbrow, 47 Mich. 59; Wilford v. Berkeley, 1 Burr. 609; Duberly v. Gunning, 4 T. R. 657; Long v. Booe, 106 Ala. 570; Prettyman v. Williamson, 1 Pennew. (Del.) 224; Browning v. Jones, *supra;* Puth v. Zimbleman, 99 Iowa 641; Dorman v. Sebree, 21 Ky. L. Rep. 634; Smith v. Meyers, *supra;* Matheis v. Mazet, 164 Pa. 580; Speck v. Gray, 14 Wash. 589; Scheffler v. Robinson, 159 Mo. App. 527; Jowett v. Wallace, 112 Me. 389.

For cases in which verdicts have been held excessive, see Hendrick v. Biggar, 151 App. Div. (N. Y.) 522; Berney v. Adriance, 157 App. Div. (N. Y.) 628; Lupton v. Underwood, 3 Boyce (Del.) 519 (reducing a verdict in favor of a wife from $4,000 to $2,500); Phillips v. Thomas, *infra* (setting aside a ver-

damages.[13] The pecuniary ability of the defendant to respond in punitive damages may be proved,[14] but where such damages are not recoverable the wealth of the defendant is immaterial.[15] Where the trial occurs several years after the cause of action accrued proof of the defendant's bankruptcy at the former trial is not competent.[16] There are also other and peculiar considerations which will enter into the account.[17] Evidence in miti-

diet for $35,000 after it was reduced to $25,000).

[13] Ward v. Thompson, 141 Wis. 376.

[14] Prettyman v. Williamson, Matheis v. Mazet, *supra;* Miller v. Pearce, 86 Vt. 322, 43 L.R.A.(N.S.) 332. *Contra*, unless he used his money as a means of seduction. Cowing v. Cowing, 33 L. J. (N.S.) Prob. 149.

[15] Phillips v. Thomas, 70 Wash. 533, 42 L.R.A.(N.S.) 582; Bailey v. Bailey, 94 Iowa 598.

[16] Peters v. Lake, 66 Ill. 206.

[17] The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant, his being a friend, relative or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. Buller's N. P. 27; Mayne on Dam. (8th Eng. ed.) 584.

The extent of the injury in any case must depend in a great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed, under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection, by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts, that, while it may be wise to give a right of action in all, yet the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little according as they find that much or little has been lost by the complaining party. Cooley on Torts, 224.

gation will be received which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act proved.[18] It is proper to show unhappy relations between him and his wife, or that he was wanting in affection for her,[19] or that there was but slight intercourse between them;[20] that he was unkind in his treatment of her, or guilty of infidelities,[21] or improprieties with other women, especially as bearing upon the extent of his mental suffering,[22] or negligently suffered her to encounter temptation,[23] or that

In Wilton v. Webster, 7 C. & P. 198, the husband's knowledge of the infidelity of his wife first came to him upon the eve of her death by her confession. He continued to treat her kindly as long as she lived. His right to maintain the action was upheld; but the damages were limited to the shock to his feelings and the loss of the society of the wife during the remainder of her life.

18 Defendant may show reconciliation as a mitigating circumstance. Rehling v. Brainard, — Nev. —, 144 Pac. 167.

19 Berney v. Adriance, 157 App. Div. (N. Y.) 628; Phillips v. Thomas, *supra;* Miller v. Pearce, 86 Vt. 322; Lupton v. Underwood, 3 Boyce (Del.) 519; Humphrey v. Pope, 1 Cal. App. 374; Barnes v. Tibbitts, 164 Mich. 217; Lewis v. Roby, 79 Vt. 487, 118 Am. St. 984; Ward v. Thompson, 146 Wis. 376; Hadley v. Heywood, 121 Mass. 236; Coleman v. White, 43 Ind. 429; Billings v. Albright, 66 App. Div. (N. Y.) 239; Rudd v. Rounds, 64 Vt. 432; Bromley v. Wallace, 4 Esp. 237; Prettyman v. Williamson, 1 Pennew. (Del.) 224; Browning v. Jones, 52 Ill. App. 597; Peek v. Traylor, 17 Ky. L. Rep. 1312.

20 Calcraft v. Harborough, 4 C. & P. 499.

21 Norton v. Warner, 9 Conn. 172; Bromley v. Wallace, 4 Esp. 237; Browning v. Jones, 52 Ill. App. 597; Cross v. Grant, 62 N. H. 675, 13 Am. St. 607; Billings v. Albright, 66 App. Div. (N. Y.) 239.

The English cases are not agreed as to the effect of open adultery on the part of the husband. In Sturt v. Marquis of Blandford, Windham v. Wycombe, 4 Esp. 17, Lord Kenyon held that it barred the action. In Bromley v. Wallace, 4 Esp. 237, Lord Alvanley ruled that it went in mitigation only. Under a statute providing that a witness in any proceeding instituted in consequence of adultery be cross-examined as to any act of adultery unless he or she has already given evidence in the same proceeding in disproof of it, a husband petitioning for the dissolution of his marriage cannot, for the purpose of mitigating damages, be questioned concerning acts of adultery committed during the lifetime of a previous wife. Babbage v. Babbage, L. R. 2 P. & D. 222.

22 Phelps v. Bergers, 92 Neb. 851.

23 Inderlied v. Bullen, 80 N. J. L. 7; Calcraft v. Harborough, *supra;* Duberley v. Gunning, 4 T. R. 657; Van Vacter v. McKillip, 7 Blackf. 598; Bunnell v. Greathead, 49 Barb. 106; Pierce v. Pierce, 3 Pick. 299; Peek v. Taylor, 17 Ky. L. Rep. 1312.

the parties were divorced,[24] or continued to live and cohabit together.[25] The loss to the plaintiff may be greatly mitigated by showing that the wife was of bad character at the time of the alleged wrong. It may be shown that there had been improper familiarities between her and other men,[26] that she was wanting or reputed to be wanting in chastity before her marriage,[27] or had committed adultery afterwards,[28] and before the cause of action accrued;[29] acts of this kind committed thereafter might be the direct result of the defendant's wrong.[30] The fact that the defendant was solicited by her will also go in mitigation.[31] The good faith of the defendant may be shown under a general denial and without special pleading.[32] If the guilt of the defendant is admitted the evidence in mitigation may take a wide range; the attitude of the plaintiff toward the marriage relation may be shown and so of his wife's attitude thereto; it bears upon her value to him and upon the liability for punitive damages.[33] The release of the husband from his obligation to clothe, support, cherish and care for his wife goes in mitigation.[34] The consent of the plaintiff to the act complained of bars the right of action;[35] but in the absence of connivance by the husband he is not barred of a recovery because he did not prevent the meeting between the parties.[36] If there was no seduction, but the fall of the wife was the result of her own licentiousness or she voluntarily gave her affections to the

24 McNamara v. McAllister, 150 Iowa 243, 34 L.R.A.(N.S.) 436; Prettyman v. Williamson, 1 Pennew. (Del.) 224.

25 Smith v. Hockenberry, *infra. Contra,* Frederick v. Morse, 88 Vt. 126.

26 Norton v. Warner, *supra;* Ward v. Thompson, 146 Wis. 376.

27 Conway v. Nicol, 34 Iowa 533; Ward v. Thompson, *supra;* Smith v. Hockenberry, *infra;* Hardy v. Bach, 173 Ill. App. 123.

28 Smith v. Hockenberry, 138 Mich. 129, 146 Mich. 7, 117 Am. St. 615; Winter v. Henn, 4 C. & P. 494.

29 Smith v. Hockenberry, 138 Mich. 129.

30 Elsam v. Faucett, 2 Esp. 562; Winter v. Henn, *supra.*

31 Elsam v. Faucett, *supra.*

32 Stroek v. Russell, 148 App. Div. (N. Y.) 483.

33 Ward v. Thompson, *supra.*

34 Jenness v. Simpson, 84 Vt. 127.

35 Frederick v. Morse, 88 Vt. 126; Kohlhoss v. Mobley, 102 Md. 199; Prettyman v. Williamson, *supra.*

36 Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 548.

defendant the husband has no cause of action for the seduction.[37] But her consent to the adultery does not bar the husband's right to recover for the loss of the *consortium* with her which is implied from the adultery.[38] It is immaterial in an action by a wife whether the defendant seduced the husband or latter seduced the defendant.[39] The husband's recovery is not limited to a nominal sum because his wife had secretely been immoral with other men, and was not seduced by the defendant. "No man has a right to invade the home of another and, if he does, he cannot find excuse in the fact that he is not the only sinner. The only issue in a case of criminal conversation is whether or not the defendant was guilty of adultery with the wife of the plaintiff without the consent of the latter. If guilty, he must respond in substantial damages." [40]

The right of a wife to maintain an action against those who wrongfully and wilfully alienate the affections of her husband from her is not everywhere admitted, and in some states in which it exists it is dependent upon statutes. Where the action may be maintained it can be done by the wife alone [41] without joining her husband; it is not a reason for denying her a remedy that she is living with him,[42] or is divorced from him.[43] The wife need not show the loss of the service of her husband or any other pecuniary loss.[44] The damages recovered become her property.[45] The alienation of the affections of the husband is often the means by which his separation from his wife is

[37] Scott v. O'Brien, 129 Ky. 1, 12, 130 Am. St. 419; De-Ford v. Johnson, 152 Mo. App. 209; Hoggins v. Coad, 58 Ill. App. 58.

[38] Bigaouette v. Paulet, 134 Mass. 123, 45 Am. Rep. 307.

[39] Miller v. Pearce, 86 Vt. 322, 43 L.R.A.(N.S.) 332; Hart v. Knapp, 76 Conn. 135, 100 Am. St. 989. See Scott v. O'Brien, 129 Ky. 1, 130 Am. St. 419, 16 L.R.A.(N.S.) 742, criticising the Connecticut case.

[40] Scheffler v. Robinson, 159 Mo. App. 527.

[41] Claxton v. Pool, 182 Mo. App. 13.

[42] Foot v. Card, 58 Conn. 1, 18 Am. St. 258, 6 L.R.A. 829; Van Olinda v. Hall, 88 Hun 452; Gregg v. Gregg, 37 Ind. App. 210.

[43] Keen v. Keen, 49 Ore. 362, 10 L.R.A.(N.S.) 504; Beach v. Brown, 20 Wash. 266, 43 L.R.A. 114, 72 Am. St. 98; Postlewaite v. Postlewaite, 1 Ind. App. 473.

[44] Lupton v. Underwood, 3 Boyce (Del.) 519.

[45] Foot v. Card, *supra*.

effected; that, however, is not essential to her cause of action. The wife is entitled to the aid, support, protection, comfort and society of her husband, and may recover for the loss thereof by the wrongful act of a third party, though the husband may continue to have affection for her.[46] "A husband makes a *prima facie* case against a stranger when he shows that such stranger voluntarily and unasked, intermeddled with his domestic affairs, and intentionally urged, persuaded and induced his wife to desert and abandon him, and to refuse to live with him; and in the absence of anything in the evidence to justify or excuse such conduct, the plaintiff's right to a recovery, upon proof of such facts, is established."[47] Proof of adultery is not required.[48] There may be liability for the partial alienation of the affections of a wife; and even if there was no affection a stranger has no right to interfere and cut off all chance of its springing up.[49] But damages for debauching a wife cannot be recovered,[50] or evidence thereof introduced,[51] without tendering the issue of criminal conversation. It is presumed that affection exists.[52] The damages must be limited to such as are the natural and probable result of the defendant's conduct.[53] It is not necessary, in order to confer a right of action, that the

[46] Nichols v. Nichols, 147 Mo. 387, 401; Noxon v. Remington, 78 Conn. 296; Gregg v. Gregg, 37 Ind. App. 210; Scott v. O'Brien, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. 419 (except, as to support, to the extent the husband may be compelled to furnish it); Nolin v. Pearson, 191 Mass. 283, 4 L.R.A. (N.S.) 643, 114 Am. St. 605; Lupton v. Underwood, 3 Boyce (Del.) 519.

Testimony as to the value of support is not necessary where the surrounding circumstances and conditions in life of the parties are shown—these enable the jury to form an estimate of the wife's loss. Stanley v. Stanley, 32 Wash. 489.

[47] Hartpence v. Rogers, 143 Mo. 623.

[48] Ireland v. Ward, 51 Ore. 102; Higham v. Vanosdol, 101 Ind. 160; Adams v. Main, 3 Ind. App. 232, 50 Am. St. 266.

[49] Dallas v. Sallers, 17 Ind. 479, 79 Am. Dec. 489; Fratini v. Caslini, 66 Vt. 273; Jenness v. Simpson, 84 Vt. 127; Claxton v. Pool, 182 Mo. App. 13.

"Estrangement is obviously not a bar to the recovery of either compensatory or punitive damages." Williamson v. Osenton, 136 C. C. A. 261, 220 Fed. 653.

[50] Sweikhart v. Hanrahan, 184 Mich. 201.

[51] Perry v. Lovejoy, 49 Mich. 529.

[52] Gregg v. Gregg, *supra;* Lupton v. Underwood, 3 Boyce (Del.) 519.

[53] Lane v. Spence, 70 Neb. 204.

defendant's conduct be the sole cause of the alienation or separation. It is sufficient if the conduct of the defendant was the controlling cause.[54]

If the action is against the parents or either of them, or a guardian, or brother, of the consort the intent is material in determining liability. A parent has the right to advise his child, and in so doing, in good faith and with a proper motive, is not to be regarded as a mere intermeddler. "A clear case of want of justification on the part of the parents should be shown before they should be held responsible." [55] The relations of the husband and wife to each other should have a material influence on the amount of damages. If the plaintiff's wife or the wife if she is the plaintiff had reached the crisis "when love begins to sicken and decay" the recovery cannot be as large as if the condition was otherwise.[56] Evidence as to the state of the plain-

[54] Baird v. Carle, 157 Wis. 565.

[55] Gernerd v. Gernerd, 185 Pa. 233, 64 Am. St. 646, 44 L.R.A. 549, and cases cited in opinion; Ickes v. Ickes, 237 Pa. 582, 44 L.R.A.(N.S.) 1118; Pooley v. Dutton, 165 Iowa 745; Brison v. McKellop, 41 Okla. 374; Hossfeld v. Hossfeld, 110 C. C. A. 131, 188 Fed. 61; Gregg v. Gregg, 37 Ind. App. 210; Multer v. Knibbs, 193 Mass. 556, 9 L.R.A. (N.S.) 322; Cornelius v. Cornelius, 233 Mo. 1; Leavell v. Leavell, 122 Mo. App. 654; Miller v. Miller, 122 Mo. App. 693; Barton v. Barton, 119 Mo. App. 507; Trumbull v. Trumbull, 71 Neb. 186; Beisel v. Gerlach, 221 Pa. 232, 18 L.R.A. (N.S.) 516; White v. White, 140 Wis. 538, 133 Am. St. 1100; Jones v. Monson, 137 Wis. 478, 129 Am. St. 1082. See Cochran v. Cochran, 127 App. Div. (N. Y.) 319; Allen v. Forsythe, 160 Mo. App. 262.

The burden is on the plaintiff to show bad faith and maliciousness of the defendant in advising the separation. Baird v. Carle, 157 Wis. 565; Pooley v. Dutton, 165 Iowa 745; Jones v. Monson, *supra.*

Bad faith of the defendant in advising separation must be alleged in the complaint. Baird v. Carle, *supra.*

The defendant may show facts in justification without pleading justification. Baird v. Carle, *supra.*

It is proper to instruct the jury that the presumption is that the defendant acted in good faith and not maliciously in advising a separation. Baird v. Carle, *supra.*

[56] Williamson v. Osenton, 136 C. C. A. 261, 220 Fed. 653; Pooley v. Dutton, 165 Iowa 745; Baird v. Carle, 157 Wis. 565; Leucht v. Leucht, 129 Ky. 700, 130 Am. St. 486; Bathke v. Krassin, 78 Minn. 272; Van Olinda v. Hall, 88 Hun 452; Rudd v. Rounds, 64 Vt. 432.

The rule of contributory negligence has no application. If the defendant's efforts were the effectual cause of the separation there may be a recovery although other causes contributed to bring it about. Nevins v. Nevins, 68 Kan. 410.

tiff's feeling toward his wife must be limited to the time previous to her association with the defendant.[57] In estimating the damages sustained by a wife by reason of the alienation of her husband's affections the effect produced upon her by the relations of her husband with defendant are to be considered.[58] In the absence of the aggravation of criminal conversation the relations which existed between the wife and husband may be proved for the purpose of showing his damage.[59] This is measured by the value of her services and marital consort, less the value of the performance of the husband's duty to support, clothe and care for her.[60] The loss of the comfort, society and service of the wife is to be compensated for,[61] and the disgrace and dishonor cast upon the husband are to be considered.[62] Damages may be allowed as smart money in the discretion of the jury under circumstances which permit their recovery in other tort actions,[63] regardless of whether there have been adulterous relations between the defendant and the plaintiff's wife.[64] It may be shown that the defendant attempted to use the influence of her property to effect the alienation, and to show in connection with that fact the amount of the property.[65] Under a statute allowing the recovery of punitive damages for a wrong done to the person, one who has intentionally or wil-

57 Fratini v. Caslini, 66 Vt. 273.

58 Frederick v. Morse, 88 Vt. 126.

59 Derham v. Derham, 125 Mich. 109; Millspaugh v. Potter, 62 App. Div. (N. Y.) 521; Bergman v. Solomon, 143 Ky. 581; Fuller v. Robinson, 230 Mo. 22.

The effect of ill treatment by the husband may be shown as bearing on the wife's attitude toward him. Pooley v. Dutton, 165 Iowa 745.

60 Rudd v. Rounds, *supra*.

61 Hartpence v. Rogers, 143 Mo. 623; Nichols v. Nichols, 147 Mo. 387; Wilson v. Coulter, 29 App. Div. (N. Y.) 85; Knapp v. Wing, 72 Vt. 334; Reading v. Gazzam, 200 Pa. 70, 106; Adkins v. Kendrick, 131 Ky. 779.

62 Linck v. Vorhauer, 104 Mo. App. 368, citing local cases.

63 Lupton v. Underwood, 3 Boyce (Del.) 519; Williamson v. Osenton, 136 C. C. A. 261, 220 Fed. 653; Woldson v. Larson, 90 C. C. A. 422, 164 Fed. 548; Gregg v. Gregg, 37 Ind. App. 210; White v. White, 76 Kan. 82; Nevins v. Nevins, 68 Kan. 410; Scott v. O'Brien, 129 Ky. 1, 16 L.R.A (N.S.) 742, 130 Am. St. 419; Leavell v. Leavell, 114 Mo. App. 24; White v. White, 140 Wis. 538, 133 Am. St. 1100; Hartpence v. Rogers, Nichols v. Nichols, *supra*.

64 Callis v. Merrieweather, 98 Md. 361, 103 Am. St. 404.

65 Knapp v. Wing, *supra*.

fully, without justification, alienated the affections of a husband from his wife may be liable for such damages.[66] The amount of the damages is in the discretion of the jury, which will not be reviewed unless there is reason to believe it has been abused.[67]

Where the action is by the wife for the alienation of the affections of the husband her occupation may be shown, and perhaps her social position as well as his, as bearing upon the value of the latter's *consortium;* but the wealth, rank, social position or condition of the defendant is immaterial,[68] except to show motive and which party was the enticer.[69] In Missouri the reputed wealth of the defendant or of one of several defendants may be proved to affect compensatory damages.[70] In Nebraska the earning capacity and financial condition of the husband bears on the *quantum* of damages.[71] If punitive damages may be recovered the wealth of the defendant may be shown,[72] but not his reputed wealth.[73] The plaintiff wife may prove the cost of her separate maintenance if the evidence tends to show the husband's ability to support her,[74] and may also show that as the result of the defendant's wrongful acts the entire support of her children has devolved upon her.[75] The value of property transferred by him is to be regarded.[76] If the conveyance was made to the defendant without consideration and he has since enjoyed it the facts are material as bearing upon his intent to deprive the plaintiff of all means of support out of the

66 Williams v. Williams, 20 Colo. 51.

67 Warnock v. Moore, 91 Kan. 262; White v. White, 101 Minn. 451; Fuller v. Robinson, 230 Mo. 22; Hartpence v. Rogers, Cochran v. Cochran, *supra.* See Silvey v. Silvey, 96 Miss. 137. In Allen v. Forsythe, *supra,* the verdict was reduced one-third. In Phelps v. Bergers, 92 Neb. 851, a verdict was set aside because grossly excessive.

68 Bailey v. Bailey, 94 Iowa 598. The defendant's wealth is immaterial where the action is by the woman's husband. Flinders v. Bailey, 133 Iowa 616.

69 Scott v. O'Brien, *supra.*

70 Leavell v. Leavell, *supra.*

71 Harvey v. Harvey, *infra.*

72 Taylor v. Wilcox, 188 Ill. App. 18; White v. White, 76 Kan. 82; Leavell v. Leavell, *supra;* Nichols v. Nichols, 147 Mo. 387.

73 Derham v. Derham, 125 Mich. 109.

74 Bowersox v. Bowersox, 115 Mich. 24.

75 Taylor v. Wilcox, 188 Ill. App. 18.

76 Williams v. Williams, 20 Colo. 51.

property of her husband, and as tending to show that the defendant was interested in separating the husband from his wife. It may also be shown that by reason of such conveyance the plaintiff had not recovered anything under a judgment of separation obtained against her husband for alimony or costs.[77]

Mental anguish, mortification and injured feelings must be compensated for;[78] and if proof has been made of the social standing and character of the parties and the circumstances surrounding the wrong done there is a sufficient basis for awarding damages.[79] Damages will not be allowed for any injury to the good name and character or the dishonor of the plaintiff's family.[80] The effects of mental suffering may be proved, as that it resulted in physical suffering, which produced a miscarriage. "This was competent evidence as tending to show the effect of defendant's conduct upon her health, and was proper for the consideration of the jury, in case they found that the miscarriage was the direct result of such conduct, upon the question of damages in connection with the wilful misconduct of the defendants in alienating the husband's affections from his wife and causing him to separate from her."[81] The general allegation of damages covers mental anguish and mortification.[82]

It may be proven in mitigation that the plaintiff had been guilty of improper relations with a certain man or woman whether the consort had knowledge thereof or not.[83] Evidence of the plaintiff's reputation for chastity when married is immaterial if it had nothing to do in bringing about the separation

[77] Wilson v. Coulter, 29 App. Div. (N. Y.) 85.

[78] Lupton v. Underwood, 3 Boyce (Del.) 519; Taylor v. Wilcox, 188 Ill. App. 18; Noxon v. Remington, 78 Conn. 296; Adkins v. Kendrick, 131 Ky. 779; Scott v. O'Brien, 129 Ky. 1, 16 L.R.A.(N.S.) 742, 130 Am. St. 419; Leavell v. Leavell, *supra;* Harvey v. Harvey, 75 Neb. 557; Hartpence v. Rogers, 143 Mo. 623.

[79] Rice v. Rice, 104 Mich. 371.

[80] Taylor v. Wilcox, 188 Ill. App. 18.

[81] Lockwood v. Lockwood, 67 Minn. 476.

[82] Nevins v. Nevins, 68 Kan. 410.

[83] Angell v. Reynolds, 26 R. I. 160, 106 Am. St. 707; Churchill v. Lewis, 17 Abb. New Cas. 226; Wolf v. Frank, 92 Md. 138.

Improper relations of the plaintiff with other women after the cause of action arose may not be shown. Welker v. Hazen, 247 Pa. 122.

from her husband.[84] The bad character of the wife of the plaintiff before marriage cannot be shown unless it is specially pleaded.[85] The cohabitation of the wife with her husband after knowledge of his illicit act may be considered in mitigation, as may delay in bringing the action.[86]

A person who has persuaded and enticed the wife of the plaintiff to refuse him marital intercourse must respond in compensatory and exemplary damages to the extent the jury may determine in view of all the evidence of his conduct, though that goes to show he committed adultery or alienated her affections from the plaintiff.[87] Testimony showing the conduct of the defendant after the plaintiff's wife had left him and after the bringing of the action is competent.[88]

[84] White v. White, 76 Kan. 82.

[85] Frank v. Berry, 128 Iowa 223.

[86] Churchill v. Lewis, *supra*.

[87] Plourd v. Jarvis, 99 Me. 161.

[88] Sweikhart v. Hanrahan, 184 Mich. 201.

CHAPTER XXXIX.

DAMAGES FOR TORTS IN ADMIRALTY.

§1286. Fundamental difference between liability in admiralty and at common law; exemplary damages.
1287. Division of loss in collision cases; contribution between joint wrongdoers.
1288. Rule applicable to other torts; in what proceedings recovery may be had by passengers; nominal damages.
1289. Liability confined to proximate loss; certainty of damage.
1290. Total loss; elements of damage.
1291. Total loss, what is.
1292, 1293. Partial loss; elements of damage.
1294. Interest.
1295. Mitigation of liability.
1296. Recovery by owner of cargo; who may sue.

§ 1286. Fundamental difference between liability in admiralty and at common law; exemplary damages. At common law a party injured by the act or neglect of another is entitled to recover such a sum as will place him in as good condition as though the wrong had not occurred. If his own conduct contributed to produce the result of which he complains he cannot obtain redress.[1] The civil law is in harmony with the common law on this proposition. The reason for the rule is said to be based upon grounds of public policy, which requires, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected. There is another and more commonly assigned reason for regarding contributory negligence as a defense instead of as a mitigation of damages—the law has no scales to determine whose wrongdoing was the most potent factor in causing the mischief. In courts of admiralty the rule is different. As between the parties to the wrong complained of, the loss resulting from a collision will be divided in three classes of cases: first, when there is no fault on either side; second, when the fault is inscrutable; and third,

[1] Belden v. Chase, 150 U. S. 674, 691, 37 L. ed. 1218, 1224.

when both parties are in fault.[2] This rule of apportionment emanated from the ancient maritime codes.

Exemplary damages are not recoverable in a suit *in rem* against a vessel for a maritime tort.[3] A claim therefor was disallowed for the forcible detention of possession of a tug by her charterers after a breach of their contract, where that was done under legal advice.[4] Such damages cannot be enforced against a vessel whose owner had no share in or knowledge of the malicious act because of which they were claimed.[5]

§ 1287. Division of loss in collision cases; contribution between joint wrong-doers. "The rule of admiralty in collision cases, as we understand it," said Justice Bradley, "is that where both vessels are in fault they must bear the damage in equal parts—the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained."[6] The judge further said: "But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode.[7] If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libelant one-half of the damage sustained by him—the damage sustained by the respondent not being regarded as the subject of investigation determinable in that suit.[8] This technical

[2] Cohen's Admiralty, 229.

[3] The William H. Bailey, 103 Fed. 799.

[4] The Mascotte, 72 Fed. 684.

[5] The Seven Brothers, 170 Fed. 126.

[6] The North Star, 106 U. S. 17, 20, 27 L. ed. 91, 93, citing The Catharine v. Dickinson, 17 How. 170, 15 L. ed. 233 (which case established the rule for the supreme court of the United States), and other cases confirmatory of it; The Conemaugh, 189 U. S. 363, 47 L. ed. 854; The Chattahoochee, 21 C. C. A. 162, 173 U. S. 540, 43 L. ed. 801, 74 Fed. 899; The Manitoba, 122 U. S. 97, 30 L. ed. 1095; The C. R. Hoyt, 136 Fed. 671.

[7] See The Itasca, 117 Fed. 885.

[8] The rule of The Milan, Lush. 388, that where both ships are at fault for a collision the cargo owners on one can recover against the other ship only one-half their damage, applied. The Drumlanrig, [1910] Prob. 249.

result of the form of proceedings and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party, and that each claim is independent of the other. But where both parties file libels, as they are entitled to do, although, to conform to the pleadings, a decree may be rendered in each suit in favor of the libelant for one-half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal." [9] In this country if both parties file libels the suits will be consolidated and the decree will pronounce for one-half of the difference of the damage sustained by the two vessels.[10] Where the injury results from the combined negligence of two or more [11] vessels the damages should be apportioned equally

[9] The North Star, *supra*.

The rule declared in The North Star is the same as that established in the house of lords a very short time before that case was decided. Stoomvaart Maatschappy Nederland v. Peninsular & O. S. N. Co., L. R. 7 App. Cas. 795 (July, 1882).

[10] Id.

[11] The S. A. McCaulley, 116 Fed. 107, modifying s. c., 110 id. 227.

It is said in The Eugene F. Moran, 143 Fed. 187: There are a number of authorities which hold that, in cases where one vessel is towing another, the tug and tow are to be considered as one vessel. The Niobe, 13 Prob. D. 556, [1891] App. Cas. 401; The Englishman and The Australian, [1894] Prob. 239; The Anerly, 58 Fed. 794; The Komuk, 120 id. 841. Other authorities hold that in such cases each vessel in each flotilla is a distinct entity, and each vessel at fault equally liable for any damage with the other vessels in fault. The Brothers, 2 Biss. 104, Fed. Cas. No. 1,969; The Peshtigo, 25 Fed. 488; The Lyndhurst, 92 id. 681; The Nettie L. Tice, 110 id. 461; The Doris Eckhoff, 41 id. 156; The Maling, 110 id. 227; The S. A. McCaulley, 116 id. 107. "In my opinion the rule which holds that each vessel in fault is to share equally with every other vessel in fault is upheld by the greater weight of authority, particularly in this country, and has the advantage of greater simplicity of application."

"Where all the tugs employed to perform a towage service belong to the same owner and injury is sustained by the vessel towed through the negligence of one of such tugs, they are rightly regarded in the same situation as a single vessel."

Rebstock v. Gilchrist T. Co., 132 Fed. 174, and cases cited.

Regardless of the number of vessels at fault the liability is apportioned equally though more than one of them is owned by the same

between them, the right being reserved to the libelant to collect the entire amount from either of them to the extent of her stipulated value in case of the inability of the other to respond for her portion.[12]

The rule of equal liability is sometimes varied, as where there is mutual fault, the fault of one vessel being much greater than that of the other.[13] In such a case, as between the cargo owner and the vessels, the entire proceeds of the one most at fault would be devoted to making good the loss, and the other vessel will be liable for any deficiency.[14] Where the rule of equal liability governs it cannot be evaded by the purchase at a discount of claims for injuries to cargo by the agents of one of the vessels. In adjusting their liabilities such claims will be allowed at the sum paid, with interest.[15] On a libel for the loss of a vessel and cargo, a division of the damages having been decreed, if one of the parties, pending suit, buys the claims of the cargo owners he can recover from the other only for his proportion of the sum paid, with interest thereon.[16] The fact that one of the vessels at fault cannot be brought before the court because without the jurisdiction does not affect the right of the libeled vessel, which has paid all the damages, to be subrogated to the rights of the original damage claimant and to bring an independent suit against the other to establish her liability also and to enforce contribution.[17] The Harter act [18] has no application in case of a collision by mutual

person. The Eugene F. Moran, 212 U. S. 466, 53 L. ed. 600.

There is no liability upon a tow free from fault if she was passively in control of a tug; the two do not constitute one vessel. The Violetta, 141 Fed. 690. The Doris Eckhoff, 50 id. 134, 1 C. C. A. 494. See Sturgis v. Boyer, 24 How. 110, 16 L. ed. 591.

[12] The Sterling and The Equator, 106 U. S. 647, 27 L. ed. 98.

[13] See Lake Erie T. Co. v. Gilchrist T. Co., 142 Fed. 89, 73 C. C. A. 313.

[14] The Victory, 15 C. C. A. 490, 68 Fed. 395.

[15] The Gulf Stream, 58 Fed. 604, 64 id. 809, 12 C. C. A. 613.

[16] Id.

[17] The Mariska, 47 C. C. A. 115, 107 Fed. 989.

A vessel owner who has paid the damage done to a cargo by his own vessel and another in fault may recover from the latter by way of contribution. Erie R. Co. v. Erie & W. T. Co., 204 U. S. 220, 51 L. ed. 450.

[18] 27 U. S. Stats. 445.

fault, whereby one vessel and her cargo are totally lost, so as to prevent the operation of the general rule allowing the other vessel, after paying the entire value of the cargo, to recoup one-half of that amount out of the half of the damages awarded to the owners of the lost vessel.[19] The claim for contribution may be enforced in proceedings by the vessel-owner, who has paid in full the damages sustained by cargo-owners or passengers, for the limitation of his liability though the vessel against which the contribution is sought was not a party to the suit in which such liability was determined.[20]

§ 1288. Rule applicable to other torts; in what proceedings recovery may be had by passengers; nominal damages. If a person injured by a tort which is cognizable in the common-law courts brings his suit to recover therefor in a court of admiralty he elects to be compensated according to the rule there prevailing; and if his fault contributed to the wrong of which he complains he must be content with the recovery of a moiety of the damages resulting from it.[21] Where seamen are injured by the fault of the vessel on which they are serving and the co-operating fault of another vessel their recovery against the latter cannot exceed one-half their loss; the other half must be borne by themselves, inasmuch as they cannot claim compensation against their employer for an injury resulting from their own neglect.[22] The recovery by a seaman for the consequences of the negligence of the master or any member of the crew of the vessel or for an accident is limited to the expense of his maintenance

[19] The Chattahoochee, 21 C. C. A. 162, 173 U. S. 540, 43 L. ed. 801, 74 Fed. 899. See The Viola, 60 Fed. 296.

[20] In re Eastern D. Co., 182 Fed. 179.

[21] Atlee v. Northwestern Union P. Co., 21 Wall. 389, 22 L. ed. 619; McCord v. The Tiber, 6 Biss. 409; The Queen, 40 Fed. 694, applying the rule to a case of personal injuries; The Watson, 128 Fed. 201; Boucher v. Clyde S. Co. (1904), 2 Irish 129.

[22] The Queen, 40 Fed. 694; Jakobsen v. Springer, 31 C. C. A. 315, 87 Fed. 953; The Livingstone, 104 Fed. 918; Wm. Johnson & Co. v. Johansen, 30 C. C. A. 675, 86 Fed. 886; The Eddystone, 33 Fed. 925; Olson v. Flavel, 34 id. 477; The City of Norwalk, 55 id. 98; The Job T. Wilson, 84 id. 204, 208; The Transfer No. 4, 61 id. 336, 9 C. C. A. 520; In re Lakeland T. Co., 103 Fed. 328. *Contra*, The Prudence, 212 Fed. 541.

and cure.[23] As to passengers, shippers or consignees the measure of compensation for any wrong or breach of contract is damages to the amount of the whole loss sustained; being innocent of all wrong, they bear no proportion of the loss resulting from a collision,[24] in the absence of negligence contributing to the injury.[25] Their full damages may be recovered against either vessel in a suit brought therefor or they may be allowed in proceedings for the limitation of liability taken by the owner of either vessel in fault.[26] The damages allowed for the loss of life are largely in the discretion of the court, which proceeds upon the same rules as courts of common law.[27] In a proceeding *in personam* for the recovery of damages caused by the death of a stranger to the vessel, the rule that contributory negligence has merely the effect to divide the damages does not apply; admiralty will give effect to the statute of the state in which the wrong was done.[28] The master of a tug is a common-law bailee of a tow in his charge, and may recover its full value against another vessel which collides with the tow and causes its loss.[29] It is otherwise as to the charterer of a vessel for a fixed sum, he paying all her expenses and having full control and management. Her contributory fault is imputed to him.[30] While the damages done to a scow being towed by a tug, the owner being an innocent sufferer, are primarily chargeable in equal parts to the tug and the vessel which collided with her, if the owner of the scow is unable to obtain the sum charged

23 The Osceola, 189 U. S. 158, 47 L. ed. 760; The Charles H. Klinck, 172 Fed. 1019.

24 The Atlas, 93 U. S. 302, 23 L. ed. 885; The Victory, 15 C. C. A. 490, 68 Fed. 395; The Virginia Ehrman and The Agnese, 97 U. S. 316, 24 L. ed. 893. See § 1296.

25 The Lackawanna, 151 Fed. 499.

26 In re Eastern D. Co., 182 Fed. 179.

27 The Charlotte, 124 Fed. 989. See § 1259.

28 Monongahela River C. C. & C. Co., 196 Fed. 375.

29 The Jersey City, 2 C. C. A. 365, 51 Fed. 527; The Mercedes, 108 Fed. 559.

30 The Livingstone, 104 Fed. 918, reversed on other questions, 113 id. 879, 51 C. C. A. 560.

But where the owner of the vessel retains possession and control of its navigation the charter party is a mere contract of affreightment and the charterer may recover his full loss from the other vessel at fault. The Beaver, 135 C. C. A. 37, 219 Fed. 139.

against either he may compel the other to pay the whole.[31] The provisions of the Harter act do not affect the operation of the equitable rule which gives priority to the claim of the innocent cargo owners over that of the vessel owner against the fund available for the payment of damages sustained through a collision brought about by mutual fault.[32] Nominal damages are not awarded for personal torts in admiralty.[33]

§ 1289. Liability confined to proximate loss; certainty of damage. The liability in admiralty for the consequences of a collision is not more extended than in the common-law courts in cases of other torts. The wrong-doer must respond for all the direct injury which follows his wrongful act or culpable neglect; but he is not liable for anything beyond the direct consequences.[34] Where a boat engaged in transporting ice was so aged as to be too weak to stand the wear and tear it was ruled that for an injury to her, which caused the loss of her cargo, the party in fault was liable only to the extent that damage would have resulted from his act if the boat affected by it had been ordinarily fit for the business in which it was engaged.[35] Remote and contingent losses caused by the demoralization of business or otherwise cannot be recovered.[36] The catch of fish made by a fishing vessel totally lost, except as to her outfit, and the average catch of fish of other vessels in the same vicinity is not a good basis on which to make an award of profits from her prospective catch during her proposed expedition.[37] It may be questioned whether the better rule is not laid down in a later case which favors the view that the proof of damages need not amount to a demonstration. A fish net was damaged, and compensation claimed for the loss of fish therein and for

[31] The Job T. Wilson, 84 Fed. 204.

[32] The George W. Roby, 49 C. C. A. 481, 111 Fed. 601.

[33] In re California N. & I. Co., 110 Fed. 670.

[34] Brown v. Pillow, 98 C. C. A. 579, 174 Fed. 967; The J. G. Lindauer, 158 Fed. 449; The Rickmers, 73 C. C. A. 415, 142 Fed. 305; The Mary S. Lewis, 126 Fed. 848; The John H. May, 53 Fed. 664.

[35] Mould v. The New York, 40 Fed. 900. See Gilkey v. The Beta, 44 id. 389; Walaas v. Johnson, 204 Fed. 440.

[36] The Glenogle, 122 Fed. 503.

[37] The Menominee, 125 Fed. 530. See § 60.

the loss of the probable catch during the time the net was being repaired. The evidence of others who were fishing in the vicinity and the number of fish taken from the net after it was injured afforded a basis for awarding damages for being deprived of the opportunity to make a catch of fish.[38] If a collision deprives the master of a ship of his compass, chart and logline, thereby rendering it difficult if not impossible for him to know his exact whereabouts, and he judiciously undertakes to reach a place of safety, and is not chargeable with negligence in his attempt to do so, the wrong-doer is liable for the consequences, as the abandonment of the vessel made necessary by her becoming grounded. Depriving the vessel's officers of the means of averting such an accident is the proximate cause of the resulting loss.[39] If personal injuries result from a collision they may be recovered for [40] and so may the damage resulting from the loss of life.[41] The latter cause of action may be recovered for in a proceeding *in rem* against the vessel responsible for it.[42] In an English case in which the collision had previously been adjudged to be owing to the mutual fault of two vessels there was added to a moiety of the plaintiffs' claim, payable by the defendants, a moiety of the amount of damages recoverable from the plaintiffs by the owners of a barge against which the plaintiffs' vessel was driven in consequence of the collision. It was contended that, as the parties were joint tort-feasors, no contribution could be claimed from the defendants in respect of the damage to the barge paid by the plaintiffs. This contention was overruled, and it was held that liability for such consequential damage existed, notwithstanding it arose out of a tort.[43] The expense incurred in replacing papers lost by a libelant in a collision is too remote to be an element of damage.[44] A libelant may recover the reasonable

[38] The Seven Brothers, 170 Fed. 126.

[39] The City of Lincoln, 15 Prob. Div. 15.

[40] The George and Richard, L. R. 3 Adm. 466.

[41] Id.; The Sea Gull, Chase's Dec. 145.

[42] The Sea Gull, Chase's Dec. 145.

[43] The Frankland, [1901] Prob. 161.

[44] Jacobsen v. Dalles, P. & A. N. Co., 93 Fed. 975.

premiums paid a surety company for securing the payment of his costs or the release of a libeled vessel free from fault.[45] The salvage award in favor of a rescuing tug may be recovered, as may the costs paid therein and the value of property damaged.[46]

Under the maritime law a seaman who is injured or becomes ill while in the service of his ship is entitled to medical care, nursing and attendance, and to a cure, so far as a cure is possible, at the expense of the ship. The duty devolves upon the master to take all reasonable measures to that end; for his neglect in that behalf her owners are responsible. If neglect results in increasing the pain of the injured seaman and renders a temporary injury permanent he may recover therefor, though but for such neglect the liability of the owners would be limited as stated.[47] Damages for loss of earnings and expenses after discharge from service are recoverable from a shipowner who has failed to furnish proper medical attention and care to an injured seaman.[48]

§ 1290. **Total loss; elements of damage.** If a vessel is completely lost the libelant is entitled to have restored to him such a one as he has been deprived of. While the measure of damages for loss of a vessel is, in the first instance, the market value,[49] in the absence of a market for such type of vessel the damages are to be ascertained by deducting the amount of depreciation from the original cost.[50] It was said where there was a loss of a French fishing brig of the kind French fishermen are willing to use for their business, and such as are constantly built in France for that purpose, that the fact that

[45] The Volund, 104 C. C. A. 373, 181 Fed. 643; The Europe, 175 Fed. 596; The John D. Dailey, 158 id. 642.

[46] The Charles G. Lister, 174 Fed. 288.

[47] Croucher v. Oakman, 3 Allen 185; The M. E. Luckenbach, 174 Fed. 265; The Fullerton, 92 C. C. A. 463, 167 Fed. 1; The Troop, 63 C. C. A. 584, 128 Fed. 856; The Matterhorn, 63 C. C. A. 331, 128 Fed. 863; Wittekoppe v. New York & P. S. S. Co., 189 Fed. 920; Whitney v. Olsen, 47 C. C. A. 331, 108 Fed. 292.

[48] North Alaska Salmon Co. v. Larsen, 135 C. C. A. 661, 220 Fed. 93.

[49] Alaska S. S. Co. v. Inland Nav. Co., 128 C. C. A. 366, 211 Fed. 840.

[50] The Samson, 133 C. C. A. 260, 217 Fed. 344.

vessels of the same tonnage, which English and American fishermen consider superior to the French vessels, could be built or purchased for a considerably less sum in England or the United States was immaterial, in view of the fact that there was a regular market price in France for vessels like the one lost.[51] Where there was a total loss of an expensive pleasure yacht, for which there was no established market value, the court said that her original cost, her condition at the time of the loss and the sum for which the plaintiff could have got such another yacht built, were important matters in the calculation. Another inquiry of practical value would be, what amount any person of sufficient means, desiring to acquire a yacht of her size and character, might reasonably be expected to be willing to pay for the same rather than incur the cost of a new structure, considering, nevertheless, the inducements to secure the new by reason of the probable improvements and the other advantages which the new offers.[52] The test of the value of a vessel, in the absence of a market value, is what she was fairly worth to her owners from a business point of view.[53]

It has been held that the value of the property lost at the time of its destruction affords full indemnity to the owners of it,[54] and that there cannot be a recovery for lost freights or the contingent profits which the master of a vessel might realize from the allowances made to him upon the voyage.[55] All the adjudications have not held to this great strictness. Where a smack was negligently run down while performing salvage service her value was recovered and also damages for the loss of the anticipated salvage reward.[56] In a later English case than is referred to in note fifty-five the principle is said to be well established to allow the gross freight, less the expense which would have been incurred in earning it.[57] Where the vessel lost was without cargo, but was under charter, the profits

51 Guibert v. British Ship George Bell, 3 Fed. 581. See The Colorado, Brown 411.

52 The H. F. Dimock, 23 C. C. A. 123, 77 Fed. 226. See La Normandie, 7 C. C. A. 285, 58 Fed. 427.

53 The Harmonides, [1903] Prob. 1.

54 The Mobila, 147 Fed. 882.

55 The Columbus, 3 W. Rob. 164 (1849).

56 The Betsey Carnes, 2 Hagg. 28.

57 The Canada, Lush. 584 (1860).

under the charter-party, rather than interest on her value at the end of the journey, more accurately represented the loss to the owner, and was considered to be the equivalent of freight when a cargo is on board.[58] Where a vessel was lost while proceeding from her home port with a cargo to a foreign port, thence to go to another port and return home under a charter therefrom, her value was fixed as of the time she would have reached home, including the profits which would have been derived under all the charters, less a reasonable allowance on a percentage basis for contingencies.[59]

In this country the admiralty courts do not recognize any distinction between cases of partial and total loss in determining the damages which may be recovered for a collision. In both classes of cases they allow as part of the damages the net freight which the vessel was in process of earning at the time of her loss.[60] The rule has been applied, though it has recently been dissented from,[61] where a vessel was chartered for a fixed time and was wholly lost while engaged in the performance of the contract.[62] In the case last cited compensation was allowed for the loss of a verbal charter for the season which embraced many trips subsequent to the one on which the collision occurred. Judge Lowell stated that his ruling was "an advance upon the decisions," and Judge Brown has observed of it that "no other similar case in this country or in England is found."[63] The rule which permits the recovery of the net value of an existing charter rests upon the ground that the loss of the vessel is necessarily followed by a loss of the profits it would have made, because the charterer could not be obliged to accept performance of his contract by the employment of any other than the

[58] The Kate, [1899] 1 Prob. 165, 174.

[59] The Racine, [1906] Prob. Div. 273, following The Kate, *supra*.

[60] The Rebecca, 1 Blatch. & H. 356; The Baltimore, 8 Wall. 386, 19 L. ed. 465; The Hope, 5 Fed. 822; The Minnie, 26 id. 860.

[61] The George W. Roby, 49 C. C. A. 481, 111 Fed. 601; The Fontana, 56 C. C. A. 365, 119 Fed. 853. In the last case there was a recovery of interest on the value of the vessel and her pending freight.

[62] The Hope, 5 Fed. 822; The Freddie L. Porter, 8 id. 170. Compare The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456.

[63] The City of Alexandria, 40 Fed. 697.

stipulated vessel. Hence the rule stated does not apply where the contract provides for the accomplishment of results and leaves the contractor at liberty to use any instrumentalities he sees fit.[64]

There has arisen some difference of opinion as to the right to recover net freight which would have been earned by the lost vessel under a charter-party which she had not entered upon.[65] But that question has been put at rest by the supreme court of the United States. Brown, J., said for the court: The probable net profits of a charter may be considered in cases of delay, occasioned by a partial loss, where the question is as to the value of the use of the vessel pending her repairs. * * * But in cases of total loss the probable profits of a charter not yet entered upon are always rejected.[66] * * * In cases of a partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs; but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance, and if the vessel were under a charter which had months or years to run the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.[67]

There cannot be a recovery for lost freight when the vessel is wholly laden with her owner's goods at the time of the collision because of the rule which confines the recovery of the

[64] Id.; The North Star, 44 Fed. 492. In the last case a steamer was sunk after she had entered upon the performance of her charter. Her owner was paid a considerable sum for a re-assignment and release of his interest in the charter on the theory that he had the right to substitute another vessel. On that consideration it was held that he could not recover the profits which would have accrued to him from a complete performance of the charter.

[65] The Iberia, 46 Fed. 301.

[66] Citing The Amiable Nancy, 3 Wheat. 546.

[67] The Umbria, 166 U. S. 404, 421, 41 L. ed. 1053, 1062; Fabre v. Cunard S. Co., 3 C. C. A. 534, 53 Fed. 288; The Hamilton, 95 Fed. 844; In re Lakeland T. Co., 103 id. 328.

shipper to the value of the cargo at the place of shipment. Brown, J., said: "The compensation for which the shipowners look in the employment of their vessel to carry their own goods is solely in the expectation of the enhanced value of the goods at the place of discharge; and if that expectation of enhanced value cannot be considered in determining the owner's loss on the goods, I do not see how it can be any more considered as regards the loss of the ship, either directly or indirectly. Nor is that necessary; nor is the supposition of a fictitious charter necessary in order to satisfy the rule of *restitutio in integrum.* That rule will be fully satisfied by allowing to the libelants, as in the case of goods wholly lost at sea, the market value of their vessel at the port of sailing at the time she was devoted to the voyage, with interest from that date; and, in addition thereto, whatever stores or special equipment of any kind may have been provided for the voyage, including the wages of officers and men from the time they were engaged, as well as any other items of expense, if any, reasonably incurred for the prosecution of the voyage up to the time of loss, with interest on such sums from the time they were supplied or paid." [68] The evidence concerning unearned freight must be so clear that the court can estimate its value with reasonable certainty.[69]

In proving the value of a vessel it may be shown, as an element thereof, that she would have been able to earn a bounty under the law of her nationality; but, there cannot be a recovery for the loss of the bounty.[70] To the full value at the time she sunk there may be added the cost of raising her if that is necessary in order to ascertain whether she should be abandoned as a total loss or repaired; [71] and if it is necessary to remove her because she is a menace to navigation the expense of so doing may be recovered.[72]

[68] The Beatrice Havener, 50 Fed. 232.

[69] Pennell v. United States, 162 Fed. 75.

[70] Fabre v. Cunard S. Co., *supra.*

[71] The Venus, 17 Fed. 926; The Oneida, 84 id. 716.

[72] The Reno, 67 C. C. A. 479, 134 Fed. 555.

§ 1291. Total loss, what is. The fact that a vessel sinks after a collision does not of itself warrant the conclusion, as a matter of legal judgment, that either she or her cargo is a total loss.[73] If it appears probable that they may be raised without much expense and the vessel repaired, her owners cannot insist upon compensation as for a total loss if they have neglected to employ reasonable measures to mitigate the damage. In some cases allowance has been made for the cost of raising a sunken vessel though she was not repaired. This course has been taken when it was necessary to raise her in order to ascertain whether she should be abandoned as a total loss or not, and also when her removal was required because she was an obstruction to navigation.[74] In all these cases the vessels were sunk in rivers or harbors or in comparatively shallow water elsewhere. If the sunken vessel lies in deep water and was of comparatively little value before the collision her owner cannot incur large expense in raising her and charge the vessel in fault with it, and also with the cost of repairs, freight, demurrage and value of the cargo. In such a case the recovery will be limited to the value of the vessel, cargo, freight and personal effects before the collision occurred.[75] It is said in The Granite State[76] that there cannot be an established market value for barges, boats and other articles of that description as in cases of grain, cotton or stock. The value of such a boat depends upon the accidents of its form, age and materials; and as these differ in each individual, there could be no such value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a cheaper rate. But when the injured vessel is not a total loss, and is capable of

[73] The Baltimore, 8 Wall. 377, 19 L. ed. 463; The Bristol, 10 Blatch. 537; The Thomas P. Way, 28 Fed. 526; The Havilah, 50 id. 331; The Granite State, 3 Wall. 310, 18 L. ed. 179; The Ernest A. Hamill, 100 Fed. 509.

[74] The Empress Eugenie, Lush. 139; The Venus, 17 Fed. 925; The America, 11 Blatch. 485; The Mary Eveline, 14 id. 497; The Nebraska, 3 Bene. 261.

[75] The Havilah, 1 C. C. A. 519, 50 Fed. 331.

[76] 3 Wall. 310, 18 L. ed. 179.

being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages. Where the vessel was sunk in the ocean, the water being thirteen fathoms deep, after a blow by the bow of a steamer which cut into her port side and penetrated about half way through her, and one wrecking company declined to undertake to raise her, and another refused to do so for any percentage of her value when raised, but offered to make the effort for $3,000 contingent upon success and without regard to the value of the vessel as saved, a finding of a total loss was approved.[77]

§ 1292. Partial loss; elements of damage. If a damaged vessel has been repaired the measure of damages is not the difference between her value in her crippled condition and before the collision, but the cost of repairing and getting her in condition to be repaired,[78] though the repairs may put her in better condition than she was in before the injury.[79] The rule is *restitutio in integrum*. Because that rule is a profitable one to the owner of an injured vessel it is not to be extended beyond the requirement of the necessities of the case. He cannot recover for the increased cost or repairs caused by the fact that, on opening up the vessel, parts adjacent to those parts injured by the collision, and not directly involved therein, are found to be unsound, so that, on that account, the cost of repairing the part injured is increased over what it would have been if the adjacent parts had been sound. There may be instances, said the court, where adjacent parts which are unsound are so closely connected with the parts directly injured by the collision that they cannot be distinguished in making repairs, so that repairs of all the parts amount only to repairs of a single whole;

[77] La Normandie, 7 C. C. A. 285, 58 Fed. 427.

[78] The Schooner Catharine v. Dickinson, 17 How. 170, 15 L. ed. 233; Union Ice Co. v. Crowell, 5 C. C. A. 49, 55 Fed. 87; The Norwood, 215 Fed. 655.

If repairs restore a vessel to her full efficiency for the purpose for which she was constructed and used an allowance in addition to their cost will not be made on the theory that there has been depreciation in value because the repairs were not made in a different manner. The Loch Trool, 150 Fed. 429.

[79] The John H. Starin, 116 Fed. 433.

but in order to establish a proposition of that kind and thus enlarge the field of application of the rule of *restitutio in integrum* the facts should be very clear and strong.[80] The reasonable value of the repairs made, and not the amount paid therefor, is the rule of damages, especially if there has been negligence in not procuring surveys on notice and in ascertaining the probable damages before accepting the only bid for making the repairs.[81] The cost of temporary repairs is not the measure of recovery; the owner is entitled to such sum as will restore the vessel to the condition she was in before the injury.[82] Where the repairs are so extensive as to practically amount to a rebuilding of the vessel the measure of damages is the value at the time of injury less the net salvage.[83] By refusing the lowest offer to repair his vessel the owner must show that she would have been injured by removing her to the place where repairs pursuant to such offer would have been made. He may recover the dock expense while the vessel was there pending the negotiations concerning the repairs.[84] Inability to repair a permanent injury at a reasonable cost justifies an allowance in addition to the cost of the repairs made.[85] The rule of liability for the cost of repairs has been disregarded where the damage done might as well be attributable to the worn-out or rotten condition of the vessel as to the collision. Both vessels were treated as at fault, and the injured one recovered one-half the cost of the repairs.[86]

Demurrage can only be recovered when profits have act-

[80] The Rickmers, 73 C. C. A. 415, 142 Fed. 305; The Providence, 38 C. C. A. 670, 98 Fed. 133.

If the repairs are in excess of what was made necessary by the collision the difference between the appraised value of the vessel and the sum she sold for before the repairs were made, measures the damages. The Marie Palmer, 173 Fed. 569.

[81] The Robert Hadden, 68 Fed. 1017.

Prima facie evidence of the cost of repairs is made by showing the necessity therefor, that they were made at the lowest prices, and payment of the bills. The Bratsberg, 127 Fed. 1005.

[82] The Elmer A. Keeler, 194 Fed. 339.

[83] Shaver Transp. Co. v. Columbia Contract Co., 208 Fed. 347.

[84] The M. Kalbfleisch, 59 Fed 198.

[85] The McIlvaine, 126 Fed. 434, citing The Helgoland, 79 id. 123.

[86] The John R. Penrose, 86 Fed. 696; The Smedley, 216 Fed. 926.

ually been, or may reasonably be supposed to have been lost, and the amount of such profits has been proved with reasonable certainty.[87] The English law on this point may not be harmonizable with the rule just stated. In a recent case in the house of lords a steam dredger was injured and its owners were deprived of the use of it for some weeks, and the works on which they were engaged were delayed. The dredger belonged to trustees who were charged with the duty of maintaining a harbor and waterway; their funds were derived from rates, and they were not entitled to distribute profits. It was held, reversing the court of appeal,[88] that though the trustees were not out of pocket in any definite sum they were entitled to recover damages for the loss of the use of the dredger. The ground upon which the court of appeal proceeded was that it was not shown that the plaintiffs had sustained any tangible pecuniary loss. The Lord Chancellor said: I am not quite certain that I understand what is meant by the use of the word "tangible." If by that is meant that, in order to entitle a plaintiff to recover, you must be able to show that during the period of repair to his vessel, or his cart, or his horse, some specific money has been lost by the period of time during which the article has not been susceptible of being used, the principle so affirmed would, as it appears to me, go very far beyond the particular case now before your lordships. But to my mind it is a principle for which there is no authority whatever. This public body has to pay money like other people for the conduct of its operations, and if it is deprived of the use of part of its machinery, which deprivation delays or impairs the progress of their works, I know no reason why they are not entitled to the ordinary rights which other people possess, of obtaining damages for the loss occasioned by the negligence of the wrong-

[87] The North Star, 80 C. C. A. 536, 151 Fed. 168; The Loch Trool, 150 Fed. 429; The Conqueror, 166 U. S. 110, 41 L. ed. 937; The Saginaw, 95 Fed. 703; The Emerald, [1896] Prob. Div. 192.

Reasonable certainty that a vessel would have obtained a profitable charter entitles her to recover the probable earnings she would have made. The North Star, 140 Fed. 263.

[88] The Emerald, *supra*.

doer.[89] As interpreted in a subsequent case [90] the principle here declared is that where by the wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages. In the case last cited a lightship was damaged in a collision caused by the negligence of the defendants. The place of the damaged ship was, during the time of her repair, taken by another ship which was maintained at an annual expense for the purpose of such emergency. It was held that the harbor board was entitled to recover not only the out-of-pocket expenses caused by the collision, but also substantial damages for the loss of the services of the damaged ship during the time her place was taken by the substituted ship. Following the case last cited it has been ruled in favor of a government whose war vessel was laid up for repairs that the contingency that she might have been needed for use was ground for allowing damage in the nature of demurrage while repairs were being made. In other words, if the owner of property is deprived of the use of it he need not show he would have used it; liability results from putting it out of his power to use it.[91] The value of the work done by a dredger maintained by the public for its service may be recovered during the time of her disability. Such value may be arrived at by proving the cost of maintaining and working her and adding thereto the depreciation in her value at the time of the collision. Profits were not an element of the damages, no second vessel having been hired to take her place.[92]

"In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum,* the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use that price is the test of the sum to be recovered.

[89] Owners of No. 7 Steam Sand Pump Dredger v. Owners of S. S. Greta Holme, [1897] App. Cas. 596.

[90] Owners of the Steamship Mediana v. Owners, Master & Crew of the Lightship Comet, [1900] App. Cas. 113; The Mediana, [1899] Prob. 127.

[91] The Astrakan, [1910] Prob. Div. 172.

[92] Mersey Docks & H. Board v. The Marpessa, [1907] App. Cas. 241.

When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is upon the libelant to prove the extent of the damages actually sustained by him." [93] The expenses of the vessel from the port of departure to the place of collision and return from thence to a port of repair have been disallowed on the theory that the voyage might not have been a profitable one.[94] There are cases which ignore some of the contingencies which may have influenced the court in ruling

[93] The Potomac, 105 U. S. 630, 632, 26 L. ed. 1194, 1195, citing Williamson v. Barrett, 13 How. 101, 14 L. ed. 68; Sturgis v. Clough, 1 Wall. 269, 17 L. ed. 580; The Cayuga, 2 Ben. 125, 7 Blatch. 385, 14 Wall. 270, 20 L. ed. 828; The Gazelle, 2 W. Rob. 279; The Clarence, 3 id. 283. To the same effect are The Umbria, 166 U. S. 404, 41 L. ed. 1053; The Mayflower, Brown's Adm. 376; The Belgenland, 36 Fed. 504; The Gorgas, 10 Ben. 666; The Argentino, 13 Prob. Div. 191, 14 App. Cas. 519; The Mary Steele, 2 Low. 370; The Armonia, 26 C. C. A. 338, 81 Fed. 227; La Champagne, 53 Fed. 398; The Bulgaria, 83 id. 312.

In the case before the court demurrage was allowed for the loss of three trips in the established trade of the vessel on the basis of the profits which according to the average of her whole business for the season she would have realized on that number of trips. This allowance was made, instead of the charter value of the vessel, because she was engaged in a regular established line for which she was peculiarly fitted, and her charter value could not be satisfactorily ascertained; neither could her place be supplied by a vessel equally fitted for the service. No deduction was made for insurance or for wear and tear or for necessary repairs at the end of the season. It did not appear that there was any need of repairs at the time of the collision, nor that there was any decrease in the cost of insurance while the repairs were being made. On these considerations a majority of the court were unable to say as matter of law that the damages were excessive. See The Margaret J. Sanford, 37 Fed. 148.

The rule stated in the text is not applied in the courts of Ontario. Brown v. Beatty, 35 Up. Can. Q. B. 328.

There cannot be a recovery of profits on behalf of a vessel worked at a loss in building up a trade. The Boldewell, [1907] Prob. Div. 286.

The allowance of demurrage based on lost profits takes account of the expenses of the vessel, including wages and food of the crew. The Marie Palmer, 173 Fed. 569.

[94] Memphis, etc. P. Co. v. The H. C. Yaeger, 4 Fed. 927.

the proposition last stated. In an English case[95] the injured vessel was in ballast on a voyage from Antwerp to Montreal to load a cargo of grain. She collided with another vessel October, 10, and was compelled to put into Queenstown for repairs. She was under a profitable charter, which her owners did not abandon until it became apparent to them that she could not be repaired in time to resume her voyage and enter upon the performance of her charter until after the time the St. Lawrence is usually closed for navigation. The abandonment of the charter being justifiable, it was ruled that the loss of the profit which would have accrued from its performance was a ground of damage in favor of the vessel owners. It has been pointed out,[96] that there were several contingencies which made it uncertain whether, had no collision occurred, the charter would have been performed. There was the contingency in the first place of the vessel's ever reaching Montreal; and second, of her charterers being ready to furnish her with the stipulated cargo, and also whether she would accomplish the homeward voyage and earn her freight. It is essential to the right to recover dead freight as an item of damage that the vessel which has lost freight in consequence of a collision shall make reasonable efforts to secure a fresh cargo.[97] If an existing charter is lost in consequence of a collision and a charter at lower rates is necessarily taken for the residue of the charter period the vessel owner is entitled to compensation for the loss resulting up to the expiration of the original charter.[98] It is not a valid reason for refusing demurrage that its allowance, added to the cost of the repairs, will make a sum in excess of the value of the vessel before the collision, if the owners acted with care, skill, diligence and fidelity and in good faith in the course pursued, and the excess of the cost of repairs over the estimates could not have been foreseen.[99] Neither is it a sufficient reason for disallowing demurrage while

95 The Consett, 5 Prob. Div. 229, [1880]; The Argentino, 13 id. 61 [1888].

96 The Hope, 5 Fed. 822.

97 The C. P. Raymond, 28 Fed. 765.

98 The Belgenland, 36 Fed. 504; The Star of India, 1 Prob. Div. 466; The Consett, 5 id. 229.

99 The Glaucus, 1 Low. 366, 372.

a boat is detained for repairs that the work she would have been put to but for the accident was done or might have been done by another boat owned by the libelants and which was at the time not otherwise employed.[1] This ruling is said to be maintainable on the ground that the owners of the disabled boat were entitled to procure another boat to take her place. It is immaterial to the wrong-doer whether the boat substituted was hired from other persons at market rates or supplied by the libelants themselves. If the latter course is pursued they are entitled to charge for the use of their own boat at the market value of its use, for the time being, as though they had hired her from other persons.[2] Such value is not always determinable by the net value of the charters of the disabled vessel for the days her place was taken by other vessels owned by the same person. The better rule is, where substituted service can be obtained, to measure the recovery by its cost. In The Emma Kate Ross, before the circuit court of appeals for the fourth circuit,[3] it appeared that the vessel was twenty-one days undergoing repairs, and was chartered for all but one of them. During eight of these days her owner hired another boat to fill her engagements at a cost of $110 per day. During the remaining days he substituted other boats of which he was the owner. It was ruled that the amount which the disabled boat would have earned under her charters was not to be taken as the measure of the wrong-doer's liability, but that the rate which was paid for the substituted vessel was the proper standard, it not appearing that she was incompetent for the service. It was not improper to apply this rule because the other vessels owned by the libelant were larger than the disabled one, and, therefore, presumably competent to earn more compensation.

The principle we have been considering and which is sustained

[1] Coffin v. The Osceola, 34 Fed. 921; The State of California, 4 C. C. A. 393, 54 Fed. 404; The Providence, 38 C. C. A. 670, 98 Fed. 133; The Cayuga, 14 Wall. 270, 20 L. ed. 828; The Favorita, 18 Wall. 598, 603, 21 L. ed. 856, 859; The North Star, 140 Fed. 263.

[2] New Haven S. Co. v. Mayor, 36 Fed. 716; The Emma Kate Ross, 46 id. 872; The Favorita, 18 Wall. 598, 21 L. ed. 856; The Cayuga, 14 id. 278, 20 L. ed. 829, 7 Blatch. 385.

[3] 2 C. C. A. 55, 50 Fed. 845.

by an unbroken current of American adjudications was not formerly recognized in England to the same extent it is here. It was there held by the privy council that indemnity for consequential loss from the detention of a vessel can only be recovered where an actual loss resulting therefrom is shown, and reasonable proof of its amount is made. This principle was applied by holding that a claim for demurrage during the detention of a vessel injured in a collision while a substituted vessel, the property of the same owners, was doing at the defendant's expense and indemnity for loss occasioned by the substitution, the work which the disabled vessel ought to have done, is not recoverable. In other words, only such sum could be recovered as would reimburse the owners for the actual outlay they incurred, such as for the lodging, maintenance and wages of the crew; loss of profits which might have been earned by the particular vessel were not an element of the damages.[4] The recovery of such profits is not allowable in Ontario, nor is the expense of hiring another vessel to take the place of the one injured.[5] The English case just cited is overthrown by the decisions of the house of lords in the cases stated in the first paragraph of this section. Doubtless the Canadian courts will change the rule there to conform to the law as declared in those cases. The lord chancellor's discussion of The City of Peking is very interesting, and tends to harmonize it with the rule laid down in the cases referred to.

The allowance in favor of a vessel damaged while she is being repaired is measured by the value of her use. The rate of demurrage stipulated for in the charter, it has been held, is not evidence of such value in favor of her owner against a third person,[6] but there are authorities to the contrary.[7] If the rate so stipulated is adopted as the value of the use of a vessel there cannot be also a recovery for wharfage and fees for

[4] The City of Peking, 15 App. Cas. 438 (1890).

[5] Brown v. Beatty, 35 Up. Can. Q. B. 328.

[6] The Jas. A. Dumont, 34 Fed. 428; The Margaret J. Sanford, 37 id. 148.

[7] The Gov. Ames, 187 Fed. 40; The Rebecca v. The America, Fed. Cas. No. 11, 619; The Columbia, 48 C. C. A. 596, 109 Fed. 660, citing Orhanovich v. The America, 4 Fed. 337, 342; The Silica v. The Lord Warden, 30 id. 845.

watchmen, because "demurrage" includes these.[8] The damages recoverable include a charge for wharfage and necessary commissions when there is not an acceptance of the rate of demurrage thus fixed.[9] If expenses have been judiciously incurred in saving property and thus reducing the amount of the loss, they are recoverable,[10] although the loss may have been increased by the efforts made.[11] Under this head a recovery has been allowed for expense in unloading the vessel and for the cost of boarding her passengers during the delay beyond the scheduled time of sailing.[12] In awarding compensation for the time a vessel was obliged to lay by in order to have necessary repairs made the allowance will not be extended beyond that actually required for that purpose in a place equipped for making them.[13] Nor will full allowance be made where the work is done with unreasonable slowness.[14] Time consumed in consultation between her owner and an attorney in deciding on the former's course will not be regarded.[15] There cannot be a recovery of what might have been earned on a voyage voluntarily abandoned in order that the vessel might undertake one for which she was previously chartered where the delay in making repairs was extended beyond the time necessary to repair the damage done by the collision in order to make other repairs which would need to have been made in the near future. In such a case the recovery was limited to one-half the value of her use while she was undergoing repairs.[16] If expenses have been incurred in retaining the crew during the time repairs were being made there may be a recovery of the amount.[17] One of the owners of an injured vessel cannot recover for his time devoted to over-

[8] The C. P. Raymond, 28 Fed. 765.

[9] The Jas. A. Dumont, 34 Fed. 428; The Fannie Tuthill, 17 id. 87.

[10] The Mary S. Lewis, 126 Fed. 848; Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. 596; Hoffman v. Union F. Co., 68 N. Y. 385.

[11] The Narragansett, Olcott 246, 267.

[12] The Saginaw, 95 Fed. 703.

[13] The Sovereign of the Seas, 137 Fed. 812.

[14] Davis v. Atlantic Dredging Co., 212 Fed. 351.

[15] Seabrook v. Cross-Ties, *supra*.

[16] The Sequoia, 132 Fed. 625. But see § 157.

[17] Hoffman v. Union F. Co., 68 N. Y. 385; The Switzerland, 67 Fed. 617; The Bulgaria, 83 id. 312; Fisk v. City of New York, 119 id.

seeing repairs to her, it not being shown there was a necessity for his so doing, that his services were of any value, or had been paid for, or payment promised by his co-owners.[18] Nor can the owner recover the salary paid his superintendent in charge of his dredging work during the time the dredge was being repaired, it appearing the latter attended to his usual duties notwithstanding the overseeing of the repairs.[19] A foreign owner may recover the reasonable commission paid an agent residing in the country in which the repairs were made for the disbursement of the funds needed to meet the expense thereof, and also a reasonable fee for his services in superintending the repairs and in preparing the contract therefor.[20] Dry dockage rendered necessary in order that repairs may be made may be recovered for, as may the cost of new sails bought to replace old ones used for stopping leaks caused by the collision, it not appearing that the latter could have been repaired.[21] In addition to the cost of dockage, there may be a recovery of the reasonable expense of securing a new rating of the vessel and of the wages of a watchman while she was being repaired.[22] The recovery for demurrage must not exceed the sum which the boat as such, and without men or supplies, could have been chartered for.[23] If the owner elects to have his vessel sold in a damaged condition demurrage is not recoverable because interest is the legal indemnity for delay in collecting the balance of her original value from the wrong-doer.[24] Demurrage is not recoverable where a pleasure yacht is injured, no actual loss being shown; the expense of caring for her during the time repairs are being made may be recovered.[25]

256; The Mary S. Lewis, 126 Fed. 848.

18 The State of California, 4 C. C. A. 393, 397, 54 Fed. 404.

19 The McIlvaine, 126 Fed. 434; The Sarah Thorp, 46 id. 816; The Itasca, 117 Fed. 885.

20 The Dorchester, 134 Fed. 564.

21 The Switzerland, 67 Fed. 617.

22 The Sequoia, 132 Fed. 625.

23 The Emilie, 4 Bene. 235.

24 La Champagne, 53 Fed. 398.

Demurrage has been allowed up to the time of sale although it was made before the repairs were. The Cumberland, 135 Fed. 234, citing Philadelphia S. T. Co. v. Philadelphia R., Fed. Cas. No. 11,085, aff'd 23 How. 209, 16 L. ed. 433.

25 Fisk v. City of New York, 119 Fed. 256.

The value of the use of a vessel while detained may be proved otherwise than by the opinions or estimates of experts. A satisfactory way of making such proof is to show the time lost, and her average earnings for a reasonable time prior and subsequent to the collision.[26] In the absence of evidence showing the market value of the use of a vessel the value of her use to the owner in the business in which she was engaged at the time of the collision is a proper basis for estimating damages for her detention, and the books of the owner showing her earnings about the time of the collision are competent evidence of her probable earnings during the time of her detention.[27]

§ 1293. Same subject. As a general rule a vessel which has been damaged may be repaired at the place where the damage was done if that is practicable; but unnecessary expense must not be incurred. If the cost of making repairs there is exceptionally great and the owner voluntarily takes his vessel to another place where they are made at much less cost, his recovery must not exceed the amount he actually pays for them, including the time and expense of moving her from one place to the other. The fact that an estimate of the expense of repairs was made by surveyors at the port where the damage was done does not suspend the application of this rule.[28] If a vessel sunk by a collision is raised and found to be in such a condition that it is prudent and practicable to repair, if her owners act with promptness they may recover the cost of raising her and her cargo and of making such temporary repairs as she may need,[29] and also the sum it costs to put the vessel, her furniture and fittings into as serviceable a condition as she and they were in before the collision occurred, as well as a reasonable amount of demurrage and compensation for damage sustained by the cargo.[30] If the crew join with the vessel owners in a libel against the vessel in fault they may recover for the loss of their personal effects; but their value should not be put at what it

[26] The State of California, 4 C. C. A. 393, 54 Fed. 404; Thompson v. Winslow, 130 Fed. 1001.

[27] The Conqueror, 166 U. S. 110, 127, 41 L. ed. 937, 945; Sturgis v. Clough, 1 Wall. 269, 17 L. ed. 580.

[28] The City of Chester, 34 Fed. 429.

[29] The Catharine v. Dickinson, 17 How. 170, 15 L. ed. 233.

[30] The Minnie, 26 Fed. 860; Comerford v. The Melvina, 43 id. 77.

would cost to replace them.[31] If the injured vessel is free from fault the expense of towing her to her home port for permanent repairs, instead of stopping at an intermediate port for temporary repairs, may be recovered if the damage is serious and the navigation was dangerous, in the absence of proof of ignorance or dishonesty on the part of her master.[32] If making repairs results in other expenses they may be recovered; as for surveying,[33] the injuries done a vessel and the superintendence of repairs, and the readjustment of the ship's compass, her re-rating at Lloyd's, the cost of the master's protest made in a foreign port, which is required by general usage, and wages of the crew under contract during her detention.[34] It is otherwise as to the expense of the master's protest made in a foreign port as a means of collecting insurance, because that grows out of a contract wholly between insurer and insured and is not made necessary by the act of the wrong-doer.[35] The expense of saving the lives of the crew of the wrecked vessel and returning them to the nearest port may be recovered. Such services are regarded as being rendered in the performance of a maritime duty, and not as a voluntary charity merely.[36] Salvage money paid by the owner of a damaged vessel and interest thereon is a proper charge against the wrong-doer;[37] but it is otherwise as to the costs and counsel fees incurred in defending a suit to recover for salvage services.[38] There cannot be a recovery of the expenses of a convoy to an injured vessel unless the necessity therefor is made clear.[39] The recovery of damages for delay

[31] Id.; Leonard v. Whitwill, 19 Fed. 547.

[32] The Benjamin F. Hunt, Jr., 34 Fed. 816; The Fannie Tuthill, 17 id. 87; Comerford v. The Melvina, 43 id. 77; The Bulgaria, 83 id. 312.

[33] The Bulgaria, 83 Fed. 312.

[34] The Belgenland, 36 Fed. 504; New Haven S. Co. v. Mayor, id. 716; The Alaska, 44 id. 498; The Switzerland, 67 id. 617.

It is otherwise as to the expense of re-rating if the vessel has been repaired in a different manner from that in which she was originally constructed. Gilkey v. The Beta, 44 Fed. 389.

[35] The Belgenland, *supra;* The City of Norwich, 118 U. S. 468, 30 L. ed. 134.

[36] Leonard v. Whitwill, 19 Fed. 547.

[37] The Alaska, 44 Fed. 498; La Champagne, 53 id. 398.

[38] Greenwood v. The Fletcher, 42 Fed. 504; The Favorite, 4 Bene. 132; The Glenogle, 122 Fed. 503.

[39] The Alaska, 44 Fed. 498.

precludes a recovery of the expense of forwarding the cargo.[40] If all the damage was not caused by the collision, or repairs not made necessary thereby were made at the same time as those which were so made necessary, the expense of a survey and other expenses arising out of making them will be divided between the vessel at fault and the libelant.[41]

§ 1294. **Interest.** Where the loss is only partial the probable earnings have been allowed the libelant if there was no more certain mode of arriving at his loss by the detention of his vessel while repairs were being made. In such cases, and also where the charter value of the vessel is recovered, there cannot also be a recovery of interest. But interest has been allowed on the damages recovered for detention as part of such damages,[42] and on all the items recoverable where the loss was partial,[43] including the sum paid for wrecking services.[44] Where other vessels were substituted for the one injured while repairs were being made, interest on the value of the latter was allowed in the absence of clear proof of what the value of her services was.[45] If there is a total loss interest on the value of the vessel or cargo is recoverable from the date of the casualty,[46] unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion whether the loss is partial or total.[47] Where it is partial only and the vessel proceeded against has been bonded in limited liability proceedings under the federal statutes in a fixed sum to "abide and answer the decree," interest is not to be computed until the date of the decree of the district court;[48] and so where both vessels are at fault.[49] Some

[40] The Glenogle, 122 Fed. 503.

[41] The Bratsberg, 127 Fed. 1005; The John F. Gaynor, 124 id. 743.

[42] The Natchez, 24 C. C. A. 89, 78 Fed. 183.

[43] The Bulgaria, 83 Fed. 312; The Oregon, 89 id. 520.

[44] The John H. Starin, 116 Fed. 433.

[45] Great Lakes T. Co. v. Kelley Island L. & T. Co., 100 C. C. A. 108, 176 Fed. 492.

[46] Guibert v. British Ship George Bell, 3 Fed. 581; The Rabboni, 53 id. 952; The Reno, 67 C. C. A. 479; 134 Fed. 555.

[47] The North Star, 140 Fed. 263, 44 id. 492, 62 id. 71, 10 C. C. A. 262, 278; Bethell v. Mellor, 135 Fed. 445; The Eliza Lines, 65 C. C. A. 538, 132 Fed. 242.

[48] The Manitoba, 122 U. S. 97, 30 L. ed. 1095; The José E. Moré, 37 Fed. 122; The H. F. Dimock, 23 C. C. A. 123, 77 Fed. 226.

[49] The Itasca, 117 Fed. 885.

discretion is exercised in fixing the time from which interest is allowed. In some courts the rule is to allow it on unliquidated demands from the time of judicial ascertainment of the amount of the damage done. It is ground for allowing it from an earlier time if the suit has been pending a long time and many of the large items involved were not questioned.[50] In the second circuit it may be allowed in the discretion of the court from the date the disbursements were made.[51] It has been refused after decree where both vessels were at fault.[52] Interest on the cost of repairs is not to be computed prior to the time the money was to be paid.[53] If a vessel is permanently injured compensation is due as of the time the injury was done, and interest as damages for withholding payment may be added, the computation to be made from the time of the injury.[54] It has been said that the allowance of interest upon the cost of repairs and sums expended for salvage services is a matter of discretion; if the repairs make the vessel more valuable than she was before the collision interest will not be allowed.[55] But the better rule is that it should be allowed in the absence of special circumstances rendering it inequitable.[56] Interest was given a libelant who was diligent in bringing the case to a decision, the other party having sought to delay the trial,[57] and has been refused prior to the decree affirming the award where the prosecution of the suit was long delayed.[58] It has also been recovered on the amount paid for the wreck by the purchaser during the period

[50] Great Lakes T. Co. v. Kelley Island L. & T. Co., *supra*.

[51] The Mahanoy, 127 Fed. 773.

[52] The Glenochil, 128 Fed. 963.

[53] The Sitka, 156 Fed. 427. See *infra*.

[54] The Marie Palmer, 173 Fed. 569; The Harold, 84 Fed. 698; The Crathie, [1897] Prob. 178.

Where a vessel was so badly injured as to necessitate a rebuilding interest was allowed from the date of the injury on her then value less the net salvage. Shaver Transp. Co. v. Columbia Contract Co., 208 Fed. 347.

[55] The Alaska, 44 Fed. 498; The Syracuse, 97 id. 978; The Rickmers, 73 C. C. A. 415, 142 Fed. 305.

[56] Harrison v. Hughes, 119 Fed. 997, citing The M. Kalbfleisch, 59 id. 198; The Natchez, 24 C. C. A. 49, 78 Fed. 183; Brent v. Thornton, 45 C. C. A. 214, 106 Fed. 35; The James A. Dumont, 34 id. 428; The Bulgaria, 83 id. 312.

[57] The Rabboni, 53 Fed. 948.

[58] The Sovereign of the Seas, 139 Fed. 812.

required by him to make repairs;[59] and on the sum awarded as demurrage for delay in making negotiations respecting repairs made necessary by the collision.[60] One who appeals from a decree in his favor thereby puts it out of the power of the other party to pay, and is not entitled to interest on his original recovery pending the appeal.[61] Where intervening petitions claiming damages are filed after the discharge of the vessel on stipulation and are treated as original libels, interest on the sum recovered will be computed from the time the order for issuing process was granted.[62] Where the libelant materially changed his case on appeal by new evidence he was allowed interest on the expenditures for repairs only from the time of filing the mandate of the appellate court.[63] On the affirmance of a decree for the libelant, which included interest, he will be allowed interest on the entire sum decreed him in the absence of special circumstances.[64] The general principle that the government is not liable for interest in tort actions is applicable to proceedings against it for the fault of one of its vessels unless the statute authorizing the suit provides for the recovery of it.[65] Interest is not allowable on damages for personal injury or death until the amount is judicially ascertained and determined either by judgment,[66] by decree in proceedings for limitation of liability,[67] or by a commissioner's report,[68] in which case it may be allowed as a matter of discretion from the completion of the report and notice thereof given to the parties, where considerable time has elapsed before confirmation and decree. While ordinarily the rate of interest allowed by courts of

59 La Champagne, 53 Fed. 398.

60 The M. Kalbfleisch, 59 Fed. 198; The J. G. Gilchrist, 173 Fed. 666 (recoverable from date of loss or injury, disapproving The Eloina, 4 id. 573, and The Sitka, *supra*, holding that interest runs only from the date of the decree).

61 The Express, 8 C. C. A. 182, 59 Fed. 476.

62 The Oregon, 89 Fed. 520.

63 The Switzerland, 67 Fed. 617.

64 The Umbria, 8 C. C. A. 181, 59 Fed. 475, approving The Blenheim, 18 Fed. 47, and disapproving Deems v. Canal Line, 14 Blatch. 474.

65 Pennell v. United States, 162 Fed. 75; Watts v. Same, 129 id. 222. See § 332.

66 Burrows v. Lownsdale, 66 C. C. A. 650, 133 Fed. 250.

67 The Argo, 127 C. C. A. 456, 210 Fed. 872.

68 Union Steamboat Co. v. Chaffin's Adm'rs, 122 C. C. A. 598, 204 Fed. 412.

admiralty is not affected by state laws, it being usually six per cent.,[69] yet it has been held that on damages resulting from collision on inland waters within the jurisdiction of a state interest will be allowed at the statutory rate of such state both before and after decree.[70]

§ 1295. **Mitigation of liability.** The common-law doctrine that a wrong-doer's liability is not mitigated by a benefit accruing to the injured party from his contract with another applies in admiralty. Hence the payment of insurance upon a lost vessel does not lessen the liability of the party responsible for a collision;[71] nor is liability for depreciation in the value of a cargo affected because the owner obtained a rebate of duty on account of its damaged condition.[72] In an action to recover for damage done a barge which was in tow of a consort belonging to the owners of the barge the value of the use of the latter is not to be lessened by the rule which fixes the value of towage generally, but only the actual expense of the towage in the particular case.[73] The duty of the owner of a vessel to endeavor to raise and repair her and save the cargo exists only where there is a reasonable probability that the loss can be thereby mitigated; he may act on the report of experts sent by the insurer to investigate the practicability of raising her or removing her cargo.[74]

§ 1296. **Recovery by owner of cargo; who may sue.** Where a cargo is lost at sea as the result of a collision its owner is entitled to recover the prime cost or market value of it at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits.[75] In some cases where the cargo has been recovered and sold after various expenses were incurred in

[69] The Aleppo, 7 Bene. 120, Fed. Cas. No. 158 (following Hemmenway v. Fisher, 20 How. 258, 15 L. ed. 799; The Oregon, 89 Fed. 520; The Norwood, 215 Fed. 655.

[70] Cambria S. S. Co. v. Pittsburgh S. S. Co., 129 C. C. A. 210, 212 Fed. 674, 51 L.R.A.(N.S.) 966.

[71] The Monticello v. Mollison, 17 How. 152, 15 L. ed. 68. See § 158.

[72] The Umbria, 8 C. C. A. 194, 59 Fed. 489; The Eroe, 17 Blatch. 16.

[73] The Cayuga, 8 C. C. A. 188, 59 Fed. 483.

[74] Pettie v. Boston T.-B. Co., 49 Fed. 464.

[75] The Aleppo, 7 Bene. 120; The Umbria, 8 C. C. A. 194, 59 Fed. 489;

putting it in proper order the rule of damages has been declared to be the difference between the market value of the goods if uninjured and their value as damaged.[76] When the goods have no ascertainable market value at the place of shipment indirect means must be resorted to for the purpose of ascertaining their real value there. In a case where the loss was of a cargo of guano, owned by the Peruvian government, the loss having occurred while the cargo was in transit to New York, it was held that evidence of value based upon an estimate of the price at which sales of it were usually made in New York, with a fair deduction for profits and expenses of every kind, afforded a just basis for fixing the measure of recovery.[77] It has been said that it is immaterial to the application of this rule how near the lost vessel may have been to her port of destination at the time the collision occurred.[78] In the absence of a market for property at the place for which it was destined it will be assumed it was worth at least what it cost at the place of shipment, with the freight charges added.[79] In several cases, however, as where whales captured at sea have been tortiously converted in regions where there was no market for them or their products, in order to do justice the courts have been obliged to adjust their value by the price at the controlling market of the country in which the suit has been brought at the time the vessel which sustained the loss could have reached there without unreasonable delay, less the expense of carrying the product to that market.[80] The same rule has been adopted where there have been collisions between whaling and fishing vessels.[81] In the case last referred to the court allowed the price at the

The Scotland, 105 U. S. 24, 26 L. ed. 1001; The Oceanica, 156 Fed. 306; The Eagle Point, 136 Fed. 1010.

[76] The Umbria, *supra.*

[77] The Scotland, 105 U. S. 24, 26 L. ed. 1001. In The Joshua Barker, Abb. Adm. 215, there was a loss of cargo through the sole fault of the vessel which had it on board. The damages were measured by its value at the place of delivery.

[78] Guibert v. British Ship George Bell, 3 Fed. 581; The Amiable Nancy, 3 Wheat. 546, 4 L. ed. 456; The Vaughan and The Telegraph, 14 Wall. 258, 267, 20 L. ed. 807, 809.

[79] The Olympia, 156 Fed. 252.

[80] Bourne v. Ashley, 1 Low. 27; Bartlett v. Budd, id. 223; Taber v. Jenny, 1 Sprague 315.

[81] Swift v. Brownell, 1 Holmes 467; Guibert v. British Ship George Bell, 3 Fed. 581.

nearest port, which was not remote from the place where the injury occurred, such port being a market for fish, and refused to allow the price at the port for which the vessel was destined. It was contended that, inasmuch as in collision cases where freight has actually been contracted for, the freight then pending, less the expense of completing the voyage, is allowed as part of the damages, and that in the case of a fishing vessel, the fish on board not having cost anything, the difference between the price at the port nearest which the loss occurred and the price at the port of destination should not be regarded as profit but as the freight earned by the vessel and wages earned by the crew according to the several and respective shares of the former and the latter in the proceeds of the "catch." The court thought the application of the rule contended for would open the doors to the very dangers and uncertainties sought to be excluded by the decisions directed against the recovery of profits in any shape; but allowed the value of the fish at the nearest port without deducting the small expense which would have been incurred in reaching there, and also interest on such value from the time of the collision, but refused to make an allowance for the fish which the master reported might have been taken with reasonable certainty during the portion of the fishing season and which the collision deprived the appellants the benefit of.[82] Where a cargo of dates gathered on the river Euphrates was lost it was held that the shipper might recover as part of his damages the expense of sending an agent there to superintend the picking and the rent of a house for one year for the shelter of the men employed, though the use of the house continued but for six weeks. It appeared that houses are usually rented for that term by those engaged in the business of gathering the fruit.[83] If a collision occurs in American waters the cargo owner may recover average charges legally assessed against the cargo in the foreign port of destination because of the collision, regardless of the time of their payment.[84] Where

[82] Guibert v. British Ship George Bell, *supra*.

[83] The Umbria, 46 Fed. 927.

[84] The Energia, 13 C. C. A. 653, 61 Fed. 222, 66 Fed. 604; Erie & W. T. Co. v. Chicago, 101 C. C. A. 170, 178 Fed. 42.

cargo was laden on board at a foreign port for an English port and, owing to a collision, was damaged and landed and sold at another English port than that for which it was destined the recovery was measurable by the sound value of the cargo if it had been duly delivered, less the net proceeds of the sale.[85]

A shipper or consignee who has freight on either of two vessels which come into collision with each other, or on a third vessel which is injured by others, may proceed in a common-law court or in admiralty, by a proceeding *in rem* or by a libel *in personam,* against the owner of either or both the offending vessels and recover the entire amount of his damages.[86] If the proceeding is in admiralty against both the offending vessels the decree should be against each of them for one moiety of the entire damages to the extent of the value of the vessels respectively; any balance of the moiety in excess of the value of either vessel which may not be collected is a charge against the other to the extent of its value beyond its own moiety.[87] In case of a collision between British vessels mutually in fault a United States court of admiralty will apply the English rule and permit the cargo owner to recover but one-half the loss from either vessel.[88]

The right of the owner or master of the vessel as bailee of all cargo, prior to its delivery, to sue for the benefit of the owners for injuries caused by others to their property,[89] is not affected by the Harter act.[90] But the charterer of a vessel for a fixed sum, he having full control and management, may not so sue; her contributory fault is imputed to him.[91]

85 The Activ, 17 Times L. Rep. 351.

86 The Atlas, 93 U. S. 302, 23 L. ed. 885; The Juniata, 93 U. S. 337; The Britannic, 39 Fed. 395; The Ruth, 178 Fed. 749.

87 The Alabama and The Gamecock, 92 U. S. 695, 23 L. ed. 763.

88 The Eagle Point, 73 C. C. A. 569, 142 Fed. 453, reversing s. c., 136 Fed. 1010.

89 The Beaconsfield, 158 U. S. 303, 39 L. ed. 993; The Jersey City, 2 C. C. A. 365, 51 Fed. 527; The Mercedes, 108 Fed. 559.

90 Erie & W. T. Co. v. Chicago, 101 C. C. A. 170, 178 Fed. 42.

91 The Livingstone, 104 Fed. 918, reversed on other questions 51 C. C. A. 560, 113 Fed. 879.

CHAPTER XL.

DAMAGES UNDER THE FEDERAL EMPLOYERS' LIABILITY ACT.

§1297. Introductory.
1298. Historical.
1299. Scope of act.
1300. Amendment of 1910.
1301. Validity.
1302. Effect.
1303. Same subject; effect on state compensation acts.
1304. Binding effect of federal decisions.
1305. Employers within the act.
1306. Employees within the act; necessity for employment in interstate commerce.
1307. Same subject; tests.
1308. Same subject; existence of relation of master and servant.
1309. Same subject; necessity for direct and substantial relation to interstate commerce.
1310. Same subject; instrumentalities or employees engaged in both classes of commerce.
1311. Same subject; interstate character of traffic.
1312. Same subject; trains operated between intrastate termini.
1313. Same subject; injury while not actively employed.
1314. Same subject; negligent fellow-servant need not be engaged in interstate commerce.
1315. Same subject; preparation of instrumentalities for use.
1316. Same subject; employees of electric railways.
1317. Same subject; employees engaged in construction work.
1318. Same subject; repairs and maintenance.
1319. Same subject; movement of cars, switching, coupling, etc.
1320. Same subject; employees engaged in transportation by water.
1321. Same subject; miscellaneous employees.
1322. Negligence under the act.
1323. Assumption of risk.
1324. Contributory negligence; effect.
1325. Same subject; distinction between contributory negligence and assumption of risk.
1326. Same subject; employee's negligence as the sole cause of injury.
1327. Same subject; what constitutes contributory negligence.
1328. Same subject; burden of proof.

1329. Same subject; violation of federal statutes.
1330. Same subject; instructions on contributory negligence.
1331. Damages for personal injuries.
1332. Damages in case of death; beneficiaries.
1333. Same subject; measure and elements of damages.
1334. Same subject; recovery for pain and suffering of decedent.
1335. Same subject; extraneous circumstances as affecting recovery.
1336. Same subject; joinder of actions for pain and suffering and pecuniary loss.
1337. Same subject; instructions.
1338. Same subject; apportionment of damages.
1339. Same subject; distribution of the amount recovered.
1340. Release, compromise, and former adjudication or recovery; releases in general.
1341. Same subject; release subsequent to injury.
1342. Same subject; compromise or release by decedent as affecting action for his death.
1343. Same subject; effect of release by beneficiary.
1344. Same subject; power of representative to compromise.
1345. Same subject; former adjudication or recovery.
1346. Limitation of actions.
1347. Pleading; requisites and sufficiency in general.
1348. Same subject; amendments.
1349. Same subject; actions for death.
1350. Same subject; alternative; allegations setting up both state and federal law.
1351. Practice in general.
1352. Same subject; parties.
1353. Same subject; removal of causes.
1354. Same subject; evidence.
1355. Same subject; instructions.
1356. Same subject; special interrogatories.
1357. Same subject; question for jury.
1358. Appeal and error.

§ 1297. Introductory. The Federal Employers' Liability Act raises many new and perplexing questions, many of which are still a matter of grave doubt. Its importance may be judged from the fact that it has been estimated that it applies to at least eighty per cent. of the thousands of employees in the service of the railroads in the United States.[1]

While an exhaustive discussion of the act and its construction is not within the scope of a work of this character, except in so far as it applies to the subject of damages, a brief resumé of the

[1] See Roberts' Injuries to Interstate Employees on Railroads, § 11.

provisions of the act and their application is essential to an understanding of the subject. For reasons which will be apparent it was deemed advisable to treat the entire subject in a single chapter, independently of other divisions of the Law of Damages as applied to personal injuries.

§ 1298. Historical. In 1906 congress passed the first Federal Employers' Liability Act. This act applied to all common carriers engaged in interstate commerce and their employees. It was declared invalid by the United States Supreme Court because of its application to all carriers, and all of their employees irrespective of whether or not either one or both were engaged in interstate commerce at the time of the injury.[2]

The decision of the supreme court invalidating the first act was handed down January 6, 1908, and on April 22, 1908 the second act was approved.[3]

§ 1299. Scope of act. In some of its provisions the act resembles acts in force in a few of the states, notably Texas.[4]

The first section of the act of 1908 provides that every common carrier by railroad engaged in interstate or foreign commerce, shall be liable to any person injured "while he is employed by such carrier in such commerce," or in case of his death, to his personal representative, for the benefit of the surviving spouse and children of such employee; "and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines,

[2] First Employers' Liability Cases, 207 U. S. 463, 52 L. ed. 297, aff'g Brooks v. Southern Pac. Co., 148 Fed. 986, and Howard v. Illinois Cent. R. Co., 148 Fed. 997.

[3] 35 U. S. Stat. at L. 65, c. 149.

[4] Vernon's Sayles' Stats. Art. 6649; San Antonio, U. & G. R. Co. v. Moya, — Tex. Civ. App. —, 173 S. W. 608.

Oregon Employers' Liability Law, sec. 6: "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage." This section has been construed as requiring the jury to compare the negligence of both parties and from such relative estimate determine the percentage of negligence properly chargeable to the employer. Sonniksen v. Hood River Gas & Electric Co., 76 Ore. 25.

appliances, machinery, track, roadbed, works, boats, wharves, or other equipment."

The second section is similar in tenor to the first, with the exception that it applies only to carriers by railroad in the "Territories, the District of Columbia, the Panama Canal Zone, or other possessions of the United States."

Section three of the act provides that the employee's contributory negligence shall not bar a recovery, "but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee." It also provides that no employee shall be deemed guilty of contributory negligence "where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The fourth section provides that the employee shall not be deemed to have assumed the risk where the violation by the carrier "of any statute enacted for the safety of employees" contributed to his death or injury.

The fifth section declares that "any contract, rule, regulation, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void." The carrier is permitted, however, to set off any sum which it has "contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto" on account of the injury or death.

Section six fixes the period of limitations at two years "from the day the cause of action accrued."

The seventh section defines the term "common carrier" as including "the receiver or receivers or other persons or corporations charged with the duty of the management and operation of the business of a common carrier."

The eighth section declares that nothing in the act "shall be held to limit the duty or liability of common carriers or to impair the rights of their employees under any other act or acts of Congress." It also saves pending proceedings and rights of action under the act of 1906.

Porto Rico is a "possession" within the meaning of the act[5] and since the Employers' Liability Act cannot be given full effect unless the Safety Appliance Act is also in force in the Island, that act also applies.[6]

§ 1300. Amendment of 1910. Section six of the original act was amended by an act approved April 5, 1910, which added a clause providing that "action may be brought in a circuit court of the United States, in the district of the residence of the defendant, or in which the cause of action arose, or in which the defendant shall be doing business at the time of commencing such action. The jurisdiction of the courts of the United States under this act shall be concurrent with that of the courts of the several states, and no case arising under this act and brought in any state court of competent jurisdiction shall be removed to any court of the United States.

This amendment also added a new section to be known as section nine, which contained a very important provision: "Any right of action given by this act to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury.

§ 1301. Validity. All doubts as to the validity of the act of 1908 were set at rest by the United States Supreme Court in a memorable decision.[7] The court, in upholding the act, said in part: "The clauses in the Constitution (Art. 1, § 8, c. 3 and 18) which confer upon Congress the power to regulate commerce * * * 'among the several States' and 'to make all laws which shall be necessary and proper' for the purpose, have been con-

[5] American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

[6] American R. Co. of Porto Rico v Didricksen, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

[7] Mondou v. New York, N. H. & H. R. Co., (Second Employers' Liability Cases) 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373.

sidered by this court so often and in such varied connections that some propositions bearing upon the extent and nature of this power have come to be so firmly settled as no longer to be open to dispute, among them being these: 1. The term 'commerce' comprehends more than the mere exchange of goods. It embraces commercial intercourse in all its branches, including transportation of passengers and property by common carriers, whether carried on water or by land. 2. The phrase 'among the several States' marks the distinction for the purpose of governmental regulation, between commerce which concerns two or more States and commerce which is confined to a single State and does not affect other States, the power to regulate the former being conferred upon Congress and the regulation of the latter remaining with the States severally. 3. 'To regulate,' in the sense intended is to foster, protect, control and restrain, with appropriate regard for the welfare of those who are immediately concerned and of the public at large. 4. This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which such commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the Constitution. But, of course, it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce. 5. Among the instruments and agents to which the power extends are the railroads over which transportation from one State to another is conducted, the engines and cars by which such transportation is effected, and all who are in any wise engaged in such transportation, whether as common carriers or as their employees. 6. The duties of common carriers in respect of the safety of their employees while both are engaged in commerce among the States, and the liability of the former for injuries sustained by the latter, while both are so engaged, have a real or substantial relation to such commerce, and therefore are within the range of this power." [8]

[8] Citing Cooley v. Philadelphia, 12 How. 299, 315–317, 13 L. ed. 996, 1003; The Lottawanna, 21 Wall. 558, 22 L. ed. 654; Sherlock v. Alling, 93 U. S. 99, 103–105, 23 L. ed. 819; Smith v. Alabama, 124

§ 1302. **Effect.** The supremacy of acts of Congress over state regulations in matters within the powers granted to the federal government in the Constitution was firmly established in one of the earliest decisions of the Supreme Court of the United States.[9] "The government of the United States, then, though limited in its powers," said the court, "is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land, 'anything in the Constitution or laws of any state, to the contrary notwithstanding.' "

It follows as a necessary sequence that all state regulations affecting the liability of common carriers by railroad to their employees, while both are engaged in interstate commerce, are superseded, and the sole remedy of an employee, or his beneficiaries in case of death, where the injury or death occurs while both the carrier and the employee are engaged in interstate commerce, is under the federal act.[10] Being complete and entire

U. S. 465, 31 L. ed. 508; Nashville, C. & St. L. R. Co. v. Alabama, 128 U. S. 96, 99, 32 L. ed. 352; Peirce v. Van Dusen, 24 C. C. A. 280, 78 Fed. 693, 698–700, 69 L.R.A. 705; Baltimore & O. R. Co. v. Baugh, 149 U. S. 368, 378, 37 L. ed. 772; Patterson v. Bark Eudora, 190 U. S. 169, 176, 47 L. ed. 1002; Johnson v. Southern Pac. Co., 196 U. S. 1, 49 L. ed. 363; Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1, 51 L. ed. 681; First Employers' Liability Cases, 207 U. S. 463, 495, 52 L. ed. 297, aff'g 148 Fed. 986, 997; Adair v. United States, 208 U. S. 161, 176, 178, 52 L. ed. 436; Baltimore & O. R. Co. v. Interstate Commerce Commission, 221 U. S. 612, 618, 55 L. ed. 878; Southern R. Co. v. United States, 222 U. S. 20, 56 L. ed. 72, 3 N. C. C. A. 822.

[9] M'Culloch v. Maryland, 4 Wheat. 316, 4 L. ed. 579.

[10] Mondou v. New York, N. H. & H. R. Co., (Second Employers' Liability Cases) 223 U. S. 1, 56 L. ed 327, 1 N. C. C. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373; Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, Ann. Cas. 1914C 176, rev'g 189 Fed. 495; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, Ann. Cas. 1914C 156, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240; Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 204 N. Y. 135; North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; Wabash

in itself the act is not to be pieced out by the state laws upon the subject.[11]

It cannot be contended that the state law giving a right of action for wrongful death in favor of persons who are not actual dependents was not superseded by the act because the two acts do not cover precisely the same field, as the act was intended to establish the nature and extent of an interstate carrier's liability to its employees engaged in interstate commerce.[12]

§ 1303. Same subject; effect on state compensation acts. The most important conflict between the federal act and state regulations which has not as yet been determined by the Supreme Court of the United States is the conflict with the various workmen's compensation acts adopted by the several states.

As will be pointed out in a subsequent chapter, liability under the compensation acts is based on contract, and the right to compensation arises *ex contractu.*[13] In theory, it is a form of industrial insurance, the burden of industrial accidents being placed upon the industry rather than upon the workman. With but few exceptions railroads are included within the industries subject to the acts, although many expressly exclude employees "for whom a rule of liability or method of compensation has been or may be established by the Congress of the United States." [14]

Under these circumstances it is contended on the one hand that the remedies provided by the federal act and the compensation acts are separate and distinct, and that where there is no negligence on the part of the carrier the compensation acts apply, while, on the other hand, it is claimed that both in fact occupy the same "field," and, this being true, the compensation acts must give way to the federal law. Numerically the courts are evenly divided, New York and New Jersey adopting the

R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 181 Ill. App. 511, writ of error dismissed; Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87.

11 Jones v. Charleston & W. C. R. Co., 98 S. C. 197.

12 Jones v. Charleston & W. C. R. Co., 98 S. C. 197.

13 Chapter 41, *post.*

14 New York Consol. L. c. 67, L. 1914, c. 41.

former view, while the courts of Illinois and California adhere to the latter view. Writers are equally divided on the subject.[15]

The question was first incidentally presented to the New York Court of Appeals in Jensen v. Southern Pacific Company,[16] where it was claimed that the compensation act of that state did not apply to employees engaged in interstate commerce. Upon this question the court said: "The statute does not purport directly to regulate or impose a burden upon interstate commerce, but merely undertakes to regulate the relation between employers and employees in this state. Such regulation may, and no doubt does indirectly affect commerce, but to the extent that it may affect interstate or foreign commerce it is plainly within the jurisdiction of the state, until congress by entering the field excludes state action." In answer to the claim that the federal act was exclusive it was held that the question was not involved as the defendant was in fact a carrier by water, its business being "transportation by steamships which, as far as appears, may not, even indirectly, be related to transportation by railroad, certainly not by any particular line of railroad."

In a later case[17] the question was squarely presented to the New York Court of Appeals, and as squarely decided. It was held that the compensation act of that state did not cover the field occupied by the federal act, and hence where there was no negligence on the part of the employer, a railroad employee injured while engaged in interstate commerce was entitled to relief under the state law. The court said in part:

"The Federal Constitution, in express terms, grants to congress jurisdiction over interstate commerce. The exercise by congress of a power granted to it by express terms supersedes all legislation on the same subject by the states. In the exercise of the power so conferred congress has prescribed the liability of carriers, for injuries resulting from negligence, to their employees while engaged in interstate commerce. 35 U. S. Stat. 65. The Federal Employers' Liability Act is therefore, in so

[15] See Roberts' Annotation 9 N. C. C. A. 286, and Boyd's Article Yale Law Review, May 1916.

[16] Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286.

[17] Winfield v. New York Cent. & H. River R. Co., 216 N. Y. 284, 10 N. C. C. A. 916.

far as it attempts to prescribe the rules of liability for injuries resulting from negligence, paramount and exclusive, and must so continue until congress shall see fit to remit the subject to the reserved police powers of the state. * * *

"Another principle which has been enunciated with the same clearness is that when the federal and state governments have jurisdiction to enter the same sphere, the state may legislate upon matters within that sphere until such time as congress shall prescribe regulations upon the same subject. * * *

"In the light of these principles, let us examine the Federal Employers' Liability Act and the Workmen's Compensation Law of this state and endeavor to ascertain whether they assume to deal with the same subject-matter. If upon examination it is found that they do, then in so far as employers and employees are engaged in interstate commerce, the provisions of the federal statute must be regarded as paramount and exclusively operative. If upon examination it is found that these two statutes do not cover the same subject-matter, we will be in a position to distinguish the different spheres in which each may be given effect. A recognition of the principles upon which the federal and state statutes are founded will demonstrate that they are not *in pari materia.* The Federal Employers' Liability Act prescribes rules under which certain employers are liable to their employees for injuries which result to the latter from negligence. The Workmen's Compensation Law is radically different in principle, purpose, scope, and method from the Federal Employers' Liability Act. It inaugurated an entirely new method of dealing with industrial accidents. Under its provisions compensation paid to the employee under the state statute is the result of injury arising in the course of employment, and is paid, regardless of fault or contract. The principle underlying the state statute is that as injuries to workmen are necessarily incident to the operation of certain hazardous occupations, the expense of compensating the employees for such injuries is properly chargeable upon the occupation. The purpose of this act was to establish an insurance fund to which employers are required to contribute, out of which fund compensation to workmen is paid, and contribution to which by the

employer relieves him of further liability. The scope of the act is much broader than the Federal Employers' Liability Act, because under its provisions the employee is awarded compensation for all accidental injuries arising in the course of his employment, whether they result from negligence or not, which are not self-inflicted or sustained as the result of intoxication. The method by which compensation is given to the employee is different from the method by which redress may be secured in an action brought under the provisions of the Federal Employers' Liability Act. Under the state statute the injured employee presents his claim to an administrative board or commission. Notice is given to the parties interested. The proceedings are informal. The compensation awarded the employee is not such as is recoverable under the rules of damages applicable in actions founded upon negligence. It is based on loss of earning power and compensation for medical, surgical, or other attendance or treatment or funeral expenses. Perhaps, without inaccuracy, it may be said that the primary purpose of this act was to give compensation in those cases where no claim of negligence on the part of the employer could reasonably be made. Having in mind the different principles which underlie the two statutes, the different purposes sought to be accomplished by them, the restricted scope of the federal statute, and the broad scope of the state statute and the different method by which redress is obtained under these statutes, can they reasonably be said to cover the same subject-matter? We are of the opinion that they cannot be so regarded. We think it is evident, also, that congress has recognized the difference between these two kinds of statutes. In enacting the Federal Employers' Liability Act it intended to occupy and exclusively pre-empt the field in which the liability of certain employers engaged in interstate commerce to their employees is prescribed when the latter were injured as the result of negligence. It did not intend to enter upon the field of compensation for industrial accidents which were not the result of negligence, but left that field open for occupancy by the state until such time as it should assume to legislate upon this subject. The view that congress intended to observe the distinction between the two kinds of

statutes referred to is fortified by the fact that it has passed a workmen's compensation law exclusively applicable to federal employees in which liability is not made to depend, either upon fault or contract (35 U. S. Stat. 556), whereas, as to certain private employments, it has regulated the subject only in those cases where the employee is injured as the result of negligence (35 U. S. Stat. 65). The Workmen's Compensation Statute of this state was not in any way designed to conflict with the authority of congress over interstate commerce. * * *

"It is true, of course, that the act is to be judged, not only by its purpose, but by what it provides may be done under it. Even considering it in the light of this principle, we think that it may lawfully be held to cover such a case as the present without in any way trespassing upon the field of federal jurisdiction. As yet, as to private employments, congress has not assumed to make any provision as to compensation for accidents not the result of negligence, and, congress not having entered upon this field, the state may lawfully do so, until such time as congress shall assume to exercise its power over this subject. The moment congress shall enter upon this field all state regulations upon the subject will be abrogated. The field which congress has pre-empted by the enactment of the Federal Employers' Liability Act is far removed from that of awarding compensation for industrial accidents that are not the result of negligence."

The reasoning of the New Jersey courts is very similar to that of the New York.[18]

[18] Rounsaville v. Central R. Co., 87 N. J. L. 371, where the court said in part, "The Federal Employers' Liability Act is an act, as its name imports, to regulate the liability of employers, and as its body shows, is applicable only to liability in tort for negligence. No new right of action is given. All that is done is to take away certain defenses which had come to be thought unjust. The legal liability of the employer under the act does not depend upon the terms of the contract of service and is neither increased nor diminished thereby. The amount of the pecuniary liability is in no way regulated or limited. The act applies only to certain classes of employers. In all these respects the Workmen's Compensation Act differs. Liability thereunder is contractual, and, while the contract liability is implied from silence, either party is at liberty to adopt or reject this

The Illinois Industrial Board at the outset took the position that the Federal Employers' Liability Act did not supersede the State Compensation Act as to employees engaged in interstate commerce. This decision was sustained by the Illinois Appellate Court.[19] But on the case being taken to the Supreme Court, the decision of the Appellate Court was reversed, the court holding squarely that congress in passing the Federal Employers' Liability Act had taken exclusive possession of the subject-matter of the liabilities of railroad companies to interstate employees. Said the court:

"Counsel on the one hand argue that under the fair construction of the Federal Employers' Liability Act as construed by these decisions (federal decisions) the act covers the field of liability of common carriers by railroad for all injuries occurring in interstate commerce, whether or not there has been neg-

statutory contract. * * * A new right of action is given, of a character unknown to our law, at least for several centuries. The liability of the employer depends, not on any fault of his own or his servants, but on whether, by act or by silence, he has adopted the statutory terms. The amount of his pecuniary liability is fixed by statute and not by the verdict of a jury. Employer and employee adopt, as a part of their contract, a novel method of procedure, in which the liability and the compensation are determined by the judge, instead of by a jury. And the compensation is ordinarily meant to be paid by installments in lieu of wages, as it were, and may be changed if circumstances change. The scheme is more like a pension scheme than a liability for a breach of contract, or damages in tort. The difference between the two kinds of legislation is illustrated in our act. Section 1 is an employers' liability act similar to the act of Congress, and regulates the liability in a common law action of tort. Section 2 creates and regulates the new statutory right. But for paragraph 8 of Section 2 there might have been a double recovery, a recovery for the tort in a common law action, and a recovery of the statutory compensation by means of the statutory procedure. Nor would that double recovery have been illegal, however unjust it might be and was in fact considered to be by the Legislature, for compensation by way of pension from the master is quite different in character from compensation by a tort-feasor, master, or third person, for a wrong not arising out of contract. We think it clear that the act of Congress deals with an entirely separate matter from the act of our own Legislature."

In West Jersey Trust Co. v. Philadelphia & R. Ry. Co., — N. J. —, 95 Atl. 753, the court adhered to its position.

[19] Staley v. Illinois Cent. R. Co., 186 Ill. App. 593, rev'd 268 Ill. 356.

ligence on the part of the employer, while counsel on the other side contend that the act covers only liability of common carriers in interstate commerce when there has been such negligence. It is clear there can be no recovery under the Federal Employers' Liability Act, properly construed, in the absence of negligence on the part of the employer, as that term is used in the statute and in the decisions construing the same. But if the question of negligence only determines the applicability of the Federal law, then, before it can be held that such law is applicable, there must be a final adjudication as to whether the injury resulted from negligence. Obviously Congress legislated on more than the subject of negligence. It legislated on that but also on the amount of recovery, and superseded all state laws on that subject, as shown by the decisions already cited. It also legislated on the subject of limitation when an action could be begun. * * * The wording of the statute and the reasoning in these decisions lead inevitably to the conclusion that the particular 'subject-matter,' 'field,' or 'chosen field' taken possession of by the Federal Employers' Liability Act was the employers' liability for injuries to employees in interstate transportation by rail and the real question, as clearly stated in distinct terms in several of the cases that we have quoted from in deciding whether the Federal Statute is applicable, is whether the injury for which the suit was brought was sustained while the company and the injured employee were engaged in interstate commerce. The Federal Employers' Liability Act has taken possession of—has occupied—that field for the purpose of calling into play therein this exclusive power of the Federal government. Necessarily, all common or statute law of this state on that subject has been superseded. The field of liability as to employees injured while engaged in interstate commerce on railroads is occupied exclusively by the Federal Employers' Liability Act and that, too, regardless of the negligence or lack of negligence of either party to the litigation." [20]

The same position was taken by the California Court of Ap-

[20] Staley v. Illinois Cent. R. Co., 268 Ill. 356, rev'g 186 Ill. App. 593.

peals in a case where a special agent while removing trespassers from an interstate train jumped therefrom to pursue them from the company's property. In doing so, his revolver fell from his pocket and exploded, injuring him. In holding that the Workmen's Compensation Act was inapplicable, the court said in part:

"The Congress of the United States in April, 1908, passed what is known as the Federal Employers' Liability Act which fixes the responsibility of every carrier towards its employees while engaged in commerce between the several states where any such employees are injured through the negligence of the officers, agents, or other employees of the carrier. In the year 1913, the Legislature of California passed a measure, known as the Workmen's Compensation Insurance and Safety Act (Statutes of 1913, p. 279) which provided for compensation to be awarded to employees injured while engaged in the work of their employers (except in certain employments not pertinent here) regardless of whether the accident occurred through the negligence of the employer, or his agents, servants, or other employees. It will be seen then as applied to common carriers, the state act covers precisely the same field as does the national legislation with the qualification that the said act obliges the employers to compensate employees for accidental injuries sustained without negligence on the part of his agents or employees, as well as those arising through the negligence of such persons. The United States Congress is given power by the Constitution to regulate commerce among the several states. As to the application of local or state statutes made in the exercise of the police power affecting instrumentalities of interstate commerce, it is said that this subject belongs to the reserved power of the states; that is, the power may be exercised by the states in the absence of legislation covering the same subject by Congress. When the power of Congress, however, is exerted in the direction of covering the matter sought to be so regulated and is comprehensive to that end, then the state regulation must give way before the superior law. * * * The conclusions herein expressed on the several contentions advanced by petitioner are therefore favorable to the determination as made by

the Industrial Accident Commission which declined jurisdiction of petitioner's application and dismissed his claim." [21]

Mr. Roberts, in an article written by him says: "Both statutes cannot apply in the same field and therefore both cannot cover the same injury and the question of the applicability of the two laws certainly should not turn upon the further question of the existence or absence of negligence, for if an employee is injured through the violation of the Federal Safety Appliance Act no negligence need be shown. Obviously congress by this statute intended to cover the entire field of the liability of interstate railroads to employees engaged in interstate commerce." [22]

But it must be remembered that even in these states it is clearly recognized that where negligence is shown the Federal Employers' Liability Act presents the exclusive remedy.[23]

Until the Supreme Court of the United States passes upon the question, the doubt created by the conflicting decisions of these strong courts must necessarily continue. It would seem, however, that the reasons underlying the decisions of the Illinois and California courts are most cogent. If the Federal Employers' Liability Act is regarded purely in the light of a *remedy* to railroad employees there is danger of overlooking the *liability,* which is the basis of the relief afforded. By its express terms the act creates a *liability* on the part of carriers by railroad to their employees in certain cases. It is reasonable to suppose that congress in passing the act intended to define the limits of the relief to be afforded the injured employee on the one hand and the liability of the employer on the other. That such a construction works a hardship and injustice to railroad employees in many cases is indisputable, but it is a condition easily remediable by congress.

§ 1304. Binding effect of federal decisions. Ordinarily state courts are required to follow the decisions of the federal courts

[21] Smith v. Industrial Acc. Commission of California, 26 Cal. App. 560.

[22] See 9 N. C. C. A. 307.

[23] Winfield v. New York Cent. & H. River R. Co., 216 N. Y. 284, 10 N. C. C. A. 916; Grybowski v. Erie R. Co., — N. J. —, 95 Atl. 764.

where the construction or application of a federal statute is involved.[24]

It has been said that, strictly speaking, "there is no common law of negligence of the federal courts as distinguished from the common law of negligence of the state courts. The law of negligence is the same in both, and apparent differences of opinion arise because of the application of the law to different combinations of facts, and frequently on account of confusing negligence which may or may not be the cause of an injury and actionable negligence which unites cause and effect." [25]

It has also been held that notwithstanding the different interpretations of the common law of the state by the state and federal courts, the law as applied by the federal courts "is none the less the law of that state." [26] However true this may be abstractly it is nevertheless true that in many important respects the rules laid down by the federal courts differ materially from the rule prevailing in the state courts. As the purpose of the federal act was to secure uniformity with respect to the liability of interstate carriers to their employees, so that their respective rights and liabilities might be determined in accordance with a single rule instead of forty-eight, common sense would dictate that in applying the act the rule prevailing in the federal courts should prevail over the state rules.[27] This being true it would seem to follow as a matter of course that the federal rule as to negligence, assumption of risk, contributory negligence, measure and elements of damages, and the like should be adopted even though different from the rules applied

[24] Belcher v. Chambers, 53 Cal. 635; Breitung v. City of Chicago, 92 Ill. App. 118; Harris v. Lyon, 16 Ariz. 35; Hayden v. Town of Aurora, 57 Colo. 389; Cleveland, C., C. & St. L. R. Co. v. Blind, 182 Ind. 398.

[25] Saunders v. Southern R. Co., 167 N. C. 375.

[26] Smith v. Alabama, 124 U. S. 465, 31 L. ed. 508; Western U. Tel. Co. v. Call Pub. Co., 181 U. S. 92, 45 L. ed. 765.

[27] Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155; Kendrick v. Chicago & E. I. R. Co. 188 Ill. App. 172; Cincinnati, N. O. & T. P. R. Co. v. Nolan, 161 Ky. 205; Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201; Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Southern R. Co. v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229.

by the state courts. This is the view adopted by the majority of the state courts,[28] which hold that the relief to be had under the Federal Employers' Liability Act is to be determined in accordance with the rulings of the federal courts,[29] and is clearly the view of the Supreme Court of the United States.[30]

In an action under the Federal Employers' Liability Act the Supreme Court of Kentucky said: "Though the difference between our measure of damages and that adopted by the federal courts is but slight, yet in view of the fact that plaintiff's action is predicated on federal laws, we conclude that it is better practice for trial courts to adopt the measure of damages sanctioned and approved by the Federal Supreme Court."[31]

The importance of following the rule prevailing in the federal courts in all questions relating to the construction and application of the Federal Employers' Liability Act, however, is not clearly recognized in some courts. Of course as to all questions under that act the Supreme Court of the United States in the final and ultimate source of authority, as was said by the court in an action under the Safety Appliance Act, in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all States of the Union."[32]

The Missouri Supreme Court, in an action arising under the act, applied the common law of the state, upon the question of assumed risk, as laid down by the state courts, under which the servant does not assume the risk of the master's negligence,[33] which materially differs from the federal rule that an employee

[28] Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202; Southern R. Co. v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229; Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033; Glenn v. Cincinnati, N. O. & T. P. R. Co., 157 Ky. 453; Farley v. New York, N. H. & H. R. Co., 88 Conn. 409.

[29] Hardwick v. Wabash R. Co., 181 Mo. App. 156.

[30] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330; Southern Ry. Co. v. Gray, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C 433.

[31] Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

[32] St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, rev'g 71 Ark. 445.

[33] Fish v. Chicago, R. I. & P. R. Co., 263 Mo. 106, 8 N. C. C. A. 538.

may be held to have assumed the risk of dangers arising from the master's negligence, providing he knows of, and appreciates them.[34]

This decision is unquestionably wrong and cannot be sustained by reason or authority. To follow it would be to assume that there can be as many rules for recovery under the act as there are states, and that the Supreme Court of the United States will abandon its position in connection with such rules to apply the principles prevailing in the various state courts. In a later case the Missouri Court of Appeals severely criticizes the conclusion reached by the state Supreme Court but, nevertheless, felt bound to follow its decision.[35]

§ 1305. Employers within the act. All common carriers by railroad engaged in interstate commerce are employers potentially within the act, although of course, to render the act applicable the employee must also be engaged in interstate commerce. Since under the well-known rule of agency, the act of the servant within the scope of his authority is that of the master, where the employee is engaged in interstate commerce, the employer necessarily must be so engaged. Therefore, cases passing upon the question as to when an employee is engaged in interstate commerce are in point in determining whether the employer is so engaged. This subject is treated elsewhere in this chapter.[36]

To be within the act a railroad must also be a common carrier. A common carrier has been well defined as "one, who by the virtue of his calling, undertakes, for compensation, to transport personal property from one place to another for all such as may choose to employ him and every one who undertakes to carry for compensation the goods of all persons indifferently, is, as to liability, to be deemed a common carrier." [37] The act itself expressly defines a common carrier as including "the receiver or receivers or other persons or corporations charged

[34] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424.

[35] Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202.

[36] See § 1306, *et seq.*, *post.*

[37] Jackson Architectural Iron

with the duty of the management and operation of a business of a common carrier." [38]

A lumber company operating a logging road purely for its own private purposes is not a common carrier within the act; [39] but where a logging road holds itself out as a common carrier, the fact that the bulk of its traffic consisted of its own products does not change its status as such, since the extent of its use by the public does not determine its character.[40] A construction company charged with the duty of the management and operation of a common carrier by railroad engaged in interstate commerce is within the act.[41]

Ordinarily the determination of what constitutes a railroad is a simple matter, but at times questions of doubt are presented. A private switch to a mill which was used by a railroad company in transporting cars in interstate commerce has been held to be a railroad within the meaning of the Safety Appliance Act.[42] Where under the state law the lessor of a railroad continues liable for negligence of the lessee, the lessor is within the act.[43]

Electric interurban railroads engaged in interstate commerce are within the act.[44] Thus, an interurban railroad carrying freight and passengers in interstate commerce is within the act although operating in part over city streets under an arrangement with a street railway company regulating local traffic and providing for the division of the receipts in certain proportions, the control of the operation of trains being at all times vested in the interurban company.[45] An electric interurban

Works v. Hurlbut, 158 N. Y. 34, 70 Am. St. Rep. 432.

38 Act of April 22, 1898, Section 7.

39 Bay v. Merrill & Ring Lumber Co., 211 Fed. 717. See also, Nordgard v. Marysville & N. Ry. Co., 211 Fed. 721.

40 Atchison, T. & S. F. Ry. Co. v. Victoria, F. & W. R. Co., 234 U. S. 1, 58 L. ed. 1185.

41 Copper River & N. W. R. Co. v. Heney, 128 C. C. A. 131, 211 Fed. 459.

42 Gray v. Louisville & N. R. Co., 197 Fed. 874.

43 North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496. *Contra*, Wagner v. Chicago & A. R. Co., 265 Ill. 245, aff'd 239 U. S. 452.

44 Ross v. Sheldon, — Iowa —, 154 N. W. 499; South Covington & C. St. R. Co. v. Finan's Adm'x, 153 Ky. 340.

45 Kansas City W. Ry. Co. v. Mc-

railroad has been held to be a railroad within the Federal Safety Appliance Act requiring common carriers engaged in interstate commerce by railroad to equip their locomotive engines with power driving-wheel brakes and appliances for operating the train-brake system, and to equip a sufficient number of cars in the trains with power or train brakes so that the engineer on the locomotive drawing such train can control its speed without requiring brakemen to use the common hand brake for the purpose.[46] So also an interurban railroad has been held not to be a lateral branch line of railroad within the Commerce Act.[47]

The supreme court in a proceeding under the Interstate Commerce Act held that a company chartered as a street railroad and engaged exclusively in business as such was not a "railroad" within the act.[48] The Court said:

"Street railroads not being guilty of the mischief sought to be corrected, the remedial provisions of the statute not being applicable to them, commands upon every railroad 'subject to the act' being such that they could not be obeyed by street railroads because of the nature of their business and the character and location of their tracks, it is evident that the case is within that large line of authorities which hold that under such a statute the word 'railroad' cannot be construed to include a street railroad."

The words "boats" and "wharves" refer to adjuncts or auxiliaries to transportation by railroad.[49] And the mere fact that a common carrier by railroad operates a line of steamships does not place the latter within the act unless operated in connection with the railroad system.[50] Hence, a vessel which is not part of a railroad system is not within the act.[51] The mere fact that a

Adow, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188.

[46] Spokane & I. E. R. Co. v. Campbell, 133 C. C. A. 370, 217 Fed. 518.

[47] United States v. Baltimore & O. S. W. R. Co., 226 U. S. 14, 57 L. ed. 104.

[48] Omaha & C. B. St. R. Co. v. Interstate Commerce Commission, 230 U. S. 324, 57 L. ed. 1501.

[49] Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

[50] Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

[51] The Pawnee, 205 Fed. 333.

canal was operated by a railroad company does not bring it within the act.[52] A ferry boat used by a railroad company in the transportation of freight and passengers in connection with its railroad system is engaged in interstate commerce within the act,[53] as are tug boats operated in connection with the railroad system.[54]

In addition to showing that the defendant is a common carrier by railroad, it must also be established that at the time of the injury it was engaged in interstate commerce. A train operated between intrastate termini, which carries cars originating beyond the state is of course engaged in interstate commerce.[55] So too an express messenger in the employ of the defendant who was charged with the duty of operating and caring for the electric light plant in the express car, was engaged in interstate commerce even in the absence of a showing that the train upon which he was serving carried interstate passengers, express or baggage, where his duties required him to pass beyond the limits of the state.[56] But the mere fact that an intrastate train was advertised to make connections with an interstate train does not make it an instrumentality of interstate commerce, where at the time of the injury it in fact carried no passengers or baggage destined beyond the state.[57] The employee of a logging road hauling logs between intrastate termini is not within the act merely because a large percentage of the logs after being manufactured into lumber were shipped outside the state.[58] A turntable is an instrumentality of interstate commerce when in use for the purpose of turning an engine which had just returned from an interstate trip prepara-

[52] Hammill v. Pennsylvania R. Co., 87 N. J. L. 388.

[53] The Passaic, 190 Fed. 644, aff'd 122 C. C. A. 466; 204 Fed. 266.

[54] Erie R. Co. v. Jacobus, 137 C. C. A. 151, 221 Fed. 335.

[55] Findley v. Coal & Coke Ry. Co., — W. Va. —, 87 S. E. 198; Noel v. Quincy, O. & K. C. R. Co., — Mo. App. —, 182 S. W. 787.

[56] Wesseler v. Great Northern Ry. Co., — Wash. —, 155 Pac. 1063.

[57] Boyle v. Pennsylvania R. Co., 142 C. C. A. 558, 228 Fed. 266.

[58] Nordgard v. Marysville & N. Ry. Co., 211 Fed. 721. See also Bay v. Merrill & Ring Lumber Co., 211 Fed. 717; where a logging road was held not to be a common carrier.

tory to its being placed in a roundhouse,[59] but a car, which after completing an interstate run was unloaded and placed in the yards awaiting orders which had not been received at the time of the accident, is not an instrumentality of interstate commerce.[60]

Train orders do not necessarily determine the character of the commerce in which the train is engaged. Thus, where an order directed the movement of a train between certain points in the same state, an order having been sent to the division point, under which the engine upon reaching that point was to proceed to a destination in another state for the purpose of repairs, the engineer was held to have been engaged in interstate commerce, the order being construed as not fixing the division point as the terminus of the run but merely the status of the train as an extra up to that point.[61]

An intermediate intrastate carrier whose entire line is confined within the limits of a single state may be engaged in interstate commerce where it carries over its lines shipments or cars originating or destined beyond the state.[62] So also, a train operated between intrastate termini which in course of transportation necessarily passes through another state is engaged in interstate commerce.[63]

A train engaged in an interstate run does not cease to be an instrumentality of interstate commerce until the completion of the run, hence the fact that upon arriving at its terminal it entered a side track to get out of the way of another train does not change its character as an interstate train, even though its crew, under special orders, were about to start from the terminal on a special intrastate trip.[64] An engine returning from

[59] Chesapeake & O. R. Co. v. Kornhoff, 167 Ky. 353.

[60] Moran v. Central R. Co. of New Jersey, — N. J. L. —, 96 Atl. 1023.

[61] Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 94 Neb. 317, 96 Neb. 87.

[62] Interstate Commerce Commission v. Cincinnati, N. O. & T. P. R. Co., 162 U. S. 184, 40 L. ed. 935.

[63] Hanley v. Kansas City S. R. Co., 187 U. S. 617, 47 L. ed. 333.

[64] Chesapeake & O. R. Co. v. Shaw, 168 Ky. 537. In this case an accommodation train which operated regularly between interstate termini, on arriving at its terminal at night usually backed down into the yards and remained there until the following morning when it made its

an interstate trip does not lose its status as an instrumentality of interstate commerce merely because it had been placed upon a turntable preparatory to being placed in a roundhouse.[65]

The hauling of empty cars from one state to another or cars containing merely railroad property is an act of interstate commerce.[66] A train engaged in hauling water between intrastate points for the use of defendant's engines, both interstate and intrastate, has been held not to have been engaged in interstate commerce.[67] Nor is the movement of cars containing coal to chutes from which the coal was to be taken for use in both interstate and intrastate engines an act of interstate commerce.[68]

The Nebraska Supreme Court has decided that where a train was made up in Nebraska destined to the Black Hills, the court would take judicial notice that the Black Hills were in South Dakota and that therefore the train and the employees thereon were engaged in interstate commerce.[69]

§ 1306. Employees within the act; necessity for employment in interstate commerce. As was shown in the preceding sec-

return trip. On the day of the accident, however, the crew had special orders upon its arrival at the usual night terminal to run the train as an extra to another point in the same state and to start from there on the following morning to carry back an excursion. The train therefore upon arriving at its terminal was first taken to the station as usual and then backed down towards the yards to get on another track in order to make way for a fast train then due. The plaintiff was injured while setting switches. It was held that even if it were assumed that the special trip contemplated was not a part of an original interstate movement, the evidence showed that at the time of the accident the train had not yet completed its regular interstate run and that the placing of a train on a side track to get out of the way of the fast train was as much a part of the interstate run as the actual crossing of the interstate line.

65 Chesapeake & O. R. Co. v. Kornhoff, 167 Ky. 353.

66 North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; United States v. Chicago, M. & St. P. Ry. Co., 149 Fed. 486; Barker v. Kansas City, M. & O. R. Co., 88 Kan. 767, 43 L.R.A.(N.S.) 1221; Kansas City Southern R. Co. v. Cook, 100 Ark. 467; Thompson v. Wabash R. Co., 262 Mo. 468.

67 Missouri, K. & T. Ry. Co. of Texas v. Fesmire, — Tex. Civ. App. —, 150 S. W. 201.

68 Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443.

69 Bower v. Chicago & N. W. R. Co., 96 Neb. 419.

tion, to sustain a recovery under the Federal Employers' Liability Act it must be shown that the defendant was engaged in interstate commerce, but the engagement in such commerce by the employer is not of itself sufficient to show that the employee was similarly engaged. It is equally essential, therefore, to show that at the time of his injury the employee was engaged in interstate commerce,[70] and the burden is upon the plaintiff to establish that fact.[70a]

§ 1307. Same subject; tests. Although the principle stated in the preceding section is clear, its application frequently involves questions of the greatest difficulty and doubt.

While the courts have laid down rules for determining the character of the employment, each case must be tested by its particular facts in the light of those rules, and even then the solution is not always free from difficulty.

The primary test, of course, is the relation of the work being performed to interstate commerce. "Is the work in question a part of the interstate commerce in which the carrier is engaged," or so closely connected therewith as to be considered part of it,[71] or was the performance of the work a matter of in-

[70] Gordon v. New Orleans G. N. R. Co., 135 La. 137.

A yard clerk whose duties required him to make a record of the numbers and initials on the cars, used in both intra- and interstate commerce, and to inspect and make a record of the seals on the car doors, etc., and who was killed by a train containing cars in interstate commerce, while he was walking between two tracks, was held not to have been engaged in interstate commerce, there being no evidence that deceased had been in any service connected with the interstate train, or to show what work he had been engaged in just prior to the accident, or where he was going when struck. Pecos & N. T. Ry. Co. v. Rosenbloom, — Tex. —, 177 S. W. 952.

A car inspector, in the employ of defendant, which was engaged in both intrastate and interstate commerce, was killed by an eastbound train while he was inspecting the cars of a westbound train, which was standing at the station where his work was performed. There was no evidence that any part of either train, or any thing or person on either train, was being moved or transported in interstate commerce. *Held*, that it could not be found that deceased was engaged in interstate commerce at the time in question. Boyle v. Pennsylvania R. Co., 221 Fed. 453.

[70a] Hench v. Pennsylvania R. Co., 246 Pa. 1.

[71] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A.

difference so far as interstate commerce is concerned?[72] The actual work being performed at the time of the injury determines its character.[73] Applying this test, employees, whose work bears a substantial relation to interstate commerce, are within the act, although they may never pass beyond the limits of the state, and although their work may also bear a substantially equal relation to intrastate commerce.[74]

The situations to which the federal act has been, or may be sought to be, applied are as diverse as the employments on the great railroad systems are varied. A train bearing a shipment destined beyond the state is engaged in interstate commerce, although the train itself does not pass beyond the state.[75]

Interstate commerce by railroad cannot "be separated into its several elements, and the nature of each determined regardless of its relation to others or to the business as a whole,"[76] hence, where the minor task upon which an employee is engaged is part of a larger one connected with interstate commerce, the employee so engaged is employed in interstate commerce.[77] Ap-

33, 197 Fed. 537; Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153, s. c. 192 Fed. 581; Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. ed. —, aff'g 214 N. Y. 413; Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443; Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611; Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604.

[72] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

[73] Chicago & E. R. Co. v. Mitchell, — Ind. App. —, 110 N. E. 78.

The same test was adopted in Fairchild v. Pennsylvania R. Co., — N. Y. App. Div. —, 155 N. Y. Supp. 751, in the following language: "The actual work being performed at the time of the injury determines its character, and is the real test whether it is interstate or intrastate work." Quoting from Parsons v. Delaware & H. Co., 167 N. Y. App. Div. 536.

[74] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A 33, 197 Fed. 537; Hearst v. St. Louis, I. M. & S. R. Co., 188 Mo. App. 36, where an engineer on a through passenger train passing from one state to another was held to be under the act although his trip ended within the state.

[75] United States v. Colorado & N W. Ry. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167.

[76] Pedersen v. Delaware, L. & W R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

[77] Pedersen v. Delaware, L. & W R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A.

plying this rule the courts will not inquire as to what specific portion of a train was engaged in interstate commerce where it is shown that it contains cars or shipments destined beyond the state. Accordingly it has been held that a watchman on a "dead" engine being hauled in an interstate train is within the act,[78] and the fact that a defective car causing injury to an employee was not destined beyond the state does not place him outside the protection of the act, where the car was part of an interstate train,[79] nor does the removal from an interstate train of a defective car carrying interstate commerce, and the taking of it to a point within the state for the purpose of making "heavy repairs," suspend its use as an instrumentality of interstate commerce.[80] One injured while not in the performance of any duty incident to his employment and while at the place where he was prohibited to be was not within the act.[81]

§ 1308. Same subject; existence of relation of master and servant. The Federal Employers' Liability Act is intended to regulate the liability of a common carrier by railroad and its *employees* when both are engaged in interstate commerce. Hence, to render the act applicable the relation of master and servant must be shown to have existed at the time the injury was sustained.[82] Consequently a car repairer injured through the negligence of a railroad company other than his employer,

33, 197 Fed. 537, employee carrying materials for use in repairing bridge devoted to both classes of commerce. See also, New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 9 N. C. C. A. 1, aff'g 157 N. Y. App. Div. 941, where the removal of an intrastate car from an interstate train was held not to deprive employees engaged in such removal of the protection of the act.

[78] A watchman on a dead engine being hauled in train carrying interstate commerce, and which when in use was used in interstate commerce is engaged in interstate commerce. Atlantic Coast Line R. Co. v. Jones, — Ala. App. —, 63 So. 693.

[79] Kansas City Southern R. Co. v. Cook, 100 Ark. 467.

[80] St. Louis & S. F. Ry. Co. v. Conarty, 106 Ark. 421, rev'd on other grounds 238 U. S. 243, 59 L. ed. 1290.

[81] Vanordstrand v. Northern Pac. Ry. Co., 86 Wash. 665, where a "call boy" was injured on jumping from a moving train which he had boarded to avoid the necessity of walking.

[82] Wagner v. Chicago & A. R. Co., 180 Ill. App. 196, aff'd 265 Ill. 245, which is affirmed by 239 U. S. 452, 60 L. ed. —.

and with whom the latter had no traffic arrangement is not entitled to recover under the act.[83] A Pullman porter paid exclusively by the Pullman Company is not an employee of a common carrier by railroad, and hence not within the act, although part of his duty was to collect tickets and turn them over to the train conductor.[84] On the other hand, a porter on a car owned jointly by the Pullman Company and a railroad, and operated by them as an association under contract, has been held to be within the act.[85]

An independent contractor, as to whom the railroad company has and exercises no power of control is not within the act as the relation of master and servant does not exist between them.[86] Thus under a contract between a railroad company and the plaintiff's intestate, in which the railroad company was described as party of the first part and decedent as party of the second part and as "contractor," the covenants of the one being made the consideration for the covenants of the other, the decedent as contractor agreed, "1st. To furnish all the labor required and necessary to handle; and (a) to handle all the coal required by the company at Enid, from either open or closed cars, or both, and to place the same in coal chute pockets of the company; to gather up all coal that falls from the coal chute pockets to the ground and place the same on cars or engines as desired by the company. (b) to break all coal to the size of four inch cubes or less before delivery to chutes for engine use and to unload all coal for stationary boilers. (c) to unload wood from cars to storage piles located on company's right of way at Enid. (d) to load cinders from the right of way to cars at points designated by the company. (e) to unload sand from cars furnished by the company at points designated by it. 2nd. The company agrees to pay for the services enumerated in certain designated numbers of cents per ton, or cord or yard, as the case may be, to be paid upon estimates and records of the

[83] Kentucky & T. Ry. Co. v. Minton, 167 Ky. 516.

[84] Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. ed. 849, 8 N. C. C. A. 1.

[85] Oliver v. Northern Pac. Ry. Co., 196 Fed. 432.

[86] Chicago, R. I. & P. Ry. Co. v. Bond, 240 U. S. 449, 60 L. ed. —, rev'g — Okla. —, 148 Pac. 103.

company. 3rd. Contractor agrees to maintain a sufficient supply of coal in the coal chutes and break or crack all coal to suitable sizes. 4th. Contractor expressly assumes all liability for injuries to or death of persons in his employ or loss or injury to his property, whether caused by the negligence of the company, its agents or employees, and he covenants to save the company harmless on account thereof, or for or on account of any injury to or death of any person employed by him when and while such persons may be in or about the cars, engines and tracks of the company, 'and any injury to said contractor while performing any services under this contract which might be or have been delegated to his agent or employees.' And the contractor expressly assumes all liability for injury to or death of third persons, including the employees of the company, occasioned by any of his acts, and the company shall not be liable to him in case of his death or injury while employed in the work set forth. 5th. Punctuality of performance is stipulated for. 6th. The contract to continue until terminated, as it may be by either party upon fifteen days' notice. 7th. Or upon failure of contractor to perform his duties, at the option of the company, without being liable in damages therefor, of which failure the company shall be the sole judge. 8th. The company to furnish the necessary tools for the performance of the stipulated services. 9th. It is 'agreed and understood that the contractor shall be deemed and held as the original contractor, and the railway company reserves and holds no control over him in the doing of such work other than as to the results to be accomplished.'

"10th. The company shall keep a record of all coal delivered and shall make settlements and pay the contractor for handling the coal upon the basis of such handling, and the contractor shall make daily reports of the cars unloaded by him and shall receive, collect and deliver to the duly authorized representative of the company a ticket from each engineman, hostler or other employee, showing the number of tons of coal delivered to any engine; (11th) payment of the work to be made monthly; and (12th) the contract and all the terms and conditions, rights and obligations thereof, to inure to the heirs, administrators, execu-

tors, legal representatives, assigns and lessees of both parties, but assigning or subletting shall not be without the written consent of the company." It was held that the relation created was that of independent contractor and not that of master and servant.[87]

§ 1309. Same subject; necessity for direct and substantial relation to interstate commerce. As has been pointed out, the relation of the work being performed at the time of injury to interstate commerce in which both the carrier and the employee are then engaged must be direct and substantial.[88] Although this rule was firmly established by the federal supreme court in one of the earlier cases arising under the act,[89] it has frequently been misapplied. Thus it was held by a state court that an employee wheeling coal for use in heating a repair shop where interstate cars were repaired, was engaged in interstate commerce.[90] This decision, however, was reversed by the United States Supreme Court.[91]

In a very recent case the Supreme Court of the United States held that an employee injured while assisting in the movement of a car of coal, owned by the carrier, from a storage track to bins, where it was to be used alike by both interstate and intrastate engines was not engaged in interstate commerce.[92] However, in another case where a station agent whose duty it was, in part, to attend a pump house some distance from the station, to keep the tank filled with water for locomotives, was injured by machinery in the pump house, a recovery was approved by the state supreme court, and affirmed by the Supreme Court of the

[87] Chicago, R. I. & P. Ry. Co. v. Bond, 240 U. S. 449, 60 L. ed. —, rev'g — Okla. —, 148 Pac. 103.

[88] Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443.

[89] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537. See also, Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153, s. c. 192 Fed. 581.

[90] Cousins v. Illinois Cent. R. Co., 126 Minn. 172, 6 N. C. C. A. 182, rev'd 241 U. S. 641, 60 L. ed. (mem. dec.).

[91] 241 U. S. 641, 60 L. ed. (mem. dec.).

[92] Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443; *Contra*, Southern Ry. Co. v. Peters, — Ala. —, 69

United States.[93] Apparently it was conceded that the plaintiff at the time of his injury was employed in interstate commerce.

One injured while hauling coal upon a platform for the purpose of coaling an interstate engine was held to have been engaged in interstate commerce.[94] Employees on a train hauling fuel for engines for use in both classes of commerce, have been held to be within the act.[95] However, to come within the rule laid down by the supreme court the interstate character of the employment in such case must necessarily be predicated upon the interstate origin of the commodity carried rather than its anticipated use. The movement of coal between intrastate points for use by another railroad in coaling both interstate and intrastate engines has been held not to involve interstate commerce.[96]

An employee whose duty it was to check coal delivered to engines engaged in both interstate and intrastate commerce and make daily reports thereof, who was killed while on his way to make such report, was held to have been engaged in interstate commerce.[97] It may be said, however, that the existence of a substantial relation to interstate commerce in such a case, is, to say the least, questionable. One employed as a miner of coal in a mine owned by an interstate railroad company was not engaged in interstate commerce although the coal handled by him might subsequently be used in such commerce.[98]

A machinist employed in a repair shop where instrumentalities of both interstate and intrastate commerce were repaired,

So. 611; Kamboris v. Oregon-Washington R. & Nav. Co., 75 Ore. 358.

93 Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 60 L. ed. —, aff'g 130 Minn. 405.

94 Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611. The soundness of this decision may be questioned as the employee at the time of injury was engaged in placing the coal upon the platform to coal an expected interstate train. It might be contended that such a service was merely anticipatory of engagement in interstate commerce.

95 Barlow v. Lehigh Val. R. Co., 214 N. Y. 116, aff'g 158 N. Y. App. Div. 768; Montgomery v. Southern Pac. Co., 64 Ore. 597.

96 Barker v. Kansas City, M. & O. Ry. Co., 94 Kan. 176.

97 Chicago, R. I. & P. R. Co. v. Bond, — Okla. —, 148 Pac. 103, rev'd 240 U. S. 449, 60 L. ed. —.

98 Delaware, L. & W. R. Co. v. Yurkonis, 137 C. C. A. 23, 220 Fed. 429, aff'g 213 Fed. 537, 6 N. C. C. A. 210. Appeal dismissed 238 U. S. 439, 59 L. ed. 1397.

who at the time of his injury was engaged in changing the location of a fixture in the shop was not engaged in interstate commerce.[99]

§ 1310. Same subject; instrumentalities or employees engaged in both classes of commerce. Employees engaged on instrumentalities used in both classes of commerce whose work is of such a character as to bear a substantial relation to interstate commerce are within the act.[1] Thus bridge workers on interstate roads,[2] tracklaborers,[3] sectionmen,[4] and yardmen [5] are usually held to be within the protection of the act. However, the mere likelihood or possibility that an instrumentality would be used in interstate commerce is not sufficient to render it a part of such commerce.[6]

One employed to clean out ashes from an ash pit used by

[99] Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, 60 L. ed. —, aff'g 214 N. Y. 413.

[1] Employees engaged in both interstate and intrastate commerce in such a way that employment in one cannot be distinguished from employment in the other are within the act. Behrens v. Illinois Cent. R. Co., 192 Fed. 581, s. c. 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153.

[2] Thomson v. Columbia & P. S. R. Co., 205 Fed. 203, 4 N. C. C. A. 925. *Contra,* Taylor v. Southern Ry. Co., 178 Fed. 380.

Ironworker on bridge used in both classes of commerce struck by intrastate train is within the act. Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

[3] Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832.

Keeping tracks used in both interstate and intrastate commerce in repair is so closely connected with interstate commerce as to be in legal contemplation part of it. Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537. Employees repairing switches used by both classes of commerce are within the act. Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832.

Employee clearing snow from track is within the act. Hardwick v. Wabash R. Co., 181 Mo. App. 156.

[4] Louisville & N. R. Co. v. Kemp, 140 Ga. 657; Zikos v. Oregon R. & Nav. Co., 179 Fed. 893.

[5] Johnson v. Great Northern R. Co., 102 C. C. A. 89, 178 Fed. 643.

[6] The mere fact that an engine upon which a hostler was employed might be used in interstate commerce does not bring him within the act where there was no equal likelihood of its being used in intrastate commerce and it had in fact been so used upon its last run. La Casse v. New Orleans, T. & M. R. Co., 135 La. 129.

both interstate and intrastate commerce, was engaged in interstate commerce.[7]

A recent Michigan case in which recovery was denied in behalf of an employee injured while engaged in cleaning snow from switches, on the ground of contributory negligence, seems to have been based upon the state law rather than the federal act.[8] The question of the applicability of the latter does not seem to have been raised, although, if the switches were used by interstate trains, unquestionably the employee was engaged in interstate commerce.

§ 1311. Same subject; interstate character of traffic. The interstate character of the traffic must be determined in the light of the facts of the individual case. The ordinary case involving merely the interstate inception or destination of the traffic is free from difficulty.[9]

The presence on a train of any commodity originating or destined beyond the state fixes the status of the entire train as an instrumentality of interstate commerce,[10] and the ultimate use to which a shipment is to be put cannot affect its character as interstate commerce, and hence the mere fact that a shipment from a point beyond the state is to be devoted to work of construction does not deprive it of its status as interstate commerce.[11]

As was previously stated the operation of a train between interstate termini constitutes an engagement in interstate commerce, irrespective of the destination of the shipments carried.[12] In accordance with this rule employees on a train passing beyond the boundaries of the state are engaged in interstate commerce although as a matter of fact all of the cars on the

7 Grybowski v. Erie R. Co., — N. J. L. —, 95 Atl. 764.

8 Barnhart v. Pere Marquette R. Co., — Mich. —, 155 N. W. 355. The accident in this case occurred in 1912, and hence was within the period covered by the act.

9 See also § 1307, *ante*.

10 United States v. Colorado & N. W. Ry. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893.

11 Kansas City, M. & O. Ry. Co. of Texas v. Pope, — Tex. Civ. App. —, 152 S. W. 185.

12 United States v. Colorado & N. W. Ry. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167, 13 Ann. Cas. 893; Kansas City Southern R. Co. v. Cook, 100 Ark. 467.

train are empty.[13] However it has been held that empty cars returned to the owner from an interstate trip, having no particular destination within the state, except to be moved from place to place to be assembled for distribution, lose their character as present instrumentalities of interstate commerce.[14]

A car in interstate transit does not lose its character as an instrumentality of interstate commerce while merely stopping for repairs before being turned over to a connecting carrier,[15] and mere delay in moving a car to its destination does not remove it from interstate commerce.[16] Evidence that some of the cars in a train bore cards indicating an interstate origin and that it was customary for such cards to indicate both the origin and destination of the same coupled with the fact that the inscription on the cars indicated that they belonged to railroads located in other states has been held sufficient to show that the train in question was transporting interstate commerce.[17]

A conductor of a street railroad company operating between adjacent cities situated in different states was not engaged in interstate commerce, where, at the time of his injury, he was in charge of a car which was not destined beyond the state, the only passenger thereon having a local destination.[18] The fact that a train operating between intrastate termini was advertised to make connections with interstate trains does not change its character as an instrumentality of intrastate commerce, unless it actually carried passengers or baggage destined beyond the state.[19] An employee engaged in distributing cars from an interstate train and clearing the track for another interstate

[13] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; See Hench v. Pennsylvania R. Co., 246 Pa. 1, where the evidence was held insufficient to show that empty cars were engaged in interstate commerce.

[14] Pennsylvania R. Co. v. Knox, 134 C. C. A. 426, 218 Fed. 748.

[15] Lorick v. Seaboard Air Line Ry., — S. C. —, 86 S. E. 675.

[16] Great Northern Ry. Co. v. Otos, 239 U. S. 349, 60 L. ed. —, aff'g 128 Minn. 283.

[17] Mattocks v. Chicago & A. Ry. Co., 187 Ill. App. 529.

[18] Kiser v. Metropolitan St. R. Co., 188 Mo. App. 169.

[19] Boyle v. Pennsylvania R. Co., 142 C. C. A. 558, 228 Fed. 266.

train is within the act,[20] and the fact that the train which had come in, being a local train, might have dropped all cars from beyond the state is too remote a possibility to warrant the withdrawal of the case from the jury.[21]

An interstate shipment may lose its character as such and become purely intrastate where upon reaching its terminus or delivery point it is reshipped to an intrastate point.[22] So where a train containing interstate shipments was destined to a point beyond which no one had authority to move it, in the absence of new orders, it was held that the interstate character of the shipment terminated at that point, and a trainman employed thereon was not engaged in interstate commerce after it had left that point pursuant to a new order directing its movement to another destination in the same state.[23] Mr. Roberts refers to this decision as close on the facts,[24] and so it is. However it is apparent that the train consisted solely of empty cars and hence the control of its movement was vested solely in the carrier. Such a question could not arise with respect to trains carrying commodities destined beyond the point fixed by the train orders, since no mere order affecting the movement of the train could affect the interstate character of the traffic.

To change the interstate character of the traffic there must be an actual reshipment and not a mere colorable one. Hence where a shipment is accepted for a point in another state requiring transshipment over another railroad, the carriage will be deemed continuous notwithstanding the fact that a through bill of lading was not issued and no through route had been established.[25] So too, a shipment may be interstate in character although transported upon a local bill of lading, where it was the intention of the parties that it should actually pass

[20] Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

[21] Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

[22] Gulf, C. & S. F. Ry. Co. v. Texas, 204 U. S. 403, 51 L. ed. 540; Chicago, M. & St. P. Ry. Co. v. Iowa, 233 U. S. 334, 58 L. ed. 988.

[23] Louisville & N. R. Co. v. Strange's Adm'x, 156 Ky. 439.

[24] Roberts' Injuries to Interstate Employees on Railroads, 139.

[25] Baer Bros. Mercantile Co. v. Denver & R. G. R. Co., 233 U. S. 479, 58 L. ed. 1055.

beyond the state without breaking the continuity of carriage except as rendered necessary for transshipment.[26] The fact that the bill of lading was executed in the state in which a shipment originated and to which it was destined does not interfere with its character as interstate commerce where there was in fact an actual movement between states.[27]

Interstate transportation is not ended merely because of the arrival of the train at its terminal, where the cars were to be distributed.[28]

§ 1312. Same subject; trains operated between intrastate termini. Where a train carries shipments or cars originating or destined beyond the state, the employees thereon are engaged in interstate commerce although it operates only between intrastate termini.[29] Thus a freight conductor, operating a train carrying interstate commerce between intrastate termini, injured while engaged in making out his reports showing the number and causes of his delays covering the entire round trip, was held to be within the act.[30] So also an intrastate shipment may constitute interstate commerce where in the course of its transportation it is carried through another state,[31] hence an employee injured while employed on a train which passed

[26] Railroad Commission of Louisiana v. Texas & P. R. Co., 229 U. S. 336, 57 L. ed. 1215, where a shipment originating in Louisiana was directed to a broker in New Orleans for exportation to a foreign country.

[27] Pecos & N. T. Ry. Co. v. Stinson, — Tex. Civ. App. —, 181 S. W 526, where cattle destined to a point in Texas were driven from Texas across the boundary to New Mexico and actually loaded on cars across the state line in New Mexico, the bill of lading being executed in Texas.

[28] St. Louis, S. F. & T. Ry. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099.

[29] Northern Pac. Ry. Co. v. Washington ex rel. Atkinson, 222 U. S. 370, 56 L. ed. 237, rev'g 53 Wash. 673; United States v. Colorado & N. W. Ry. Co., 85 C. C. A. 27, 157 Fed. 321, 15 L.R.A.(N.S.) 167; United States v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609. See also, § 1305, *ante*.

[30] Peery v. Illinois Cent. R. Co., 123 Minn. 264, s. c. 128 Minn. 119.

[31] Hanley v. Kansas City Southern Ry. Co., 187 U. S. 617, 47 L. ed. 333; Louisville & N. Ry. Co. v. Allen, 152 Ky. 145, s. c. 152 Ky. 837; Deardorff v. Chicago, B. & Q. Ry. Co., — Mo. —, 172 S. W. 333.

through another state en route to an intrastate terminus was engaged in interstate commerce.[32]

§ 1313. Same subject; injury while not actively employed. Many questions of interest arise in connection with cases where the employee was injured at a time when not actually engaged in the performance of his duties. Of course the question of suspension of employment arising from the temporary cessation of actual work may be settled under the well recognized principles of the law of master and servant. On this question Mr. Labatt says:

"It is not necessary to show, as a condition precedent to recovery, that he [the servant] was on duty when the injury was received. In so far as his rights are dependent upon the position which he was occupying at the time of the event complained of, a good cause of action is made out as soon as it is proved that, although he may not have been actively engaged in the performance of any duty, the position in question was one which he was authorized to occupy. This rule enures to the servant's advantage where the matters upon which he was engaged were not immediately connected with the actual performance of the work undertaken by him, and even where those matters were of a merely personal and private nature." [33]

While common-law rules as to the effect of a temporary cessation of work upon the continuity of the relation of master and servant, and the obligations thereunder may be applied purely for the purpose of fixing the status of the injured employee, they cannot be relied upon exclusively for the purpose of determining the question of the application of the Federal Employers' Lia-

[32] Baltimore & O. Ry. Co. v. Darr, 124 C. C. A. 565, 204 Fed. 751, aff'g 197 Fed. 665.

[33] 4 Labatt's Master and Servant, § 1558; Powell v. Freeman, 105 Tex. 317, where a brakeman falling into a pit while looking for a tool boy to get a tin cup for a way car of an interstate train was held to have been within the act.

See also exhaustive annotation upon when the relation of master and servant exists, considered with reference to time and place, and the right of a workman to compensation for injuries incurred at such time and place, 4 N. C. C. A. 110. While this annotation is devoted primarily to the right to compensation under workmen's compensation acts, the underlying principles are the same.

bility Act, for there is still another question which must be answered; viz., the relation to interstate commerce. Can it be said that an employee who is not engaged in actual performance of his duties is employed in interstate commerce?

The logical answer would seem to be that where the cessation of activity was not such as to suspend or terminate the relation of master and servant, the character of the employment should partake of the nature of the work temporarily suspended. In other words, a servant engaged in interstate commerce, who, without terminating or suspending the relation of master and servant, ceases work temporarily, continues to be engaged in interstate commerce, although not actively employed in such commerce. It is believed that an analysis of the decisions will bear out this conclusion. Thus the supreme court has held that an employee about to make a brief visit to a boarding house after having assumed his duties and while waiting to engage in an interstate trip is employed in interstate commerce.[34] There, obviously, the work temporarily suspended involved interstate commerce and the court properly held that the cessation of active duties in connection with it did not change the nature of the employment. Similarly it was held in another case that an employee returning on a pass from a trip on which he was engaged in interstate commerce, to take out another interstate train, was engaged in interstate commerce.[35] So also an employee, traveling "deadhead" upon the expiration of his period of service under the Sixteen Hour Law, who at the request of the conductor, who was disabled, performed services for the company which were useful and necessary at the time and under the circumstances is not to be regarded as a mere volunteer or as a stranger who had been employed for the occasion by the conductor.[36]

A brief absence from the scene of work or instrumentality which is not inconsistent with the employee's duty to his em-

[34] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496.

[35] St. Louis Southwestern Ry. Co. v. Brothers, — Tex. Civ. App. —, 165 S. W. 488.

[36] Seaboard Air Line Ry. v. McMichael, 143 Ga. 689.

ployer does not necessarily preclude his claim to be still on duty and engaged in interstate commerce; neither the period or nature or continuity of service is changed by such a stepping aside from or cessation of activity. Thus, the visiting of a wayside place for a lunch or other legitimate and common means of refreshment or waiting for further orders after the performance of the task in hand, the employee at all times being within customary reach for continuance of the day's service and holding himself in readiness immediately to respond, does not change the character of his employment. Accordingly, it has been held that a workman, who, upon arriving at a terminal transfer point on a train engaged in interstate commerce upon the completion of his train work, proceeded to a nearby saloon, off the right of way, to get a drink, and who was injured upon his return to the railroad premises in search of the conductor to receive further instructions was engaged in interstate commerce. The court saying: "Work in the transfer yard was indispensable to the interstate business. Respondent had not been relieved for the day. His service from the time he started out in the morning until the instant of his injury and the work he then thought might be required of him, were inseparably connected with interstate business and, so, were a part thereof. The court, under the circumstances, would not have made any mistake by so deciding, as matter of law."[37] So too an employee was nevertheless within the act although waiting to chock the wheels of cars being placed in a coal chute.[38] The mere fact that at the time of the injury an employee had ceased his activities to get out of the way of a train does not remove him from the protection of the act.[39]

A section foreman, whose duty it was to keep in repair switches in defendant's yard which were used for breaking up, temporary storage, and making up of trains which were devoted to intrastate as well as interstate commerce and who was killed by a train in the yard as he was crossing the track after having repaired some switches and while going to another

[37] Graber v. Duluth, S. S. & A. R. Co., 159 Wis. 414.

[38] Kamboris v. Oregon-Washington R. & Nav. Co., 75 Ore. 358.

[39] Glunt v. Pennsylvania R. Co., 249 Pa. 522.

point in the yard, where or for what purpose not being disclosed, was held to have been engaged in interstate commerce.[40]

An employee on the master's premises, while on his way to work, where he would have engaged in interstate commerce has been held to be within the act[41] and a similar rule has been applied to sectionmen returning from work on a hand car.[42]

A laborer, knocked from a trestle while on his way to defendant's boarding quarters where he intended to spend the night, was held to have been engaged in interstate commerce at the time of his death. In this case, it appeared that decedent had been engaged in repairing and rebuilding a trestle on defendant's interstate road. The boarding cars, at which defendant's employees stayed at night were located about a mile from the trestle. In going to and from their work, they frequently used hand cars but on the day in question, because of obstructions on the tracks they were directed by their foreman to walk and in doing so were compelled to cross a trestle. In affirming a judgment below for the plaintiff, the court said: "At the time of his death he was either an employee engaged in interstate commerce or he was a mere licensee using the tracks of the company in going from his place of work to the boarding car. It is clear that while actually engaged at work for the company he was an employee engaged in interstate commerce, and we think it equally clear that the moment his day's work ended he was not thereby converted into some other kind of an employee, but that he retained his character as an interstate employee, or became, when his work ended, and while going to the boarding car under the circumstances stated, a licensee. After giving to this question careful consideration our opinion is that in going from his place of work to his boarding car he continued in the character of an employee of the company, engaged in interstate commerce. The boarding cars in which he took his meals and re-

[40] Willever v. Delaware, L. & W. R. Co., 87 N. J. L. 348.

[41] Missouri, K. & T. Ry. Co. of Texas v. Rentz, — Tex. Civ. App. —, 162 S. W. 959.

[42] San Pedro, L. A. & S. L. R. Co. v. Davide, 127 C. C. A. 454, 210 Fed. 870.

mained at night were owned by the company. They were carried about by the company from one state to another and from place to place for the convenience and accommodation of its employees, and at the time in question were standing on the tracks of the company. The employees were not only invited to, but were, in a measure, obliged by the company to use these boarding cars, and the only convenient and practicable way to go to and from the cars and the place of work was on the track of the company where Walker was when he was knocked off. * * * And so we think that under these circumstances an employee such as Walker was should be treated as engaged in interstate commerce, not only when actually employed at his work, but while using the premises of the company in going to and from the place set apart for him to eat and sleep and his work on the premises of the employer. In other words, within the contemplation of the act, the course of his employment covered, not only the time he was actually engaged at work, but the time he was engaged in going to and from his work." [43]

A section foreman, who while on his way to his home station on a hand car was injured while helping to lift the car from the track, was held to be within the act. The train which inflicted the injury was engaged in interstate commerce. The court saying: "The return trip to Loraine, his headquarters, was as much an incident and a part of the work of repairing the broken rail as was the outgoing trip to perform that service. We are of the opinion that the act of removing the car from the track out of the way of the coming train, being in the aid of the movement of interstate commerce, was sufficient of itself to bring the accident within the operation of the Federal Employers' Liability Act."[44]

In another case a rather extended application of the rule was made where a repairman sleeping in a bunk car was held to be within the act.[45]

The relation has been held to continue for a reasonable period after the termination of an interstate trip to enable the

[43] Louisville & N. R. Co. v. Walker's Adm'r, 162 Ky. 209.

[44] Texas & P. Ry. Co. v. White, — Tex. Civ. App. —, 177 S. W. 1185.

[45] Sanders v. Charleston & W. C. R. Co., 97 S. C. 50.

employee to wash and change his soiled clothes, in the caboose provided with conveniences therefor, before going to his lodging house.[46] An engineer, who fell into a pit in defendant's roundhouse in the early morning hours while apparently in search of his engine, was held to be within the act.[47]

An engineer testing an engine preparatory to an interstate run is within the act.[48] On the other hand it has been held that a train dispatcher directing the movement of both classes of commerce was not engaged in interstate commerce, during moments of leisure, while awaiting the arrival of a train.[49] This decision, however, is of doubtful authority.

§ 1314. Same subject; negligent fellow-servant need not be engaged in interstate commerce. It is not essential that a fellow-servant whose negligence resulted in injury should have been engaged in interstate commerce if the injured employee was so engaged,[50] and the converse is also true. Hence the mere fact that the negligent fellow-servant was engaged in interstate commerce does not of itself bring the injured employee within the act. Thus recovery cannot be had under the act for injury to an employee engaged solely in intrastate commerce merely because the train inflicting the injury was engaged in interstate commerce.[51]

[46] Easter v. Virginian Ry. Co., — W. Va. —, 86 S. E. 37.

[47] In Seaboard Air Line Ry. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

[48] Lloyd v. Southern R. Co., 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —.

[49] In Gray v. Chicago & N. W. R. Co., 153 Wis. 637, it was held that a train dispatcher employed in dispatching trains engaged in both classes of commerce was not engaged in interstate commerce during intervals of leisure or rest while merely awaiting the arrival of an engine. This decision was affirmed by the United States Supreme Court in 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452, the court refusing to review the action of the court below in excluding evidence that the employee was engaged in interstate commerce on the ground that since defendant's liability was substantially the same under either the state law or the federal act, the error, if any, was not prejudicial.

[50] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

[51] Employee on engine hauling merely a caboose on an intrastate trip who was struck by an interstate train while crossing the track to receive orders is not engaged in interstate commerce. McAuliffe v. New York Cent. & H. River R. Co., 164 N. Y. App. Div. 846.

It has been held by the United States Circuit Court of Appeals that an allegation that both deceased, who was struck by an engine while at work near the track, and the defendant were engaged in interstate commerce at the time of the accident was insufficient, without an allegation showing that the engine which struck the deceased was also engaged in interstate commerce at that time.[52] This decision, however, is clearly erroneous as it is directly in conflict with the decisions of the Supreme Court of the United States.[53]

Where the injured employee was engaged in interstate commerce, the fact that at the time of the injury his negligent fellow-employees were moving a push car loaded with material which defendant found it could not use and which they were taking to their homes after the day's work, the defendant was held liable.[54]

§ 1315. Same subject; preparation of instrumentalities for use. The distinction between the preparing of an instrumentality for use and its actual use is well defined in a recent case. The court after assuming the correctness of the proposition that a car which has been used, and may again be used indiscriminately in both intrastate and interstate commerce is an instrumentality of interstate commerce, says: "There is a distinction between employment in preparing an instrument of commerce for use, and employment in using such an instrument in commerce. Preparation of an instrument for use in commerce of both kinds necessarily means preparation for use in commerce of either kind, and as one kind is interstate commerce, it follows logically that such preparation is for use in interstate commerce; but employment connected with the actual use of

A conductor upon an intrastate car injured in a collision with an interstate car was not engaged in interstate commerce, and the fact that it was his duty to place his car upon a switch so as to permit of the passage of the interstate car does not alter the case. Miller v. Kansas City Western Ry. Co., — Mo. App. —, 168 S. W. 336.

[52] Illinois Cent. R. Co. v. Rogers, 136 C. C. A. 530, 221 Fed. 52.

[53] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, Ann. Cas. 1914C 153n, rev'g 117 C. C. A. 33, 197 Fed. 537.

[54] Louisville & N. R. Co. v. Walker's Adm'r, 162 Ky. 209.

such an instrument is a part of intrastate or interstate commerce according as the instrument is in use in commerce of one kind or the other." The court accordingly held that the preparation for continued use of an instrumentality then in actual use in intrastate commerce was not within the act.[55] It need hardly be said that employees preparing an interstate train for movement are within the act.[56] Thus a porter injured while carrying ice for a water cooler on an interstate train,[57] and an engineer testing his engine preparatory to an interstate run [58] have been held to be within the act.

One employed as a general worker about a railroad yard, who was firing an engine preparatory to its hauling an interstate train, and who was injured while assisting to move the engine to a place in the yard where a barrel of oil would be taken on, to be carried on the trip, prior to the arrival of the engineer, was held to have been engaged in interstate commerce.[59]

It must be borne in mind, however, that the work of preparation must have a direct and substantial relation to interstate commerce, and not a mere anticipated or remote connection growing out of the general transaction of railroad business and equally applicable to all classes of commerce. The failure to apply this rule renders erroneous many of the earlier decisions. To illustrate: An employee taking coal from a chute and placing it in the tender of an engine employed in interstate commerce is properly held to have been engaged in such commerce,[60] while the employee who placed the coal in the chute, from which it was to be taken to coal engines engaged in both classes of

[55] Boyle v. Pennsylvania R. Co., 142 C. C. A. 558, 228 Fed. 266.

[56] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, Ann. Cas. 1914C 159, rev'g 156 N. C. 496; Bramlett v. Southern Ry. Co., 98 S. C. 319; Neil v. Idaho & W. N. R. Co., 22 Idaho 74; Bower v. Chicago & N. W. R. Co., 96 Neb. 419.

[57] Freeman v. Powell, — Tex. Civ. App. —, 144 S. W. 1033.

[58] Lloyd v. Southern Ry. Co., 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —.

[59] Tonsellito v. New York Cent. & H. River R. Co., 87 N. J. L. 651.

[60] Armbruster v. Chicago, R. I. & P. Ry. Co., 166 Iowa 155.

commerce, was not, while so engaged, employed in interstate commerce.[61]

Prior to the decision of the supreme court in the Harrington case [62] it had been held that employees engaged in placing coal in chutes for the use of interstate and intrastate trains, were employed in interstate commerce.[63]

§ 1316. Same subject; employees of electric railways.[64] A motorman on an interstate electric car has been held to be within the act.[65] A lineman, employed by an electric railroad company operating wholly within the boundaries of a state was held to be engaged in interstate commerce where it was shown that by means of connections with other lines of railway more than eight per cent. of its business was of an interstate character and the decedent at the time of the accident was engaged in placing cross-arms on a line of poles in connection with an automatic signal device used by the railroad.[66]

§ 1317. Same subject; employees engaged in construction work. The courts are quite in harmony in holding that employees engaged in initial construction work are not within the act,[67] and there is dictum to that effect in a

[61] Chicago, B. & Q. R. Co. v. Harrington, 241 U. S. 177, 60 L. ed. —, 11 N. C. C. A. 992, aff'g — Mo. App. —, 180 S. W. 443. But see Great Northern Ry. Co. v. Knapp, 240 U. S. 464, 60 L. ed. —, aff'g 130 Minn. 405.

[62] *Supra.*

[63] Kamboris v. Oregon-Washington R. & Nav. Co., 75 Ore. 358; Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

[64] See also, § 1305, *supra.*

[65] South Covington & C. St. R. Co. v. Finan's Adm'x, 153 Ky. 340; McAdow v. Kansas City Western Ry. Co. (Mo. App.), 164 S. W. 188, aff'd 240 U. S. 51, 60 L. ed. —.

[66] Ross v. Sheldon, — Iowa —, 154 N. W. 499.

[67] One employed in the construction of a tunnel, which was intended to be utilized for the purpose of defendant's interstate traffic when completed, was held not to be employed in interstate commerce, because the tunnel had not been and was not being used in, or in connection with, interstate commerce. Jackson v. Chicago, M. & St. P. Ry. Co., 210 Fed. 495.

Where one was at work in the construction of a railroad bridge some 600 feet distant from the railroad, and which was to form part of a cut-off, which had not been provided with rails or used as a railroad, it was held that he was not engaged in interstate commerce, although when the cut-off should be completed it was intended to use it in interstate commerce. Bravis v. Chicago, M. & St. P. R. Co., 133 C. C. A. 228, 217 Fed. 234.

decision of the supreme court.[68] The reason, of course, is that instrumentalities in course of construction, whether cars, engines, tracks, roadbeds, or bridges, have but a potential connection with interstate commerce. But care must be taken to distinguish between initial construction, and construction in the nature of repairs, upkeep, maintenance or operation of a road already in use in interstate commerce. Thus signal construction men have been held to be within the act,[69] as, also, have employees engaged in tearing down and removing the debris of a roundhouse, which had been destroyed, by fire, to permit of its being rebuilt.[70] Employees engaged in the erection of an extension or an addition to a building already in use in interstate commerce are not engaged in construction work and hence are within the act,[71] as are employees engaged in building a new office in a freight shed already used in interstate commerce.[72]

Employee engaged in constructing double track which had never been used for traffic is not within the act. Chicago & E. R. Co. v. Steele, — Ind. —, 108 N. E. 4.

[68] Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, 57 L. ed. 1125, 3 N. C. C. A. 779, rev'g 117 C. C. A. 33, 197 Fed. 537.

[69] Ross v. Sheldon, — Iowa —, 154 N. W. 499; Grow v. Oregon Short Line R. Co., 44 Utah 160.

One employed in installing a block system on track used in interstate commerce is within the act. Saunders v. Southern Ry. Co., 167 N. C. 375.

In Glunt v. Pennsylvania R. Co., 249 Pa. 522, it appeared that the plaintiff was employed in drilling holes through the rails of defendant's interstate railroad so that they could be bonded for the purpose of installing a signal system, and while so engaged was injured. It was contended that plaintiff was not employed on any instrumentality used in interstate commerce, and that, therefore, the Federal Employers' Liability Act did not apply. In holding that the plaintiff was engaged in interstate commerce, the court said: "It is true the signal system at this time was not in operation, but the rail in which the holes were being drilled was part of the roadbed, which at the time of the injury was used in interstate commerce. The rail was to be utilized in connection with the new signal system, but it also entered into and formed a part of the roadbed. The fact that ultimately this rail's use was to be enlarged and its efficiency made greater did not deprive it of being used as an instrumentality in interstate commerce at that time."

[70] Thomas v. Boston & M. R. R., 134 C. C. A. 554, 219 Fed. 180, 8 N. C. C. A. 981.

[71] Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256.

[72] Eng v. Southern Pac. Co., 210 Fed. 92.

It is obvious that construction work of this character is merely incidental to the operation of the road, and in no sense work of initial construction.

The question as to whether work was construction work or repair and maintenance is sometimes difficult of solution but the trend of decisions seems to favor a construction in favor of repairs rather than work of construction.[73] An employee of a railroad company who was killed while removing trash and drift so that a trestle could be erected for temporary use as a bridge for the passage of trains across a river, and to be used later as false works for rebuilding an old bridge, the partial destruction of which necessitated the building of the trestle, was held to have been engaged in interstate commerce, where it was admitted that the old bridge was used for interstate traffic, and the trestle was intended for similar use.[74] A train master in charge of construction work on a new track was held to be within the act although the track had not been placed in general service where it was shown that on two occasions prior to the accident it had been used for interstate trains.[75]

§ 1318. Same subject; repairs and maintenance.[76] Repairmen[77] if shown to have been engaged on instrumentalities of interstate commerce[78] are within the protection of the act.

[73] Ross v. Sheldon, — Iowa —, 154 N. W. 499.

[74] Columbia & P. S. R. Co. v. Sauter, 139 C. C. A. 150, 223 Fed. 604.

[75] Clark v. Chicago Great Western R. Co., 170 Iowa 452.

[76] See also, § 1310, *supra*.

[77] Hostler preparing engine for interstate trip is within the act. Armbruster v. Chicago, R. I. & P. R. Co., 166 Iowa 155.

Boilermaker repairing an engine which had been used and was destined for use in interstate commerce is within the act. Law v. Illinois Cent. R. Co., 126 C. C. A. 27, 208 Fed. 869.

Repairman working on locomotive used in interstate commerce is within the act. Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260.

Repairman working on car used indiscriminately in both inter and intrastate commerce is within the act. Missouri, K. & T. R. Co. v. Denahy, — Tex. Civ. App. —, 165 S. W. 529.

Repairman working on car which belonged to another road and which had just completed an interstate journey is engaged in interstate commerce. Gaines v. Detroit, G. H. & M. R. Co., 181 Mich. 376.

Repairman making temporary repairs on engine used in interstate commerce is within the act. Baltimore & O. R. Co. v. Darr, 124 C. C. A. 565, 204 Fed. 751, aff'g 197 Fed. 665.

[78] A boilermaker injured while re-

This rule has been applied to laborers repairing tracks used in both classes of commerce;[79] to sectionmen clearing away wrecks;[80] to laborers, removing earth from the roadbed in the course of repair and maintenance;[81] and to a section foreman, taking out rails from the main track and replacing them with others, the old rails being placed upon a flat car standing upon a track employed in both classes of traffic.[82]

It has been held that a track laborer injured while loading old rails, which had been replaced by new ones, on a flat car for the purpose of storing them elsewhere, or possibly selling them as scrap iron, was not engaged in interstate commerce.[83] The United States Circuit Court of Appeals, upon similar facts, reached a different and more logical conclusion. There, also, the plaintiff was injured while removing from between the tracks old rails which had been replaced by new ones. In holding that the work was connected with interstate commerce the court said: "The work of which the plaintiff's was a part, was the repair of the roadbed by replacing old rails with new ones. The work of removing old rails was not complete when they were lifted from their place upon the ties and tossed upon

pairing the boiler constituting part of a wrecking train which when in use was subject to call to different states is not engaged in interstate commerce. Ruck v. Chicago, M. & St. P. R. Co., 153 Wis. 158.

Machinist in shop used for repair of both inter- and intrastate engines, injured while removing a shaft hanger from a girder in the shop is not within the act. Shanks v. Delaware, L. & W. R. Co., 163 N. Y. App. Div. 565, aff'd 239 U. S. 556, 60 L. ed. —.

[79] An employee injured by the fall of a rail which he was carrying to replace an old rail in a track used by interstate trains is within the act. Cincinnati, N. O. & T. P. Ry. Co. v. Tucker, 168 Ky. 144; Truesdell v. Chesapeake & O. Ry. Co., 159 Ky. 718.

A laborer in a track gang, engaged in repairing a track located wholly within the local state, but used by defendant for the transportation of both intrastate and interstate freight and passengers, was employed in interstate commerce. Lombardo v. Boston & M. R. R., 223 Fed. 427.

[80] A section man injured while clearing up a wreck and repairing a track used in interstate commerce is within the act. Missouri, K. & T. Ry. Co. of Texas v. Mooney, — Tex. Civ. App. —, 181 S. W. 543.

[81] Tralich v. Chicago, M. & St. P. R. Co., 217 Fed. 675.

[82] Cherpeski v. Great Northern Ry. Co., 128 Minn. 360.

[83] Illinois Cent. R. Co. v. Kelly, 167 Ky. 745.

the roadbed, but was complete only when they were carried away from the place where they lay between the tracks. The removal of the old rails was as much a part of the repair work as the bringing of new rails to the place to be repaired." [84]

An engineer on a train hauling gravel for the purpose of repairing or improving the roadbed on an interstate road is engaged in interstate commerce [85] as is a machinist struck by a train engaged in switching both interstate and intrastate commerce while on his way to repair an engine engaged in interstate commerce.[86] Taking an engine from one state to another for the purpose of repairs is an act of interstate commerce.[87]

§ 1319. Same subject; movement of cars, switching, coupling, etc. The fact that interstate cars had not yet been coupled to the train is of no significance where they were to be moved, and the train was then awaiting their attachment.[88]

Switching crews when engaged upon interstate cars or trains are within the act,[89] but the proof must show employment in

[84] Philadelphia, B. & W. R. Co. v. McConnell, 142 C. C. A. 555, 228 Fed. 263.

[85] Holmberg v. Lake Shore & M. S. Ry. Co., — Mich. —, 155 N. W. 504.

[86] Staley v. Illinois Cent. R. Co., 268 Ill. 356.

[87] Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87.

[88] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496.

Where an employee was injured while coupling an engine to a baggage car which did not appear to be then engaged in interstate commerce, the fact that interstate cars were to be immediately attached thereto as part of a mixed train did not bring him within the act. Atchison, T. & S. F. Ry. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545. The holding in this case would seem to be in conflict with the decision of the supreme court in North Carolina R. Co. v. Zachary, *supra*.

[89] Moliter v. Wabash R. Co., 180 Mo. App. 84; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609; Southern R. Co. v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229, 60 L. ed. —; Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684; Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177; Pittsburgh, C., C. & St. L. Ry. Co. v. Glinn, 135 C. C. A. 46, 219 Fed. 148; Vandalia R. Co. v. Holland, — Ind. —, 108 N. E. 580; Walsh v. Lake Shore & M. S. Ry. Co., 185 Mich. 177; St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41; Southern Ry. Co. v. Gadd, 125 C. C. A. 21, 207 Fed. 277, aff'd 233 U. S. 572, 58 L. ed. 1099; Kansas City, M. & O. Ry. Co. of Texas v. Pope, — Tex. Civ. App. —, 152 S. W. 185; Barlow v. Lehigh Val. R. Co., 214 N. Y. 116, aff'g 158 App.

interstate commerce[90] and the particular service upon which they are then engaged must relate to interstate commerce;[91] mere anticipated service affecting interstate commerce will not suffice. But the mere fact that at the time of his injury a switchman was employed about an intrastate car being detached from or added to an interstate train does not place him without the act.[92] The removal of empty cars from a private side track to permit of the placing of loaded interstate cars thereon presents a question for the jury as to whether an employee engaged in such removal was engaged in interstate commerce.[93] An employee engaged in "breaking-up" a train which had carried interstate baggage was not within the act, the baggage having been removed from the train and the decedent's employment being merely preparatory to the making up of another train with the empty cars.[94] The work of taking a "bad-order" car from an interstate train is part of interstate commerce.[95]

Div. 768; Montgomery v. Southern Pac. Co., 64 Ore. 597; Otos v. Great Northern Ry. Co., 128 Minn. 283, aff'd 239 U. S. 349, 60 L. ed. —; Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379; Hall v. Vandalia R. Co., 169 Ill. App. 12; St. Louis Southwestern R. Co. v. Anderson, 117 Ark. 41; Devine v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —; Atlantic Coast Line R. Co. v. Reaves, 125 C. C. A. 599, 208 Fed. 141.

An employee injured while engaged in switching cars preparatory to returning them to their points of origin in other states was within the act. Bruckshaw v. Chicago, R. I. & P. Ry. Co., — Iowa —, 155 N W. 273.

90 Norton v. Erie R. Co., 163 N. Y. App. Div. 466; Knowles v. New York, N. H. & H. R. Co., 164 N. Y. App. Div. 711.

91 Illinois Cent. R. Co. v. Behrens, 233 U. S. 473, 58 L. ed. 1051, 10 N. C. C. A. 153, s. c. 192 Fed. 581; Erie R. Co. v. Welsh, 89 Ohio St. 81; Norton v. Erie R. Co., 163 N. Y. App. Div. 466.

92 New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 9 N. C. C. A. 1, aff'g 157 N. Y. App. Div. 941; Crandall v. Chicago Great Western R. Co., 127 Minn. 498; Southern R. Co. v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229, 60 L. ed. —. *Contra,* Brakeman detaching intrastate car from interstate train not within the act. Van Brimmer v. Texas & P. Ry. Co., 190 Fed. 394.

93 Pennsylvania Co. v. Donat, 239 U. S. 50, 60 L. ed. —, aff'g 139 C. C. A. 665, 224 Fed. 1021. A writ of error in this case was held frivolous. *Contra,* Louisville & N. R. Co. v. Parker's Adm'r, 165 Ky. 658.

94 Fairchild v. Pennsylvania R. Co., — App. Div. —, 155 N. Y. Supp. 751.

95 Sears v. Atlantic Coast Line R. Co., 169 N. C. 446.

A car inspector who was injured while disconnecting the steam hose between the engine and cars of an interstate passenger train, in order to uncouple the engine from the cars so that another engine could be substituted, when the train would continue its run, was held to have been engaged in interstate commerce at the time.[96]

It has been held that a trainman injured while engaged in coupling an engine to a baggage car, was not within the act where there was no evidence that the engine and baggage car were going beyond the state and ordinarily did not do so, notwithstanding the fact that some of the cars in the train had come from or were destined beyond the state.[97] This decision is unquestionably erroneous involving as it does an analysis of each particular element of an entire instrumentality of interstate commerce. The fact that interstate cars were included in the train rendered the entire train engaged in interstate commerce and to hold that an employee was not within the act merely because the particular car which inflicted the injury was engaged in intrastate commerce is to say the least anomalous.[98]

An intermediate state court has held that a freight conductor in charge of a locomotive, tender and caboose, who was killed by an interstate train while he was crossing the track at the station at which his train had stopped while on his way to report the arrival of his train was not engaged in interstate commerce.[99]

§ 1320. Same subject; employees engaged in transportation by water. The question as to whether a railroad company also engaged in transportation by water is within the act is discussed in another section.[1] An employee, injured while unloading a vessel owned by a railroad but which was not operated in connection with same or as part of defendant's system was not within the act.[2] A deck hand on a tug boat operated in

[96] Kansas City Southern R. Co. v. Miller, 117 Ark. 396.

[97] Atchison, T. & S. F. Ry. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545.

[98] New York Cent. & H. River R. Co. v. Carr, 238 U. S. 260, 59 L. ed. 1298, 9 N. C. C. A. 1, aff'g 157 N. Y. App. Div. 941.

[99] McAuliffe v. New York Cent. & H. River R. Co., 164 N. Y. App. Div. 846.

[1] See § 1305, *supra*.

[2] Jensen v. Southern Pac. Co.,

connection with the railroad system, who was injured as the tub was tying up to its home dock preparatory to moving a barge to another state, was engaged in interstate commerce.[3]

§ 1321. Same subject; miscellaneous employees. Yard clerks inspecting trains containing interstate shipments,[4] employees engaged in loading freight on cars for interstate transportation,[5] employees engaged in examining and making a record of seals on interstate cars,[6] a yard clerk, whose duty required him to make a record of all cars entering the yard, both interstate and intrastate, who was killed while in the performance of his duty,[7] and linemen employed upon a railroad engaged in both interstate and intrastate commerce [8] have been held to be within the act. So also a signal man charged with the duty of keeping electric signals used in controlling the operation of both interstate and intrastate trains is within the act where injured while engaged in the line of his employment,[9] and an employee engaged in repairing a telegraph line which was used by defendant for the purpose of directing the operation of its trains in interstate commerce, has been held to be within the act.[10] One employed in repairing an electrical apparatus on a bridge over defendant's railroad was held to be within the act.[11]

A car inspector, who was injured while endeavoring to raise a wrecked car which obstructed tracks over which interstate commerce was carried, was held to have been within the act although his efforts were primarily for the purpose of liberating

215 N. Y. 514, 9 N. C. C. A. 286, aff'g 167 App. Div. 945.

[3] Erie R. Co. v. Jacobus, 137 C. C. A. 151, 221 Fed. 335.

[4] St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800.

[5] Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311.

One employed in loading car must show relation to interstate commerce. Tsmura v. Great Northern R. Co., 58 Wash. 316.

[6] Pecos & N. T. Ry. Co. v. Rosenbloom, 240 U. S. 439, 60 L. ed. —, rev'g — Tex. —, 173 S. W. 215.

[7] In Pittsburgh, C., C. & St. L. Ry. Co. v. Farmers' Trust & Savings Co., — Ind. —, 108 N. E. 108.

[8] Ross v. Sheldon, — Iowa —, 154 N. W. 499.

[9] Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435.

[10] Deal v. Coal & Coke R. Co., 215 Fed. 285.

[11] Millette v. New York, W. & B. R. Co., 169 N. Y. App. Div. 126.

a fellow-employee held beneath it.[12] A division road master, who was killed while endeavoring to repair a brake beam which was dragging and which if it continued to drag might damage the track and switch and result in a derailment, was engaged in interstate commerce.[13] An employee, whose duty it was to operate a turntable and to wipe engines, who at the time of his injury was obeying a direction to proceed to the turntable, was held entitled to recover under the act.[14]

A watchman, employed to keep trespassers from railroad premises who was injured while pursuing trespassers whom he had driven from a train was within the act;[15] but a watchman at a grade crossing employed to warn trespassers on the highway of the approach of trains, who was injured while endeavoring to prevent a traveler from going upon a crossing, was not engaged in interstate commerce.[16] An assistant gardener employed by an interstate carrier to cultivate its station yards is not engaged in interstate commerce[17] nor was an employee, killed while cleaning stencils used for marking cars engaged in interstate commerce.[18] An employee of a private logging railroad is not within the act.[19]

An instruction that if the decedent "at the time of his death was engaged in examining seals and making record of seals on cars being transported interstate over the line of defendant and other lines of connecting carriers, and if such work was a necessary part and customary work, reasonably carried on by defendant as a part of its business, transporting freight interstate over its line, or if he had then just completed such inspection of said train and had not yet completed his record and placed it in the place where usually kept, then you will return a verdict

12 Southern R. Co. v. Puckett, 16 Ga. App. 551.

13 Lynch's Adm'r v. Central Vermont Ry. Co., — Vt. —, 95 Atl. 683.

14 Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202.

15 Smith v. Industrial Acc. Commission of California, 26 Cal. App. 560.

16 Louisville & N. R. Co. v. Barrett, 143 Ga. 742.

17 Galveston, H. & S. A. Ry. Co. v. Chojnacky, — Tex. Civ. App. —, 163 S. W. 1011.

18 Illinois Cent. R. Co. v. Rogers, 136 C. C. A. 530, 221 Fed. 52.

19 The case of Bay v. Merrill & Ring Lumber Co., 211 Fed. 717.

for the defendant on its special plea that plaintiff has no right to maintain this suit in the capacity in which she sues" was held erroneously refused where plaintiff sued as widow.[20]

§ 1322. Negligence under the act. The act provides that common carriers by railroad engaged in interstate commerce shall be liable for "injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

The question as to what constitutes negligence rendering the railroad company liable is too varied in character for discussion in a chapter of this scope. Unquestionably it must be determined in the light of the decisions of the federal courts.[21]

Negligence need not be proved where a violation of the Federal Safety Appliance Act is shown, since that act imposes an absolute duty upon the railroad company to comply with its terms, and noncompliance renders it unconditionally liable for injury irrespective of the degree of care exercised.[22]

It must be shown that the violation of the act complained of was the proximate cause of the injury. Thus the violation of the Federal Hours of Service Act does not of itself confer a right of action for injuries sustained by an employee working beyond the prescribed period unless such violation was the proximate cause of the injury.[23]

§ 1323. Assumption of risk. Section 4 of the act provides as follows:

"In any action brought against any common carrier under or by virtue of any of the provisions of this act to recover damages for injury to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where the violation by such common

[20] Pecos & N. T. Ry. Co. v. Rosenbloom, 240 U. S. 439, 60 L. ed. —, rev'g — Tex. —, 173 S. W. 215.

[21] See § 1304, *ante*.

[22] St. Louis, I. M. & S. Ry. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, rev'g 71 Ark. 445; Chicago, B. & Q. R. Co. v. United States, 220 U. S. 559, 55 L. ed. 582.

[23] St. Louis, I. M. & S. Ry. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427.

carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee."

The Supreme Court of the United States has construed the word "statute" in this section to refer solely to federal statutes,[24] and, except where the injury is the result of a violation of a federal statute enacted for the safety of employees, assumption of risk continues to be a defense under the Federal Employers' Liability Act.[25]

It is not the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but the employee may assume that the employer or his agents have exercised proper care with respect to his safety until informed to the contrary unless the want of care and the danger arising from it are so obvious that an ordinarily careful and prudent person would, under the circumstances, have observed and appreciated them.[26]

The question as to what risks are assumed is too broad a subject for discussion in a work of this kind. Elsewhere the distinction between assumption of risk and contributory negligence is pointed out.[27]

§ 1324. Contributory negligence; effect. Under the express provisions of the act contributory negligence on the part of the injured employee is not a defense.[28] The section reads as follows:

[24] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424.

[25] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; Jacobs v. Southern Ry. Co., 241 U. S. 229, 60 L. ed. —, aff'g 116 Va. 189; Baugham v. New York, P. & N. R. Co., 241 U. S. 237, 60 L. ed. —.

[26] Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

[27] See *post*, § 1325.

[28] Hardwick v. Wabash R. Co., 181 Mo. App. 156; Kenney v. Seaboard Air Line Ry. Co., 165 N. C. 99; La Mere v. Railway Transfer Co., 125 Minn. 159; Gee v. Lehigh Valley R. Co., 163 N. Y. App. Div. 274; Pfeiffer v. Oregon-Washington R. & Nav. Co., 74 Ore. 307, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, 60 L. ed. —; Fish v. Chicago, R. I. & P. Ry. Co., 263 Mo. 106, 8 N. C. C. A. 538; Mattocks v. Chicago & A. Ry. Co., 187 Ill. App. 529; Baltimore & O. R.

"In all actions hereafter brought against any such common carrier by railroad under and by virtue of any of the provisions of this act to recover damages for personal injuries to an employee or where such injuries have resulted in his death, the fact that such employee may have been guilty of contributory negligence shall not bar a recovery but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided,* That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee." [29]

The purpose of the act was to abrogate the common-law rule completely exonerating the carrier where contributory negligence was established, and to substitute a new rule, confining the exoneration arising from the failure of the employee to use due care for his safety to a proportional part of the damages, corresponding to the amount of negligence attributable to the employee.[30]

The statutory direction that the diminution shall be in proportion to the amount of negligence attributable to such employee; means that, where the causal negligence is partly attributable to him and partly to the carrier, he shall not recover full damages, but only a proportional amount bearing the same relation to the full amount as the negligence attributable to the carrier bears to the entire negligence attributable to both; [31]

Co. v. Whitacre, 124 Md. 411; Saunders v. Southern Ry. Co., 167 N. C. 375; Easter v. Virginian Ry. Co., — W. Va. —, 86 S. E. 37; Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611; Charleston & W. C. Ry. Co. v. Sylvester, — Ga. App. —, 86 S. E. 275.

[29] Section 3, Act of April 22, 1908, 35 U. S. Stat. L. 65, c. 149.

[30] Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096.

[31] Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096; Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836; Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88; Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, rev'g 167 N. C. 163; Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321; Chadwick v. Oregon-Washington R. & Nav. Co., 74 Ore. 19.

hence no degree of negligence on the part of the plaintiff, however gross or proximate, can, as a matter of law, bar recovery where the defendant was also negligent,[32] for, of course, it would be impossible for the plaintiff's negligence to equal the combined negligence of both the plaintiff and the defendant.[33]

In considering the question of contributory negligence for the purpose of reducing the damages, it cannot too strongly be emphasized that the negligence of the employee is not compared with the negligence of the defendant. If such were the rule, in the event of equality of fault there could be no recovery. As clearly pointed out by the supreme court the quantum of negligence chargeable to the employee is to be determined upon the basis of the proportion it bears to the combined negligence of both parties.[34] To illustrate the rule mathematically, if the combined negligence of both parties is placed at 100, and the employee is chargeable with ninety per cent. of the entire amount he would still be entitled to recover ten per cent. of his total damages, the amount of his damages being reduced ninety per cent. on account of his contributory negligence.[35]

Even where contributory negligence is shown it will not be considered unless it directly and proximately contributed to the injury. In other words, it must be causal in character,[36] and

[32] Pennsylvania Co. v. Cole, 131 C. C. A. 244, 214 Fed. 948 (where a brakeman on a standing train was injured in a rear-end collision while asleep in the caboose, when, it was claimed, he should have flagged the following train). Louisville & N. R. Co. v. Heinig's Adm'x, 162 Ky. 14, (where decedent, an engineer, negligently failed to give signal of his approach to meeting point of trains resulting in collision with waiting train, it having been the conductor's duty to listen for such signals on approaching the meeting point and on failure to hear them to stop the train by means of the angle-cock.

See also, New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

[33] Pennsylvania Co. v. Cole, 131 C. C. A. 244, 214 Fed. 948.

[34] Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096; Chadwick v. Oregon-Washington R. & Nav. Co., 74 Ore. 19.

[35] Chadwick v. Oregon-Washington R. & Nav. Co., 74 Ore. 19.

[36] Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311. See also, Coney Island Co. v. Dennan, 79 C. C. A. 375, 149 Fed. 687, and Toledo, St. L. & W. R. Co. v. Kountz, 94 C. C. A. 244, 168 Fed. 832.

this is true, in actions under the federal act, irrespective of the rule prevailing in the state courts.[37]

Damages and contributory negligence being so blended and interwoven, and the conduct of the plaintiff at the time of the injury being so important a matter in the assessment, it is rarely permissible for the court to submit the questions of damages to the jury without also permitting them to consider the conduct of the plaintiff at the time of the injury.[38]

§ 1325. Same subject; distinction between contributory negligence and assumption of risk. The distinction between contributory negligence and assumption of risk was not of great importance in actions at common law, since the presence of either prevented a recovery. For this reason the courts were not always careful in applying the principles underlying these two defenses to the facts presented. The distinction is of the greatest importance in actions under the Federal Employers' Liability Act, however, since while contributory negligence has been abolished as a defense, assumption of risk, if shown, bars a recovery, except where a federal act, intended for the safety of employees, is violated.[39]

The difference has been very clearly pointed out by the United States Supreme Court. "Contributory negligence," said the court, "involves the notion of some fault or breach of duty on the part of the employee, and since it is ordinarily his duty to take some precaution for his own safety when engaged in a hazardous occupation, contributory negligence is sometimes defined as a failure to use such care for his safety as ordinarily prudent employees in similar circumstances would use. On the other hand, the assumption of risk, even though the risk be obvious, may be free from any suggestion of fault or negligence on the part of the employee. The risks may be present, notwithstanding the exercise of all reasonable care on his part. Some em-

[37] Illinois Cent. R. Co. v. Porter, 125 C. C. A. 55, 207 Fed. 311, 6 N. C. C. A. 98n.

[38] Norfolk-Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351.

[39] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424; s. c. 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

ployments are necessarily fraught with danger to the workman—danger that must be and is confronted in the line of his duty. Such dangers as are normally and necessarily incident to the occupation are presumably taken into account in fixing the rate of wages. And a workman of mature years is taken to assume risks of this sort, whether he is actually aware of them or not. But risks of another sort, not naturally incident to the occupation, may arise out of the failure of the employer to exercise due care with respect to providing a safe place of work and suitable and safe appliances for the work. These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person would have observed and appreciated them." [40]

In another decision it was said: "Assumption of risk rests upon the intelligent acquiescence and knowledge of the danger and appreciation of the risk naturally incident to the employment, or arising from a particular situation in which the work is done. It negatives the prima facie liability of the master, and does not involve the aggravation or creation of the peril by misconduct of the servant. On the other hand, contributory negligence rests on the breach of duty to exercise ordinary care. It displaces the prima facie liability of the master, adds a new danger to the situation not necessarily incident to the work, and is imposed by law upon the servant, however unwilling or protesting he may be. Though some authorities hold that assumption of risk is not based upon contract, it is generally held to grow out of the contract of employment, and of the application

[40] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424. See also, Schlemmer v. Buffalo, R. & P. Ry. Co., 220 U. S. 590, 55 L. ed. 596.

The act of a brakeman in going through the yards in search of a drinking cup in the course of which he fell into a cinder pit involves the application of the doctrine of contributory negligence, not assumption of risk. Baltimore & O. R. Co. v. Whitacre, 124 Md. 411.

The fact that decedent may have known beforehand that an engine on a cross-over track was too close to the track upon which he was operating his engine involves the application of the doctrine of contributory negligence, not assumption of risk. Louisville & M. R. Co. v. Fleming, — Ala. —, 69 So. 125.

of the maxim '*volenti non fit injuria.*' The test of knowledge of danger is not the exercise of ordinary care to discover the danger, but whether the danger was known to or plainly observable by the employee. The test of appreciation of risk is whether the servant understood the risk, or by the exercise of ordinary care ought to have understood it. * * *

"Notwithstanding this distinction, it is generally held that assumption of risk and contributory negligence frequently approximate where the danger is so obvious and imminent that no ordinarily prudent man would assume the risk of injury therefrom." [41]

While it is a general rule that an employee cannot without impairing his right to recover from the employer, remain at work in presence of a known danger so imminent that no reasonably prudent man would confront it, even though the employer has promised to repair, the authorities differ as to whether the recovery is defeated upon the ground of assumption of risk or contributory negligence. The question has not as yet been definitely determined by the Supreme Court of the United States with respect to the Federal Employers' Liability Act.[42]

§ 1326. Same subject; employee's negligence as the sole cause of injury. The failure of the employee to exercise ordinary care for his own safety must be distinguished from acts of the employee constituting the sole cause of the injury; in other words, where there is an absence of concurring negligence on the part of the carrier proximately contributing to the accident. In the latter case, of course, the defendant is not liable for there is no negligence upon which liability can be predicated.[43] However, it must be borne in mind that the statute permits a recovery where the injury resulted "in whole or *in part*" from the defendant's negligence, consequently where it is negligent, the defendant cannot escape liability by calling the plaintiff's act

[41] Chesapeake & O. Ry. Co. v. De Atley, 159 Ky. 687, rev'd on other grounds 241 U. S. 310, 60 L. ed. —.

[42] Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

[43] Fletcher v. South Dakota Cent. Ry. Co., — S. D. —, 155 N. W. 3; Gee v. Lehigh Val. R. Co., 163 N. Y. App. Div. 274; Ellis' Adm'r v. Louisville, H. & St. L. R. Co., 155 Ky. 745 (where a flagman sent out to flag trains was struck by a train which he was supposed to flag, no evidence of negligence on the part of the engineer being shown);

the proximate cause.[44] Hence the mere fact that the contributory negligence of an employee was the proximate cause of his injury will not prevent a recovery.[45]

It is only where the plaintiff's act is the sole cause, in other words, when the defendant's act is no part of the causation, that defendant can escape liability under the act.[46] If the defend-

Charleston & W. C. Ry. Co. v. Sylvester, — Ga. App. —, 86 S. E. 275 (act of employee in passing between moving cars held sole cause of injury).

[44] Grand Trunk Western Ry. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836, aff'd 233 U. S. 42, 58 L. ed. 838; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761; Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

[45] Louisville & M. R. Co. v. Heinig's Adm'x, 162 Ky. 14.

[46] Grand Trunk Western Ry. Co. v. Lindsay, 120 C. C. A. 166, 201 Fed. 836, aff'd 233 U. S. 42, 58 L. ed. 838; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761 (holding that where the employee, seeing that because of the defective condition of the coupler it would not couple automatically, endeavored to press the bumper into position with his foot, the question as to whether his act was the sole cause of the injury should have been left to the jury); Chesapeake & O. Ry. Co. v. De Atley, 159 Ky. 687, rev'd 241 U. S. 310, 60 L. ed. — (where an employee attempting to board a moving train slipped and was thrown under the wheels by the speed of the train); Hobbs v. Great Northern Ry. Co., 80 Wash. 678 (recovery refused where a hostler was injured riding on pilot in violation of orders); Pennsylvania R. Co. v. Goughnour, 126 C. C. A. 39, 208 Fed. 961 (where a conductor making a coupling was injured when the rear of his train was struck by another train, it was held that plaintiff's omission to see that the flagman performed his duty was not the sole cause); Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901 (where plaintiff, a fireman, after calling the engineer's attention to a green light paid no further attention to the engineer's failure to slow down, it was held that his non-action constituted contributory negligence merely and was not the sole proximate cause).

Fireman's failure to see signal indicating an open switch held contributory negligence merely and not the sole cause. Hackney v. Missouri, K. & T. Ry. Co., 96 Kan. 30.

Defendant held not liable for death of experienced fireman acquainted with general condition of premises who was killed by contact with a car on an adjoining track on account of the alleged proximity of the tracks. Reese v. Philadelphia & R. Ry. Co., 239 U. S. 463, 60 L. ed. —, 10 N. C. C. A. 926, aff'g 140 C. C. A. 660, 225 Fed. 518.

Recovery for death of section foreman who stepped on track in front of approaching engine notwithstanding repeated warnings held barred by his negligence which was the sole cause. Chesapeake, Western Ry. v. Shiflett's Adm'x, — Va. —, 86 S. E. 860.

Where a brakeman voluntarily placed himself in a position of dan-

ant was guilty of any negligence whatever, however slight, which contributed to cause the injury, it cannot be contended that the negligence of the plaintiff was the sole proximate cause of the accident.[47]

Where the negligence of the defendant was not a continuous

ger where he was crushed between a moving car and a platform, his negligence was held the sole cause of the injury. Pankey v. Atchison, T. & S. F. R. Co., 180 Mo. App. 185, 6 N. C. C. A. 74.

Going between moving cars to uncouple them bars recovery in the absence of negligence on the part of defendant. Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

Where an engineer was injured while standing by his engine in violation of rules, a recovery was permitted, negligence being shown on the part of the defendant. Pfeiffer v. Oregon-Washington R. & Nav. Co., 74 Ore. 307, 7 N. C. C. A. 685, writ of error dismissed, 239 U. S. 658, 60 L. ed. —.

An instruction that if decedent, an engineer, had been flagged in time to have prevented a collision and he was not on the lookout, such conduct would constitute contributory negligence diminishing the damages was held erroneous as permitting a recovery where the employee's negligence was the sole cause of the accident. Louisville & N. R. Co. v. Holloway's Adm'r, 163 Ky. 125.

Where a roadmaster went under a car after hearing the conductor direct a brakeman to tell the engineer not to move the train pending repairs, and was killed upon the movement of same, his negligence was held not to render that of the trainmen remote. Lynch's Adm'r v. Central Vermont Ry. Co., — Vt. —, 95 Atl. 683.

Plaintiff's stumbling on greasy floor held not sole cause of injury where he fell against an unguarded crank shaft. Knapp v. Great Northern R. Co., 130 Minn. 405, aff'd 240 U. S. 464, 60 L. ed. —.

The act of an engineer in using a Buckner gauge without a guard glass when he could have cut it off and used the gauge-cocks held not as a matter of law, the proximate cause of his injury caused by the bursting of the glass. Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

Where an employee sent out to flag a train, placed no torpedoes on the track but placed his lantern on the ground and then laid down beside the track with his head on a cross tie and while in this position was struck by the train which he was sent to flag, the injury was the result of the sole negligence of the employee. Southern Ry. Co. v. Gray, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C. 433.

See also, Louisville & N. R. Co. v. Johnson's Adm'x, 161 Ky. 824, where the question as to whether decedent killed was while relieving nature between two box cars where he was out of sight, as claimed by defendant, or at the end of a train of box cars with the knowledge of the section foreman, who knew or should have known of the approach of the cars which inflicted the injury, as claimed by the plaintiff was held a question for the jury.

[47] Houston Belt & Terminal Ry. Co. v. Barger, — Tex. Civ. App. —, 176 S. W. 870.

sequence proximately causing the injury, but was broken by an act of the plaintiff constituting a new intervening cause independent of the defendant's act and which broke the causal connection, there can be no recovery.[48] The violation by the employee of a rule the observance of which was essential to imposition upon the defendant of a duty toward him may constitute the sole, proximate cause of the injury.[49] Thus where a brakeman was killed in a collision following the stopping of his train upon its breaking apart, he having failed to conform with the rule of defendant which required him in the event of the stopping of his train between stations immediately to protect his train by going back a sufficient distance to warn oncoming trains, it was held that his own negligence was the sole cause of the accident.[50] A similar rule applies to the disobedience of positive orders, resulting in injury.[51]

Negligence on the part of the employee which would otherwise be the sole cause of the injury may be affected by subsequent negligence on the part of the defendant and the application of the "last clear chance" doctrine.[52] Since the "last clear chance" doctrine presupposes antecedent negligence upon the part of the person injured it would seem that in such cases the

48 Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

49 Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 60 L. ed. —, rev'g 125 Minn. 348; Kentucky & T. Ry. Co. v. Minton, 167 Ky. 516, where a car inspector went under a car without placing the warning signals required by the defendant's rules.

50 Great Northern Ry. Co. v. Wiles, 240 U. S. 444, 60 L. ed. —, rev'g 125 Minn. 348; Ellis' Adm'r v. Louisville, H. & St. L. R. Co., 155 Ky. 745; Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187 (where it was held that there could be no recovery for the death of a railroad conductor in a collision if such collision was due solely to the failure of the conductor to perform his duty to see that following trains were properly flagged).

51 Where an engineer who had been ordered to reduce speed to 10 miles per hour at a certain point because of the condition of the track, was killed in a derailment while traveling at a speed of about 45 miles per hour, it was held there could be no recovery. Kendrick v. Chicago & E. I. R. Co., 188 Ill. App. 172. While this decision was based upon the doctrine of assumption of risk, it is apparent that the employee's negligence was the sole cause of the accident.

52 Raines v. Southern Ry. Co., 169 N. C. 189.

question of contributory negligence is always present. However a recent decision is somewhat obscure on the question.[53]

While it has been held that contributory negligence, to be available, must be pleaded,[54] the claim that plaintiff's negligence was the sole cause of the injury is available under the general issue.[55]

§ 1327. Same subject; what constitutes contributory negligence. The act has not changed the rule as to what constitutes contributory negligence,[56] and, as in other actions, the question must be determined in the light of the age and experience of the employee.[57] It has been held that it is not available unless pleaded.[58]

[53] Raines v. Southern Ry. Co., 169 N. C. 189. In this case the court said: "If, notwithstanding his (decedent's) negligence in sleeping on the track, the defendant's engineer, after he saw him lying there and became aware of his perilous situation, could, by exercising the proper care, have stopped the train in time to avoid the injury, and failed to do so, his negligence in not doing so would be considered the proximate cause of intestate's death." The court held erroneous an instruction that if decedent placed himself in a position of peril on the track he would be guilty of contributory negligence. At best this must be regarded as a very doubtful decision.

[54] San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194. But see Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

[55] Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

[56] Raines v. Southern Ry. Co., 169 N. C. 189.

A conductor passing between cars which he supposed to be "dead," and which would have been "dead" had the instructions which he had previously delivered to his subordinate been carried out, is not guilty of contributory negligence. Murphy v. Atlanta & C. Air Line Ry. Co., — S. C. —, 87 S. E. 310, s. c. 89 S. C. 15.

[57] Raines v. Southern Ry. Co., 169 N. C. 189. In this case a boy between 15 and 16 years of age was sent out to flag an approaching train, and in attempting to do so was struck and killed. The court instructed the jury as follows on the issue of contributory negligence:

"If he sat down near the track in a dangerous position, if you find he thought that he was far enough away, if he put himself in a perilous position upon the railroad track, and he was killed, the court charges you that he would be guilty of contributory negligence, and it would be your duty to answer the second issue, 'Yes.'"

This instruction was held erroneous by the supreme court. This decision goes very far, as in another portion of the opinion the court intimates that the employee was sleeping on the track. On the latter question the court says: "If

A superior servant is not chargeable with the negligence of his subordinate merely because the latter was under his control.[59] A reasonable reliance by an employee upon the employer's promise to repair a defect is as good an answer to the charge of contributory negligence as to the contention that the risk was assumed.[60]

The question of contributory negligence is for the jury to determine, unless from all the evidence and circumstances only one conclusion could reasonably be reached; namely, that the defendant was at fault and thereby contributed to his injury.[61] But where contributory negligence is clearly shown, the court should so instruct the jury, with directions as to how to apportion the damages if they believe the defendant to have been negligent.[62] The jury is entitled to consider all the circumstances which tend to fix the quality and quantity of the plaintiff's contributory negligence in its relation to the sum total of the negligence of both parties, and even though the negligence

the deceased had fallen asleep on the track, his negligence in doing so would not be contributory, in a legal sense, unless it was the proximate cause of the injury to him."

58 San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194. But see Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

59 Louisville & N. R. Co. v. Winkler, 162 Ky. 843, 9 N. C. C. A. 146, where a conductor was injured by the pulling out of a draw-head, the defective condition of which had not, through the negligence of the brakeman, been discovered.

60 Seaboard Air Line Ry. v. Horton, 239 U. S. 595, 60 L. ed. —, aff'g 157 N. C. 146, 162 N. C. 424.

61 Pfeiffer v. Oregon-Washington R. & Nav. Co., 74 Ore. 307, 7 N. C. C. A. 685, writ of error dismissed 239 U. S. 658, 60 L. ed. —, where it was held that an engineer leaving his engine on the main line to make a necessary repair was not guilty of contributory negligence as a matter of law, although defendant's rules imposed certain restrictions upon the leaving of engines and the making of repairs.

Hawkins v. St. Louis & S. F. R. Co., 189 Mo. App. 201, where it was held that the contributory negligence of a roundhouse foreman who tripped on an obstruction while walking beside an engine which he was piloting out of the structure was for the jury.

Where a locomotive engineer while walking between the tracks of defendant's main line was struck and killed by an engine operated without signal, warning or lookout, and which could not have been seen owing to clouds of steam and smoke from defendant's roundhouse and other engines, decedent's contributory negligence was held a question for the jury. Huxoll v. Union Pac. R. Co., — Neb. —, 155 N. W. 900.

of either party clearly appears, all circumstances of aggravation or of mitigation must be considered.[63]

§ 1328. Same subject; burden of proof. Under the rule followed by the federal courts the burden is upon the defendant to establish contributory negligence upon the part of the employee,[64] and this is true even in states, where under the state law proof of freedom from contributory negligence is an essential element of plaintiff's case, in other words where the burden is upon the plaintiff as part of his case to disprove contributory negligence.[65] Consequently even in an action in a state court, under the Federal Employers' Liability Act, the burden is upon the defendant to show contributory negligence, since it is not a mere matter of local procedure.[66]

§ 1329. Same subject; violation of federal statutes. Contributory negligence will not be considered in diminution of damages where the violation of the Federal Safety Appliance Act, or other federal act intended for the protection of employees, was a proximate cause of the accident.[67] But the statute, the breach of which will prevent the consideration of contributory negligence in diminution of damages must be a federal statute, as distinguished from a state law or local regulation.[68]

[62] Louisville & M. R. Co. v. Heinig's Adm'x, 162 Ky. 14; Holmberg v. Lake Shore & M. S. Ry. Co., — Mich. —, 155 N. W. 504, where plaintiff, an engineer on an extra train, was injured in a collision with a train having the right of way, while operating his train in violation of defendant's rules to clear the main track five minutes before the approach of trains having the right of way.

[63] New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

[64] Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330; Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096.

[65] Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330;

[66] Central Vermont Ry. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

[67] Grand Trunk Western Ry. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836; La Mere v. Railway Transfer Co., 125 Minn. 159; Smith v. Atlantic Coast Line R. Co., 127 C. C. A. 311, 210 Fed. 761; Fletcher v. South Dakota Cent. Ry. Co., — S. D. —, 155 N. W. 3; St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41; Sears v. Atlantic Coast Line R. Co., 169 N. C. 446.

[68] Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, aff'g 162 N. C. 424;

However, a violation by the defendant of a federal statute does not deprive it of the right to show contributory negligence unless such violation contributed to the injury.[69]

§ 1330. Same subject; instructions on contributory negligence. The plaintiff is entitled to a plain and unambiguous instruction to the effect that contributory negligence is not a complete defense.[70] But the defendant is also entitled to have the question of contributory negligence put before the jury in a reasonably definite and concrete form.[71]

As the statute prescribes a rule for determining the amount of the deduction required to be made, the jury should be advised of the rule and its controlling force.[72] Hence an instruction submitting to the jury the matter of diminishing the damages without naming any standard to which their actions should conform other than their own conception of what was reasonable, is erroneous.[73]

As has already been shown the basis for diminishing the damages is the proportion which the employee's negligence bears to the combined negligence of both employee and the company. Consequently, an instruction that where contributory negligence is shown, the damages are to be diminished "in proportion to his [plaintiff's] negligence as compared with the negligence of the defendant" is improper,[74] since it merely requires a comparison of the negligence of each instead of requiring the

Gee v. Lehigh Val. R. Co., 163 N. Y. App. Div. 274; Lauer v. Northern Pac. Ry. Co., 83 Wash. 465, overruling Opsahl v. Northern Pac. Ry. Co., 78 Wash. 197.

69 Atchison, T. & S. F. Ry. Co. v. Swearingen, 239 U. S. 339, 60 L. ed. —, 10 N. C. C. A. 778.

70 Ross v. St. Louis & S. F. R. Co., 93 Kan. 517, 7 N. C. C. A. 737.

71 Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901.

72 Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, rev'g 167 N. C. 163.

73 Seaboard Air Line Ry. v. Tilghman, 237 U. S. 499, 59 L. ed. 1069, rev'g 167 N. C. 163. Here the court instructed the jury that, if they found that the plaintiff was injured through the concurring negligence of the railway company and the plaintiff, they should determine the full amount of damages sustained by him, "and then deduct from that whatever amount you think would be proper for his contributory negligence."

74 Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096; Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609; Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

diminution to rest upon a comparison with the entire negligence of both. As pointed out by the supreme court, the instruction should have read "as compared with the combined negligence of himself and the defendant." [75]

An instruction that where contributory negligence is shown the damages, if any, are to be diminished "in proportion to his [plaintiff's] negligence as compared with the combined negligence, if any, of the plaintiff and the defendant, if any," states the law correctly.[76]

A charge in almost the identical language of the statute is not erroneous,[77] especially where the defendant makes no request for a charge clarifying any obscurity on the subject which he deemed existed.[78] Consequently, an instruction that if the jury found the plaintiff guilty of contributory negligence they should "reduce his damages in proportion to the amount of negligence which is attributable to him" is not erroneous,[79] and an instruction upon the effect of contributory negligence, following the language of the statute is not inconsistent with an instruction that the "damage should be diminished in the proportion that deceased's negligence bears to the combined negligence of the deceased and the defendant." [80] The danger of relying upon instructions in the language of the statute is that the jury may apply the old comparative negligence rule; in other words, compare the negligence of the plaintiff with that of the defendant, instead of the quantum of negligence attributable to each as compared with the joint negligence attributable to both. Courts have made the same mistake. Common sense would suggest the adoption of the form of instruction laid down by the Supreme Court of the United States.

[75] Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096.

[76] Louisville & N. R. Co. v. Winkler, 162 Ky. 843, 9 N. C. C. A. 146.

[77] Devine v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —; Missouri, K. & T. Ry. Co. of Texas v. Rentz, — Tex. Civ. App. —, 162 S. W. 959; Irvin v. Southern R. Co., 64 N. C. 5 But see Cross v. Chicago, B. & Q. R. Co., 191 Mo. App. 202.

[78] St. Louis & S. F. R. Co. v Brown, 241 U. S. 223, 60 L. ed. —.

[79] Id.

[80] St. Louis, I. M. & S. Ry. Co. v. Rodgers, 118 Ark. 263.

An instruction that it was the duty of the jury to diminish or reduce the damages attributable to defendant's negligence in proportion to the amount of negligence justly chargeable to the plaintiff, and if there should be any difference in favor of the plaintiff, after the damages were reduced to a money value, such difference should be the amount of their verdict has been held substantially correct.[81] However, it is substantially in the language of the statute and objectionable for the reason just pointed out.

An instruction that if the plaintiff failed to exercise reasonable care for his own safety, "and by reason of such failure he contributed to bring about the injuries to him, *and but for which he would not have been injured,* then you will diminish the damages in proportion to such negligence" was held too broad as to the italicized portion although it would have been proper if contributory negligence were a complete bar.[82]

An instruction that if the jury found the defendant to have been negligent, and that plaintiff also was "guilty of negligence contributing to his injury, and his negligence is less than that of the defendant company, then, instead of his contributory negligence being a bar to his recovery, you should take the amount of damages which you found against the defendant company, if you so find, and compare it with the amount of negligence attributable to Sheeley [plaintiff], and set off against the amount you so find, if you so find against the defendant company, this lesser amount of Sheeley's, if you so find it; and discount the damages attributable to the defendant if you find it negligent, in the ratio that this lesser negligence on behalf of Sheeley bore to the greater negligence on behalf of the defendant company if you so find it negligent" is erroneous for obvious reasons,[83] as is an instruction that the damages should be diminished in proportion to the relative negligence of the two parties.[84]

An instruction that if plaintiff's injuries "were due directly

[81] Chadwick v. Oregon-Washington R. & Nav. Co., 74 Ore. 19.

[82] Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

[83] Pennsylvania Co. v. Sheeley, 137 C. C. A. 471, 221 Fed. 901.

[84] New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

to the absence and imperfect working condition of the coupler in question" the defendant would be liable, is correct.[85] A requested instruction that riding on the pilot with knowledge of apparent and obvious danger, and without necessity, would imperatively reduce the damages to a nominal sum is properly refused.[86]

An instruction that "if you find from the evidence that the contributory negligence of the deceased * * * was the sole and proximate cause of his death, then you should find a verdict for the defendant" is erroneous for the reason that contributory negligence presupposes concurring negligence on the part of the defendant.[87] An instruction upon the effect of contributory negligence stating that if the jury found the plaintiff guilty of contributory negligence "the damages shall be diminished" is not erroneous merely because followed by a clause that contributory negligence "goes by way of diminution of damages." [88]

It has been held that an instruction that the recovery, if any, should be reduced "by such an amount as you find the negligence attributable to him [plaintiff] bore in proportion to the negligence of the defendant company" was not prejudicial where the court also instructed that "if the negligence of the plaintiff was as great as the negligence of the defendant, there might be an equality of negligence, and therefore no substantial recovery of any amount of damages could be had." [89] This de-

[85] Great Northern Ry. Co. v. Otos, 239 U. S. 349, 60 L. ed. —, aff'g 128 Minn. 283.

[86] Louisville & N. R. Co. v. Lankford, 126 C. C. A. 247, 209 Fed. 321.

[87] Ross v. St. Louis & S. F. R. Co., 93 Kan. 517, 7 N. C. C. A. 737. See, however, Pennsylvania R. Co. v. Goughnour, 126 C. C. A. 39, 208 Fed. 961, where the instruction given authorized a verdict against plaintiff "because the amount to be deducted, if his contributory negligence was the sole cause of the accident, would wipe out the damages." This instruction is an absurdity for the reason that recovery is precluded where the employee's act is the sole cause of the injury, not because the damages are thereby wiped out according to the rule of proportion, but because in such a case it cannot be said that negligence on the part of defendant contributed "in whole or in part" to the injury. It may be noted, however, that this instruction was not attacked by the plaintiff.

[88] Norfolk & W. R. Co. v. Earnest, 229 U. S. 114, 57 L. ed. 1096.

[89] Pennsylvania Co. v. Cole, 131 C. C. A. 244, 214 Fed. 948.

cision is unique as both instructions are palpably wrong, both being based upon a comparison of the negligence of the one with that of the other. Inasmuch as the latter portion of the instruction was clearly prejudicial to the plaintiff in assuming that equality of negligence would bar a substantial recovery, it is probable the court arrived at the conclusion that the defendant was not prejudiced. However even the latter portion of the instruction might be regarded as emphasizing by illustration the error common to the entire instruction.

An instruction that an employee has the right to assume, and to rely upon the assumption, in his work, that the track was reasonably free from overhead obstructions, and if he did not have knowledge of the existence of such obstructions he was not required to examine to determine whether defendant has performed its duty, is not erroneous.[90]

§ 1331. **Damages for personal injuries.** In an action for personal injury, the plaintiff is entitled to recover compensation, so far as it is susceptible of an estimate in money, for the loss and damage caused to him by the defendant's negligence, including not only expenses incurred for medical attendance, and a reasonable sum for his pain and suffering, but also a fair recompense for the loss of what he would otherwise have earned in his trade, and has, as the result of his injury been deprived of his capacity of earning.[91] Future damages may be recovered if proved,[92] and where the evidence shows that there will be future effects from an injury, an instruction justifying an inclusion of same in the award of damages is not erroneous.[93]

[90] Bruckshaw v. Chicago, R. I. & P. Ry. Co., — Iowa —, 155 N. W. 273.

[91] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, citing Wade v. Leroy, 20 How. 34, 15 L. ed. 813; Nebraska City v. Campbell, 2 Black 590, 17 L. ed. 271; Ballou v. Farnum, 11 Allen (Mass.) 73; New Jersey Exp. Co. v. Nichols, 3 Vroom (N. J. L.) 166, aff'd 4 Vroom (N. J. L.) 434; Phillips v. London & S. W. Ry. Co., 4 Q. B. D. 406, 5 Q. B. D. 78.

The measure of recovery for the loss of expected future earnings, however, is confined to the present cash value of such earnings. Chesapeake & O. Ry. Co. v. Kelly, 241 U. S. 485, 60 L. ed. —.

[92] Washington & G. R. Co. v. Harmon, 147 U. S. 571, 37 L. ed. 284.

[93] Chesapeake & O. Ry. Co. v. Carnahan, 241 U. S. 241, 60 L. ed. —.

Expenses, loss of time, suffering and diminished earning power form elements of recovery.[94]

The plaintiff's capacity to labor will not be determined as of the precise time of the injury where as the result of temporary illness an occupation previously pursued had been given up, such illness having practically terminated at the time of the injury in suit, which incapacitated him for further work.[95]

Mental pain and suffering inevitably and necessarily resulting from the injury constitute a proper element of damages,[96] for "when the injury, whether caused by wilfulness or by negligence, produces mental, as well as bodily anguish and suffering, independently of any extraneous consideration or cause, it is impossible to exclude mental suffering in estimating the extent of the personal injury for which compensation is to be awarded.[97] And an instruction that "the jury are to consider mental suffering, past and future, found to be the necessary consequence of the loss of his leg" has been held to state the law correctly.[98] An instruction that plaintiff may recover for such pain and suffering caused by the injury as he "may in the future suffer" has been held erroneous.[99] The court arrived at its conclusion upon the rule laid down in an earlier case,[1] as follows: "The liability for future damages for the wrongful infliction of a personal injury is strictly limited to compensation for such suffering and other evil effects as are reasonably certain to result from it. Possible, even probable future damages are too remote and speculative to form the basis of legal injury. If they may or subsequently do result from the accident, they are but a part of that *damnum absque injuria* which reaches too

[94] Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

[95] Texas & P. Ry. Co. v. Humble, 181 U. S. 57, 45 L. ed. 747.

[96] Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110; McIntyre v. Giblin, 131 U. S. CLXXIV, 25 L. ed. 572.

[97] Kennon v. Gilmer, 131 U. S. 22, 33 L. ed. 110.

[98] McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162.

[99] Chicago, M. & St. P. R. Co. v. Lindeman, 75 C. C. A. 18, 143 Fed. 946. The supreme court in passing upon an instruction upon recovery for future pain and suffering referred to the rule laid down in this case as conservative. Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170.

[1] Chicago & N. W. R. Co. v. De Clow, 61 C. C. A. 34, 124 Fed. 142.

far into the realm of conjecture to form any basis of an action at law."

The supreme court has intimated that possibly an increase in wages which the plaintiff would receive by a fixed rule of promotion may be considered by the jury in estimating the damages,[2] but a mere possibility or expectancy of promotion cannot be considered.[3] In an action under the Federal Employers' Liability Act the defendant requested the court to charge that "in awarding damages, the jury must take into consideration the fact that the earning power of the deceased might, at any time, have been materially, or even wholly destroyed. You are to further consider that and make proper allowances for the probable decreased earning power of the deceased arriving at the approaching old age." The request was given except as modified by the charge "that if you find his earning capacity would probably be increased, you can take that into consideration just as you take into consideration the probability of his earning capacity being decreased; just whatever is probable."[4] While this instruction was given in an action for wrongful death, it is

[2] Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728.

[3] Richmond & D. R. Co. v. Elliott, 149 U. S. 266, 37 L. ed. 728, citing with approval Richmond & D. R. Co. v. Allison, 86 Ga. 145. In the Elliott case the plaintiff after testifying to his age, health and the wages he was receiving at the time of the accident was asked: "What were your prospects of advancement, if any, in your employment on the railroad and of obtaining higher wages?" In response he stated that he thought that by staying with the company he would be promoted; that in the absence of the yardmaster he had sometimes discharged his duties, and also in like manner temporarily filled the place of other employees of the company of a higher grade of service than his own; that there was a "system by which you go in there as coupler or trainhand or in the yard, and if a man falls out you stand a chance of taking his place," and that the average yard conductor received a salary of from $60 to $75 per month. The admission of this evidence was held erroneous.

[4] Thornton v. Seaboard Air Line Ry., 98 S. C. 348. This decision was reversed by the United States Supreme Court (238 U. S. 605, 59 L. ed. 1485) upon the authority of Seaboard Air Line Ry. v. Horton, 233 U. S. 492, 58 L. ed. 1062, 8 N. C. C. A. 834, rev'g 162 N. C. 424. The instruction in question was not considered by the supreme court. Its correctness would undoubtedly depend upon the sufficiency of the evidence to show a probability of increase or decrease in earning capacity.

equally applicable in an action by the employee for personal injuries.

The Supreme Court of Kentucky held improper an instruction that the jury were to award such sum as "will fairly and reasonably compensate him [the plaintiff] for injuries to his person" on the ground that the words "for injuries to his person" should have been omitted, the court saying that "what would compensate a man for losing both of his hands is too uncertain to be submitted to a jury." [5] An instruction authorizing a recovery "for injuries to his [plaintiff's] person and for physical and mental suffering, if any of either, suffered on account of said injuries, and for permanent injury to him, if any, lessening his power to earn money" has been held erroneous as allowing the recovery of double damages, the court saying: "Where a person is permanently injured, he may in addition to special damages, which must be alleged and proved, recover for the physical and mental suffering, and the permanent reduction of his power to earn money. In other words, the injuries to his person are measured by his pain and suffering, and the permanent reduction of his power to earn money. It is not contemplated that he shall receive damages 'for injuries to his person,' and in addition thereto damages for physical and mental suffering, and for the permanent reduction of his power to earn money. To do so is necessarily to allow double damages." [6]

An instruction that the jury may consider the plaintiff's loss of time with reference to his ability to earn money, the impairment of his capacity to earn money, whether temporary or permanent, disfigurement, and pain past or reasonably certain to be suffered in the future correctly states the law.[7] An instruction that damages could not be recovered in excess of the sum claimed in the declaration is not prejudicial to the defendant, the court having also advised the jury that the sum claimed

[5] Nashville, C. & St. L. R. Co. v. Banks, 156 Ky. 609.

[6] Nashville, C. & St. L. Ry. v. Henry, 158 Ky. 88.

[7] Southwestern Brewery & Ice Co. v. Schmidt, 226 U. S. 162, 57 L. ed. 170.

should not be taken as a criterion to act upon, but that it was only a limit beyond which they could not go.[8]

Where the court explicitly required the jury to find that there must be a proximate and causal relation between the damages and the negligence of the defendant, the fact that it referred to the amount sued for as the maximum amount which could be allowed is not erroneous.[9]

As in other actions the amount of the damages must depend in a large measure upon the good sense and sound judgment of the jury, upon all the facts and circumstances of the particular case. There can be no fixed measure of compensation for the pain and anguish of body and mind, nor for the loss of time or the permanent injury to health and body.[10]

Neither the particular occupation in which the plaintiff was employed, nor the necessity for abandoning same need be averred to admit evidence thereof. Consequently if the plaintiff was engaged in business in addition to his employment, which on account of his injury he is required to abandon a recovery may be had although not specifically averred.[11] Evidence of impotency as the result of the injury is admissible although not specially pleaded.[12]

§ 1332. Damages in case of death; beneficiaries. The act provides that in case of the death of an employee from an injury sustained while he was engaged in interstate commerce, the railroad company shall be liable "to his personal representative for the benefit of his widow and children, if any, if none, then for his parents, if none, then for his next of kin dependent upon him."

The supreme court has construed this provision to require that beneficiaries within any of the designated classes must have been dependent upon the deceased and that the words

[8] McDermott v. Severe, 202 U. S. 600, 50 L. ed. 1162.

[9] Chesapeake & O. Ry. Co. v. Carnahan, 241 U. S. 241, 60 L. ed. —.

[10] Illinois Cent. R. Co. v. Barron, 5 Wall. 90, 18 L. ed. 591; The "City of Panama," 101 U. S. 453, 25 L. ed. 1061; Opsahl v. Northern Pac. R. Co., 78 Wash. 197, 138 Pac. 681.

[11] Wade v. Leroy, 20 How. 34, 15 L. ed. 813.

[12] Denver & R. G. R. Co. v. Harris, 122 U. S. 597, 30 L. ed. 1146.

"dependent upon him" do not refer to the next of kin alone.[13] In other words this provision has been construed as though it read: The railroad company shall be liable to his personal representative for the benefit of his widow and children *dependent upon him,* if any, if none, then for his parents *dependent upon him,* if none, then for his next of kin dependent upon him.

The statute plainly intends that the beneficiaries shall take in the order named, and each class takes in the order named to the exclusion of the other;[14] hence parents of an employee are not beneficiaries where there is a surviving widow.[15] To be dependents within the act the beneficiaries must at the time of the death of the decedent, have been dependent upon him for substantial if not entire support.[16] There must be some reasonable expectation of pecuniary assistance or support, of which the beneficiaries were deprived,[17] hence a married sister provided for by her husband is not "dependent" upon her brother merely because he contributed money to her in return for board and lodging, which was approximately worth the amount contributed;[18] nor can an adult sister claim to be dependent upon a brother whose wages were barely sufficient for his own maintenance.[19] Self-supporting adult children, who contributed to

[13] Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188. *Contra,* Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

[14] Leyhan v. Leyhan, 47 Ind. App. 280, an action which did not arise under the act.

[15] St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 144 N. Y. App. Div. 634.

[16] Southern Ry. Co. v. Vessell, — Ala. —, 68 So. 336.

[17] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; Fogarty v. Northern Pac. R. Co., 85 Wash. 90.

Evidence that decedent, who was unmarried, and whose parents were dead, had contributed to his adult sister and her minor child held sufficient to form the basis of a recovery in their behalf. Bruckshaw v. Chicago, R. I. & P. Ry. Co., — Iowa —, 155 N. W. 273.

[18] Southern Ry. Co. v. Vessell, — Ala. —, 68 So. 336.

[19] Collins v. Pennsylvania R. Co., 163 N. Y. App. Div. 452. In this case the decedent was eighteen years of age and earned but five or six dollars per week. He and an adult sister earning $15 per week pooled their wages and out of the sum total supported themselves and an invalid sister.

the family expenses cannot be considered dependents.[20] The mere physical disability of a brother does not render him a dependent in the absence of evidence showing reasonable ground for belief that deceased would have contributed to his support.[21]

It has been held that pecuniary loss by the parents from the death of an adult son was sufficiently shown where the evidence disclosed that the parents were in need of financial assistance; that the deceased had during his minority and for two years in addition given such aid both in money and in work, and that he had the disposition to continue the same as evidenced by the contribution of a portion of his wages.[22] In an action in behalf of the surviving mother of the decedent, proof that she had a reasonable expectation of pecuniary benefit from a continuance of the decedent's life is sufficient.[23]

The period of dependency of a minor child, under ordinary circumstances ends upon the attainment of his majority, hence mere expectation founded upon the expressed wishes of the father to give him an education which would necessarily continue for a considerable period after he became of age, cannot form the basis of a claim of pecuniary loss as to the time following his attainment of majority.[24] The pecuniary loss of a mentally defective child growing out of the death of its father is necessarily greater than the loss to children not so afflicted.[25]

The action is not for the equal benefit of each of the surviving relatives in whose behalf the suit is brought, and though the judgment may be for a gross amount, the interest of each beneficiary must be measured by his or her individual pecuniary

20 Houston & T. C. R. Co. v. Walker, — Tex. —, 173 S. W. 208.

21 Jones v. Charleston & W. C. R. Co., 98 S. C. 197.

22 Lundeen v. Great Northern R. Co., 128 Minn. 332.

23 Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

24 McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242.

25 Louisville & N. R. Co. v. Stewart's Adm'x, 163 Ky. 823, aff'd 241 U. S. 261, 60 L. ed. —, where a verdict for $4,469 in favor of a child six years old, suffering from a mental affliction was held not to be excessive.

loss.[26] The interest of a beneficiary who dies before the recovery of judgment will not survive.[27]

The recovery by the personal representatives is in trust for the designated beneficiaries.[28] Where the injuries to an employee resulted in his death the original act of 1908 created a new and independent cause of action in favor of his personal representatives for the pecuniary loss suffered by the beneficiaries on account of such death.[29]

Does the physical existence of beneficiaries of the preferred class as named in the act, who are incapable of taking because not dependent upon the deceased, prevent compensation to beneficiaries of subordinate classes who were in fact dependent upon the deceased? Obviously not, unless indeed the construction placed upon the act by the supreme court is to be emasculated. Assume that a deceased employee left surviving him, as sole representatives of the first class, adult sons who were self-supporting and in no way dependent upon him, and as beneficiaries of the second class, aged and indigent parents, who were wholly dependent upon him, and who, from his contributions in the past, might justly anticipate the continuance of his bounty had he survived. Are the parents to be deprived of a remedy merely because of the existence of beneficiaries of the first class, who could not recover because of lack of dependency?

In the light of the construction placed upon the act by the supreme court this provision can only be construed as meaning that beneficiaries of the subsequent classes can take only when there is no beneficiary of the prior classes dependent upon the deceased.

A similar question was presented in an action arising under the Indiana Death Act, which gives a right of action to the personal representative for death caused by wrongful act or omis-

[26] Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188.

[27] Gulf, C. & S. F. Ry. Co. v. Higginbotham, — Tex. Civ. App. —, 173 S. W. 482. This case did not arise under the Federal Employers' Liability Act, but unquestionably the rule is the same.

[28] Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

[29] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

sion, provided that the damages "must inure to the exclusive benefit of the widow or widower as the case may be, and children, if any, or next of kin, to be distributed in the same manner as personal property of the deceased." [30] The deceased left surviving him adult children who were in no way dependent upon him, and minor children of a deceased child who were dependents. It was held that the grandchildren of the decedent "were not 'children' and do not stand for or represent 'children' in the sense in which that word is used in this statute, but they may be beneficiaries under the statute, indicated therein by the words 'next of kin.' "

In holding that recovery might be had for the benefit of the grandchildren, notwithstanding the existence of children, who could not recover because not dependent, the court said: "The right of action accrues upon the death of the intestate. Unless at that time, and at the commencement of the action, and also at the time of awarding the damages, there be living some person, or persons, related to the decedent of whom it can be said that the law implies damages from the death of the plaintiff's decedent, or who may be said to have suffered pecuniary loss through his death, there can be no recovery under the statute (Dillier v. Cleveland, etc., 34 Ind. App. 52); but if, as in the case at bar, the decedent left no widow, but left surviving him children who were not pecuniarily injured by his death, and there were not existing at his death any beneficiary of the first class, but there were, at the time of his death, and at the time of the trial, beneficiaries of the second class, being 'next of kin,' who were in fact pecuniarily injured by his death, such next of kin come within the intention of the Legislature in designating the beneficiaries for whom the action may be maintained. The three minor grandchildren so dependent upon their grandfather should stand in no worse condition than if the decedent had left surviving him neither a widow or children. He left no widow, and the children who survive him were not beneficiaries. In the absence of beneficiaries of the first class who have suffered pecuniary loss, the damage should go to the 'next

[30] Burns' Ann. St. 1908, § 285.

of kin' shown to have suffered loss as contemplated by the statute, and the decisions of the court construing it." [31]

The fact that the person for whose benefit the action is brought is a nonresident alien does not preclude recovery.[32]

The act is silent as to who are to be considered the next of kin of a deceased employee. It is now settled that the question must be determined in accordance with the local law,[33] hence the common law and statutes of the various states form the sole guide. In passing upon the question, the Supreme Court of the United States said:

"Plainly the statute contains no definition of who are to constitute the next of kin to whom a right of recovery is granted. But as, speaking generally, under our dual system of government who are next of kin is determined by the legislation of the various states to whose authority that subject is normally committed, it would seem to be clear that the absence of a definition in the act of Congress plainly indicates the purpose of Congress to leave the determination of that question to the state law. But it is urged as 'next of kin' was a term well known at common law, it is to be presumed that the words were used as having their common law significance and therefore as excluding all persons not included in the term under the common law, meaning, of course, the law of England as it existed at the time of the separation from the mother country. Leaving aside the misapplication of the rule of construction relied upon, it is obvious that the contention amounts to saying that Congress by the mere statement of a class, that is next of kin, without defining whom the class embraces, must be assumed to have overthrown the local law of the states, and substituted another law for it, when conceding that there was power in Congress to do so, it is clear that no such extreme result could possibly be attributed to the act of Congress without express and unam-

[31] Pittsburgh, C., C. & St. L. R. Co. v. Reed, 44 Ind. App. 635.

[32] McGovern v. Philadelphia & R. R. Co., 235 U. S. 389, 59 L. ed. 283, 8 N. C. C. A. 67, rev'g 209 Fed. 975; Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —.

[33] Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

biguous provisions rendering such conclusion necessary. The truth of this view will be made at once additionally apparent by considering the far-reaching consequence of the proposition since if it be well founded, it would apply equally to the other requirements of the statute—to the provisions, as to the surviving widow, the husband and children, and to parents, thus for the purposes of the enforcement of the act overthrowing the legislation of the states on subjects of the most intimate domestic character and substituting for it the common law as stereotyped at the time of the separation. The argument that such result must have been intended since it is to be assumed that Congress contemplated uniformity, that is, that the next of kin entitled to take under the statute should be uniformly applied in all States after all comes to saying that it must be assumed that Congress intended to create a uniformity on one subject by producing discord and want of uniformity as to many others." [34]

The term "next of kin" as used in statutes ordinarily refers to those who take the personal estate of the decedent under the statutes of distribution.[35] The Illinois Death Act providing for a recovery for the widow and next of kin has been construed as referring to next of kin in a technical sense, and cannot be limited to certain degrees of consanguinity.[36] "If," said the court, "the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss for which under the statute compensation must be given." [37] The words "next of kin" in the Kansas Death Act have been construed to mean those who inherit from the deceased under the statute of descent and distribution.[38]

[34] Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

[35] In re Weaver's Estate, 140 Iowa 615.

[36] Chicago & A. R. Co. v. Shannon, 43 Ill. 338; Chicago, P. & St. L. R. Co. v. Woolridge, 174 Ill. 330, rev'g 72 Ill. App. 551; Dukeman v. Cleveland, C., C. & St. L. R. Co., 237 Ill. 104, aff'g 142 Ill. App. 622.

[37] Chicago & A. R. Co. v. Shannon, 43 Ill. 338.

[38] Bolinger v. Beacham, 81 Kan. 746; Atchison, T. & S. F. Ry. Co. v. Ryan, 62 Kan. 682. It is noteworthy, however, that the Kansas Act provides for distribution "in

In an action under the act it was held by a state court that where under the state law illegitimate children by the same mother are legitimate as between themselves, an action for the death of an illegitimate child may be maintained in behalf of his brothers and sisters by that same mother, she being dead.[39] This decision was subsequently affirmed by the Supreme Court of the United States[40] where it was further urged that under such a construction of the act the right should have been recognized to seek to trace the paternity of the illegitimate child so as to make the asserted father the "parent" under the statute. This contention was disposed of on two grounds: (1) "Because it was necessarily foreclosed by the ruling of the court below as to the state law concerning the next of kin and the right of the brothers and sister of the illegitimate child to inherit from him solely because of a common motherhood, a ruling which excluded by necessary implication the right now contended for;" and (2) "because, as no provision, either of the state law or of the common law, supporting the asserted right is referred to, the suggestion may be taken as simply a typical illustration of the confusion of thought involved in the main proposition relied upon which we have previously adversely disposed of."

Although the act specifically mentions "children" and "parents" as beneficiaries, the question as to the status of adopted children or foster parents must unquestionably be determined in accordance with the state law. As previously pointed out the United States Supreme Court has declared that the question as to who are next of kin must be decided in the light of the local law. The words "parents" and "children" unquestionably have a well defined meaning at common law, but so also has the term "next of kin." The legislature has the undoubted power to declare that under certain circumstances persons other than the

the same manner as personal property of the deceased."

[39] Kenney v. Seaboard Air Line Ry., 167 N. C. 14, aff'd 240 U. S. 489, 60 L. ed. —. It is worthy of note, however, in connection with this case that the decision of the majority was vigorously dissented from by two of the five justices constituting the court.

[40] Seaboard Air Line Ry. v. Kenney, 240 U. S. 489, 60 L. ed. —, aff'g 167 N. C. 14.

natural progenitors or offspring shall be regarded as "parents" or "children" as the case may be. Having done so, such a declaration should be regarded as a definition of the terms "parents" or "children," as used in the Federal Employers' Liability Act to the same extent that a legislative declaration that illegitimates shall be regarded as next of kin under certain circumstances is upheld.

Under such a construction the question as to whether a recovery may be had under the act by either the natural or foster parent of an adopted child for its death, or by an adopted child for the death of the natural or foster parent would depend solely upon the status and rights of the respective persons under the state law, and the same is true as to the collateral kindred by the blood or by adoption.

Probably in most states a recovery is permitted in behalf of adopted children for the death of the foster parent; but the converse is not true. The right of the adopting parent to recover for the death of the foster child depends upon whether such right is conferred by statute, as it does not exist at common law. As such statutes are strictly construed, the right must be clearly granted, and the fact that a right of action for the death of the foster parent is conferred upon the child does not *per se* extend a similar right to the parent to recover for the death of the child.[41] An adopting parent cannot recover for the death of his foster child under the New Jersey Act.[42]

Apparently the provisions of the Adoption Act must be strictly complied with, it being held in one case that where a foster father brought suit for the death of his adopted child and upon his death the action was continued by the foster mother, there could be no recovery by the latter where it was shown that she had not acknowledged the deed of adoption as her free act and deed, although her husband had properly executed the deed and

[41] Boswell v. Lake Shore Elec. Ry., 35 Ohio Cir. Ct. 522, 10 N. C. C. A. 743; Mount v. Tremont Lumber Co., 121 La. 64, 16 L.R.A.(N.S.) 199, 126 Am. St. Rep. 312, 15 Ann. Cas. 148.

[42] Heidecamp v. Jersey City, H. & P. St. R. Co., 69 N. J. L. 284.

she had signed it.[43] Such a ruling would seem to carry the doctrine of strict compliance to the border at least, if not beyond the limits of common sense.

Even though an adoption act confers upon both the foster parents and an adopted child the same rights as if the child had been born in wedlock, such rights do not extend to other kindred not covered by the statute, hence an adopted child cannot inherit from kindred of the adopting parents by right of representation.[44] This being true, unquestionably an adopted child is not "next of kin" to relatives of its parents either direct or collateral, irrespective of the question of dependency, nor are such relatives "next of kin" to the child. But the New York courts have held, in construing the Adoption Act of that state which provides that the heirs and next of kin of the adopted child shall be the same as if he were the "legitimate child" of the person adopting, that the legislature "clearly used the words 'legitimate child' in the well-established meaning of the term as a child born in lawful wedlock, and effectively embodied in the law of descent a provision that the adopted child was the heir at law and next of kin of the adoptive parent to the same extent as though the adoptive parent in this case had borne the adopted child." A recovery was therefore permitted in behalf of the brothers and sisters of the intestate's foster mother.[45]

§ 1333. Same subject; measure and elements of damages. The right of action for death is dependent upon the existence of such a right in the decedent if he had survived his injuries,[46] and the question of survival can only be determined in the light of the federal act. Recourse cannot be had to a state statute.[47] The right of action provided for in the original act is grounded

[43] Sarazin v. Union R. Co., 153 Mo. 479.

[44] Van Derlyn v. Mack, 137 Mich. 146; Moore v. Moore's Estate, 35 Vt. 98. See also Delano v. Bruerton, 148 Mass. 619, 2 L.R.A. 698; Keegan v. Geraghty, 101 Ill. 26.

[45] Carpenter v. Buffalo General Elec. Co., 213 N. Y. 101, aff'g 155 App. Div. 655.

[46] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

[47] Walsh v. New York, N. H. & H. R. Co., 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

upon an original wrongful injury to the person for the exclusive benefit of the beneficiaries named in the act, and permits the recovery of such damages as flow from the pecuniary benefits which the beneficiaries might reasonably have received if the decedent had survived.[48] And so far as it relates to the independent right of action growing out of the wrongful death, as distinguished from the survival of the decedent's right of action for personal injury where death was not instantaneous, this is also true under the amendment of 1910.

While the word "pecuniary" does not appear in the act, the supreme court, in conformity with the uniform construction given the Lord Campbell Act, and similar statutes, has interpreted it as providing compensation for pecuniary loss or damage only.[49] "A pecuniary loss or damage," says the supreme court, "must be one which can be measured by some standard. It is a term employed judicially not only to express the character of the loss of the beneficial plaintiff which is the foundation of the recovery, but also to discriminate between a material loss which is susceptible of pecuniary valuation, and that inestimable loss of the society and companionship of the deceased relative upon which, in the nature of things, it is not possible to set a pecuniary valuation." [50] The loss of the society and companionship of the decedent not being capable of pecuniary admeasurement cannot, therefore, form an element of damages.[51]

No hard and fast rule by which pecuniary damages may in all cases be measured is possible,[52] and the rule for the measurement of damages must differ according to the relation between

[48] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

[49] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188; Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

[50] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495, quoting from Patterson Railway Law, § 401.

[51] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. 456, rev'g 5 Porto Rico Fed. Rep. 401, 427.

[52] Michigan Cent. R. Co. v. Vree-

the parties beneficially interested and the decedent, the pecuniary damages suffered being proportionate to the degree of dependency upon the deceased.[53] Thus the word "pecuniary" as judicially interpreted is not so narrow as to exclude damages for the loss of services of the husband, wife or child,[54] and where the beneficiary is a child, recovery may be had for the care, counsel, training and education which it might, under the evidence, have reasonably received from the parent, and which can only be supplied by the service of another for compensation.[55]

The measure of recovery is not the amount necessary to provide means of caring for, educating and properly training the dependent children, but the amount which deceased in view of the evidence might reasonably be expected to have contributed toward that end.[56] Bearing in mind that only the pecuniary loss suffered by the surviving dependents is recoverable, the importance of the distinction becomes apparent.

In an action in behalf of minor children of a deceased employee the measure of damages is the pecuniary loss to the dependent children; that is, such an amount as the deceased would reasonably be expected under all the facts and circumstances in the case to have contributed towards the maintenance and education of such children.[57] Compensation does not include damages by way of recompense for grief or wounded failings.[58]

The pecuniary loss is not dependent upon any legal liability of the injured person to the beneficiary.[59] Funeral expenses are not recoverable.[60]

The fact that decedent survived his injuries for an appreci-

land, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

53 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

54 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

55 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

56 Kansas City, M. & O. Ry. Co. v. Roe, — Okla. —, 150 Pac. 1035.

57 Kansas City, M. & O. Ry. Co. v. Roe, — Okla. —, 150 Pac. 1035.

58 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

59 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

60 Collins v. Pennsylvania R. Co., 163 N. Y. App. Div. 452.

able period does not render the loss of future earnings a proper element of damages.[61]

State limitations upon the amount of recovery in action for wrongful death do not control,[62] since the act supersedes all state regulations within its sphere.

Since the damages should be equivalent to compensation for the deprivation of the reasonable expectation of pecuniary benefits which would have resulted from the continued life of the deceased, the earning power of a lump sum awarded by the jury must be considered. It is obvious that a sum of money presently paid in cash is of much greater value than the payment of the same aggregate in instalments through a period of years. The present value, therefore, of the expected future contributions of the decedent is the measure of recovery. In arriving at this conclusion, the Supreme Court of the United States said:

"The putting out of money at interest is at this day so common a matter that ordinarily it cannot be excluded from consideration in determining the present equivalent of future payments, since a reasonable man, even from selfish motives, would probably gain some money by way of interest upon the money recovered. Savings banks and other established financial institutions are in many cases accessible for the deposit of moderate sums at interest, without substantial danger of loss; the sale of annuities is not unknown; and, for larger sums, state and municipal bonds and other securities of almost equal standing are commonly available.

"Local conditions are not to be disregarded, and besides, there may be cases where the anticipated pecuniary advantage of which the beneficiary has been deprived covers an expectancy so short and is in the aggregate so small that a reasonable man could not be expected to make an investment or purchase an annuity with the proceeds of the judgment. But, as a rule, and in all cases where it is reasonable to suppose that interest may

61 Jorgenson v. Grand Rapids & I. Ry. Co., — Mich. —, 155 N. W. 535.

62 Chicago, R. I. & P. Ry. Co. v. Devine, 239 U. S. 52, 60 L. ed. —, aff'g 266 Ill. 248, which affirms 185 Ill. App. 488; Devine v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —.

safely be earned upon the amount that is awarded, the ascertained future benefits ought to be discounted in the making up of the award.

"We do not mean to say that the discount should be at what is commonly called the 'legal rate' of interest; that is, the rate limited by law, beyond which interest is prohibited. It may be that such rates are not obtainable upon investments on safe securities, at least without the exercise of financial experience and skill in the administration of the fund; and it is evident that the compensation should be awarded upon a basis that does not call upon the beneficiaries to exercise such skill, for where this is necessarily employed the interest return is in part earned by the investor rather than by the investment. This, however, is a matter that ordinarily may be adjusted by scaling the rate of interest to be adopted in computing the present value of the future benefits; it being a matter of common knowledge that, as a rule, the best and safest investments, and those which require the least care, yield only a moderate return." [63]

The difficulty on the part of the average juryman in calculating the present cash value of future payments involving the computation of interest on deferred payments with annual rests was recognized by the court which refused to approve of any particular formulae for the determination of the question, holding that, like other questions of procedure and evidence, it was to be determined in accordance with the law of the forum.

As in other actions the amount to be awarded is a question for the jury under proper instructions from the court, and unless prejudice and passion are clear, their discretion will not be interfered with. On the whole, the amounts awarded are probably considerably in excess of the average verdicts in actions under state death acts, which of course in many states are limited. Verdicts for very large amounts have been sustained.[65] As will be shown elsewhere, the excessiveness of the

[63] Chesapeake & O. R. Co. v. Kelly's Adm'x, 241 U. S. 485, rev'g 160 Ky. 296, 161 Ky. 655.

[65] Verdict for $15,000 not excessive for death of switchman thirty-seven years of age. Devine v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, which is affirmed by 239 U. S. 52, 60 L. ed. —.

verdict does not present a federal question, and hence is not reviewable by the Supreme Court of the United States on error to a state court.[66]

Where the evidence shows that the relations between the deceased and his father were affectionate and that he had contributed toward the latter's support, the jury may infer that he would continue to do so.[67]

§ 1334. Same subject; recovery for pain and suffering of decedent. The original act of 1908 was analogous to the English Death Act, usually known as Lord Campbell's Act, and, hence, prior to the amendment of 1910 the right of action created in favor of an injured employee did not survive his death.[68] No recovery could be had, therefore, for the pain and

Verdict for $19,011 for the death of an engineer who had earned $192 per month, and whose life expectancy was 22 years, apportioned among the widow and five children whose ages varied from 3 to 16 years held not excessive. Chesapeake & O. R. Co. v. Kelly's Adm'x, 160 Ky. 296.

A verdict for $22,750 for the death of a foreman earning $105 who contributed to his wife from $90 to $95 monthly is excessive and a reduction to $15,000 was within the discretion of the court. Millette v. New York, W. & B. R. Co., 169 N. Y. App. Div. 126.

Verdict for $6,000 for death of adult son, leaving surviving him a father, whose age was 51 years and whose expectancy was 20.20 years, and a mother 48 years of age with an expectancy of 22.36 years, held excessive to the extent of $2,000 decedent having contributed but $400 to his parents during the five years preceding his death. Denver v. Atchison, T. & S. F. R. Co., 96 Kan. 154.

Award of $7,000 not excessive for death of employee in good health, 47 years of age, frugal and industrious in habits, and who although incapacitated from pursuing his former occupation as locomotive engineer, on account of deafness, could have secured employment in other work earning as high as $125 per month. St. Louis Southwestern Ry. Co. v. Wilson, — Ark. —, 177 S. W. 415.

A verdict for $8,000 in favor of the widow and $4,000 each in favor of three minor children for the death of the husband and father who at the time of his death was 37 years of age and earned a little more than $54 per month is not excessive. San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194.

66 See *infra*, § 1358.

67 Saunders v. Southern R. Co., 167 N. C. 375.

68 Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; American R. Co. of Porto Rico v. Didricksen, 227 U. S. 145, 57 L. ed. 456; Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147

suffering of the deceased.[69] This defect, however, was remedied by the amendment of 1910, which provides that: "Any right of action given by this act to a person suffering injury shall survive to his or her personal representatives, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, but in such cases there shall be only one recovery for the same injury." [70]

Recovery may now be had for the conscious pain and suffering of the decedent following the infliction of the injury which subsequently resulted in his death.

Obviously there can be no recovery for pain and suffering where death was instantaneous,[71] nor for pain and suffering which are substantially contemporaneous with death or merely an incident thereto,[72] and short periods of insensibility intervening between a fatal injury and death do not afford a basis for a separate estimate or award of damages for pain and suffering; [73] but where there was evidence from which the jury could reasonably find that after the injury the decedent endured conscious pain and suffering as a result of his injury, although the time elapsing between the injury and death may have been very brief, their finding will not be disturbed.[74] Accordingly where it was shown that decedent's injury was one calculated to cause extreme pain and suffering, if he remained conscious, and there was evidence that he groaned and endeavored to free himself while a car was being lifted from his body, a recovery for conscious pain and suffering was sustained by the United States

S. W. 1188; St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240.

[69] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495; Walsh v. New York, N. H. & H. R. Co., 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

[70] Section 9, Act of Apr. 5, 1910.

[71] Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

[72] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[73] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[74] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

Supreme Court although death intervened but little more than a half hour after the injury.[75] The court, however, characterized it as a case close to the border line.

Under the doctrine of the supreme court the decision of the Minnesota court that recovery may be had for pain and suffering if the decedent lived an "appreciable" length of time after the injury, is erroneous.[76] It seems to have been predicated upon the rule prevailing in some states that survival for but a single moment preserves the decedent's cause of action,[77] and that the survival of the action depends not upon the consciousness or sensibility of the injured person, but upon the continuance of life after the infliction of the injury, however brief the period.[78] That this is not the rule under the federal act is definitely settled by the Supreme Court of the United States.

As in other cases the determination of the amount to be awarded rests with the jury, but while no standard of admeasurement is possible their finding must not be arbitrary.[79]

In an action to recover for the conscious pain and suffering of the deceased and the pecuniary loss suffered by the beneficiaries on account of his death, the jury cannot be required to assess separately the amount awarded on each cause of action, especially is this true where in harmony with local practice.[80]

[75] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[76] Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144, 7 N. C. C. A. 154. This decision is particularly obnoxious as the decedent lived but ten minutes after the injury was inflicted and was unconscious during the entire period.

[77] Kellow v. Central Iowa Ry. Co., 68 Iowa 470.

[78] St. Louis, I. M. & S. Ry. Co. v. Dawson, 68 Ark. 1; Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478; Bancroft v. Boston & W. R. Corporation, 11 Allen (Mass.) 34; Tully v. Fitchburg R. Co., 134 Mass. 499; Oliver v. Houghton Co. St. R. Co., 134 Mich. 367; Ely v. Detroit United Ry., 162 Mich. 287; Beeler v. Butte & L. Copper Development Co., 41 Mont. 465.

[79] A verdict for $11,000 for conscious pain and suffering where decedent survived his injury for about half an hour held excessive and reduced to $5,000. St. Louis, I. M. & S. R. Co. v. Craft, 115 Ark. 483, aff'd 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754.

[80] Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

§ 1335. Same subject; extraneous circumstances as affecting recovery. The possession of property or independent means contributing to support does not necessarily deprive one of the status of a beneficiary;[81] so, too, the fact that the beneficiary collected insurance upon decedent's life cannot be considered in mitigation of damages, and evidence thereof is incompetent.[82]

Although no contributions for support had actually been made by the deceased, the legal liability to support possesses a pecuniary value capable of admeasurement, and when coupled with proof of earning capacity sufficient to sustain the enforcement of that duty, may form the basis of a recovery.[83] Hence the mere fact that deceased long prior to his death had abandoned his wife and child does not bar a recovery in their behalf, it being shown that his earnings were sufficient to have supported them, since under the law his legal duty to support his family could have been enforced.[84] And this is true as to minor children although the parents have been divorced, there having been no award of alimony.[85] At most, such a separation can be considered in mitigation of damages.[86] However, where subsequent to the separation the wife leads such a dissolute life as to absolve the husband from the duty to support her, recovery in her behalf is barred.[87]

In actions not arising under the act the remarriage of the widow has been held not to affect nor to diminish the amount

[81] Richelieu v. Union Pac. R. Co., 97 Neb. 360, where a sister was held to be a dependent within the act although possessed of the family homestead renting for $30 per month, and $9 per week received from a clerical position.

[82] Brabham v. Baltimore & O. R. Co., 136 C. C. A. 117, 220 Fed. 35, where the admission of such evidence was held prejudicial although the beneficiary was permitted to testify that the amount of insurance received was used to pay burial expenses and certain debts.

[83] Fogarty v. Northern Pac. R. Co., 85 Wash. 90; McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242.

[84] Fogarty v. Northern Pac. R. Co., 85 Wash. 90; Dunbar v. Charleston & W. C. Ry. Co., 186 Fed. 175; McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242; Boos v. Minneapolis, St. P. & S. S. M. R. Co., 127 Minn. 381.

[85] McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242.

[86] Fogarty v. Northern Pac. R. Co., 85 Wash. 90.

[87] Fogarty v. Northern Pac. R. Co., 85 Wash. 90; Ft. Worth & D. C. Ry. Co. v. Floyd (Tex. Civ. App.), 21 S. W. 544; Boos v. Minne-

which she would otherwise be entitled to recover had she remained unmarried.[88] The rule is a sound one and probably would apply to actions under the act since remarriage merely affects the widow's present dependency and not the financial loss which she has suffered on account of her husband's death. So also evidence that since the death of her husband the widow had become engaged to marry is inadmissible.[89]

§ 1336. Same subject; joinder of actions for pain and suffering and pecuniary loss. Prior to the amendment of 1910 a cause of action for conscious suffering on the part of the deceased could not be joined with the personal representative's cause of action for the wrongful death.[90] But since that amendment, an action for pain and for pecuniary loss involves two distinct rights of action,[91] and recovery may now be had in a single action for the conscious pain and suffering of the deceased and the pecuniary loss suffered by his beneficiaries on account of his death.[92]

The administrator suing for both the pain and suffering of the deceased and the pecuniary loss of the next of kin cannot be required to elect as to which cause of action he will proceed upon,[93] but may join both causes of action in a single action and recover for both.[94]

§ 1337. Same subject; instructions. Instructions upon the amount recoverable for death must, of course, present to the jury correct principles governing the measure of damages,[95]

apolis, St. P. & S. S. M. R. Co., 127 Minn. 381.

88 Archer v. Bowling, 166 Ky. 139, citing Georgia Railroad & Banking Co. v. Garr, 57 Ga. 277, 24 Am. Rep. 492; Davis v. Guarnieri, 45 Ohio St. 470, 4 Am. St. Rep. 548.

89 Jones v. Kansas City Southern R. Co., 137 La. 178, rev'd on other grounds, 241 U. S. 181, 60 L. ed. —.

90 Walsh v. New York, N. H. & H. R. Co., 173 Fed. 494, aff'd 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875.

91 St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

92 Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

93 St. Louis, I. M. & S. R. Co. v. Rodgers, 118 Ark. 263.

94 St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

95 An instruction that the measure of damages "is the present worth of the amount which it is reasonably probable the deceased would have contributed to the sup-

and should clearly limit the damages recoverable to pecuniary loss.[96] Thus an instruction that the jury "should not act either miserly or with reckless extravagance, but should assess such an amount as your own good judgment tells you would provide the means of caring for, educating and properly training the children of the deceased" is erroneous since it is not based upon the theory of pecuniary loss; in other words, the amount which it might reasonably be expected the deceased would contribute to those purposes.[97] The court may charge the jury that they may take into consideration the care, attention, instruction, training, advice and guidance which the evidence showed the decedent might reasonably have been expected to give his children during their minority, and to include the pecuniary value thereof in the damages assessed,[98] but it is erroneous to permit the jury to consider the loss of companionship and association as an element of damages.[99]

An instruction is erroneous which permits the jury to assess such "sum as you find from the evidence will be a fair and just compensation with reference to the pecuniary loss resulting from decedent's death to his widow and child, and in fixing the amount of such pecuniary loss, you should take into consideration the age, health, habits, occupation, expectation of life, mental and physical disposition to labor, the probable increase or diminution of that ability with the lapse of time and the deceased's earning power and rate of wages. From the amount thus ascertained the personal expenses of the deceased should be deducted and the remainder reduced to its present value should be the amount of contribution for which plaintiff is entitled to recover, if your verdict should be for the plain-

port of his parents during the whole expectancy of life in proportion to the amount he was contributing, if any, at the time of his death, not exceeding his expectancy of life" was held, at most, obscure and not positively erroneous because of the use of the word "whole," nor, as allowing recovery for probable contributions during the entire period of deceased's expectancy. Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125.

[96] Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

[97] Kansas City, M. & O. Ry. Co. v. Roe, — Okla. —, 150 Pac. 1035.

[98] Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 7 N. C. C. A. 814, rev'g 131 C. C. A. 621, 215 Fed. 687.

[99] New York, C. & St. L R Co. v.

tiff."[1] The error in this instruction is patent, as it predicates recovery upon the decedent's earning capacity instead of upon his probable contributions to his beneficiaries.

An instruction that the jury might consider the relationship between the decedent and his widow, and drawing upon their experiences as men, measure as far as they could, what it would reasonably have been worth to the widow "in dollars and cents to have had, during their life together, had he lived, the care and advice" of her husband, is erroneous since it does not confine the jury to a consideration of the financial benefits which might reasonably have been expected from the decedent in a pecuniary way.[2]

A charge that where the persons suffering injury are the dependent widow and infant children of a deceased husband and father, the pecuniary injury suffered would be much greater than where the beneficiaries are adults or dependents who were mere "next of kin," is erroneous.[3] An instruction has been held proper which permitted the jury to "take into consideration the increasing wants of the parents by reason of advancing age and the increasing ability of the son to supply those wants, should you find such to be the case."[4] The propriety of such an instruction under the rules laid down by the federal courts may be seriously questioned. While mathematical exactitude cannot be expected, to inject elements of such a nature into the consideration of the question involves the determination of possibilities and probabilities which can have no basis except speculation and conjecture.

An erroneous instruction on damages may be harmless where the amount of the verdict indicates lack of prejudice.[5]

Niebel, 131 C. C. A. 248, 214 Fed. 952.

[1] Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

[2] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495.

[3] Norfolk & W. R. Co. v. Holbrook, 235 U. S. 625, 59 L. ed. 392, 7 N. C. C. A. 814, rev'g 131 C. C. A. 621, 215 Fed. 687.

[4] Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125. This instruction was claimed to be erroneous for want of evidence to support it.

[5] Instruction authorizing the jury to consider "the care and attention, instruction and training, if any,

§ 1338. Same subject; apportionment of damages. The apportionment of the amount awarded among the various beneficiaries for whose benefit the action is brought is for the jury.[6] But the act does not specifically require the jury to apportion the damages among the beneficiaries, and their failure to do so is not reversible error.[7] But where the plaintiff sues for one not entitled to share in the recovery, and whose improper inclusion might increase the amount of the recovery, the defendant may raise the question in such mode as may be appropriate under the practice of the court in which the trial is had, so as to secure a ruling which will prevent a recovery in behalf of one not entitled to share therein.[8]

In view of the decision of the supreme court that the jury need not in all cases apportion the amount awarded among the beneficiaries, that duty must necessarily devolve upon the court, probably in most cases upon the probate court, where the jury has failed to act. But while the deliberations of the jury are secret, and they are under no particular obligation to account for the methods followed in making their apportionment, the task of the court is not always an easy one. Under such circumstances the rule followed by the Kentucky Court of Appeals merits the highest commendation. In the case presented the decedent had married twice, his first wife having secured a divorce and having been awarded the custody of their son, who was a minor seventeen years of age at the time of his

one of Rodger's disposition and capacity, as shown by the evidence, might reasonably be expected to give his wife and children, which was lost to them by his death" construed as referring to the children so far as training was concerned and in any event harmless where the amount of the verdict was less than the jury might have allowed for the pecuniary loss of the widow and children. St. Louis, I. M. & S. R. Co. v. Rodgers, 118 Ark. 263.

[6] Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188.

[7] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330, distinguishing Gulf, C. & S. F. R. Co. v. McGinnis, 228 U. S. 173, 57 L. ed. 785, 3 N. C. C. A. 806, rev'g — Tex. Civ. App. —, 147 S. W. 1188. *Contra*, Fogarty v. Northern Pac. R. Co., 74 Wash. 397.

[8] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

father's death. An action to recover for his death, under the act, was compromised by the administrator and on a contest between the son's guardian and the administrator, the former claimed that in view of the father's expressed wish that his son should receive a medical education, which would require six years, his pecuniary loss should be measured by the period required to give him such an education. On the other hand, the widow claimed that her period of pecuniary loss should be measured by her life expectancy. The court refused to adopt either contention, holding that the son's pecuniary loss would terminate when he attained his majority, while that of the widow could not continue longer than the life expectancy of the deceased, and the recovery should be divided upon the basis of their respective periods of pecuniary loss.[9]

This rule furnishes a sound basis for apportionment in practically all cases, the maximum period of dependency being the life expectancy of the deceased, and the lesser periods being determined in the light of the time when dependency from minority, physical incapacity, and the like, would terminate, the pecuniary loss of the particular beneficiaries being proportionate to the period of reasonably anticipated dependency. However, it must be borne in mind that the application of the rule assumes that the pecuniary loss of all beneficiaries per annum is the same. Cases frequently arise where the pecuniary loss to one beneficiary is greater than the loss to others, thus the pecuniary loss to an infant of tender years should not be placed upon the same plane as the loss to a minor approaching majority. Similarly physical incapacity upon the part of one of the beneficiaries may affect the equable division of the proceeds of the recovery. In such cases reason would dictate that the proportionate loss per annum of the different beneficiaries should first be determined, after which their rights in the gross sum may be adjusted in accordance with their respective periods of dependency.

The jury is not required to apportion damages awarded for pain and suffering and for pecuniary loss.[10]

[9] McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242.

[10] St. Louis, I. M. & S. R. Co. v. Rodgers, 118 Ark. 263.

§ 1339. Same subject; distribution of the amount recovered. Since the amount recovered by the personal representative of the decedent is for the benefit of the next of kin, as provided in the act,[11] the fund so collected does not become an asset of the estate, and the administrator is not entitled to commissions thereon,[12] and where the attorneys for the administrator paid the amount collected over to the sole beneficiary, such administrator cannot maintain a rule against the attorneys for the purpose of recovering the money so paid.[13] Not being an asset of the estate, unquestionably the fund is not subject to claims of creditors of the decedent.

With respect to the amount recovered for the pain and suffering of the decedent, however, some question may arise as to whether it does not constitute an asset of the estate to the extent of subjecting it to claims of creditors. While section 9 of the act provides that the action shall be for the benefit of certain designated persons, it must be remembered that the action is in fact but a survival of the decedent's right of action for the injury suffered. The question has not been passed upon by the courts, but it would seem that since the survival of the cause of action is purely a creature of the statute, which provides the purposes for which it shall survive, the fund recovered should not be diverted from the benevolent purposes expressed in the act.

The federal act and not the state laws control the distribution of the sum awarded, whether recovered by action or as the result of a compromise after the bringing of the action, and whether the action is brought under section 1 or section 9 of the act.[14] Hence, the parents of a deceased employee can claim no interest in the amount recovered where the decedent left a surviving widow.[15] And, while the question has never been decided it would seem that this rule should apply to the dis-

[11] Allen v. Napier, Maynard & Plunkett, — Ga. —, 85 S. E. 1013, citing Roberts, Injuries to Interstate Employees, § 139.

[12] Allen v. Napier, Maynard & Plunkett, — Ga. —, 85 S. E. 1013.

[13] Allen v. Napier, Maynard & Plunkett, — Ga. —, 85 S. E. 1013.

[14] Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 204 N. Y. 135.

[15] Taylor v. Taylor, 232 U. S. 363, 58 L. ed. 638, 6 N. C. C. A. 436, rev'g 204 N. Y. 135.

tribution of the fruits of a compromise effected without litigation, since the relief afforded by the act is a substantive right of action and not a mere regulation of a remedy.

§ 1340. Release, compromise, and former adjudication or recovery; releases in general. Section 5 of the act is as follows:

"Any contract, rule, regulation or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this act, shall to that extent be void: *Provided,* That in any action brought against any such common carrier under or by virtue of any of the provisions of this act, such common carrier may set off therein any sum it has contributed or paid to any insurance, relief benefit, or indemnity that may have been paid to the injured employee or the person entitled thereto on account of the injury or death for which said action was brought."

This provision has been upheld by the supreme court as not repugnant to the constitution.[16] Under it the acceptance of benefits on a relief contract does not bar the action, the defendant merely having the right to set off any sum which it had contributed to the benefits received.[17] It applies to contracts entered into before the passage of the act, as well as to contracts subsequently entered into.[18]

The section applies to a contract of membership in a relief department stipulating that the acceptance of benefits under the contract shall be equivalent to a release from liability;[19] but a contract under which decedent, who was an independent contractor, assumed all risk of injury was not within the prohibition of the act.[20]

16 Mondou v. New York, N. H. & H. R. Co. (Second Employers' Liability Cases) 223 U. S. 1, 56 L. ed. 327, 1 N. C. C. A. 875, 38 L.R.A. (N.S.) 44, rev'g 82 Conn. 373; Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

17 Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

18 Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

19 Philadelphia, B. & W. R. Co. v. Schubert, 224 U. S. 603, 56 L. ed. 911, 1 N. C. C. A. 892, aff'g 36 App. Cas. (D. C.) 565.

20 Great Northern Ry. Co. v. Wiles, 240 U. S. 444, rev'g 125 Minn. 348.

The section has no application to releases given to those who are not employers,[21] and since a release given to the employer would not under the act bar an action against it by the employee, a joint tort-feasor, when sued by one not in its employ, cannot avail itself of a release given by such employee to his employer on the theory that under the common law of the state the release of one joint tort-feasor is a release of all.[22]

§ 1341. Same subject; release subsequent to injury. Unquestionably a release for personal injuries, executed after the infliction of the injury, if fairly entered into under circumstances rendering it valid independently of the act, is valid thereunder. The provision was intended merely to protect the employee from antecedent contracts releasing the employer from liability in advance of injury, a class of contracts the viciousness of which is apparent, but which, unfortunately, have received judicial sanction in many states and even in the Supreme Court of the United States.[23]

The acceptance of compensation under the Workmen's Compensation Act and the execution of a release after an injury is a bar to an action under the Federal Employers' Liability Act in the absence of proof that release was not fairly entered into.[24]

§ 1342. Same subject; compromise or release by decedent as affecting action for his death. The question as to whether a release by a person injured through the negligence of another bars an action by his personal representative to recover for his subsequent death has been frequently presented in connection with the death acts of the various states. While the decisions are not harmonious the weight of authority undoubtedly supports the conclusion that such a release precludes an action by the personal representative. In the notes will be found a number of decisions in which the various views are presented.[25]

[21] Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

[22] Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245.

[23] Baltimore & O. S. W. R. Co. v. Voigt, 176 U. S. 498, 44 L. ed. 560; Santa Fe, P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177, 57 L. ed. 787; Robinson v. Baltimore & O. R. Co., 237 U. S. 84, 59 L. ed. 849, 8 N. C. C. A. 1.

[24] Mitchell v. Louisville & N. R. Co., 194 Ill. App. 77.

[25] Hulbert v. City of Topeka, 34

The Supreme Court of South Dakota, in a well-considered opinion in which all the authorities are reviewed, held that a release signed by an injured person did not operate as a bar to a subsequent action by his personal representative for his death as a result of such injuries under the Death Act of that state which is analogous to the Lord Campbell Act. The majority opinion after holding that the action for the death involves a new and distinct cause of action from the action for the injury itself, declares:

"We must confess our inability to grasp the logic of any course of so-called reasoning through which the conclusion is drawn that the husband simply because he may live to suffer from a physical injury and thus become vested with a cause of action for the violation of his own personal right, has an implied power to release a cause of action—one which has not then accrued; one which may never accrue; one which from its very nature cannot accrue until his death; and one which, if it ever does accrue, will accrue in favor of his wife and be based solely upon a violation of a right vested solely in the wife. The unsoundness of such reasoning rests not only upon the fact that this cause of action so held to be released is not in existence during the life of the husband, but it rests even

Fed. 510; Burk v. Arcata & M. River R. Co., 125 Cal. 364; Southern Bell Telephone & Telegraph Co. v. Cassin, 111 Ga. 575; Mooney v. City of Chicago, 239 Ill. 414; Holton v. Daly, 106 Ill. 131, rev'g 4 Ill. App. 25; Maney v. Chicago, B. & Q. R. Co., 49 Ill. App. 105; Pittsburgh, C., C. & St. L. R. Co. v. Hosea, 152 Ind. 412; Hecht v. Ohio & M. Ry. Co., 132 Ind. 507; Missouri Pac. Ry. Co. v. Bennett's Estate, 5 Kan. App. 231; Louisville R. Co. v. Raymond's Adm'r, 135 Ky. 738; Bowes v. City of Boston, 155 Mass. 344; McCarthy v. William H. Wood Lumber Co., 219 Mass. 566 (the court held that the decedent during her life could not control the right of action of her personal representative for the reason that the Massachusetts Act was penal in character); Sweetland v. Chicago & G. T. Ry. Co., 117 Mich. 329; Hurst v. Detroit City Ry. Co., 84 Mich. 539; Vicksburg & M. R. Co. v. Phillips, 64 Miss. 693; Strode v. St. Louis Transit Co., 197 Mo. 616; Littlewood v. Mayor, 89 N. Y. 24, 42 Am. Rep. 271; Whitford v. Panama R. Co., 23 N. Y. 465; Mahoning Val. R. Co. v. Van Alstine, 77 Ohio St. 395; Putman v. Southern Pac. Co., 21 Ore. 230; Brown v. Chicago & N. W. R. Co., 102 Wis. 137; Robinson v. Canadian Pac. Ry. Co., [1892] A. C. 481; Griffiths v. Earl of Dudley, 9 Q. B. D. 357; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555.

more upon the fact that the *legal right* the existence of which is the fundamental element in every cause of action upon which the other elements all rest is not a right that, in the remotest manner, directly or indirectly, belongs to the husband, it is, in fact, a right which the wife, by virtue of the marital relation, holds *against* her husband—a right giving rise to a *duty* upon his part; it is that marital right in lieu of which a court grants alimony when terminating that bond upon which such right and its corresponding duty have theretofore rested. * * * We apprehend that no one would deny but that it would be the limit of absurdity for one to contend that a wife who had been forcibly abducted could, when settling with the wrongdoer for the wrong done her, the violation of her right of personal liberty, also bind her husband by settling for the wrong done him, the violation of his right to her services, and thus bar his right of action therefor." The court holds that the right of the personal representative to recover in an action for wrongful death is to be determined in the light of whether the facts surrounding the injury created a cause of action in the deceased during his lifetime and not by the existence of a right of action in him at the time of his death from the injury.[26]

The conclusion of the majority was vigorously dissented from by two of the five justices constituting the court, but so far as the Federal Employers' Liability Act is concerned their dissent was somewhat weakened by their opinion that the South Dakota Death Act did not create a new and independent cause of action.

Decisions construing state acts, however, are of doubtful aid in the solution of the question in the light of the federal act. Many of them proceed upon the theory that the Death Act does not create a new cause of action in favor of the personal representative, and even in states where recovery is allowed for the conscious pain and suffering of the decedent, it has been held that the plaintiff must elect as to whether to sue as at common law upon the decedent's cause of action, or under the statute

[26] Rowe v. Richards, 35 S. D. 201.

giving a remedy for his wrongful death, and that he cannot recover on both.[27] Whatever may be the rule under the various state acts it is now settled beyond controversy that the federal act creates two distinct causes of action and recovery may be had on both in a single action.[28] As was said by the supreme court: "Although originating in the same wrongful act or neglect, the two claims are quite distinct, no part of either being embraced in the other. One is for the wrong to the injured person and is confined to his personal loss and suffering before he died, while the other is for the wrong to the beneficiaries and is confined to their pecuniary loss through his death. One begins where the other ends, and a recovery upon both in the same action is not a double recovery for a single wrong, but a single recovery for a double wrong." [29]

An expression of the supreme court in an action under the federal act would indicate a tendency to hold that a release by the decedent bars an action by the personal representative. The court says: "But as the foundation of the right of action is the original wrongful injury to the decedent, it has been generally held that the new right of action is a right dependent upon the existence of a right in the decedent immediately before his death to have maintained an action for his wrong-

[27] Munro v. Pacific Coast Dredging & Reclamation Co., 84 Cal. 515; Goodsell v. Hartford & N. H. R. Co., 33 Conn. 51; Long v. Morrison, 14 Ind. 595; Louisville R. Co. v. Raymond's Adm'r, 135 Ky. 738; Hansford's Adm'x v. Payne & Co., 11 Bush (Ky.) 380; Conner's Adm'x v. Paul, 12 Bush (Ky.) 144; Donahue v. Drexler, 82 Ky. 157; Hackett v. Louisville, St. L. & T. P. R. Co., 95 Ky. 236; Louisville & N. R. Co. v. McElwain, 98 Ky. 700, 34 L.R.A. 788, 56 Am. St. Rep. 385; Hackett v. Louisville, St. L. & T. P. R. Co., 95 Ky. 236; Lewis' Adm'r v. Taylor Coal Co., 112 Ky. 845, 57 L.R.A. 447; State v. Maine Cent. R. Co., 60 Me. 490; Safford v. Drew, 3 Duer (N. Y.) 627; Mason v. Union Pac. Ry. Co., 7 Utah 77; Graetz v. McKenzie, 3 Wash. 194.

[28] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[29] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483. It will be noted that the conclusion of the supreme court in this case is similar to the reasoning upon which the decision of the South Dakota court in the case of Rowe v. Richards, 35 S. D. 201, was based, and in fact both cases cite the same authorities to sustain their position.

ful injury."[30] This was *dictum,* however, and the action then before the court arose prior to the Amendment of 1910. In a later decision the court expressly calls attention to its statement in the earlier case, and passes the question.[31]

§ 1343. Same subject; effect of release by beneficiary. A release by one of the beneficiaries does not bar an action in behalf of other beneficiaries.[32]

§ 1344. Same subject; power of representative to compromise. Since the right of action for death is vested in the personal representative, necessarily he must have full power to settle or compromise the cause of action, although compliance with the state laws governing the procedure in such cases is undoubtedly essential. It has been held in actions not arising under the act that a special administrator may settle a cause of action for wrongful death, although the real parties in interest had no knowledge either of his appointment or the settlement.[33]

To render a settlement by a personal representative valid he must have been regularly appointed.[34] Hence where a jurisdictional step was omitted the order of the probate court appointing a personal representative being a nullity, a settlement by him does not bar an action under the act.[35]

§ 1345. Same subject; former adjudication or recovery. A judgment in an action prosecuted under the state law, and litigating different issues is not a bar to a subsequent action

[30] Michigan Cent. R. Co. v. Vreeland, 227 U. S. 59, 57 L. ed. 417, rev'g 189 Fed. 495. It is to be noted in this connection that the authorities cited by the court to sustain its contention deny a recovery where the deceased executed a release prior to his death.

[31] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[32] Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

[33] Jones v. Minnesota T. R. Co., 108 Minn. 129; Foot v. Great Northern Ry. Co., 81 Minn. 493, 52 L.R.A. 384, 83 Am. St. Rep. 395.

[34] Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —.

[35] Bombolis v. Minneapolis & St. L. R. Co., 128 Minn. 112, aff'd 241 U. S. 211, 60 L. ed. —. So held where a special administrator was appointed by the court although the statutory petition for such appointment had not been filed.

under the Federal Employers' Liability Act.[36] Nor can such a judgment in an action by the beneficiaries operate as a bar to a subsequent action by the personal representative of the deceased, brought under the federal act.[37]

It would seem that a judgment rendered against the employee in an action to recover for personal injuries is *res adjudicata* barring a subsequent action by the personal representative to recover for his death as a result of such injuries. For though the causes of action are separate and distinct, both are predicated upon the same wrongful act or omission upon the part of the defendant, and where a court of competent jurisdiction has found that the defendant was not guilty of the wrong charged its finding should be conclusive in a subsequent action based upon the same charge of wrongdoing whether the action is commenced in the same or a different court. This view has been adopted in actions based upon state laws and is probably applicable to actions under the federal act.[38]

The supreme court declined to consider whether the recovery by the decedent during his lifetime for injuries sustained, barred an action for his wrongful death by his personal representative because of the concluding clause of section 9, "there shall be only one recovery for the same injury." [39]

§ 1346. Limitation of actions. Section 6 of the act provides that "no action shall be maintained under this act unless commenced within two years from the day the cause of action accrued." This provision is applicable in all actions by or in behalf of railroad employees, against the railroad company employing them, for injuries sustained while both were engaged in interstate commerce,[40] and a failure to bring the

[36] Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

[37] Troxell v. Delaware, L. & W R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

[38] Frescoln v. Puget Sound Traction, Light & Power Co., 225 Fed. 441.

[39] St. Louis, I. M. & S. R. Co. v. Craft, 237 U. S. 648, 59 L. ed. 1160, 9 N. C. C. A. 754, aff'g 115 Ark. 483.

[40] Shannon v. Boston & M. R. R., 77 N. H. 349.

action within the statutory period operates as a bar although not pleaded.[41]

It will be noted that the period of limitations does not begin to run until the cause of action accrues. In actions for personal injuries no question can arise as to when the right of action accrues, but where recovery is sought for the death of an employee, does the action accrue at the time of death or is the accrual postponed until the appointment of the personal representative of the deceased, who alone is entitled to maintain the action? It has been held by a federal court in a well reasoned opinion that an action for the death of an employee does not accrue until the appointment of a personal representative, and hence the period of limitations does not begin to run until that time.[42]

The amendment of pleadings after the expiration of the statutory period is treated elsewhere.[43]

§ 1347. Pleading; requisites and sufficiency in general. The plaintiff must allege facts showing that at the time of the injury the defendant was a common carrier by railroad within the act, and that both the defendant and the injured employee were engaged in interstate commerce.[44] The necessity of such allegations is well expressed by a state court as follows:

"It is essential to the certain and orderly administration of the law of master and servant, as these distinct enactments establish it, that the initial pleading, or its amendment, be so drawn that the courts may be able to determine under which of the two enactments, state or federal, the respective counts are intended to assert a claim for liability. The sufficiency *vel non* of counts under our state statute necessarily involve questions that will not arise upon the issue of sufficiency *vel*

[41] Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199, 60 L. ed. —, rev'g 163 N. C. 186.

[42] American R. Co. of Porto Rico v. Coronas, 230 Fed. 545, 12 N. C. C. A. 49.

[43] See § 1348 *infra*.

[44] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Shade v. Northern Pac. Ry. Co., 206 Fed. 353; Southern R. Co. v. Howerton, 182 Ind. 208; Chicago, R. I. & P. Ry. Co. v. McBee,

non of counts seeking to declare upon a liability under the federal statute; and the provisions of the latter enactment forbid matters of defense admissible in an action under the state statute." [45]

A petition is defective which does not allege that the defendant was a common carrier [46] and a petition under the Safety Appliance Act prior to its amendment was held insufficient where it did not allege that at the time of the injury the defective couplers were being used in interstate commerce.[47] It is not essential, however, that the pleadings should refer to the act to bring the action within its terms,[48] and a reference in the pleadings to a state statute does not alter the rule.[49]

It is sufficient if the facts alleged show that the injury was incurred in the course of employment in interstate commerce,[50] thus an allegation that the defendant operated a line of railroad through and outside the state, and that the decedent was employed by it in the construction, repairing and maintaining of the roadbed of such railway, amounts to an allegation that defendant was engaged in interstate commerce and that the decedent was employed by it in such commerce.[51]

While rules of pleading have become more liberal, yet in order to found a cause of action upon the alleged shortcomings of another, they must at least be so far plainly set up as to show actual damages and the wrongful act of the adverse party as the proximate and natural cause. The particulars of the alleged wrong resulting in damages should be so set forth that

— Okla. —, 145 Pac. 331; Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

45 Ex parte Atlantic Coast Line R. Co., 190 Ala. 132.

46 Shade v. Northern Pac. Ry. Co., 206 Fed. 353.

47 Brinkmeier v. Missouri Pac. Ry. Co., 224 U. S. 268, 56 L. ed. 758, aff'g 81 Kan. 101.

48 Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

49 Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919.

50 Grand Trunk W. R. Co. v. Lindsay, 233 U. S. 42, 58 L. ed. 838, aff'g 120 C. C. A. 166, 201 Fed. 836.

51 Jorgenson v. Grand Rapids & I. Ry. Co., — Mich. —, 155 N. W. 535.

the court may be able to see therefrom that such alleged damages are neither obscure, vague nor shadowy, but might, and probably would, naturally result from the acts complained of.[52]

Where the petition states a cause of action solely under the state law there cannot be a recovery under the federal act, in the absence of an amendment,[53] and a similar rule should prevail where the cause of action alleged is solely under the federal act, precluding a recovery under the state law,[54] although there is authority to the contrary.[55] Even though the petition sets up a cause of action under the state law, the necessary allegations may be supplied by the defendant's answer and thus permit a recovery under the federal act.[56]

Where the petition states a cause of action under the state law, and the evidence shows a case under the federal act, the defendant is entitled to raise the question without pleading it specially.[57]

Where the plaintiff's allegations predicate a cause of action under the state laws, the defendant to defeat liability must plead the federal act, and, in the absence of such a plea evidence tending to show the applicability of the federal act is not admissible.[58] But the fact that the act was not pleaded by the defendant does not preclude reliance thereon where the evidence adduced shows that at the time of the injury the plaintiff was engaged in interstate commerce.[59]

[52] McGuire v. Gerstley, 204 U. S. 489, 51 L. ed. 581.

[53] Gaines v. Detroit, G. H. & M. R. Co., 181 Mich. 376; Moliter v. Wabash R. Co., — Mo. App. —, 168 S. W. 250; Rich v. St. Louis & S. F. R. Co., 166 Mo. App. 379; Penny v. New Orleans G. N. R. Co., 135 La. 962; Midland Val. R. Co. v. Ennis, 109 Ark. 206.

[54] Id., Creteau v. Chicago & N. W. R. Co., 113 Minn. 418.

[55] Jones v. Chesapeake & O. R. Co., 149 Ky. 566.

[56] Vickery v. New London N. R. Co., 87 Conn. 634; White's Adm'x v. Central Vermont R. Co., 87 Vt. 330, aff'd 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265; St. Louis, I. M. & S. R. Co. v. Sharp, 115 Ark. 308.

[57] St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S W. 1099, 3 N. C. C. A. 800.

[58] Illinois Cent. R. Co. v. Nelson, 128 C. C. A. 525, 212 Fed. 69; Bradbury v. Chicago, R. I. & P. R. Co., 149 Iowa 51, 40 L.R.A.(N.S.) 684; Fleming v. Norfolk Southern R. Co., 160 N. C. 196.

[59] Toledo, St. L. & W. R. Co. v. Slavin, 236 U. S. 454, 59 L. ed. 671, rev'g 88 Ohio St. 536.

Contributory negligence must be pleaded to be available.[60] A plea setting up contributory negligence in bar and not in mitigation of damages has been held to be demurrable.[61] And since a plea that the employee knew of the defect, or negligently failed to discover same is as much a plea of contributory negligence as one of assumption of risk it is bad on demurrer.[62] However, the accuracy of these rulings would seem to depend upon whether they were in accordance in recognized and established local practice.[63]

§ 1348. Same subject; amendments. Where the petition states a cause of action under the state law, it may be amended so as to make it conform to the proof bringing the case within the federal act,[64] and, where an action is improperly brought under the act, the pleadings may be amended so as to conform to the proof, and this is permissible on remand after reversal.[65]

Where the sole beneficiaries join as plaintiffs in an action under the act, an amendment substituting the personal representative of the deceased as a party plaintiff is properly allowed,[66] nor is such an amendment barred by the period of limitations fixed by the act on the theory that it introduces a new cause of action.[67] An amendment expressly bringing the case within the federal act may properly be allowed after the expiration of the period of limitations.[68] But where an amendment

60 San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194. *Contra*, Jones v. Kansas City Southern R. Co., 137 La. 178, reversed on other grounds 241 U. S. 181, 60 L. ed. —.

61 Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

62 Southern Ry. Co. v. Peters, — Ala. —, 69 So. 611.

63 Kansas City Southern R. Co. v. Jones, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

64 Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

65 Illinois Cent. R. Co. v. Kelly, 167 Ky. 745.

66 Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919. See also Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

67 Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919. But see Hall v. Louisville & N. R. Co., 157 Fed. 464, aff'd 98 C. C. A. 664, 174 Fed. 1021; Allen v. Tuscarora Val. R. Co., 229 Pa. 97, 30 L.R.A.(N.S.) 1096, 140 Am. St. Rep. 714; Union Pac. R. Co. v. Wyler, 158 U. S. 285, 39 L. ed. 983.

68 Jorgenson v. Grand Rapids & I.

introduces a new or different cause of action it is equivalent to a new suit, as to which the running of the period of limitations is not arrested.[69] Where an amendment merely expanded or amplified what was alleged in the support of a cause of action already asserted, it relates back to the commencement of the action and is not affected by the expiration of the period of limitations.[70] Thus where a complaint set forth that the defendant was operating a line of railroad between certain states, that the plaintiff was in defendant's employ, that when he was injured, he was in the line of duty, proceeding to board one of defendant's trains, that the injury was sustained in another state through the defendant's negligence in permitting the right of way to remain in a dangerous condition, it was held not error to permit an amendment alleging that at the time of the injury both the plaintiff and the defendant were engaged in interstate commerce although such permission was given after the expiration of the period of limitation fixed in the act.[71]

Permitting the trial to proceed after the allowance of an amendment bringing the action under the federal act is not erroneous where defendant's counsel refused to claim surprise.[72] The allowance of an amendment alleging facts bringing the case within the act raises no question under the laws of the United States.[73]

§ 1349. Same subject; actions for death. In actions for death the existence of the beneficiaries named in the statute must be alleged and proved;[74] but a petition which shows that the persons in whose behalf the action is maintained are within the statutory classification of beneficiaries is sufficient;[75] and

Ry. Co., — Mich. —, 155 N. W. 535.

[69] Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

[70] Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

[71] Seaboard Air Line Ry. v. Renn, 241 U. S. 290, 60 L. ed. —, aff'g — N. C. —, 84 S. E. 964.

[72] Seaboard Air Line Ry. v. Koennecke, 239 U. S. 352, 60 L. ed. —, aff'g 101 S. C. 86.

[73] Kansas City Western Ry. Co. v. McAdow, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188.

[74] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496.

[75] Illinois Cent. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30.

the inclusion of persons not entitled to share in the distribution is immaterial where upon the trial reference to them is treated as surplusage, and the court expressly limits recovery to the use of the proper beneficiaries.[76]

Where the action is prosecuted for the benefit of the parents of the deceased the plaintiff must allege and prove that decedent left no widow or children surviving him.[77] However, in the absence of direct evidence upon the subject, the evidence may be such as to permit an inference that such was the case.[78]

A declaration which contains no positive averment of pecuniary loss to the parents for whose benefit the action was brought, and which does not set out facts or circumstances sufficient to apprise the defendant with reasonable particularity that such loss was suffered, is insufficient.[79]

§ 1350. Same subject; alternative allegations setting up both state and federal law. To protect himself in advance of definite knowledge as to which law applies, the plaintiff may set up a cause of action under the federal act in one count and under the state law in another count.[80] However, the courts are not in accord as to whether an election may be required and, if so, at what stage of the proceedings. On the one hand it is contended that, since the liabilities and defenses under the state and federal laws are frequently very different in character, it is imposing too great a burden upon the defendant to expect it to meet the varying, and in fact conflicting issues presented where an election is not required in advance of trial. This view has been upheld.[81]

On the other hand it is claimed that to require an election in advance of trial will frequently work a hardship upon the plaintiff, since, where the facts are obscure, he would be re-

[76] Illinois Cent. R. Co. v. Stewart, 138 C. C. A. 444, 223 Fed. 30.

[77] Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

[78] Moffett v. Baltimore & O. R. Co., 135 C. C. A. 607, 220 Fed. 39.

[79] Garrett v. Louisville & N. R. Co., 235 U. S. 308, 59 L. ed. 242, aff'g 117 C. C. A. 109, 197 Fed. 715.

[80] San Antonio & A. P. Ry. Co. v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194.

[81] Louisville & N. R. Co. v. Strange's Adm'x, 156 Ky. 439; South Covington & C. St. R. Co. v. Finan's Adm'x, 153 Ky. 340; Thompson v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256.

quired to elect at a time when he could not intelligently determine which act applied. This view seems to be supported by the weight of authority.[82] As was said by the Massachusetts Supreme Judicial Court:

"It ofttimes would be a great hardship upon the parties to compel them to try out first the question whether the federal act applies, and, if it, in the end shall be decided that it does not, then to test, by further litigation, their rights under the state statute. The short period of limitations provided in each act often might expire before a final decision could be reached. If adverse to the plaintiff on the ground of error in the form of relief sought, he thus might be barred from a just recovery. Although both the federal and state statutes are liberal, * * * nevertheless the allowance of such amendments rests commonly in the sound discretion of the trial judge and is not subject to revision on exceptions. As it is not a matter of right, substantial interests might be lost through no fault of a plaintiff who constantly had been alert in his own behalf.

"The federal act has been construed as covering injuries occurring at the moment when the particular service performed is a part of interstate commerce. * * * Whether a railroad employee is engaged in interstate or intrastate commerce often involves legal discrimination of great nicety about which even the justices of the highest court are not always in harmony. * * * It would be a saving of expense both to the parties and to the Commonwealth if the two actions could be prosecuted together, so that by one trial the facts could be ascertained and the causes ended by the determination of the governing principles of law. Where the settlement of an issue of fact depends upon conflicting evidence, it seems more likely that the truth will be ascertained by adducing all the evidence at one

[82] Corbett v. Boston & M. R. R., 219 Mass. 351, 9 N. C. C. A. 691; Bankson v. Illinois Cent. R. Co., 196 Fed. 171; Koennecke v. Seaboard Air Line Ry., 101 S. C. 86, aff'd 239 U. S. 352, 60 L. ed. —; Howell v. Atlantic Coast Line R. Co., 99 S. C. 417; Ex parte Atlantic Coast Line R. Co., 190 Ala. 132, rev'g Atlantic Coast Line R. Co. v. Jones, 9 Ala. App. 499; Atkinson v. Bullard, 14 Ga. App. 69; Tinkham v. Boston & M. R. R., 77 N. H. 111. See also note in 9 N. C. C. A. 691–702, where all of the authorities are exhaustively reviewed.

time before a single tribunal and enabling it to find out the real situation under an adequate statement of the governing rules of law applicable to all phases, than to require two distinct and successive inquiries before separate tribunals where only a single aspect of the incident could be open to investigation at one time.

"There are important points of dissimilarity between the rights conferred and the burdens imposed under the two statutes. The rules of evidence may be different. The principles of law by which liability may be established under the two statutes are somewhat divergent. Difficulties will be presented in the trial which will require great care and a strong grasp by the presiding judge, and careful discrimination by jurors. But these are not insurmountable obstacles, nor do they appear to counterbalance the advantages which will accrue in permitting a conjoint prosecution of the two causes in appropriate instances." [83]

§ 1351. Practice in general. Questions pertaining to mere matter of procedure, such as pleading, or the order of evidence are governed by the *lex fori.*[84] But a substantive right or defense arising under the act cannot be impaired or destroyed by a rule of state practice.[85]

The Seventh Amendment to the Constitution of the United States under which a substantial compliance with the common-law standard as to what constitutes a jury is exacted applies only to the federal government and is inapplicable to proceedings in a state court, even under the federal act. Consequently, in an action under the Federal Employers' Liability Act, in a state court trial may be had before, or a verdict returned by, a jury of less than twelve where authorized by the laws of the state.[86] Of course, in actions in the United States courts, the

[83] Corbett v. Boston & M. R. R., 219 Mass. 351, 9 N. C. C. A. 691.

[84] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

[85] Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351; Atlantic Coast Line R. R. v. Burnette, 239 U. S. 199, 60 L. ed. —, rev'g 163 N. C. 186, failure to plead bar of limitations immaterial.

[86] Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. —, aff'g 128 Minn. 112; St. Louis & S. F. R. Co. v. Brown, 241 U. S.

jury must be constituted in accordance with the common-law standards.[87]

§ 1352. Same subject; parties. In case of death the act give a right of action to the personal representative of the deceased employee, and the action can only be prosecuted by such representative.[88] And this is true although the persons suing as plaintiffs are the sole surviving beneficiaries of the decedent.[89] In the event of the death of an employee after commencing an action for his personal injuries, the personal representative only is entitled to revive and prosecute the action.[90]

Letters of administration may be issued notwithstanding the fact that the decedent left no property aside from the right of action for his death under the statute.[91]

An ancillary administrator is entitled to maintain an action under the act where he was appointed in the state where the death occurred and his suit was prosecuted with the approval of the domicillary administratrix who was the personal beneficiary.[92] But a foreign administrator is not entitled to sue in

223, 60 L. ed. —; Chesapeake & O. Ry. Co. v. Carnahan, 241 U. S. 241, 60 L. ed. —; Louisville & Nashville R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823; Chesapeake & O. R. Co. v. Kelly's Adm'r, 241 U. S. 485, 60 L. ed. —, aff'g 161 Ky. 655; Chesapeake & O. R. Co. v. Gainey, 241 U. S. 494, 60 L. ed. —, rev'g 162 Ky. 427; Winters v. Minneapolis & St. L. R. Co., 126 Minn. 260; Louisville & N. R. Co. v. Johnson's Adm'x, 161 Ky. 824.

[87] Minneapolis & St. L. R. Co. v. Bombolis, 241 U. S. 211, 60 L. ed. —, aff'g 128 Minn. 112.

[88] American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919; Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44; St. Louis, S. F. & T. R. Co. v. Seale, 229 U. S. 156, 57 L. ed. 1129, rev'g — Tex. Civ. App. —, 148 S. W. 1099, 3 N. C. C. A. 800; Penny v. New Orleans G. N. R. Co., 135 La. 962; Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435; Hearst v. St. Louis, I. M. & S. R. Co., 188 Mo. App. 36.

[89] American R. Co. of Porto Rico v. Birch, 224 U. S. 547, 56 L. ed. 879; Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355; Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, 57 L. ed. 586, rev'g 118 C. C. A. 272, 200 Fed. 44.

[90] St. Louis Southwestern Ry. Co. v. Brothers, — Tex. Civ. App. —, 165 S. W. 488.

[91] Gulf, C. & S. F. Ry. Co. v. Beezley, — Tex. Civ. App. —, 153 S. W. 651.

a state other than that in which he was appointed unless authorized to do so by the *lex fori.*[93]

The want of legal capacity in one other than the personal representative to sue as an individual under the act is substantive in character and not subject to waiver,[94] and may be raised in the appellate court for the first time.[95] Where the widow in an action under the state law recovered judgment for the death of her husband, who was killed while both he and the railroad employing him were engaged in interstate commerce, it has been held that she could not after the entry of judgment appear as administratrix and adopt the judgment.[96]

A fellow-servant or an agent of the company whose negligence caused the injury cannot be sued under the federal act since it applies exclusively to common carriers by railroad. But he is nevertheless liable under the state law. He cannot therefore be joined as a codefendant with the railroad company.[97] Where under the laws of the state the lessor of a railroad continues liable for the acts of the lessee, the lessor may be sued for an injury sustained by an employee of the lessee through the negligence of the latter.[98]

§ 1353. Same subject; removal of causes. Under the amendment of 1910 an action under the act cannot be removed to the federal courts upon the ground of diversity of citizenship[99] nor upon any ground whatsoever.[1]

[92] Anderson v. Louisville & N. R. Co., 127 C. C. A. 277, 210 Fed. 689.

[93] Baltimore & O. R. Co. v. Evans, 110 C. C. A. 156, 188 Fed. 6. See also Midland Val. R. Co. v. Lemoyne, 104 Ark. 327; Hall v. Southern R. Co., 146 N. C. 345.

[94] Missouri, K. & T. R. Co. v. Lenahan, 39 Okla. 283.

[95] St. Louis, I. M. & S. R. Co. v. Hesterly, 228 U. S. 702, 57 L. ed. 1031, rev'g 98 Ark. 240; Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435; La Casse v. New Orleans, T. & M. R. Co., 135 La. 129; Southern Ry. Co. v. Howerton (Ind. App.), 101 N. E. 121.

[96] Vaughan v. St. Louis & S. F. R. Co., 177 Mo. App. 155. See also Dungan v. St. Louis & S. F. R. Co., 178 Mo. App. 164.

[97] Kelly's Adm'x v. Chesapeake & O. Ry. Co., 201 Fed. 602.

[98] North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496. *Contra,* Wagner v. Chicago & A. R. Co., 265 Ill. 245, aff'd 239 U. S. 452, 60 L. ed. —, 11 N. C. C. A. 1087.

[99] Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478, rev'g 112 Ark. 305.

[1] Kansas City Southern R. Co. v. Leslie, 238 U. S. 599, 59 L. ed. 1478,

§ 1354. Same subject; evidence. As in the case of other branches of practice, the question of evidence is largely governed by local rules, unless the parties are thereby deprived of substantial rights under the act.[2] State and federal courts take judicial notice of the act.[3]

Evidence of the age, probable duration of life, habits of industry, means, earnings, health, skill, intelligence and character of the deceased, his reasonable future expectation, and other like facts, is admissible.[4]

To assist the jury in arriving at its determination, standard life and annuity tables, showing at any age the probable duration of life, and the present value of a life annuity, are admissible.[5] But the rules derived from such tables are not absolute guides which the jury is bound to follow.[6] They are not inadmissible merely because of the fact that owing to the dangers of his employment the employee was not, at the time of the accident, an insurable risk.[7]

Evidence tending to show the character of plaintiff's ordinary pursuits, and the extent to which his injury prevented him from following those pursuits is admissible, and this is true although no financial loss is caused thereby, since it tends to show the extent of his physical and mental suffering.[8] Testimony tending to show the character of the work performed by plaintiff before and after the accident is competent upon the question as to how far his capacity of earning a livelihood had been impaired by his injury.[9]

rev'g 112 Ark. 305; Southern Ry. Co. v. Lloyd, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24.

[2] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

[3] Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

[4] Louisville & N. R. Co. v. Fleming, — Ala. —, 69 So. 125.

[5] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257; Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

[6] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257.

[7] Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

[8] District of Columbia v. Woodbury, 136 U. S. 450, 34 L. ed. 472, where evidence that plaintiff, a doctor, had contributed to medical journals prior to his injury was held admissible although there was no evidence that he had been paid therefor.

[9] Texas & P. R. Co. v. Volk, 151 U. S. 73, 38 L. ed. 78, where it was

The rejection of evidence tending to show contributory negligence cannot be sustained upon the ground that it was offered in bar and not in mitigation of damages, especially where objection on that ground was not made at the time of the exclusion, and there was no settled local rule requiring counsel without inquiry by the court, to announce in advance the purpose for which evidence is tendered.[10] Upon the question of negligence or contributory negligence the defendant is not limited to its printed rules, but may properly introduce in evidence special instructions given to its employees, together with other well known rules, practices and customs promulgated by it to govern its employees in the safe operation of its trains.[11]

Contradictory statements have no legal tendency to establish the truth of a subject matter to which they relate.[12]

§ 1355. Same subject; instructions. While the substance of the instructions given is of course controlled by the act, and must conform to the construction placed thereon by the Supreme Court of the United States, the form, manner of giving and the like is purely a matter of local practice, so long as neither of the parties is thereby deprived of substantial rights under the act.[13]

In the courts of the United States the judge, in submitting a case to the jury, may, in his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated, and all matters of fact are ultimately sub-

held that testimony of a fellow-workman that after the injury plaintiff's employer "just kept him on, being he got hurt, so he could make a living for his wife and family" was held properly admitted.

[10] Kansas City Southern Ry. Co. v. Jones, 241 U. S. 181, 60 L. ed. —, rev'g 137 La. 178.

[11] Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187.

[12] Southern Ry. Co. v. Gray, 241 U. S. 333, 60 L. ed. —, rev'g 167 N. C. 433.

[13] The sufficiency of particular instructions is treated in connection with the sections to which they relate.

[14] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257.

mitted to the determination of the jury, will not be reviewed.[14] The powers of the federal courts in this respect are not controlled by the statutes of the state forbidding judges to express any opinion upon the facts.[15]

Where a judgment of the state appellate court affirmed the judgment below on the ground that there was no evidence of assumed risk sufficient to require the trial court to prepare and give a proper instruction in lieu of a defective one offered by the defendant in accordance with the local practice requiring the trial court to prepare or direct the preparation of proper instructions in such case where the issue is one which should be submitted to the jury and an examination of the record shows the existence of evidence sufficient to present the issue, the judgment of the state court will be reversed.[16]

§ 1356. Same subject; special interrogatories. The submission of special interrogatories as to the amount which the jury deducted for contributory negligence is discretionary with the court,[17] and it has been held proper to refuse to submit to the jury a special issue on the question of contributory negligence.[18]

§ 1357. Same subject; question for jury. It has been held that the sufficiency of the evidence to take the case to the jury will be determined in accordance with the rule prevailing in the state courts.[19] While the question has not as yet been definitely settled, the supreme court has held that the sufficiency of the evidence to sustain a recovery, under the act, when properly

[15] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545, 30 L. ed. 257, Nudd v. Burrows, 91 U. S. 426, 23 L. ed. 286.

[16] Chesapeake & O. Ry. v. De Atley, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

[17] Huxoll v. Union Pac. R. Co., — Neb. —, 155 N. W. 900.

[18] Lloyd v. Southern R. Co., 166 N. C. 24, 7 N. C. C. A. 520, aff'd 239 U. S. 496, 60 L. ed. —, where the defendant requested the court to submit the following special issues: "(1) Did the plaintiff contribute by his negligence to his own injury, as alleged in the answer? (2) How much is the whole amount of damages sustained by the plaintiff by reason of the injuries received by him? (3) What sum should be deducted from the damages sustained by plaintiff as the proportion or just share thereof attributable to the negligence of the plaintiff?"

[19] Louisville & N. R. Co. v. Johnson's Adm'x, 161 Ky. 824, where the so-called "scintilla" rule prevailing in Kentucky was applied in an action under the act.

preserved, presents a federal question, and hence reviewable by that court.[20] This being true, reason would suggest that it must be determined, when presented, in accordance with the rules prevailing in the federal courts. Whether an employee is engaged in interstate commerce is ordinarily a mixed question of law and fact.[21] Where the undisputed facts, however, show that the parties were engaged solely in intrastate commerce at the time of the injury it is error to submit to the jury the question as to whether the state or the federal law applies,[22] and in such case the court may decide the question as one of law.[23] But where an issue of fact is raised as to whether they were engaged in interstate commerce at the time of the accident, it has been held that the court should instruct the jury on both issues and allow them to decide which law applies according as they find the facts.[24] And where the evidence leaves the question in doubt, it should be submitted to the jury under proper instructions.[25] The submission of the question to the jury where the evidence warranted a peremptory instruction is not prejudicial, however, where the complaining party was not harmed thereby.[26] Refusal to instruct that the plaintiff was not engaged in interstate commerce is proper where there was evidence in support of plaintiff's claim that he was so employed at the time of his injury.[27]

The court cannot properly direct a verdict for the defendant unless it can say as a matter of law that the employee's acts con-

20 Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

21 Atkinson v. Bullard, 14 Ga. App. 69.

22 Atchison, T. & S. F. R. Co. v. Pitts, 44 Okla. 604, 9 N. C. C. A. 545.

23 Louisville, & N. R. Co. v. Holloway's Adm'r, 163 Ky. 125, 9 N. C. C. A. 546n; Cousins v. Illinois Cent. R. Co., 126 Minn. 172, 6 N. C. C. A. 182, rev'd 241 U. S. 641, 60 L. ed. — (mem. dec.).

24 Camp v. Atlanta & C. Air Line R. Co., 100 S. C. 294.

25 North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109, rev'g 156 N. C. 496; Cherpeski v. Great Northern R. Co., 128 Minn. 360.

26 Pelton v. Illinois Cent. R. Co., — Iowa —, 150 N. W. 236.

27 Southern Ry. Co. v. Lloyd, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24, 7 N. C. C. A. 520.

stituted negligence which was the sole, proximate cause of his injuries.[28]

§ 1358. Appeal and error. Where the case is taken to the United States Supreme Court from a state court, the power of the former to review is governed by the Judicial Code.[29] Hence merely incidental questions not federal in character will not be considered; in other words, questions cannot be reviewed which do not in their essence involve the existence of a right in the plaintiff to recover under the federal act, or the right of the defendant to be shielded from responsibility under that act, because when properly applied no liability on its part would result.[30] In such cases the court is not a court of general review,[31] and, upon a writ of error to a state court, the supreme court will not consider assignments of error which do not involve a construction of the act.[32]

The rule as to what are federal questions is best stated in the language of the supreme court in an action under the Safety Appliance Act: "Where a party to litigation in a state court insists, by way of objection to or requests for instructions, upon a construction of a statute of the United States which will lead, or, on possible findings of fact from which the evidence may lead, to a judgment in his favor, and his claim in this respect, being duly set up, is denied by the highest court of the state, then the question thus raised may be reviewed in this court. The plain reason is that in all such cases he has claimed in the state court a right or immunity under a law of the United States and it has been denied to him. Jurisdiction so clearly warranted by the Constitution and so explicitly conferred by the

[28] Houston B. & T. Ry. Co. v. Barger, — Tex. Civ. App. —, 176 S. W. 870.

[29] Rev. St. § 709, Judicial Code § 237. St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427; Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

[30] Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

[31] Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

[32] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

act of Congress needs no justification. But it may not be out of place to say that in no other manner can a uniform construction of the statute laws of the United States be secured, so that they shall have the same meaning and effect in all states of the Union." [33] But it must "appear from the record that there was necessarily present a definite issue as to the correct construction of the act, so directly involved that the court could not have given the judgment it did without deciding the question against the contention of the plaintiff in error." [34]

In another case it was said: "Where in a controversy of a purely federal character the claim is made and denied that there was no evidence tending to show liability under the federal law, such ruling, when duly excepted to, is reviewable, because inherently involving the operation and effect of the federal law." [35] But the mere assertion of a formal right under the act is not sufficient to present a federal question, unless the right so asserted is substantial.[36]

A claim that the trial court erred in not taking the case from the jury upon the ground that there was no evidence sufficient to justify the submission of the case to the jury, presents a federal question reviewable by the supreme court.[37] Whether an amendment was granted in violation of the period of limitations prescribed in the act presents a federal question subject to re-examination in the Supreme Court of the United States, however much the allowance of the amendment otherwise might have rested in the discretion of the court below or have been a matter of local procedure.[38]

Where under an established rule of state practice it is the

[33] St. Louis, I. M. & S. R. Co. v. Taylor, 210 U. S. 281, 52 L. ed. 1061, rev'g 71 Ark. 445; Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

[34] Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

[35] St. Louis, I. M. & S. R. Co. v. McWhirter, 229 U. S. 265, 57 L. ed. 1179, rev'g 145 Ky. 427.

[36] Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

[37] Seaboard Air Line R. Co. v. Padgett, 236 U. S. 668, 59 L. ed. 777, aff'g 99 S. C. 364.

[38] Seaboard Air Line Ry. v. Renn, 241 U. S. 290, aff'g — N. C. —, 84 S. E. 964.

duty of the court where instructions are offered upon any issue respecting which the jury should be instructed to prepare or direct the preparation of proper instructions where those offered are incorrect in form or substance and an improper instruction was refused by the state court, the action being sustained by the state appellate court on the ground that there was no evidence upon which it could be predicated, even if properly drawn, a federal question is presented permitting a review in the Supreme Court of the United States, and where there was evidence which would require the giving of a proper instruction in accordance with the practice of the state the judgment will be reversed.[39]

The application of the common law of the state in no way involving the construction or application of the federal act does not present a federal question.[40] Hence the decision of the state court that defects in a pleading were cured by evidence and admissions in other pleadings does not present a federal question.[41] The action of the court in treating a declaration as amended to conform to the proofs, involves a mere question of local practice.[42] So where the trial court treated an allegation that plaintiff was engaged in interstate commerce as eliminated, the evidence showing that the accident occurred outside of interstate commerce, the court's action involved the application of a mere rule of local practice and raised no question of federal right.[43]

The conclusion of the state court, supported by the record, that the issue of assumption of risk was not presented, and

[39] Chesapeake & O. Ry. Co. v. De Atley, 241 U. S. 310, 60 L. ed. —, rev'g 159 Ky. 687.

[40] Chicago & A. R. Co. v. Wagner, 239 U. S. 452, 60 L. ed. —, aff'g 265 Ill. 245 where the state court held that the defendant, who was not the plaintiff's employer, was not discharged by a release given by plaintiff to his employer, who was a joint tort-feasor with defendant.

[41] Central Vermont R. Co. v. White, 238 U. S. 507, 59 L. ed. 1433, 9 N. C. C. A. 265, aff'g 87 Vt. 330.

[42] Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

[43] Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

[44] Southern Ry. Co. v. Lloyd, 239 U. S. 496, 60 L. ed. —, aff'g 166 N. C. 24, 7 N. C. C. A. 520.

therefore under the state practice was not reviewable on appeal does not deny a federal right.[44] An assignment of error based upon the court's charge that if the jury found that if the act of an employee in "going into the express car was such an act on his part that a reasonably prudent man ordinarily would not have done under the circumstances of the situation" he would be guilty of contributory negligence does not present a federal question, since it raises no specific question as to the proper construction of the act.[45]

Questions as to the excessiveness of the verdict will not be reviewed by the supreme court on writ of error to a state court [46] and where no error of law intervenes the judgment will not be reversed on that ground.[47]

Whether the question of employment in interstate commerce was properly raised in the trial court is a question of state practice [48] and where the highest court of the state either decided or assumed that the record presented a question of federal right, and decided against the party asserting that right, the supreme court will pass upon the merits of the question so raised.[49]

An objection which was not raised in the state appellate court will not be considered by the Supreme Court of the United States.[50] A motion for a peremptory instruction sufficiently challenges the plaintiff's right to proceed under the state law.[51]

Where the judgment of the United States Circuit Court is founded upon the Federal Employers' Liability Act, the judgment of the circuit court of appeals is not final, and, where it

45 Seaboard Air Line R. Co. v. Duvall, 225 U. S. 477, 56 L. ed. 1171, s. c. 152 N. C. 524, writ of error dismissed.

46 Southern Ry.—Carolina Division v. Bennett, 233 U. S. 80, 58 L. ed. 860, 10 N. C. C. A. 853, aff'g 98 S. C. 42.

47 Southern Ry.—Carolina Division v. Bennett, 233 U. S. 80, 58 L. ed. 860, 10 N. C. C. A. 853, aff'g 98 S. C. 42, where a verdict for $20,000 was rendered for the death of a fireman whose life expectancy was 30 years and whose earnings were $900 per year.

48 North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109.

49 North Carolina R. Co. v. Zachary, 232 U. S. 248, 58 L. ed. 591, 9 N. C. C. A. 109.

50 Jacobs v. Southern Ry. Co., 241 U. S. 229, 60 L. ed. —, aff'g 116 Va. 189.

51 Cincinnati, N. O. & T. P. R. Co. v. Tucker, 168 Ky. 144.

exceeds one thousand dollars, it may be reviewed by the supreme court on writ of error.[52]

Mere disputes as to the conflicting tendencies of the proof will not be reviewed.[53] Where at the request of the defendant the court instructed the jury that the employee was not engaged in interstate commerce at the time of his injury, the defendant is estopped to make a contrary claim.[54] Where the state law is so similar to the federal act that the liability of the defendant would not be affected by the question of which governed the case, it is immaterial which law is applicable,[55] and an instruction upon contributory negligence under the state law is not ground for reversal where it is more favorable than the rule applicable under the federal act.[56] The refusal of an instruction as to the legal result which could follow only upon certain hypotheses which were expressly negatived by special findings of the jury is not ground for reversal.[57]

The rule in the federal courts is that an erroneous instruction on damages cannot be cured by remittitur where the elements of damages are of such an indeterminate character that there is no criterion for segregation.[58] Since, where contributory negligence is claimed, the amount of the verdict is necessarily dependent upon the amount of negligence attributable to the defendant, the submission of an improper issue of negligence

52 Missouri, K. & T. R. Co. v. Wulf, 226 U. S. 570, 57 L. ed. 355, aff'g 113 C. C. A. 665, 192 Fed. 919.

53 Chicago, R. I. & P. Ry. Co. v. Devine, 239 U. S. 52, 60 L. ed. —, aff'g 266 Ill. 248.

54 Wabash R. Co. v. Hayes, 234 U. S. 86, 58 L. ed. 1226, 6 N. C. C. A. 224, s. c. 180 Ill. App. 511, writ of error dismissed.

55 Kansas City W. Ry. Co. v. McAdow, 240 U. S. 51, 60 L. ed. —, aff'g (Mo. App.), 164 S. W. 188; Chicago & N. W. R. Co. v. Gray, 237 U. S. 399, 59 L. ed. 1018, 9 N. C. C. A. 452, aff'g 153 Wis. 637.

56 Chicago, R. I. & P. Ry. Co. v. Wright, 239 U. S. 548, 60 L. ed. —, aff'g 96 Neb. 87. In this case the state court erroneously proceeded upon the theory that the action was governed by the state law under which contributory negligence was a bar to recovery, except where the employee's negligence was slight and that of the employer gross in comparison, in which case the negligence of the former was not a bar but operated to diminish the damages proportionately.

57 Kanawha & M. Ry. Co. v. Kerse, 239 U. S. 576, 60 L. ed. —.

58 New York, C. & St. L. R. Co. v. Niebel, 131 C. C. A. 248, 214 Fed. 952.

is prejudicial notwithstanding the submission of another and proper issue upon which a finding of negligence could have been sustained.[59]

The fact that the court below may have inaccurately expressed in one respect its reasons for affirmance does not require the supreme court to reverse the judgment where no reversible error exists.[60] Where a judgment in favor of the plaintiff in an action under the act was reversed by the state court and upon the subsequent trial the plaintiff recovered a less amount, judgment for which was affirmed by the state court, the United States Supreme Court will not order the former judgment reinstated where an erroneous instruction was given upon the first trial.[61] The Supreme Court, however, declined to consider whether if error had not intervened in the first trial, judgment thereon would have been reinstated notwithstanding the judgment in the second trial.[62] Where a judgment is erroneous because the action was prosecuted in the name of the widow it should be reversed without prejudice to her rights under the act.[63]

The practice of granting a partial new trial upon the sole question of damages, eliminating the question of contributory negligence is rarely proper, and, as the supreme court says, not to be commended.[64] However, where the issues are clearly severable, such as where upon the trial below the jury in answers to special interrogatories expressly found that the employee was free from contributory negligence, and their finding was justified by the evidence, the granting of a partial new trial

59 Louisville & N. R. Co. v. Heinig's Adm'x, 162 Ky. 14. In such case the jury might well conclude that as the plaintiff was negligent in but one particular, while the carrier was negligent on two grounds, the negligence of the defendant was much greater, thus requiring the latter to bear the greater part of the loss.

60 St. Louis & S. F. R. Co. v. Brown, 241 U. S. 223, 60 L. ed. —.

61 Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

62 Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

63 Cincinnati, N. O. & T. P. R. Co. v. Bonham, 130 Tenn. 435.

64 Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351.

upon the sole issue of the amount of damages does not present a federal question, especially where the defendant made no request for the modification of the mandate, nor for permission to introduce newly discovered evidence.[65] The offer of the plaintiff after judgment to consent to a partial new trial on the issue of damages does not preclude a reversal for partial new trial on the ground of error in the instructions on damages, since it is the province of the court to determine the propriety of a new trial even though both parties consent to it.[66]

Where the state law provides for the addition of a penalty of ten per cent. of the damages recovered in the event of an affirmance where a supersedeas is obtained on appeal or error, such a penalty is properly assessed in an action under the Federal Employers' Liability Act where the judgment appealed from is affirmed.[67]

[65] Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, 59 L. ed. 1303, aff'g 163 N. C. 351.

[66] Kenney v. Seaboard Air Line R. Co., 165 N. C. 99.

[67] Louisville & N. R. Co. v. Stewart, 241 U. S. 261, 60 L. ed. —, aff'g 163 Ky. 823, s. c. 156 Ky. 550, 157 Ky. 642.

CHAPTER XLI.

WORKMEN'S COMPENSATION ACTS.

§1359. Introduction.
1360. Nature, scope, and effect.
1361. Constitutionality in general.
1362. Same subject; delegation of judicial functions.
1363. Same subject; abolition of defenses.
1364. Same subject; police power; vested and contract rights; due process of law.
1365. Same subject; right to jury trial.
1366. Same subject; right to judicial remedies.
1367. Same subject; impairment of obligation of contracts.
1368. Same subject; compulsory acts.
1369. Same subject; provisions governing partial invalidity.
1370. Same subject; tax provisions.
1371. Same subject; by whom and how constitutional question may be raised.
1372. Same subject; insurance provisions.
1373. Conflict of laws.
1374. Existence of relation of master and servant.
1375. Election.
1376. Employments within the acts.
1377. Accidents or injuries arising out of and in the course of employment; general rules.
1378. Same subject; disease.
1379. Same subject; wilful misconduct.
1380. Same subject; acts of nature.
1381. Same subject; sportive acts.
1382. Same subject; suicide.
1383. Same subject; intermission from or suspension of work.
1384. Same subject; assaults.
1385. Dependency.
1386. Notice.
1387. Award of compensation.
1388. Injuries caused by negligence of third persons.

§ 1359. Introduction. No remedial legislation in American history has proved as popular as the so-called Workmen's Com-

pensation Acts. In the seven years which have elapsed since the passage of what was practically the first American Act, thirty-two states have accepted the principle that the burden of industrial accidents should be borne in part by society as represented by the industry, while the federal government has but recently passed an act applicable to federal employees.

The subject is not directly connected with the Law of Damages, and treatment within the scope of a single chapter must necessarily be confined to a mere outline or skeleton of the rules applicable.

§ 1360. Nature, scope and effect. Compensation acts partake more of the law of insurance than probably any other branch of the law. In a measure they provide for a species of industrial insurance. The growth of industrialism, and the increased use of dangerous and complicated machinery, the constantly increasing toll of dead and maimed workmen, and the injustice and inadequacy of the common-law remedies were the moving factors in the passage of the acts.

In principle, the liability under the acts is contractual, since either expressly or impliedly they enter into the contract of employment, and, where injury occurs, liability grows out of this *quasi* contractual relation independently of negligence or tort.[1]

The purpose of the act is to compensate the injured employee within certain limits for the pecuniary loss suffered as the result of his injury, or, in the event of his death, to give such compensation to his legal beneficiaries. No account is taken of his pain or suffering, although in some states compensation is allowed for disfigurement; but, even then, the compensation is not predicated upon the mental anguish suffered, but rather upon the pecuniary loss attendant upon the difficulty in securing remunerative employment.

[1] The construction placed upon the Iowa Act by the Supreme Court of that state renders it anomalous, since negligence on the part of the master must be shown. It is indeed an employers' liability act rather than a compensation act, possessing none, or at best but few, of the beneficial qualities of either form of legislation. See Hunter v.

The award is necessarily more or less arbitrary, particularly as to injuries resulting in total permanent incapacity; that is, injuries which will wholly incapacitate the employee from again engaging in his employment, or partial permanent incapacity. In all cases the award is based upon the earnings of the employee, thus further emphasizing its pecuniary basis. The acts do not aim to compensate the employee fully for his injury, since no provision is made for the pain and suffering endured, and, even as to the actual pecuniary loss suffered, the relief is not complete, as the award carries only a certain percentage of the average earnings of the employee between certain fixed maximum and minimum amounts. As a result, the loss does not fall upon the employer alone, but is shared by the employee.[2]

In practical operation, the effect of the acts is to reduce a substantial recovery which might have been had by a minority of injured workmen at common law in favor of a universal recovery, under the acts, by injured employees who would otherwise have been without a remedy. The theory of the act is that the plan of compensation it provides for injuries suffered in the course of the employment is more advantageous than a suit for damages.[3]

Being remedial in character, the act should receive a broad and liberal interpretation [4] so as to effectuate its beneficent pur-

Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[2] Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1.

[3] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[4] The California Workmen's Compensation, Insurance and Safety Act is, under section 86 (a) thereof, to be liberally construed. Massachusetts Bonding & Insurance Co. v. Pillsbury, 170 Cal. 767, 11 N. C. C. A. 426.

The Massachusetts Workmen's Compensation Act is a remedial statute and is to be so construed as to include all controversies arising under the act between the employee and the employer and the insurer. In re Panasuk, 217 Mass. 589, 5 N. C. C. A. 688.

The Workmen's Compensation Act (Laws 1913, c. 467 [Gen. St. 1913, §§ 8195–8230]) is remedial in its nature, and must be given a liberal construction, to accomplish the purpose intended. The provisions defining when the relation of employer and employee exists bring within the act all cases in which,

pose.[5] Although a contrary rule seems to prevail in Michigan.[6]

It is the purpose of the compensation acts to remove from the field of litigation all questions arising from the injury of an employee where both the employer and the employee are voluntarily or involuntarily within the act [7] with the exception that in most states where the injury is caused by the negligence of a third person recovery against him may be had at common law, or the remedy against the employer under the act followed, at the option of the employee.[8]

Many of the acts also permit an action at law by the employee against the employer where the injury was due to the wilful failure of the employer to comply with statutes intended for the safety of employees, or to his deliberate intention to produce the injury.[9]

under the above rule, such relation is found to exist. State ex rel. Virginia & Rainy Lake Co. v. District Court St. Louis Co., 128 Minn. 43, 7 N. C. C. A. 1070.

The New York Workmen's Compensation Act must be broadly and liberally interpreted in order to protect employees for injuries received in the course of their employment, and to charge upon the fund or the insurer the loss which must otherwise fall upon the master. Spratt v. Sweeney & Gray Co., 168 N. Y. App. Div. 403, 9 N. C. C. A. 918.

[5] Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 11 N. C. C. A. 599.

[6] The Michigan Compensation Act being in derogation of the common law is to be strictly construed even though remedial. Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 6 N. C. C. A. 807.

[7] Peet v. Mills, 76 Wash. 437, 4 N. C. C. A. 786, L.R.A.1916A 358; Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 10 N. C. C. A. 939.

The original Workmen's Compensation Act (Laws 1911, c. 218, as amended by c. 216, Laws 1913) leaves an employee in industries within its purview no other remedy than the one provided by the act, where neither the employer nor employee has filed a statement of his election not to accept thereunder. Shade v. Ash Grove Lime & Portland Cement Co., 92 Kan. 146, 5 N. C. C. A. 763.

An injured workman who takes advantage of the Oregon Workmen's Compensation Act (L. 1913, c. 112), cannot recover damages in an action against his employer under the Employers' Liability Act unless he brings himself within one of the exceptions mentioned in the compensation act. Jenkins v. Carman Mfg. Co., — Ore. —, 155 Pac. 703, 11 N. C. C. A. 547.

[8] See *infra*, § 1388.

[9] By the words the "deliberate intention of his employer to produce such injury," as used in section 22

The Arizona Act is anomalous in this respect. It does not limit the remedy of an injured employee who has not disaffirmed before the injury to the compensation provided by the act, but he may, after the injury, elect whether he will enforce the remedy provided by the act, or whether he will pursue his common-law remedy or his remedy under the Arizona Employers' Liability Law.[10]

The Massachusetts Workmen's Compensation Act does not affect a parent's right of action for injuries to his minor child, though the latter comes within and has accepted the act and has received compensation thereunder for his injuries.[11]

It has been held that a common-law action for personal injuries received in Idaho, in which state the common law prevails, may be brought in Washington, although, under the Workmen's Compensation Act of the latter state, such an action would not lie had the injury been received in Washington.[12]

An employer who does not elect to bring himself within the provisions of the act is deprived of the defense of the negligence of an injured employee, unless wilful; or that the negligence was that of fellow-servants; or that the injury was caused by the assumption of the risks inherent in or incidental to, or arising out of the employment, or from the failure to provide and

of the Oregon Workmen's Compensation Act which gives a workman, sustaining an injury as the result of "the deliberate intention of his employer to produce such injury," the right to take under the act and also to bring an action against his employer for damages over the amount payable thereunder, the legislature meant to imply that the employer must have determined to injure the employee and used some means appropriate to that end; that there must be a specific intent, and not merely carelessness or negligence, however gross. Jenkins v. Carman Mfg. Co., — Ore. —, 155 Pac. 703, 11 N. C. C. A. 547.

10 Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 5 N. C. C. A. 742.

11 The provision of the Massachusetts Workmen's Compensation Act (St. 1911, pt. 2, § 5), that the insurer shall pay a part of the medical expenses made necessary by injury to an employee does not take away, by implication, the parent's right of action for injuries to a minor employee. King v. Viscoloid Co., 219 Mass. 420, 7 N. C. C. A. 254.

12 Reynolds v. Day, 79 Wash. 499, 5 N. C. C. A. 814, L.R.A.1916A 432.

maintain safe premises and suitable appliances; or that the employee's contributory negligence was the proximate cause thereof.[13] And, in action against the rejecting employer, evidence of such rejection is admissible.[14] But an employer who has not elected to bring himself within the provisions of the act, is not answerable for injuries sustained by an employee, in the absence of some negligence on the part of the former.[15] The abo-

[13] Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649.

Part B, § 1 of the Workman's Compensation Act (Conn. Pub. Acts of 1913, c. 138), provides that any employer who, having accepted part B of the act, fails to comply with § 30 of part B as to insurance of liability, shall forfeit all benefits thereunder and be liable as if he had not accepted the same. *Held*, that such failure to comply with § 30 deprives the employer of the right to exemption from liability at common law for injuries to his employees arising out of their employment and renders him liable to such actions as modified by part A, but while such failure on the part of the employer deprives him of his benefits under part B, it does not deprive the employee of his benefits thereunder, and the latter may claim compensation under the act or, where the common law gives a remedy, bring such an action as modified by part A. Bayon v. Beckley, 89 Conn. 154, 8 N. C. C. A. 588.

Negligence or assumed risk on the part of a deceased employee will not avail a negligent employer who has not elected to take the benefit of the Ohio Workmen's Compensation Act. Crucible Steel Forge Co. v. Moir, 219 Fed. 151, 8 N. C. C. A. 1006.

Under the Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), if the employer has elected not to be bound by the act, the employee is remitted to an action at law, except that the employer cannot interpose the defenses of assumed risk, negligence of a fellow servant and contributory negligence, and in such an action it is not error to refuse instructions, requested by the defendant, based on these defenses, nor to give instructions for plaintiff based on the theory that these defenses were not available. Crooks v. Tazewell Coal Co., 263 Ill. 343, 5 N. C. C. A. 410.

Under the Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), an employer not operating under the act cannot plead that an employee injured by falling while attempting to stand on a slanting chute and work assumed the risk of the injury. Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

But see Hunter v. Colfax Consol. Coal Co., — Iowa —, 157 N. W. 145, 11 N. C. C. A. 886.

[14] Crooks v. Tazewell Coal Co., 263 Ill. 343, 5 N. C. C. A. 410.

[15] Lydman v. De Haas, 185 Mich. 128, 8 N. C. C. A. 649; Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

lition of the common-law defenses is not limited to actions against employers who have elected to go under the act and thereafter elect not to be governed by it.[16] In order that the provision of the Illinois Act abolishing the common-law defenses as to employers electing not to be bound by the act may apply, it is not necessary that the employee shall be under the provisions of the act.[17]

To avail himself of the benefits of the act in an action by an employee against him for personal injuries, the employer must plead and prove that he has complied with the requirements of the act.[18]

§ 1361. Constitutionality in general. Probably nothing illustrates the progressive tendencies of the courts better than the practical unanimity with which the various compensation acts have been sustained.[18a] In only three states have such acts been declared unconstitutional in their entirety, New York,[19] Montana[20] and Kentucky.[21] And, in all of these states, new acts

[16] Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

[17] Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

[18] Acres v. Frederick & Nelson, 79 Wash. 402, 5 N. C. C. A. 557.

[18a] Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1; Massachusetts Bonding & Insurance Co. v. Pillsbury, 170 Cal. 767, 11 N. C. C. A. 426; Sayles v. Foley, — R. I. —, 96 Atl. 340, 12 N. C. C. A. 949; Middleton v. Texas Power & Light Co., — Tex, —, 185 S. W. 556, 11 N. C. C. A. 873.

The Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), is constitutional. Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

The Workmen's Compensation Bill Part I, § 1, which provides that, in an action brought to recover damages for personal injuries to or death of an employee, it shall be no defense that he was negligent, or that the injury was caused by the negligence of a fellow employee, or that the risk was assumed, when construed as meaning contributory negligence or negligence of a fellow-servant which falls short of serious and wilful misconduct, is constitutional. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

The Minnesota Act contains no provisions prohibited by the State or Federal Constitution and is valid. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 5 N. C. C. A. 871.

[19] Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

[20] The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and disability benefits for employees

have been adopted, which have been found free from the constitutional deficiencies of the prior enactments.[22]

In conformity with the usual rules of construction, the acts have been construed so as to render them valid, wherever possible.[23] They have been found not to be in conflict with the public policy of the state.[24]

The courts are not concerned with the wisdom of the act and cannot declare it invalid merely because it is unwise legislation; the question of policy is pre-eminently one for the law-making branch of the government and the courts will interfere only when there is no question as to the evil tendencies of the act.[25]

It is within the power of the legislature to provide new measures or means for the recovery of compensation by servants who sustain injuries in the performance of the duties of their employment,[26] and, while the effect of the compensation act upon the rights of employees cannot be properly weighed or determined without a due consideration of its aim and policy in their interest, the inquiry whether the legislature was without the power to completely change the law upon the subject of the em-

engaged in mining coal within the state, to be paid from a fund collected from mine operators in accordance with the amount of coal mined and from employees in accordance with the amount of wages earned, is unconstitutional in that it fails to protect the employer who furnishes compensation under the act, from being sued for the injury in an action at law, and thus compelled to pay twice. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

21 Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562, L.R.A.1916A 389.

22 Lewis & Clark County v. Industrial Acc. Board of Montana, — Mont. —, 155 Pac. 268; Greene v. Caldwell, — Ky. —, 186 S. W. 648, 12 N. C. C. A. 520.

Authority for the adoption of the New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), is found in the amendment of November 4, 1913, to section 19, article I, of the Constitution of the State of New York. Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A.1916A 403.

23 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

24 Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

25 State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

26 Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

ployer's liability for accidental injuries to his employee has no concern in the wisdom of the change, takes no account of the reason for it, and is limited to the naked question of the legislature's power.[27]

Various provisions of the acts have been attacked on various grounds,[28] such as the sufficiency of the title,[29] payments in lump sums,[30] interference with interstate

[27] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[28] Clause "f" of section 19 of the Illinois Workmen's Compensation Act, as amended by L. 1915, p. 410, which provides that the judgment of the circuit court on certiorari to the Industrial Board shall be reviewable only by the supreme court, is not violative of section 29, article VI of the Constitution of 1870, which provides that "All laws relating to courts shall be general, and of uniform operation; and the organization, jurisdiction, powers, proceedings and practice of all courts, of the same class or grade, so far as regulated by law and the force and effect of the process, judgments and decrees of such courts, severally, shall be uniform." People ex rel. Munn v. McGoorty, 270 Ill. 610, 10 N. C. C. A. 978.

Provision in Illinois Act authorizing supreme court to issue certiorari for review of decisions of Industrial Board is unconstitutional. Courter v. Simpson Const. Co., 264 Ill. 488, 6 N. C. C. A. 548.

The Miners' Compensation Act which provides for indemnity to be paid to injured employees engaged in mining coal in the state, from a fund collected by assessment levied on both the employer and employee, is not unconstitutional on the ground that it fails to differentiate between a careful and careless employer. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

Part 2 of the Minnesota Act substitutes the rights, remedies, and liabilities therein provided for those previously existing, and employers and employees subject thereto are limited to such rights and remedies; but such provisions impair no constitutional rights, as they apply only to those who have voluntarily chosen to become subject thereto, and such choice is no less optional because part 2 is presumed to have been accepted by all employers and employees who have not given notice to the contrary. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 5 N. C. C. A. 871.

[29] The Texas Workmen's Compensation Act (Acts 33rd Leg. c. 179), contains but one general subject; its purpose is one general object; and its title sufficiently expresses it. Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

[30] The Miners' Compensation Act (Laws 1909, Chap. 67), which provides for an indemnity to be paid to employees injured in the course of their employment in the mining of coal within the state, is not in-

commerce,[31] provisions relative to minors,[32] and the like, but, with few exceptions, none of the objections have been sustained.[33]

§ 1362. Same subject; delegation of judicial functions. Administrative boards may lawfully be endowed with very broad powers and, when acting within their jurisdiction and not otherwise, their decisions are conclusive and not subject to review in any proceeding.[34]

Accordingly, it is held that the commissions created to administer the act are not courts, but administrative bodies empowered to ascertain and determine some questions of fact, and, to that extent, acting *quasi* judicially it is true, but nevertheless, not vested with judicial functions in violation of constitutional restrictions,[35] the jurisdiction of the courts not being

valid as a police regulation, on the ground that it provides for the payment to an injured employee of his compensation in a lump sum. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

[31] The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), does not violate the Federal Constitution by directly attempting to impose a burden or tax on interstate or foreign commerce. Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

[32] A provision in the Workmen's Compensation Act (Wis. Laws, 1911, c. 50; stat. §§ 2394–1 to 2394–32), declaring that a minor legally entitled to work shall have the same power of contracting for service as an adult, is not objectionable, as the legislature may endow minors with the right to make contracts otherwise lawful. Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489.

[33] Wood v. City of Detroit, — Mich. —, 155 N. W. 592; Mackin v. Detroit-Timkin Axle Co., — Mich. —, 153 N. W. 49; Grand Rapids Lumber Co. v. Blair, — Mich. —, 157 N. W. 29; Troth v. Millville Bottling Works, — N. J. L. —, 98 Atl. 435; Watts v. Ohio Val. Elec. Ry. Co., — W. Va. —, 88 S. E. 659.

[34] Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

[35] The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), is not unconstitutional as delegating judicial power to arbitrators. Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401; Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489.

completely ousted thereby even where there has been an acceptance of the act.[36]

§ 1363. **Same subject; abolition of defenses.** Under the British Act and in all American Acts except in Iowa none of the common-law defenses is available where both the employer and the employee are within the act, the whole subject of compensation being removed from the law of Negligence and placed under the law of Contracts.[37] The Iowa Supreme Court, however, has placed an anomalous construction upon the act of that state, which may perhaps be sustained by the peculiar wording of its provisions. The court held that, even as to an employer within the act, the defense of want of negligence was not barred.[38]

On the other hand, such defenses are still retained to protect employers electing to accept the act against rejecting employees.

An employer rejecting the act is precluded from asserting the common-law defenses of assumption of risk, contributory negligence, and the fellow-servant doctrine. As these defenses were created by the courts, it is within the undoubted power of the legislature to abolish them absolutely independently of the compensation acts. They have been the subject of innumerable legislative restrictions which have been uniformly sustained by the courts, notably the Federal Employers' Liability Act.[39]

It is difficult to conceive, therefore, of any constitutional objections to their abolition as against employers refusing to accept the compensation acts, since, independently of such rejection, the legislature could preclude their being asserted as defenses in actions at law based purely upon the negligence of the employer. Such provisions of the compensation acts have, therefore, been sustained in every instance when presented to the courts.[40]

36 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

37 Lavin v. Wells Bros. Co., 272 Ill. 609.

38 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

39 See ch. 40 *ante*.

40 Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401; Hunter v. Colfax Consol. Coal Co., — Iowa

The power to classify is primarily in the legislature; the courts accord it the widest latitude in performing this function, hence, a classification adopted by it will be sustained unless it is so palpably arbitrary as to leave no room for doubt that the legislature has abused its discretion in the matter.[41] The question as to the legitimacy of the classification in the compensation acts is not whether there may be some in one class whose situation is practically the same as that of some in the other class, but whether there is "a distinction between the classes as classes, whether there are characteristics which, in a greater degree, persist through the one class than in the other which justify legal discrimination between them." [42] Where a compensation act is not compulsory, therefore, and the class of employees included in, and that excluded from its operation, are each permitted to and can readily put itself into the position of the other, whatever discrimination there may be against either, would seem to be purely academic.[43]

The fact that the act preserves intact the defenses of assumption of risk, and negligence of a fellow-servant as to employers electing to accept the act, but abolishes such defenses as to employers rejecting it; [44] or classifies employers in accordance with

—, 154 N. W. 1037, 11 N. C. C. A. 886; In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 537; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 5 N. C. C. A. 871; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569; State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; De Francesco v. Piney Min. Co., — W. Va. —, 86 S. E. 777, 10 N. C. C. A. 1015; Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489.

41 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

42 Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

43 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

44 Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569; Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 5 N. C. C. A. 871.

the hazards [45] or character [46] of the employment, or the number of employees,[47] or excludes certain classes of employees from its operation [48] does not render it unconstitutional as class legislation.

[45] The Industrial Insurance Law (Wash. L. 1911, c. 74), which provides for the contribution by employers in extrahazardous employments of fixed sums based upon their payrolls for the purpose of creating a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability therefor, which fund is to be administered by the state, to the exclusion of all other remedies or rights to compensation, does not violate Washington Constitution, art. 1, sec. 12, which prohibits class legislation. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

[46] Exclusion of railroads not invalid. Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The Miners' Compensation Act (Laws 1909, Chap. 67), which creates a state insurance fund for the benefit of workmen disabled while engaged in mining coal within the state, is not unconstitutional as class legislation as singling out a particularly hazardous occupation and subjecting it to burdens not placed on other employments equally hazardous, where the statute is equally applicable to workmen within the state engaged in the particularly hazardous business of mining coal. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

[47] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

A workmen's compensation act affecting only employers of five or more employees and applicable only to workmen or operatives, is not invalid on the ground that it makes an unjust and arbitrary classification. State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

A minor classification in the Workmen's Compensation Act (Wis. Laws 1911, c. 50; stat. §§ 2394–1 to 2394–32), by which the fellow-servant defense is preserved to all employers employing less than four employees in a common employment, is valid. Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489.

The Ohio Workmen's Compensation Act (G. C. §§ 1465–37 *et seq.*), is not unconstitutional as arbitrarily discriminating against employers of five or more workmen in depriving them of the defense of the employee's contributory negligence where they fail to comply with the requirements of the act, while such defense may still be made by employers of four or less. Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 7 N. C. C. A. 570.

[48] The classification adopted by the Texas Workmen's Compensation Act (Acts 33rd Leg. c. 179), whereby domestic servants, and farm and gin laborers are excluded from its operation, held not such as to justify a holding that it was purely arbi-

Thus classification for purposes of taxation or of regulation under a police measure, of workmen engaged in the erection or demolition of bridges or buildings of iron or steel construction, or in the operation of elevators used in connection with the erection or demolition of such bridges or buildings, or in work on scaffolds of any kind elevated 20 feet or more, or about wires charged with electric currents, or with explosives, or in the operation of railroads, or in the construction of tunnels and subways, or in work carried on under compressed air, is not a denial of the equal protection of the laws, on the ground that the classification is arbitrary.[49] And, although a state constitution confers power upon the legislature to create liability upon the part of "all" employers, it does not compel the legislature to

trary. Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The exclusion from the operation of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), of household or domestic servants, farm or other laborers engaged in agricultural pursuits, and persons whose employment is of a casual nature is not palpably arbitrary. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Excluding domestic servants, farm laborers, casual employees, and such railroads and railroad employees as are engaged in interstate commerce from the provisions of the Minnesota Workmen's Compensation Act does not render it unconstitutional as class legislation. Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286, 5 N. C. C. A. 871.

Workmen's Compensation Bill, Part I, § 2, providing that § 1 of such bill which declares that, in an action for injury to or death of an employee, it shall be no defense that the employee was negligent, or that the injury was caused by the negligence of a fellow employee, or that he assumed the risk of injury, shall not apply to domestic servants and farm laborers, is not unconstitutional. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

The exclusion of casual, farm, dairy, etc., employees from the operation of a compensation act, does not render such law vulnerable as special legislation. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1.

The provisions of the Illinois Workmen's Compensation Act (Laws of 1911, p. 315, §§ 21, 22, J. & A. ¶¶ 5470, 5471), defining the employees to whom the act shall apply is not unconstitutional as class legislation. Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401.

[49] Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162.

act with respect to all employers, but merely gives the power to do so.[50]

The Illinois Workmen's Compensation Act has been held not unconstitutional as depriving the employee of his common-law remedies while permitting the employer to retain them.[51]

Classification common to the various compensation acts has uniformly been held not to operate as a denial of equal protection of the law.[52]

§ 1364. Same subject; police power; vested and contract rights; due process of law. Whether authority for the passage of compensation acts is to be found in the police power of the state or in the taxing power is largely a matter of academic interest, except in so far as the power employed may be affected by constitutional restrictions. On the one hand, it is claimed that such measures are authorized by the power of the state to provide for the general welfare of the public, in other words, the police power;[53] while others find its basis in the taxing

[50] Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1.

[51] Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401.

[52] Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1; Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

The Industrial Insurance Law (Wash. L. 1911, c. 74), which requires employers in extrahazardous employments to contribute toward a fund from which losses sustained by employees in such employments shall be paid without regard to negligence or common-law liability, is not a denial to owners of property of the equal protection of the laws. State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

A compensation act which precludes an action under the Washington Death Act against the third person whose negligence causes the death of an employee while he is engaged about his ordinary duties at his employer's plant, does not for that reason, conflict with the equal protection clause of the Fourteenth Amendment. Northern Pac. Ry. Co. v. Meese, 239 U. S. 614, 10 N. C. C. A. 939.

[53] The requirements of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), in case of their acceptance constitute a proper exercise of the police power of the state—such exercise thereof as would sustain compulsory acceptance. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

power, in other words, the power under which the state provides for education, charities and the like, the fundamental purpose of the acts being to prevent public dependency.[54] The Legislature may provide how compensation shall be made in case of accidental injury to employees in the public service and, in raising funds to discharge those indemnities, the levying of taxes by municipalities becomes a public purpose and taxpayers are not deprived of their property without due process of law.[55]

The Miners' Compensation Act (Laws 1909, Chap. 67), providing for state industrial insurance and compensation for injuries sustained by employees engaged in mining coal within the state, is constitutional, as a valid exercise of the police power. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

The provisions of sections 15 to 20 of the act passed February 26, 1913, known as the "Workmen's Compensation Law" (103 Ohio Laws, p. 72), constitute a valid exercise of the legislative power not repugnant to the Constitution or to any limitation contained therein. Porter v. Hopkins, 91 Ohio St. 74, 9 N. C. C. A. 839.

An act (102 Ohio L. 524), providing a plan of compensation from a state insurance fund, for accidental injuries sustained by those employed in industrial pursuits pertains to the public welfare and is a valid exercise of the police power. State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A. (N.S.) 694.

The Texas Workmen's Compensation Act (Laws 1913, c. 179), is not unconstitutional as not within the state's police power. Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The Washington Act is within the police power as a reasonable enactment in support of economic and moral considerations affecting the protection of the public health, safety or welfare, although it incidentally deprives some persons of property without fault; and since it is not so unreasonable or extravagant as capriciously to interfere with or destroy private rights. State ex rel. Davis-Smith Co. v. Clausen, State Auditor, 65 Wash. 156, 2 N. C. C. A. 823, 37 L.R.A.(N.S.) 466.

The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449 *et seq.*), is not an exercise of police power. Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401. This decision fails to point out the basic power involved.

[54] Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

See exhaustive article by James Harrington Boyd, 10 N. C. C. A. 1, where all of the authorities are reviewed.

[55] Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

Independently of the source of authority involved, the acts, as heretofore pointed out, have been sustained with practical unanimity as proper exercises of the legislative functions.

Rights of property which have been created by the common law cannot be taken away by the legislature, being protected from destruction by any process except the due process of the law, that is, law in its regular course of administration through courts of justice; but no one has a vested interest in the rules, themselves, of the common law, and it is within the power of the legislature to change or entirely repeal them,[56] and, while the right to contract is a property right, like all other property rights it is subservient to the public welfare, and may be taken by the state in a well-directed effort to promote the public welfare by the exercise of the police power.[57] Hence an act which requires employers in extrahazardous employments to contribute fixed sums based upon their payrolls, for the creation of a fund to be used to reimburse employees injured in such employments, without regard to negligence or common-law liability therefor, and which provides that no employer shall be exempt from the burden imposed or waive the benefits of the act by a contract, and that any contract shall be void *pro tanto,* is not unconstitutional as an unlawful interference with the right of contract, since the liberty to contract is not absolute, and means absence from arbitrary restraint, and not immunity from reasonable regulations and prohibitions enforced in the interests of the community by public policy.[58]

[56] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[57] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

The Illinois Workmen's Compensation Act (Laws of 1911, p. 315, J. & A. ¶ 5449), is not unconstitutional as depriving the employee of liberty and property, nor as subjecting him to unreasonable search and seizure, nor as impairing his right to contract and his right of waiver. Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401.

[58] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

Section 3 of the Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), provides that if, by or on behalf of the employer, any request, suggestion or demand be made that an employee, or one seeking employment, shall exercise

Provisions that, where both the employer and the employee reject the act, the liability of the employer shall be the same as though the employee had not rejected; that, if the employee rejects, the employer may plead and rely upon "any and all defenses, including those at common law, and the rules and defenses of contributory negligence, assumption of risk, and fellow-servant," with certain limitations; and that compensation under the act is to be awarded only if both have accepted the act are not invalid on the ground that the act contained an improper classification and an arbitrary differentiation in that if the employer and employee both reject the act, the employee none the less takes the benefit of the act, and that where the employer accepts and the employee rejects, the latter gets as much as the former, whatever differences there are as to the consequences of similar conduct on the part of the employer and employee being sustained by the generally accepted doctrine that the freedom to contract is only in theory enjoyed by the employee as fully as by his employer, and that the police power may be invoked to sustain some differentiations in favor of the employee, on the theory that this is a method of protecting him for the public good against the actual inequality between him and his employer.[59]

The exactions and restrictions of the compensation acts being authorized by the fundamental law, it cannot be contended

his right to reject the act, there shall arise a conclusive presumption that the employee or applicant was unduly influenced to exercise this right; that the rejection, made under such circumstances, shall be conclusively presumed to have been procured through fraud, and be null and void. *Held*, that this section is not objectionable as interfering with the freedom of contract, since, if there can be a valid workmen's compensation act, the legislature may make provision against having the legislative intent as to such act thwarted. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

The section of a workingmen's compensation bill which provides that no agreement by an employee waiving his right to compensation under such bill shall be valid, is constitutional. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

[59] Hunter v. Colfax Consol. Coal Co., — Iowa —, 157 N. W. 145, 11 N. C. C. A. 886.

that either the employer or the employee is thereby deprived of liberty or property without due process of law.[60]

[60] California Workmen's Compensation, Insurance and Safety Act (St. 1913, p. 279), known as the Boynton Act, superseded the Roseberry Act, so called (St. 1911, p. 796), the former being elective, while the provisions of the latter are compulsory is not obnoxious to the "due process of law" and the "equal protection of the laws" clauses of the Fourteenth Amendment to the Federal Constitution; for, if legislation may fairly be regarded as necessary or proper for the protection and furtherance of a legitimate public interest, under the police power, the mere fact that it may hamper private action, is not a ground for nullifying such act. Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1.

The Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147), is not unconstitutional on the ground either that it violates the guaranties of due process of law and of equal protection of the laws or that it effects a wrongful abridgement of the privileges and immunities of citizenship. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

A workingmen's compensation bill, which is not compulsory in character as applied to employers and employees, does not violate any provision of the Federal or State Constitutions concerning the taking of property without due process of law. Hence the Massachusetts Act, which provides that, in an action for injury to or death of an employee, it shall be no defense that he was negligent, or that he assumed the risk, or that the injury was caused by the negligence of a fellow employee, is not invalid as authorizing the taking of property without due process of law. In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41), does not infringe the Fourteenth Amendment of the Federal Constitution, by taking property without due process of law. Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

The Miners' Compensation Act (Laws 1909, Chap. 67), which provides a scheme of accident insurance and benefits for persons engaged in mining coal within the state, and which requires the funds to be provided by payment of one per cent. of the wages of such persons and a tax on the employers of one cent per ton for each ton of coal mined, is in the nature of an occupation or license tax, and therefore the plan provided for its collection is not invalid as taking property without due process of law. Cunningham v. Northwestern Improvement Co., 44 Mont. 180, 1 N. C. C. A. 720.

Section 2 of the New Jersey Employers' Liability Act of April 4, 1911 (P. L. p. 136) provides that compensation shall be made "without regard to the negligence of the employer" when the employer and employee shall by agreement, either express or implied, accept the provisions of section 2, and where the personal injury or death for which compensation is sought is the re-

§ 1365. Same subject; right to jury trial. The right to trial by jury is not absolute in the sense that it has universal application,[61] and, so far as proceedings in the state courts are concerned, it is not protected by the Federal Constitution, which has reference only to the administration of the federal laws in the federal courts.[62] Therefore, it can be waived, and the waiver need not be in express terms.[63] The right applies only to judicial proceedings and cannot be claimed in an inquiry of a nonjudicial character, or with respect to proceedings before an administrative board.[63a] Accordingly compensation acts have uniformly been held not to be invalid as depriving either the employer or the employee of the right to a trial by jury, the inquiry conducted thereunder being of a nonjudicial character before a purely administrative tribunal.[64]

sult of an accident arising out of and in the course of the employment, in all cases except when the injury or death is intentionally self-inflicted, or when intoxication is the natural and proximate cause of injury. The section further provides that, with respect to contracts of hiring made after the act becomes effective, it shall be presumed that the parties are acting under section 2 if one or the other does not then or before the accident expressly elect to operate under section 1. *Held*, that such provisions of section 2 are not in violation of the "due process of law" provision of the Fourteenth Amendment. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569.

The Texas Workmen's Compensation Act (Laws 1913, c. 179) is not contrary to the prohibition contained in the Fourteenth Amendment of the United States Constitution against the denial of equal protection of the laws, nor of the prohibition contained in that amendment and also in the Texas Constitution, art. I, § 19, against the taking of property or deprival of liberty without due process of law. Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873. See, however, Ives v. South Buffalo Ry. Co., 201 N. Y. 271, 1 N. C. C. A. 517, 34 L.R.A.(N.S.) 162, where the first New York Act was declared unconstitutional as a deprivation of property without due process of law.

61 Hunter v. Colfax Consol Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

62 Hunter v. Colfax Consol Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

63 Hunter v. Colfax Consol Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

63a Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

64 Deibeikis v. Link-Belt Co., 261 Ill. 454, 5 N. C. C. A. 401; Hunter

Of course, an employer who has rejected the act when sued by an injured employee in an action at law is entitled to a jury trial, if the right is properly asserted.[65]

§ 1366. Same subject; right to judicial remedies. What is known and denominated as the cause of action arising from an accidental injury is purely the creation of the common law; it is a common-law liability founded upon the common-law doctrine of negligence, and, but for the rule of the common law—sometimes also expressed in statutes—there would be no liability for such an injury, and hence no cause of action for it.[66] Hence, in denying the employee of a subscribing employer, or his beneficiaries, any cause of action for accidental injuries, the compensation acts simply change the common-law rule of liability on the subject,[67] as the right to have the liability of an employer for an accidental injury to an employee determined by the common-law doctrine is not a constitutional immunity, and, since employers who become subscribers under the act voluntarily waive the right to have their liability determined in the courts, it cannot be held that the act deprives them of fundamental rights and is therefore unconstitutional.[68]

v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886; Cunningham v. Northwestern Improvement Co., 44 Mont 180, 1 N. C. C. A. 720; Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569; Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873; State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

65 The Iowa Workmen's Compensation Act (Acts 35th Gen. Assem. c. 147) does not deny to an employer who rejects the act the right to trial by jury but merely changes the rules under which such trial shall proceed. Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

66 Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

67 Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

The New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41) does not unconstitutionally deprive an employee of his right of action for injuries imputable to his employer's negligence. Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A 1916A 403.

68 Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

Under the Texas Bill of Rights, which provides that "every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law," the legislature is without the power to deny the citizen the right to resort to the courts for the redress of any intentional injury to his person by another,[69] but as the injuries or wrongs with which the Texas Act deals are those which are accidental and not those which are intentional, this provision cannot be invoked to defeat the validity of the act as to employees.[70]

The constitutional right to appeal to the courts for redress of wrongs is not denied by a compensation act which establishes a board of awards by which the right of claimants to participate in a state insurance fund is determined, where an appeal lies to the courts from its decision, and an injured employee may, in the first instance, waive his claim under the act and sue in court for his damages.[71] And notwithstanding the provisions in the acts relative to procedure, the structure of the law of the land and the inherent power of the courts enable the latter to interfere, if the arbitration committee exceeded its jurisdiction, to inquire whether the act was being enforced against one who had rejected it, whether the claiming employee was an employee, whether he was injured at all, whether his injury was one arising out of his employment, whether it was due to his intoxication or was self-inflicted, or, acceptance being conceded, whether an award different from the statute schedules had been made, whether the award was tainted with fraud on the part of the prevailing party, or of the arbitration committee, and whether such committee attempted judicial functions in violation of or not granted by the act.[72]

The legislature cannot validate a contract the parties to which agree to be bound by a statutory delegation of judicial power if

[69] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[70] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[71] State ex rel. Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694.

[72] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

the Constitution puts the exercise of all judicial power in the courts, nor can it authorize a contract ousting the courts of such jurisdiction as the fundamental law gives to the courts exclusively;[73] but to provide by contract for the arbitration of special matters does not oust the jurisdiction of the courts so long as the ultimate question at issue may be litigated in the courts.[74]

The legislature is without power to deny a citizen the right of making a defense when sued in the courts.[75]

So also, a vested right of action given by the principles of the common law is a property right and is protected by the Constitution as is other property.[76]

§ 1367. Same subject; impairment of obligation of contracts. Parties *sui juris* and at liberty can make new contracts that modify or annul existing ones without running counter to any constitutional inhibition, and whenever any liability is left on which to contract, a new contract or a change in contract made by contract cannot be objected to as an invalid impairment.[77] Hence, where the acceptance of a workmen's compensation act is elective, such act cannot work an impairment of the obligation of contracts.[78]

Many acts expressly exempt existing contracts and, in such cases, of course, it cannot be contended that the obligation of a contract is impaired,[79] but even contract obligations are not proof against proper exercises of the police power, and it has accordingly been held that the fact that an act applies to existing contracts does not invalidate it.[80]

[73] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[74] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[75] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[76] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[77] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[78] Hunter v. Colfax Consol. Coal Co, — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[79] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[80] The Workmen's Compensation Act (Wis. Laws, 1911, c. 50; stat. §§ 2394–1 to 2394–32) is intended to apply to all employers and employees, including persons employed

Courts will labor diligently to avoid a construction which imputes to a statute the impairment of existing obligations, and will hold that that is not the true interpretation if any other is in reason attainable.[81]

§ 1368. Same subject; compulsory acts. Compulsory features of the compensation acts have been sustained,[82] and the fact that the act is elective as to the employer but compulsory as to the employees does not render it unconstitutional.[83]

Since the nonacceptance of the Iowa Act does not impose upon an employer any greater burden than the legislature could have imposed in any event, the act is not unduly compulsive.[84]

under contracts of service made prior to the passage of the statute and not expiring until some definite date subsequent to the statute, but the obligations of such contracts are not thereby impaired. Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A.(N.S.) 489. See also Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Section 1 of the Employers' Liability Act of April 4, 1911 (P. L. p. 134), allows a recovery only in cases where the employee can show that his injuries were caused by an accident "arising out of and in the course of his employment, of which the actual or lawfully imputed negligence of the employer is the natural and proximate cause," and "provided the employee was himself not wilfully negligent," and abolishes the common-law defenses of assumption of risk and the fellow-servant rule. *Held*, that, in modifying or abolishing such defenses to an action for an injury sustained after the act became effective, the section does not violate the "due process of law" and "equal protection of the law" provisions of the Fourteenth Amendment of the Federal Constitution, nor does it impair the obligation of contracts, in violation of the State and Federal Constitutions. Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569.

But see State ex rel Yaple v. Creamer, 85 Ohio St. 349, 1 N. C. C. A. 30, 39 L.R.A.(N.S.) 694, holding that contracts in existence and unexpired at the time a workmen's compensation act is put into operation by an employer cannot be affected or impaired by it.

[81] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[82] Western Indemnity Co. v. Pillsbury, 170 Cal. 686, 10 N. C. C. A. 1; State v. Clausen, 65 Wash. 156, 37 L.R.A.(N.S.) 466, 3 N. C. C. A. 599.

[83] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 556, rev'g. — Tex. Civ. App. —, 178 S. W. 956, 9 N. C. C. A. 847; Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A.1916A 403.

[84] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

Where a compensation act expressly gives to employer and employee a free choice as to whether he will accept its terms or not, and provides as to those employers only who do accept that the defenses of assumption of risk and negligence of fellow-servants shall be abrogated, it cannot be said that the law is coercive, nor that the employee, if the law is accepted by his employer, will feel compelled to accept through fear of discharge if he does not accept, such matters being purely speculative and conjectural for which a statute cannot be declared invalid.[85]

§ 1369. Same subject; provisions governing partial invalidity. Many of the acts contain provisions to the effect that the invalidity of any part of the act shall not affect the validity of any other portion, nor the act as a whole. The constitutionality of such provisions has been sustained since anything that might have been eliminated by the legislature can properly be eliminated by the courts, if it is unconstitutional, without affecting the balance of the act;[86] and, in such cases, the invalidity of any part of the act which is not such as to defeat the operation of the act as a whole, will not invalidate the entire act.[87]

§ 1370. Same subject; tax provisions. The taxing power may not be used as a subterfuge to accomplish that which is not legitimately for such power, and the exercise of the taxing pow-

[85] Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

[86] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

[87] Since the Texas Workmen's Compensation Act expressly declares that the holding of any portion thereof invalid shall not affect the remainder of the act, the unconstitutionality of that portion making it obligatory on employees whose employers elect to be governed by the act, without the consent of the former, does not invalidate the act as to consenting employees. Middleton v. Texas Power & Light Co., — Tex. Civ. App. —, 178 S. W. 956, 9 N. C. C. A. 847, rev'd on other grounds, — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

Even if so much of the Texas Workmen's Compensation Act (Laws 1913, c. 179) as provides for the insurance of employees is unconstitutional as violating Texas Constitution, art. XII, §§ 1 and 2, requiring that creation of private corporations be by general laws, such unconstitutionality would not render the remaining provisions of the act unconstitutional. Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309, 7 N. C. C. A. 547.

er, no matter in what form, can be sustained only where the exaction is, in the sense of the law, for a public use;[88] but it is not a sufficient ground for holding a tax invalid that in a sense it is to be used for what is both a private and a public benefit, or that others than the taxpayers are benefited.[89] When the principles underlying the exaction of taxes to support public charities are borne in mind, it is not difficult to find a basis to sustain the acts as tax measures, in that their purpose is to prevent public dependency on the part of workmen injured and maimed through industrial hazards.

An act which assesses upon employers in extrahazardous employments certain sums based upon their payrolls for the purpose of creating a fund to reimburse all employees injured in such employments, without regard to negligence or common-law liability therefor, does not violate a constitutional provision that property shall be taxed according to its value in money and that all taxation shall be uniform, since such an act does not create a general tax, but is in the nature of a license tax only.[90]

§ 1371. Same subject; by whom and how constitutional question may be raised. A person cannot complain of a statutory discrimination either when it is in his favor or when it imposes a burden on a class to which he does not belong.[91] Hence, the employer cannot be heard to urge a grievance of the employee in attacking a workmen's compensation act.[92] Thus, where no objection is raised by the employees that an act in limiting its application to employers having in service five or more workmen, is unconstitutional in that it discriminates against employees in the service of an employer employing less than five, the employer cannot be heard to object to its constitutionality on this ground.[93]

88 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

89 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

90 State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

91 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

92 Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

93 Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571, 59 L. ed. 364, 7 N. C. C. A. 570.

In reviewing a judgment awarding compensation on account of the death of an employee under the act, an allegation that a provision that, in the employment of minors, certain portions of the act "shall be presumed to apply unless the notice be given by or to the parent or guardian of the minor" is void, will not be considered when it appears that decedent was of age at the time of his death.[94]

The question as to the constitutionality of an act may properly be raised upon an application for a writ of mandamus to the state auditor to compel the auditing of a warrant issued to the state treasurer in payment of a debt incurred by the Industrial Insurance Department created by such statute.[95]

§ 1372. Same subject; insurance provisions. That the insurance provisions of a compensation act may have induced insurance associations to combine and to fix prohibitive insurance rates is not ground for holding that such provisions invalidate the act since, in the first place, if the rates have been made prohibitive, employers will reject the act and there will be no insurance taken, and the associations will automatically be brought to terms, and, in the second place, there are more direct and better methods of dealing with such a combine, if it actually exists, than by declaring the act void because it requires the employer to insure his liability.[96] Nor can such provisions be attacked on the ground that they work an illegal taxation of the employer, the tax, if it is a fact that one is imposed, being valid under the police power of the state.[97]

An act which does not require liability insurance companies to insure risks thereunder, is not unconstitutional because it requires that such companies and policy holders, if policies are issued, shall be governed by the act so far as applicable.[98]

Although the insurance association created by the Texas

[94] Sexton v. Newark Dist. Tel. Co., 84 N. J. L. 85, 3 N. C. C. A. 569.

[95] State ex rel. Davis-Smith Co. v. Clausen, 65 Wash. 156, 3 N. C. C. A. 599, 37 L.R.A.(N.S.) 466.

[96] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[97] Hunter v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037, 11 N. C. C. A. 886.

[98] In re Opinion of Justices, 209 Mass. 607, 1 N. C. C. A. 557.

Workmen's Compensation Act is denominated a "corporation" by the act, it is not a private corporation, and the part of the act creating it has been held not violative of the constitutional provision that no private corporation shall be formed except by general laws.[1]

§ 1373. **Conflict of laws.** The question as to what law governs may arise in different ways; thus it may be presented in connection with accidents occurring (1) within the state, and (2) without the state. Accidents occurring within the state may affect: (1) local employees, (2) employees who entered into the contract of employment in another state in which a compensation act is in force, and (3) employees from another state having no compensation act. Accidents occurring without the state may affect: (1) local employees, (2) employees of another state in which compensation acts may or may not be in force. As Mr. Bradbury says:

"The whole subject may be generally divided into two questions, namely:

"First. When may the authorities of a state enforce the compensation of their own state in relation to accidents which happen beyond the borders of their own state?

"Second. When may the courts of one state enforce the compensation of another state in relation to accidents which happen:

"(a) Within the boundaries of the state the law of which is sought to be enforced;

"(b) Within the boundaries of the state where the proceeding is brought; or

"(c) Within the boundaries of a third state?"[2]

It is thus seen that the Industrial Commission of a state may be called upon to enforce the local law as to an accident occurring in another state. Similarly, the courts of a compensation state may be presented with the question of enforcing the laws of another state to an accident occurring in a third state, or within the border of their own state. Again an employee en-

[1] Middleton v. Texas Power & Light Co., — Tex. —, 185 S. W. 556, 11 N. C. C. A. 873.

[2] See exhaustive article by Mr. Bradbury, 9 N. C. C. A. 918–932.

tering into a contract of employment in a compensation state may be injured in another state, and seek his remedy in a third state where no compensation act is in force.

In the light of these difficulties it is not strange that a conflict should arise as to whether compensation acts have extraterritorial effect. The earlier decisions declined to give them effect beyond the boundaries of the state.[3] The later decisions adopt the broader view, however, that liability under the compensation acts is contractual in character, and hence, under familiar principles of the law of contracts, in determining the right to compensation the *lex loci contractus* applies.[4]

Where a contract of employment was entered into in New York and the employee was injured in New Jersey, the New Jersey courts applied the compensation act of that state, but, at the time, there was no compensation act in force in New York.[5]

The solution of the question would seem to depend upon whether liability under the acts is regarded as arising *ex contractu* or *ex delicto*. If the compensation act is regarded as part of the contract of employment and liability thereunder, therefore, contractual in character, it would seem that many of the difficulties attendant upon any other construction will be avoided. Domestic tribunals could then give extraterritorial force to their own or foreign acts as determined by the place where the contract was entered into.

§ 1374. Existence of relation of master and servant. Under compensation acts purporting to apply solely to master and servant, necessarily proof of the existence of the relationship is indispensable to the award of compensation. This is a question determinable in accordance with familiar principles. The term "master and servant" presupposes control on the part of

[3] In re Gould, 215 Mass. 480, 4 N. C. C. A. 60; Keyes-Davis Co. v. Alderdyce, Detroit Legal News, May 3, 1913, 3 N. C. C. A. 639n. See also Johnson v. Nelson, 128 Minn. 158.

[4] Spratt v. Sweeney & Gray Co., 168 N. Y. App. Div. 403, 9 N. C. C. A. 918; Kennerson v. Thames Towboat Co., 89 Conn. 367, L.R.A.1916A 436; Edwardsen v. Jarvis Lighterage Co., 168 N. Y. App. Div. 368; Post v. Burger & Gohlke, 216 N. Y. 544, 10 N. C. C. A. 888.

[5] American Radiator Co. v. Rogge, 86 N. J. L. 436, 7 N. C. C. A. 144.

the master and, to that extent, subordination upon the part of the servant. Therefore, where the element of control is absent, the relation does not exist and the act does not apply.[6] But, on the other hand, where the employer has power to direct the manner of performance by the employee, in other words, to control the performance of the work, the act applies,[7] and it matters

[6] Gilmore v. Sexton, 1 Cal. Ind. Acc. Comm. Dec. (No. 17, 1914) 5, 7 N. C. C. A. 1084n; Rose v. Pickrell, 1 Cal. Ind. Acc. Comm. Dec. (No. 6, 1914) 7 N. C. C. A. 1085n; Curtis v. Plumptre, [1913] W. C. & Ins. Rep. 195, 6 B. W. C. C. 87, 7 N. C. C. A. 1085n; Hayden v. Dick. 5 F. 150, 40 Sc. L. R. 95, 7 N. C. C. A. 1085n; In re Johns, Ohio, Ind. Comm., No. 50,018, Oct. 22, 1914, 7 N. C. C. A. 1085n; McGregor v. Dansken, 1 F. 536, 36 Sc. L. R. 393, 7 N. C. C. A. 1086n; McDermott v. Grindol & Sons, Ill. Ind. Bd., Aug. 3, 1914, 7 N. C. C. A. 1086n; Vamplew v. Parkgate Iron & Steel Co., [1903] 1 K. B. 851, 72 L. J. K. B. 575, 88 L. T. 756, 51 W. R. 691, 67 J. P. 417, 19 T. L. R. 421, 7 N. C. C. A. 1087n; Simmons v. Faulds, 65 J. P. 371, 17 T. L. R. 352, 7 N. C. C. A. 1087n; Walsh v. Waterford Harbor Comr's, [1914] W. C. & Ins. Rep. 16, 7 N. C. C. A. 1087n; Busse v. Brugger, Wis. Workm. Comp. Rep. (1914) 78, 7 N. C. C. A. 1087n; McConnell v. Galbraith, [1914] W. C. & Ins. Rep. 90, 7 N. C. C. A. 1088n; Ryan v. Tipperary, South Riding, County Council, [1912] W. C. & Ins. Rep. 195, 5 B. W. C. C. 578, 46 Ir. L. T. 69, 7 N. C. C. A. 1089n; Reid v. Leitch Collieries, Ltd., 4 Alberta L. R. 338, 7 B. W. C. C. 1017, 21 W. L. R. 689, 2 W. W. R. 663, 10 N. C. C. A. 846n.

[7] Stevens v. Tittle, 2 Cal. Ind. Acc. Comm. Dec. (1915) 146, 10 N. C. C. A. 837n.

Plumber making repairs under direction of owner of house held a workman. McNally v. Fitzgerald, [1914] W. C. & Ins. Rep. 7, 7 N. C. C. A. 1080n.

In a proceeding under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751), it appeared from the agreed statement of facts that the injured employee was employed by an electric light company as a tree trimmer; that the foreman under whose direction he worked was employed by the company and had also been elected to, and still held the office of tree warden of the town; that, on the day of the injury, the employee had gone out with the foreman and other employees of the electric light company to trim trees along the company's wires; that the foreman ordered them to trim some dead limbs from a tree on a lawn inside of the sidewalk, on the opposite side of the street from the company's wires, and in so doing the employee fell and was injured. *Held*, that, upon these facts, the Accident Board might have found that his injuries were received in trimming a tree in accordance with the orders of the company's duly authorized officer, and that at the time of the injury he was acting as an employee of the company, not of the town. In re

not that the employee may have been vested with a large amount of discretion [8] or that his compensation was not certain and definite, but based upon the amount of his production,[9] as where the relation is once established, the fact that compensation was payable in a lump sum or by the job cannot alter the existing status.[10] Where the relation is shown, the fact that, at the time of the injury, the employee may have been loaned to a third person does not affect his status.[11]

Howard, 218 Mass. 404, 5 N. C. C. A. 449.

[8] Quarryman paid by day and directed where he was to work, but free to choose exact place in quarry where excavation should be made is a workman. Paterson v. Lockhart, 7 F. 954, 42 Sc. L. R. 755, 7 N. C. C. A. 1076n.

A workman, paid by the piece, paying his own traveling expenses and under no obligation to undertake any particular job, and, in fact, at liberty to, and occasionally accepting work from others, held a workman. Taylor v. Burnham & Co., [1910] S. C. 705, 47 Sc. L. R. 643, 3 B. W. C. C. 569. (This is a very extreme application of the act, however.)

[9] Cangreme v. Alberta Coal Min. Co., 5 Alberta L. R. 173, 7 B. W. C. C. 1020, 22 W. L. R. 68, 2 W. W. R. 1058, 10 N. C. C. A. 850n.

Shipyard worker member of a squad paid on piece basis through squad leader, and subject to rules of employer held a workman. McCready v. Dunlop, 2 F. 1027, 37 Sc. L. R. 779, 7 N. C. C. A. 1078n.

Quarryman working on a piece basis, but under general direction of employer, held a workman. Jones v. Penwyllt Dinas Silica Brick Co., [1913] W. C. & Ins. Rep. 394, 6 B. W. C. C. 492, 7 N. C. C. A. 1077n.

Painter and paperhanger working on piece basis, supplying tools in part and subject to general direction of employer as to place of work and manner of performance held to be within the English Act. Lewis v. Stanbridge, [1913] W. C. & Ins. Rep. 515, 6 B. W. C. C. 568, 7 N. C. C. A. 1080n.

[10] Rheinwald v. Builders' Brick & Supply Co., 168 N. Y. App. Div. 425, 10 N. C. C. A. 844n.

[11] A firm of contracting teamsters let out their teams with drivers to persons desiring their services. The firm contracted with another to haul sand and building material for him at a fixed price per team per day, which included the services of wagon, horses and driver. An employee of the contracting firm while engaged in taking on a load of sand or stone for another under a contract with his employer, was injured by his hand being caught in the jaws of a team shovel used in loading the wagon. In a proceeding under the New Jersey Workmen's Compensation Act of 1911, an award of compensation was made against the person contracting with the injured employee's employer. On appeal the court held this ruling was erroneous, as the wages of the injured employee were paid by the contracting firm, and the latter was consequently the employer within

In construing the compensation acts, the well-settled rules as to when the relation of independent contractor exists, apply, except perhaps that the courts seem somewhat more liberal in applying the principle of control. As was said in a recent case:

"The true test of a contractor would seem to be that he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of his work, and not as to the means by which it is accomplished. The one indispensable element to his character as an independent contractor is that he must have contracted to do a specified work and have the right to control the mode and manner of doing it." [12]

The fact that the relation of the injured person was primarily that of independent contractor will not deprive him of the right to compensation, where, at the time of the injury, he had temporarily suspended that relationship, and was performing work actually under the control of the employer.[13]

Under the Massachusetts Workmen's Compensation Act, an employee of an independent contractor who is doing the work of a subscriber has the same rights against the subscriber's insurer as he would have were he working directly for the subscriber.[14]

The relationship of master and servant must also be distinguished from that of partnership or joint adventurer where the parties operate independently of control, except as to the division of the proceeds of the undertaking, as where the business or operations are conducted purely on a profit-sharing basis, the

the meaning of the act; and further the person hiring the services of the team, etc., had no direct dealings with the injured person, and had nothing to say as to the wages to be paid, the only contract made being for the supply of a team consisting of a wagon, horses and driver, for which he paid as a team. Rongo v. R. Waddington & Sons, 87 N. J. L. 395, 9 N. C. C. A. 402.

[12] Powley v. Vivian & Co., 169 N. Y. App. Div. 170, 10 N. C. C. A. 835.

[13] Owner of dredge leasing same and controlling its operation, but injured at a time when he was not operating same, but was engaged in work which he did not control was, as to such work, an employee and not an independent contractor. Powley v. Vivian & Co., 169 N. Y. App. Div. 170, 10 N. C. C. A. 835.

[14] In re Sundine, 218 Mass. 1, 5 N. C. C. A. 616, L.R.A.1916A 318.

element of control being entirely lacking. Such operations are not within the act.[15]

While the relation of employer and employee, as defined by the act, must have existed at the time of the injury, it matters not whether the employment was under a valid contract as to both parties, or under a contract voidable at election of the employer.[16] Thus, it has been held that the fact that the employment was secured in violation of law does not alter the rule.[17]

§ 1375. Election. Compensation acts may be roughly divided into compulsory, semi-compulsory and elective. Acts of the first class arbitrarily, in a sense, place all of the enumerated employments within the provisions of the acts, and all employers and their employees engaged in such occupations automatically come within the scope of the law without any action on their part.

[15] Sayers v. Gerard, Cal. Ind. Acc. Comm. Dec. (No. 19, 1914) 48, 7 N. C. C. A. 1093n; Ellis v. Joseph Ellis & Co., [1905] 1 K. B. 324, 74 L. J. K. B. 229, 92 L. T. 718, 53 W. R. 311, 21 T. L. R. 182, 7 N. C. C. A. 1092n; Doggett v. Waterloo Taxicab Co., [1910] 2 K. B. 336, 79 L. J. K. B. 1085, 102 L. T. 874, 54 Sol. J. 541, 26 T. L. R. 491, 7 N. C. C. A. 1093n; Pears v. Gibbons, [1913] W. C. & Ins. Rep. 469, 6 B. W. C. C. 722, 7 N. C. C. A. 1094n; Cole v. Shrubsall & Wakeley Bros., Ltd., [1912] W. C. Rep. 226, 5 B. W. C. C. 337, 7 N. C. C. A. 1094n; Smith v. Horlock, [1913] W. C. & Ins. Rep. 441, 6 B. W. C. C. 638, 7 N. C. C. A. 1095n; Boon v. Quance, 102 L. T. 443, 3 B. W. C. C. 106, 7 N. C. C. A. 1095n; Hughes v. Postlethwaite, 4 B. W. C. C. 105, 7 N. C. C. A. 1095n; Hoar v. Barge "Cecil Rhodes," 5 B. W. C. C. 49, 7 N. C. C. A. 1095n.

Evidence that a licensed driver operated a public taxicab, without control by the company owning the machine and that he received one-fourth of the proceeds for his services, justifies a finding that he was a bailee of the cab rather than a servant, and, therefore, he was not entitled to an award under the workmen's compensation act for an injury sustained by him while driving the cab. Smith v. General Motor Cab. Co., Ltd., [1911] App. Cas. 188, 1 N. C. C. A. 576.

[16] Conductor claimed to have secured employment by false statement held an employee within the provisions of the act, the operation of an electric street railway being a hazardous employment, and the enforcement of the act was not dependent upon the validity of the contract of employment. Kenny v. Union Ry. Co. of New York City, 166 N. Y. App. Div. 497, 8 N. C. C. A. 986.

[17] The Workmen's Compensation Act (N. Y. Consol. Laws, c. 67; Laws 1913, c. 816, re-enacted and amended by Laws 1914, c. 41, and amended by Laws 1914, c. 316) does not except from its benefits employees who have secured employment

As to such acts, of course, the question of election is of no importance.

Acts of a semi-compulsory nature become operative upon the acceptance of the act by either the employer or the employee. In most acts of this character, the choice of election to accept the act is placed solely in the hands of the employer, and his election to accept the act is binding upon the employee.[18]

In Arizona an extremely anomalous rule prevails.[19] There probably owing to constitutional restrictions, the employee may elect to take under the act, to sue under the Employers' Liability Act of that state, or to sue at common law, and he is not required to exercise his election until after the injury.[20] The choice of election is vested solely in the employee, and his election is binding upon the employer, as to whom the act is compulsory in the event of the employee's decision to accept its provisions. A somewhat similar act is in force in New Hampshire, the employee being given the right to make his election after the injury.[21]

Probably the majority of the acts are purely elective, both the employer and the employee being given the right to reject, although the time for election or rejection is usually definitely fixed. The procedure is fixed by law. In some states, a definite acceptance of the act is required of all employers, and in others election is conclusively presumed as to certain occupations without affirmative action, in the absence of an express rejection in the manner prescribed by law.[22] The employee is usually presumed to have elected to accept the act in the absence of a

in violation of section 939 of the Penal Law which makes it a misdemeanor to obtain employment under a false statement. Kenny v. Union Ry. Co. of New York City, 166 N. Y. App. Div. 497, 8 N. C. C. A. 986.

18 The Texas and New York Acts are probably the best illustrations of this type of enactment.

19 Arizona Laws 1912 (First Special Sess.) ch. 14.

20 Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382, 5 N. C. C. A. 742.

21 Laws 1911, ch. 163, § 4.

22 The election provided for in the Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449) is to be exercised to avoid being governed thereby, and not to cause the act to be applied. Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

definite rejection.[23] In such cases an election by the employee to accept the act is futile where the employer has rejected it.[24]

An action at law by the employee does not constitute a final election of his remedy, where he recovered nothing and was relegated to the remedy provided by the act.[25] A general election to accept the act is an acceptance *in toto* notwithstanding an enumeration therein of the employments covered.[26]

[23] Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

Under the Minnesota Workmen's Compensation Act (Laws 1913, c. 467; Gen. St. 1913, §§ 8195–8230), approved April 24, 1913, effective from October 1, 1913, an employee accepts the provisions of the act until he makes an election not to accept; under the proviso contained in § 12 of said chapter his election, made within 30 days after October 1st, is effective at once, notwithstanding the clauses of §§ 11 and 12 relative to a 30 days' notice; and an employee injured on October 15, 1913, perfecting his election not to be bound by the act on October 29, 1913, is, until that date, bound by the act, and cannot maintain a common-law action for his injury. Harris v. Hobart Iron Co., 127 Minn. 399, 7 N. C. C. A. 44.

[24] Under the Illinois Workmen's Compensation Act of 1911 (Laws 1911, p. 315, J. & A. ¶ 5449), an employee cannot elect to be bound thereby unless his employer has previously elected to accept the act. Dietz v. Big Muddy Coal & Iron Co., 263 Ill. 480, 5 N. C. C. A. 419.

[25] An action brought by an injured employee in the superior court was not a final election of his remedy under the workmen's compensation act, nor was the Industrial Accident Commission deprived of jurisdiction in the matter, nor the judgment of the superior court a final determination of the employee's rights in the matter, where the judgment of the superior court simply determined that the allegations of the complaint failed to state a case under the Workmen's Compensation, Insurance and Safety Act (Cal. L. 1913, c. 176), § 12 (b) of which provides that, where the specified conditions of compensation exist, the right to recover such compensation in a proceeding before the Industrial Accident Commission shall be the exclusive remedy of the employee except that when the injury is caused by the employer's gross negligence or wilful misconduct, the injured employee may, at his option, either claim compensation under the act or maintain an action at law for damages. Such employee, therefore, was not estopped from pursuing his remedy before the Industrial Accident Commission, nor was the commission without jurisdiction in the matter. San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321, 9 N. C. C. A. 37.

[26] Acceptance in general terms by a railway company of the provisions of the Workmen's Compensation Act (Wis. Laws 1911, c. 50, secs. 2394–1 to 2394–31 Stats.), covered all the employees of the company, although the form of accept-

There is no cause of relief in equity nor ground for injunction, in a suit by an employee to restrain his employer from electing to come under the acts on the ground that, by such election, the employee would be obliged either to break his existing contract of employment or lose his common-law remedies, for his employer's torts, as, if the employer breaks his contract because the employee declines to accept the statute, the employee has adequate legal remedies for breach of contract, and, if the employee accepts the statute, he loses no vested or contract right and is not damaged, in the eyes of the law, by the change in his remedy for future torts.[27]

The question of the effect of a rejection of the act upon the rights of both the employer and the employee is treated elsewhere.[28]

§ 1376. Employments within the acts. The acts usually define the employments to which they shall apply, and occupations not within the enumerated scope are excluded. Many of the acts expressly exclude certain employments, such as agricultural pursuits, domestic labor and the like, while, under other acts, the application of the act is made to depend, in part, upon the number of persons employed.[29] Naturally the occupations sub-

ance specified the number of employees and places and nature of employment only as to those working in shops and offices. Minneapolis, St. Paul & S. S. M. Ry. Co. v. Industrial Commission of Wisconsin, 153 Wis. 552, 3 N. C. C. A. 707.

[27] Borgnis v. Falk Co., 147 Wis. 327, 3 N. C. C. A. 649, 37 L.R.A. (N.S.) 489.

[28] See § 1360.

[29] Part A, § 1, of the Workmen's Compensation Act (Conn. Pub. Acts of 1913, c. 138), defines the employers' liability and abolishes the common-law defenses in actions for injuries sustained by an employee arising out of and in the course of his employment, or for death resulting from such injuries, and § 2 of part A provides that § 1 shall not apply to the employees of any employer having regularly less than five employees, or to casual employees, or to outworkers, nor to actions against any employer who shall have accepted part B of the act in the manner prescribed. Part B, § 1, provides for the payment of compensation where both employer and employee have accepted the provisions of the act and § 2 states when acceptance is conclusively presumed. In an appeal from an award of compensation to an injured employee, the employer claimed that the act was not applicable to employers having less than five employees, and that, if applicable, he incurred no liability thereunder because he

jected to the act are such as are common to the state passing the act, thus logging operations are not included within the Illinois Act, while they are expressly denominated hazardous employments in the Washington Act. This lack of harmony may result in difficult questions if the rule giving the acts extraterritorial effect is adhered to.[30] Thus, an employee entering into a contract of employment in Illinois may be sent by his employer to perform temporary work in Washington and, while there, may be injured in an "accident arising out of and in the course of his employment" in connection with logging operations. What is his remedy? If the Illinois Act applies, he must be relegated to his common-law right of action as the employment in which he was engaged is not within that act. On the other hand, if the Washington Act applies he must seek his remedy under the compensation act of that state. In such a case, it would seem more just to view the situation as though no compensation act were in force in Illinois, and to apply the law of the forum. In other words, since the employee was not within the terms of the Illinois Act, it could not be said that the parties contracted with reference to it, and, since there was no foreign contract regulating the terms of employment, the law of the forum would govern.

Casual employments are exempted from the provisions of many of the acts. Employment is not casual where one is employed to do a particular part of a service recurring somewhat regularly with the fair expectation of its continuance for a reasonable period.[31] Employments within the usual course of business of the employer may be within the act, although casual. Thus, a city employee injured while loading gravel used by the city for improving and repairing its streets, was held to be

failed to comply with the provisions of § 30 of part B as to insurance of liability. *Held*, that §§ 1 and 2 of part B include every employer who has accepted part B, whether he regularly has five or less than five employees, and that such employer is conclusively presumed to have accepted part B, unless he or the employee indicates refusal to accept. Bayon v. Beckley, 89 Conn. 154, 8 N. C. C. A. 588.

30 See *ante*, § 1373.

31 Sabella v. Brazileiro, 86 N. J. L. 505, 6 N. C C. A. 958.

within the act, although the employment may have been casual.[32] Where one employed by an electric light company to trim trees under the direction of its foreman was injured while cutting dead limbs from a tree located on a lawn inside the sidewalk and across the street from the company's lines, the act being done under the foreman's orders, his employment was held not casual within the meaning of the Massachusetts Workmen's Compensation Act.[33] In Wisconsin, the defense of "casual employment" is available only by private employers, and cannot be asserted in behalf of a municipal corporation.[34]

An infant, who, because of his age, could not be legally employed in any capacity is not within the act;[35] but an employee who may be legally employed, but not in the particular occupation in which he was engaged at the time of his injury has been held to be within the operation of the law.[36]

The question as to whether municipalities and public corporations and their employees are within the act is to be determined from the act itself. Usually they are expressly included. But, even where they are included, public officers as distinguished from mere employees are not within the act. Many of the acts expressly define the terms "officers" and "employees," but, in the absence of such a definition, the question

[32] State ex rel. City of Northfield v. District Court Rice Co., 131 Minn. 352, 11 N. C. C. A. 366.

[33] In re Howard, 218 Mass. 404, 5 N. C. C. A. 449.

[34] Brown v. City of Mauston, 1 Bul. Wis. Industrial Com. No. 3, p. 97, 3 N. C. C. A. 693n.

[35] Boy under fourteen employed in violation of statute held not a workman within workmen's compensation act. Hillestad v. Industrial Ins. Commission of Washington, 80 Wash. 426, 6 N. C. C. 763.

[36] Under Wis. St. subd. (2), § 2394–7, which brings within the meaning of the word "employee" as used in the Wisconsin Workmen's Compensation Law "minors who are legally permitted to work under the laws of the state (who, for the purposes of section 2394–8, shall be considered the same and have the power of contracting as adult employees)," a minor who may legally be employed to do any work at all is within the operation of such law without regard to the fact that his employer was penally liable for employing him to do the work at which he was engaged when he was injured. Foth v. Macomber & Whyte Rope Co., 161 Wis. 549, 11 N. C. C. A. 599.

must be determined in accordance with the rules of the common law, and the general laws of the state on the subject. Thus, under the Ohio and other acts, policemen are expressly included, while the Michigan Act does not refer to them in terms, and the Michigan Supreme Court holds that they are public officers and not employees.[37] The power of the municipality to engage in the particular employment carried on at the time of the injury may also be involved.[38] State institutions and boards are not within the act unless within the statutory enumeration.[39]

[37] Under the Michigan Workmen's Compensation Act (Public Acts 1912, Act No. 10, part I, § 7, How. Ann. St., 2nd Ed. §§ 3939–4008), a policeman who is appointed under a charter provision of a city providing that the police department shall consist of the chief of police and as many subordinate officers, policemen and employees as shall be determined by the commission by ordinance, and who is required to take an official oath of office, is an "officer," and not an "employee" and hence comes within the exception of the act. Blynn v. City of Pontiac, 185 Mich. 35, 8 N. C. C. A. 793.

[38] A park caretaker, engaged in work under the direction of the park commissioners, died from injuries received while mowing grass outside of the park area and in a part of a street between the curb and the sidewalk. Under the statute (Laws 1907, c. 493, Wis. Stat. § 925–171*a*) the park commissioners were given jurisdiction and control for park purposes over that part of public streets between the curb and sidewalk, and there was also a city ordinance to the same effect. The Industrial Commission held that the case came within the workmen's compensation act (L. 1911, c. 50) and awarded compensation to the widow of the deceased, which award was sustained by the trial court, it being held that the statute was not limited to parkings or paved streets, but applied to all public streets, and that the city had power to care for the grass plot at the place where deceased was injured. On appeal it was held that, while § 925–171*a*, enacted in L. 1907, c. 493, which was an act of general nature as to cities, and was incorporated into the general city charter law, would indicate that it applied specially to cities incorporated under such law or which have adopted such law, § 925–2 must be regarded as restrained so as not to modify the general power granted later and made applicable to all cities, and the ruling of the trial court was sustained. City of Superior v. Industrial Commission, 160 Wis. 541, 8 N. C. C. A. 960.

[39] Neither the Michigan Agricultural College nor the State Board of Agriculture which has supervision of it is among the employers enumerated in the Michigan Workmen's Compensation Act (Pub. Acts 1912, Part 1, sec. 5) and the act is

Where charitable institutions are made subject to the act, or elect to be bound thereby, the question may arise as to whether inmates employed in the various occupations carried on are "employees" or "workmen" within the act. Where, in return for the care bestowed, the inmate is required to perform services possessing a monetary value, there would seem to be no good reason why he should not be regarded as an employee, especially is this true where the inmate receives compensation in addition to care, lodging, etc.[40] By far the greatest number of questions arise in connection with so-called hazardous employments. The employments deemed hazardous are enumerated in the acts, and, to be within them, the occupation must bear a substantial relation to the enumerated employments.[41] But the act applies

not applicable to them in the absence of their election to come under it. Agler v. Michigan Agr. College, 181 Mich. 559, 5 N. C. C. A. 897.

[40] A blind pauper while working in the industrial department of a charitable institution met with an accident while filling a machine, his right hand being dragged into the machine and crushed, necessitating the amputation of the three middle fingers of his hand. The institution was not self-supporting but had to depend on charitable aid, receiving a certain annual amount from the pauper's parish, and another amount from a charitable fund. The workmen in the department were graded into three classes who were paid varying amounts of money for their work. The injured man was in the second class and the institution supplied him with board, lodging and clothing, and paid him 5 shillings a month. In arbitration proceedings under the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58), the arbitrator found that applicant was in receipt of parochial and charitable relief, and, therefore, was not a workman within the meaning of the act. On appeal, the Court of Session held that appellant was a workman within the terms of the act, and that the monthly payments to members of his class in the institution being supposed to represent 20 per cent. of their average earnings, compensation was to be calculated on that basis. MacGillivray v. Northern Counties Institute for the Blind, [1911] Ct. of Sess. Cas. 897, 4 B. W. C. C. 429, 48 Sc. L. R. 811, 11 N. C. C. A. 77.

[41] Among the hazardous employments specified in the New York Workmen's Compensation Law (Consol. L., c. 67; L. 1913, c. 816, as re-enacted and amended by L. 1914, c. 41 and c. 316) are: "Packing houses, abattoirs, manufacture or preparation of meats, or meat products, or glue" (section 2, group 30), and "Canning or preparation of fruits, vegatables, fish, or foodstuffs; pickle factories and sugar refineries" (section 2, group 33).

to workmen injured by accidents described therein while engaged in any of the employments enumerated, whether or not the in-

In a claim for compensation under the act it appeared that an employee was a butcher, or assistant to the chef at a hotel, his duty being to distribute meats to the cooks as ordered, and that, while boning a leg of mutton on the butcher block, his knife accidentally slipped and severed an artery in his groin, which resulted in femoral hemorrhage, and caused his death. The commission denied the claim, holding that the deceased was not engaged in a hazardous employment within groups 30 and 33 specified in section 2 of the compensation act. On appeal the decision was affirmed, the court adopting the construction of the law by the commission that the preparation of meats, and the preparation of foodstuffs, as the word "preparation" was used in section 2 of the compensation law, did not mean the ordinary preparation of meat or foodstuffs for cooking purposes, but involved a preparation by some mechanical device, or a preparation which either changed the form of the material to render it suitable for use, or changed the nature of the material for the same purpose. De La Gardelle v. Hampton Co., 167 N. Y. App. Div. 617, 9 N. C. C. A. 703.

The Washington Workmen's Compensation Law (Laws 1911, c. 74, § 2) classifies among employments "inherently dangerous" and therefore "extra-hazardous," elevators. Section 3 defines certain terms and classes of business. "Mill" is defined to be "any plant, premises, room or place where machinery is used, etc., * * * including elevators, warehouses and bunkers." Section 4 schedules the rates to be paid, but no schedule specifically covers freight or passenger elevators. In the same section under the subhead "Construction Work" industries are classified, and here are found the words "freight and passenger elevators," but the context and setting of the words indicate that this part of the statute means those engaged in the manufacture or work of construction of freight and passenger elevators. Under another subhead is found the classification "Grain Elevators." *Held*, that this latter classification brings § 4 into harmony with §§ 2 and 3, and renders it certain that there was no purpose to cover the operation of an ordinary freight or passenger elevator or to recognize it as an "extra-hazardous" occupation or as one inherently dangerous. Guerrieri v. Industrial Ins. Commission, 84 Wash. 266, 8 N. C. C. A. 440.

The loading and unloading of vessels is not within group 8 of section 2 of the New York Workmen's Compensation Act (Consol. L., c. 67; L. 1914, c. 41) providing compensation for the death or injury to employees engaged in "the operation, within or without the state, including repair, of vessels other than vessels of other states or countries used in interstate or foreign commerce, when operated or repaired by the company." But such operations are within group 10 of section 2 providing compensation for the death or injury to employees engaged in "longshore work, including the loading or unloading of cargoes, or parts

juries were caused by the particular risk which induced the legislature to include those engaged in such employment in the operation of the act,[42] and the mere fact that the particular occupation in which the injury occurred may have been merely incidental to the business of the employer, does not affect its character as a hazardous employment.[43]

§ 1377. Accidents or injuries arising out of and in the course of employment; general rules. The English act which has been the basis for practically all American legislation upon the subject, requires that, to be compensable, the accident must arise "out of and in the course of employment." The British courts

of cargoes * * *, or moving or handling the same on any dock, platform or place, or in any warehouse or other place of storage." Jensen v. Southern Pac. Co., 215 N. Y. 514, 9 N. C. C. A. 286, L.R.A. 1916A 403.

In the provision of the New Hampshire Workmen's Compensation Act (Laws 1911, c. 163, § 1) rendering the act applicable to workmen engaged in work in any "mill, factory or other place," the word "mill" is to be construed as including not only the building in which the employer's business is carried on, but the dam, flume, yard and the ways provided for the use of the employees. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 5 N. C. C. A. 840, L.R.A.1916A 10.

[42] Boody v. K. & C. Mfg. Co., 77 N. H. 208, 5 N. C. C. A. 840, L.R.A. 1916A 10.

A stableman for an express company whose duties are confined solely to the care of the horses, used by a company to draw the wagons operated by it, is employed in the "operation" of wagons drawn by horses within the meaning of section 2, group 41 of the New York Workmen's Compensation Act, which entitles persons thus employed to compensation for injuries sustained, equally with the actual drivers of the wagons. Costello v. Taylor, 217 N. Y. 179, 11 N. C. C. A. 320.

The Workmen's Compensation Act (Wis. Laws of 1911, c. 50, secs. 2394–1 to 2394–31 Stats.) extends to railway employees other than those "working in shops or offices," and a railway company may accept the provisions of such act as to all its employees. Minneapolis, St. Paul & S. S. M. Ry. Co. v. Industrial Commission of Wisconsin, 153 Wis. 552, 3 N. C. C. A. 707.

[43] Under the Washington Workmen's Compensation Act (Laws 1911, c. 74), a repair shop operated by a department store company for the repair of its vehicles in which machinery is used, power-driven machinery employed, manual labor exercised, and over which place the company has control or to which it has right of access, is an extra-hazardous business, although it is merely incidental to the company's principal business. Wendt v. Industrial Ins. Commission of Washington, 80 Wash. 111, 5 N. C. C. A. 790.

construe the terms "out of" and "in the course of" as not being synonymous, and both conditions must appear.[44] While some of the American acts permit recovery where the injury merely arises "out of" the employment,[45] the majority of the acts follow the English act in this respect, and the construction placed upon the act by the British courts has been uniformly adopted. To warrant a recovery, therefore, it must appear that the employee's injury was caused by (a) an accident, (b) arising out of, and (c) in the course of, his employment. Even though the injury arose out of and in the course of the employment, if it be not an "accident" within the purview of the act, there can be no recovery. Even if there be an accident which occurred "in the course of" the employment, if it did not arise "out of the employment," there can be no recovery; and even though there be an accident which arose "out of the employment," if it did not arise "in the course of the employment," there can be no recovery.[46]

At the outset, therefore, it becomes important to define the word "accident." An "accident," within the meaning of the compensation acts, denotes "an unlooked-for mishap or an untoward event which is not expected or designed." [47] The question whether or not an injury to an employee is an "accident"

[44] An accident in respect of which compensation is claimed under the English Workmen's Compensation Act of 1906 must be one arising "out of and in the course of the employment." Astley v. R. Evans & Co., Ltd., [1911] 1 K. B. 1036, aff'd [1911] App. Cas. 674 (Eng.), 3 N. C. C. A. 239.

[45] The injuries for which compensation is to be paid, under the Wisconsin act, are such as are incidental to and grow out of the employment. Hoenig v. Industrial Commission of Wisconsin, 159 Wis. 646, 8 N. C. C. A. 192, L.R.A.1916A 339.

[46] Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[47] Fenton v. Thorley & Co., [1903] App. Cas. 443, 72 L. J. K. B. 787, 89 Law Times Rep. 314, 19 Times Law Rep. 684, 5 W. C. C. 1, 3 N. C. C. A. 268n; Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

The word "accident" is employed in its popular sense in the New Hampshire Workmen's Compensation Act (Laws 1911, c. 163, § 2) and means an untoward and unexpected event. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 5 N. C. C. A. 840, L.R.A.1916A 10.

within the purview of the act is a mixed one of law and fact. When applied to ascertained facts, it is a question of law.[48]

With respect to the necessity that the accident arise "out of and in the course of employment," the difficulty consists rather in the application than in the definition of the terms. Thus, it has been said that an accident arises "out of" the employment when it is something the risk of which might have been contemplated by a reasonable person, when entering the employment, as incidental to it,[49] while an accident arises "in the course of the employment" if it occurs while the employee is doing what a man so employed may reasonably do within a time during which he is employed, and at a place where he may reasonably be during that time.[50]

In a proceeding under the act the obligation to pay compensation is absolute when the fact is determined that the injury arose out of and in the course of the employment. Hence, the single inquiry is whether, in fact, the injury did arise out of and in the course of the employment, and it is immaterial, if death ensues, whether that was the reasonable and likely consequence or not. In other words, the inquiry relates solely to the chain of causation between the injury and the death.[51]

Accidents arising in the course of the workman's performance of his duties arise "out of and in the course of his employment," [52] even though they were caused by the acts of stran-

[48] Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[49] Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[50] Moore v. Manchester Liners, Ltd., [1910] App. Cas. 498, 3 N. C. C. A. 269n; Smith v. Fibre Coal Co., [1913] 1 Scot. L. T. 263, [1913] W. C. & Ins. Rep. 343, 347, 3 N. C. C. A. 270n; Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[51] In re Sponatski, 220 Mass. 526, 8 N. C. C. A. 1025, L.R.A.1916A 333.

[52] In an action under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) to recover compensation for the death of a workman, it appeared that the deceased was a brakeman in charge of a train that was running buffer to buffer with and pushing another train towards siding points, and that in endeavoring to climb from the truck in which he was riding on to the brake van of the first train, he fell and was killed, and it was shown that it was the duty of the brakeman on the other train to open the points: *Held*, that there was evidence from which it could be inferred that the accident arose "out of and in

gers,[53] and although his act may have related to a sphere of the employment with which he was not directly connected.[54]

The burden of furnishing evidence from which the inference can be legitimately drawn that the death of an employee was caused by an accident or injury arising out of and in the course of the employment is on the claimant.[55]

Direct evidence of the manner in which the injury was sustained is not essential, it being sufficient if the inferences from the facts proved support the conclusion that the accident occurred while the employee was engaged in the performance of his duties.[56]

the course of the employment," and that the dependents of the deceased were entitled to compensation. Astley v. R. Evans & Co., Ltd., [1911] 1 K. B. 1036, aff'd [1911] App. Cas. 674, 3 N. C. C. A. 239.

[53] When the evidence permitted the court to find as a fact that decedent while at work for his employer as a journeyman carpenter, on a building in course of erection, was killed by the falling of a bar of metal from one of the upper stories, which was caused to fall by a workman of an independent contractor who had work on the same building, the court was justified in concluding that decedent's death arose "out of and in the course of his employment," within the purview of section 2 of the Employers' Liability Act of April 4, 1911 (P. L. p. 136). Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[54] In turning on the electric current in a repair shop in which he was working for the purpose of running a grindstone to sharpen his chisel, a carpenter was acting within the scope of his employment within the meaning of the Washington Workmen's Compensation Act (Laws 1911, c. 74), even though he had nothing to do with the maintenance or operation of the power-driven machinery in the shop. Wendt v. Industrial Ins. Commission of Washington, 80 Wash. 111, 5 N. C. C. A. 790.

[55] Hills v. Blair, 182 Mich. 20, 7 N. C. C. A. 409; McCoy v. Michigan Screw Co., 180 Mich. 454, 5 N. C. C. A. 455, L.R.A.1916A 323; Bryant v. Fissell, 84 N. J. L. 72, 3 N. C. C. A. 585.

[56] A workman whose duty it was to remove rubbish from racks in a flume which supplies water for his employer's mill, standing, while so doing, on an unrailed walk very near the river and using a rake, was seen performing this duty, his back being to the river. Some days afterward, his body was found down the river, bearing marks of having struck on rocks, and a broken rake handle was found in the water. It was held that the evidence warranted a finding that he was killed by an accident arising out of and in the course of his employment, and that the employer was guilty of negligence in failing to rail the walk. Boody v. K. & C. Mfg. Co., 77 N. H. 208, 5 N. C. C. A. 840, L.R.A.1916A 10.

§ 1378. Same subject; disease. The wording of the acts is not uniform; in some, provision is made for compensation for "accidental injuries"; in others, for "injuries by accidents arising out of" etc.; and in others for "injuries" or "personal injuries" omitting the word accident entirely.

The question whether incapacity or death was due to disease or to an accident or injury within the act is not free from difficulty. Although certain industrial diseases are expressly included within the British Act, by the Amendment of 1907,[57] this is not true of the American acts, and it has been quite uniformly held that industrial diseases are not within the act unless expressly included.[58] However, the mere fact that disease may have been the immediate cause of incapacity or death will not prevent compensation where it was proximately caused by an accident or injury within the act. This rule has been applied to nervous shock,[59] heart disease,[60] muscular spasm,[61] pneu-

[57] Death of one employed as a gardener, laborer and caretaker, alleged to be the result of ptomaine poisoning from sewer gas breathed while obeying an order of his employer to find and open certain cesspools, on which work he was engaged four or five days, is not due to an "accident" arising out of or in the course of employment within the meaning of the English Workmen's Compensation Act of 1906, so as to entitle his widow to claim compensation thereunder, in absence of proof indicating the exact time, circumstances, place, and cause of the accident, since such disease is not an "industrial disease" scheduled in the act concerning which the applicant is not required to present such proof. Eke v. Hart-Dyke, [1910] 2 K. B. 677, 3 N. C. C. A. 230.

[58] The condition known as "lead poisoning" which is a disease, and the disability resulting therefrom, is not one for which the commission is authorized to pay compensation out of the state insurance fund to employees "that have been injured in the course of their employment." In re Brown, Ohio Ind. Comm. Bul., No. 11656, 8 N. C. C. A. 1089, aff'd 92 Ohio St. 309.

Lead poisoning is an occupational disease and not an accidental injury within meaning of the Michigan Workmen's Compensation Act for which compensation may be awarded. Adams v. Acme White Lead & Color Works, 182 Mich. 157, 6 N. C. C. A. 482, L.R.A.1916A 283.

[59] A nervous shock sustained by a workman engaged in coal mining caused by excitement and alarm resulting from a fatal accident to a fellow workman engaged in the same employment, is a "personal injury by accident arising out of and in the course of the employment" within the Workmen's Compensation Act of 1906. Yates v. South Kirkby, F. &

monia,[62] blood poison,[63] typhoid fever,[64] and other germ dis-

H. Collieries, Ltd., [1910] 2 K. B. 538, 3 N. C. C. A. 225.

[60] A workman employed as cook on a lighter, who was suffering from valvular disease of the heart, in attempting to save some of his clothes and a surveying instrument when the lighter commenced to sink, so aggravated the disease by his exertions and the excitement that he died. It was held that his death arose out of and in the course of his employment. In re Brightman, 220 Mass. 17, 8 N. C. C. A. 102, L.R.A.1916A 321.

A workman, who was 50 years of age, had been employed at the respondents' tin sheds for 10 years, his work being to move tin plates in cases. On October 5, 1914, he had been working with some other men shifting heavy cases. In the afternoon, while they were moving lighter cases than they had had to move in the morning, he fell backwards and died almost immediately. A post-mortem examination established that cause of death was rupture of an aneurism of the aorta. The county court judge found that the death of the workman was the result of long-standing heart disease which reached its ordinary and fatal result while he was doing the lightest part of his ordinary day's work. He found that there had not been any "accident" within the meaning of the act and made his award in favor of the employers. *Held*, it was a misdirection to consider whether the rupture occurred when the deceased was or was not doing work of a light nature. An accident should have been found as soon as it was ascertained that the rupture occurred by reason of the strain at work, however slight that strain might have been. McArdle v. Swansea Harbor Trust, 8 B. W. C. C. 489, 11 N. C. C. A. 175.

[61] Bystrom Bros. v. Jacobson, 162 Wis. 180.

[62] In a claim for compensation for the death of an employee from pneumonia, the question whether the pneumonia was caused by an accident arising out of and in the course of the employment is one of fact and the finding of the commission in the affirmative will not be disturbed where there is evidence to support it. Bayne v. Riverside Storage & Cartage Co., 181 Mich. 378, 5 N. C. C. A. 837.

[63] An employee sustained a mortal injury from which death must sooner or later ensue, a fracture of the spine with severance of the spinal cord, causing complete paralysis of the lower limbs and a loss of power and sensation below the seat of the injury. He was placed in a hospital and under medical care. The nature of the injury compelled him to lie in bed in one position as a result of which a bed sore developed and from it he contracted blood poisoning, or septicæmia, which was the immediate cause of his death. *Held*, that his death resulted from the injury, septicæmia being merely a contributory cause, and compensation was properly allowed. In re Burns, 218 Mass. 8, 5 N. C. C. A. 635.

While an employee was engaged in shaving and painting poles in the course of his employment, he accidentally caught his hand between one of the poles and a piece of tim-

eases; but the relation of the disease to the injury must be shown with reasonable certainty.[65] A pre-existing diseased condition rendering one more vulnerable to injury will not bar compensation.[66] Rupture or hernia when shown to have arisen from the employment is compensable.[67]

ber, whereby the flesh was bruised and a small piece of skin knocked from the back of his hand. A few days later inflammation and suppuration set in, the same being produced by poisonous germs entering the flesh through the break in the skin. It was impossible to ascertain the source of the germs or when they gained entrance to the wound, the time which elapsed between the abrasion and the beginning of severe pain and suppuration was the usual period of the infection for the disease commonly known as blood poisoning. It was held that the disability attending this disorder was proximately caused by the injury and abrasion of the skin, and that the employee was entitled to compensation therefor under the California Workmen's Compensation Act. Great Western Power Co. v. Pillsbury, 171 Cal. 69, 11 N. C. C. A. 493.

64 Vennen v. New Dells Lumber Co., 161 Wis. 370, L.R.A.1916A 273.

65 Particles of steel from a lathe lodged in the operator's eye. On removal of the particles it was discovered that the eye had become infected with gonorrhea. The claimant contended that the injury from the steel was the inciting cause because it caused an inclination to rub and also because it gave rise to an inflamed condition rendering the eye susceptible to the entry of germs. Testimony of the medical witnesses showed that a normal eye could easily be infected by rubbing it with a hand infected with gonorrheal germs. *Held*, that the evidence did not show that the injury was one arising out of and in the course of claimant's employment within the meaning of the Michigan Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10, How. Ann. St. 2d Ed. § 3939). McCoy v. Michigan Screw Co., 180 Mich. 454, 5 N. C. C. A. 455, L.R.A. 1916A 323.

66 Where a workman is employed in a wood-working shop furrowing posts and his occupation subjects his abdomen to unusual pressure, which produces internal hemorrhage, resulting in his death, a finding that his death was the result of an accident arising out of and in the course of his employment is warranted, even though the parts on which the pressure was exerted were already diseased and weakened by cancer. Voorhees v. Smith Schoonmaker Co, 86 N. J. L. 500, 7 N. C. C. A. 646.

67 Proof of apparent previous good health, a heavy and unusual lift in the course of work, discovery of rupture on the second day thereafter, death from surgical operation for relief thereof, and opinion of the operating surgeon that the rupture was caused by the lifting, is sufficient to establish accidental injury in the course of employment, within the meaning of the act. Poccardi, Royal Consul of

§ 1379. Same subject; wilful misconduct. Where other conditions permitting recovery are shown, it can only be barred by proof that the injury was the result of the wilful misconduct, or, as provided in most acts, the "serious and wilful misconduct," of the workman.[68] Under most of the American acts, intoxication constitutes such misconduct,[69] and this is true of the British act also; [70] but, under the latter, intoxication will not bar compensation where death or serious and permanent disability results.[71] Serious and wilful misconduct is to be distinguished from negligence and gross negligence and resembles closely the wanton or reckless misconduct which will render one liable to a trespasser or bare licensee.[72] It is more than gross or culpable negligence, and involves the intentional doing of something either with the knowledge that is likely to result in serious injury or with a wanton and reckless disregard of its prob-

Italy v. Public Service Commission, 75 W. Va. 542, 8 N. C. C. A. 1065.

Evidence held sufficient to warrant finding that hernia suffered by employee was caused by accidental injury sustained in course of his employment even though a strangulation did not follow closely upon the occurrence of hernia. Andreini v. Cudahy Packing Co., 1 Cal. Ind. Comm. (No. 10, 1914) 8, 6 N. C. C. A. 390.

[68] Where the plaintiff in an action under the Workmen's Compensation Act for British Columbia has proved that she was dependent upon the deceased and that he came to his death during his employment, the defendants, to escape liability, must prove that the injury which caused death was attributable solely to the wilful misconduct or serious negligence of the deceased. British Columbia Sugar Refining Co. v. Granick, 44 Can. Sup. Ct. 105, 2 N. C. C. A. 852.

[69] Under the terms of the Roseberry Act (Cal. L. 1911, p. 796) an act providing a system of compensation for accidental injuries to employees, the liability of the employer exists only where there is a concurrence of certain conditions, one of which is the absence of wilful misconduct. If the injury occurred through the employee's wilful misconduct, there is no liability, and the Industrial Accident Board has no power to assess compensation. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 9 N. C. C. A. 466.

But see Nekoosa-Edwards Paper Co. v. Industrial Commission of Wisconsin, 154 Wis. 105, 3 N. C. C. A. 661n, L.R.A.1916A 348.

[70] Williams v. Llandudno Coaching & Carriage Co., Ltd. [1915] 2 K. B. 101, 9 N. C. C. A. 245.

[71] Williams v. Llandudno Coaching & Carriage Co., Ltd., [1915] 2 K. B. 101, 9 N. C. C. A. 245.

[72] In re Nickerson, 218 Mass. 158, 5 N. C. C. A. 645.

able consequences.[73] If an accident occurs while the workman is acting within the scope of his authority, and is doing an act which it was part of his duty to do, and the accident arises from his being engaged in doing that act and being thereby exposed to a special risk beyond that of other persons not so engaged, the employer is liable to pay compensation although the workman is doing the act negligently or contrary to rules laid down for his guidance.[74] The fact that an employee was injured while disobeying orders is not conclusive on the question of serious and wilful misconduct, but his act must have been deliberate, not merely thoughtlessly done on the spur of the moment,[75]

[73] In re Burns, 218 Mass. 8, 5 N. C. C. A. 635.

An employee's death is none the less compensable under the New Jersey Workmen's Compensation Act because of the fact that the fatal accident was due to the employee's wilful negligence. Taylor v. Seabrook, 87 N. J. L. 407, 11 N. C. C. A. 710.

[74] Williams v. Llandudno Coaching & Carriage Co., Ltd., [1915] 2 K. B. 101, 9 N. C. C. A. 245.

[75] In re Nickerson, 218 Mass. 158, 5 N. C. C. A. 645.

An employee engaged to do cleaning, painting and whitewashing, some of it near machinery and shafting, had been directed to do the latter work during the noon hours, when the machinery was stopped. At about 11:30 in the forenoon of the day he was injured, the superintendent, replying to a question from him about the work on a wall near moving shafting, told the employee that the work was to be done during the noon hour, that it was then about 11:30 and that he would find out the correct time and report it to the employee. About five minutes later, the employee started working at the place indicated and was caught in the shafting and received injuries resulting in his death. *Held*, that he was not guilty of serious and wilful misconduct, within the meaning of the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, part 2, § 2) preventing the award of compensation. In re Nickerson, 218 Mass. 158, 5 N. C. C. A. 645.

A servant's hand was injured while picking cotton from a carding machine which injury was followed by infection causing his death. It appeared that cotton collected on the guard of the finisher, and unless removed, caused an imperfection in the product, and that it was the operator's duty to pick it off while the machine was in motion. It was near this guard that the accident happened. It also appeared that the machinery was so delicate that the mere placing of the hand on it at places would cause it to dump and thereby interfere with its operations. *Held*, (1) that the evidence was sufficient to justify the finding of the Industrial Accident Board that the sign "Hands Off" placed on the machines by the manufacturer was put there, not as a warning against danger, but to prevent

particularly is this true where it is not clear that the orders were understood.[76] The question as to what constitutes serious and wilful misconduct, within the meaning of the act, is generally a question of fact, and the finding of the Industrial Accident Board in regard thereto will not be disturbed when not unwarranted by the evidence.[77]

§ 1380. Same subject; acts of nature. The question as to whether injuries caused by acts of nature such as lightning,[78]

people from disturbing the operation of the machine, and (2) that other signs posted in the room to the effect that "Cleaning machinery while in motion positively forbidden," did not have reference to picking cotton from the machines while in motion, where it was caught on parts of the machine but not in a dangerous place, especially as this was part of the operator's duty. Redfield v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633, 8 N. C. C. A. 889.

Where an experienced lineman violated the employer's posted rules enjoining the use of rubber gloves by linemen when working with high-power or "hot" electric wires, which gloves were provided by the employer, and disobeyed the order of the foreman to use such gloves, and while at work on such wires without using gloves the employee came in contact with a wire and received a shock causing his death, it was held that he was guilty of wilful misconduct, and a finding by the Industrial Accident Board to the contrary was not supported by the evidence. Great Western Power Co. v. Pillsbury, 170 Cal. 180, 9 N. C. C. A. 466.

[76] In an action brought by a widow under the Workmen's Compensation Act of British Columbia for the death of her husband, who was employed by defendant by the day and who could understand little or no English, and who was found dead crushed between the ceiling and the cage of an elevator which he had been ordered in English not to run until he was acquainted with the same, evidence *held* insufficient to support a finding of wilful and serious misconduct. British Columbia Sugar Refining Co. v. Granick, 44 Can. Sup. Ct. 105, 2 N. C. C. A. 852.

[77] In re Nickerson, 218 Mass. 158, 5 N. C. C. A. 645; In re Burns, 218 Mass. 8, 5 N. C. C. A. 635.

[78] A driver for an ice company was required to follow a fixed route, in substantial disregard of weather conditions, though permitted to seek shelter in times of necessity. When a severe rain storm, accompanied by lightning, was in progress he left his team and went to a tall tree just within the lot line, either for protection or in the performance of his duties soliciting orders. Lightning struck the tree, and the same bolt struck him, and he was killed. It was held that the evidence sustained a finding that the death of the decedent was the result of an accident "arising out of" his employment within the meaning of the workmen's compensation act (Laws

heat,[79] or cold,[80] are compensable would seem to depend upon whether the workman's employment was such as to increase the hazard. If his occupation was such as to subject him to a risk of such injury beyond that to which persons not so engaged were exposed, there would seem to be no valid reason for denying compensation.

§ 1381. Same subject; sportive acts. Unless there is a causal relation between the injury and the employment, there would seem to be no sound reason for allowing compensation to an employee injured by the sportive or playful act of a fellow workman, wholly disassociated from the employment. The

1913, c. 467, § 9; Gen. St. 1913, § 8203). State ex rel. People's Coal & Ice Co. v. District Court Ramsey Co., 129 Minn. 502, 9 N. C. C. A. 129, L.R.A.1916A 344.

The finding of the Industrial Commission that a workman who was killed by lightning while at work was not exposed to a hazard from lightning stroke peculiar to the employment and that the injury did not arise out of the employment cannot, under the Wisconsin act, be disturbed on appeal where there is substantial basis in the evidence to warrant the finding. Hoenig v. Industrial Commission of Wisconsin, 159 Wis. 646, 8 N. C. C. A. 192, L.R.A.1916A 339.

[79] Engineer dying as result of heat prostration while on duty held to have died of accident arising out of and in course of employment. Maskery v. Lancashire Shipping Co. Ltd., [1914] W. C. & Ins. Rep. 290, 6 N. C. C. A. 708.

[80] The fact that other men working with an employee whose foot was frozen as the result of exposure to intense cold for ten hours in the course of his employment were not affected, is not sufficient to absolve an employer from liability under the Quebec Workmen's Compensation Act, on the theory that the injury was not an accident but the result of ill health rendering the employee peculiarly susceptible to the cold, and the loss of a portion of an employee's foot as the result of it freezing where he was exposed to intense cold for ten hours in the discharge of his duties, is an "accident" within the meaning of the act. Canada Cement Co. v. Pazuk, 22 Quebec K. B. 432, 12 D. L. R. 303, 7 N. C. C. A. 982.

The employment of a journeyman baker to drive a cart for the purpose of delivering loaves of bread and receive payment therefor from his master's customers, does not expose the servant to any peculiar danger from cold, beyond that to which a large section of the population whose occupation is out of doors is ordinarily exposed, so as to entitle him to claim compensation under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58) for injury to his hand caused by frostbite. Warner v. Couchman, [1911] 1 K. B. 351, 80 L. J. K. B. 526, 1 N. C. C. A. 51.

British courts deny compensation in such cases.[81] The American courts have not gone so far as to deny compensation in all cases where the injury was the result of the sportive act of another.[82]

§ 1382. **Same subject; suicide.** Suicide like any other injury is compensable when it follows as the proximate sequence of an injury which would itself have been compensable. Where there follows, as a direct result of a physical injury, an attack of insanity of such violence as to cause the victim to take his own life through an uncontrollable impulse or in a delirium of frenzy "without conscious volition to produce death, having knowledge of the physical consequences of the act," there is a

[81] Fitzgerald v. Clarke & Son, [1908] 2 K. B. 796, 1 B. W. C. C. 197, 99 Law Times Rep. 101, 77 L. J. K. B. 1018; Mullen v. D. Y. Stewart & Co., Ltd., [1908] Ct. of Sess. Cas. 991, 45 Sc. L. R. 729, 1 B. W. C. C. 204; Wilson v. Laing, [1909] Ct. of Sess. Cas. 1230, 46 Sc. L. R. 843, 2 B. W. C. C. 118; Shaw v. Wigan Coal & Iron Co., 3 B W. C. C. 81; Cole v. Evans, Son, Lescher & Webb, Ltd., 4 B. W. C. C. 138; Wrigley v. Nasmyth, Wilson & Co., [1913] W. C. & Ins. Rep. 145.

[82] Where a workman, while engaged with others in operating a trip hammer, attempted to remove a tin can placed on the lower die by a bystander and his hand was crushed, held that the injury sustained arose out of and in the course of his employment within the meaning of section 1 of the Illinois Workmen's Compensation Act of 1912 (J. & A. ¶ 5449), though the bystander placed the can on the die for fun, it appearing that the workman took no part in the fun but proceeded to clear the die of the obstruction so that he could continue the work. Knopp v. American Car & Foundry Co., 186 Ill. App. 605, 5 N. C. C. A. 798.

Where a plumber engaged on a job at a private dwelling quit work about five o'clock and went to his employer's shop, and, while passing to a bin to get fittings for the job, dodged the arm of a fellow workman thrown out in a spirit of fun, and in doing so slipped and fell on a descending concrete floor, whereby he received injuries from which he died, it was held that the accident arose out of his employment within the New Jersey Workmen's Compensation Act. Hulley v. Moosbrugger, 87 N. J. L. 103, 8 N. C. C. A. 283.

Where workmen were forbidden to use compressed air to clean their clothes, and a workman, in violation of the rule, upon quitting work, proceeded to clean his clothes with a hose containing compressed air, when a fellow workman in a spirit of fun applied the nozzle of the hose to his rectum causing a rupture of the intestines, it was held that the injury was not compensable. Federal Rubber Mfg. Co. v. Havolic, 162 Wis. 341.

direct and unbroken causal connection between the physical injury and the death. But where the resulting insanity is such as to cause suicide through a voluntary wilful choice determined by a moderately intelligent mental power which knows the purpose and physical effect of the suicidal act even though choice is dominated and ruled by a disordered mind, then there is a new independent agency which breaks the chain of causation arising from the injury.[83]

§ 1383. Same subject; intermission from or suspension of work. In considering what is sufficient evidence of a fatal accident, in an action to recover compensation under the act, to justify an inference that the accident arose "out of and in the course of the employment," a distinction must be drawn between cases where death occurs at a time when the workman is engaged in his employer's work and cases where death occurs at a time when the workman is free, without any breach of contract, to do what he pleases on his own account.[84] As at common law, a mere temporary cessation or suspension of work will not place a workman outside the protection of the act,[85] but the

[83] Evidence held sufficient to sustain the finding of the Industrial Board that decedent "while insane as a result of the injury," threw himself from the window and was fatally injured, and that there was no conscious volition of the act. In re Sponatski, 220 Mass. 526, 8 N. C. C. A. 1025, L.R.A.1916A 333.

[84] In an action under the Workmen's Compensation Act, 1906 (6 Edw. 7, c. 58), to recover compensation for the death of a workman, where the workman was engaged in his employer's work up to the time of his death, and the last acts known about him were consistent with the continuance of that work, the onus was on those who alleged a cessation of his work for his employer, to prove it (Per Fletcher Moulton, L. J.). Astley v. R. Evans & Co., Ltd., [1911] 1 K. B. 1036, aff'd [1911] App. Cas. 674, 3 N. C. C. A. 239.

[85] A drayman whose duties took him into the streets for twelve hours continuously away from his home and his employers' place of business, while going his proper rounds, stopped opposite a public house. He left his dray, crossed the street to the public house, got one glass of ale there, and in re-crossing the street to his dray was run over and killed. He was not away from his dray for more than two minutes: *Held*, that the street risk he ran was one incidental to his employment, and that, under the circumstances of the employment, he was entitled so to procure reasonable liquid refreshment, and that the accident therefore arose "out of and

rule is otherwise if the workman, in fact, undertakes the performance of an act wholly outside the scope of his employment.[86] It has been held that an employee's injury arose "out of and in the course of" her employment, within the meaning of the act, though received after she had left her employer's work-room to go to luncheon and was on a stairway not under the control of her employer nor of the subscriber for whom he was working, but which was the sole means of access to the employer's work-room.[87]

§ 1384. Same subject; assaults. The earlier decisions of the British courts were in conflict as to whether injury from

in the course of" the employment within section 1, subsection 1 of the English Workmen's Compensation Act of 1906. Martin v. John Lovibond & Sons, Ltd., [1914] 2 K. B. 227, [1914] W. C. & Ins. Rep. 76, 5 N. C. C. A. 985.

[86] A stationary engineer employed to run the engine and dynamo in the basement of the building in which he was employed, left the engine room to go to the upper floors of the building. He walked up the stairway to the second floor and there met employees engaged in other parts of the building, whom he offered to take up on the elevator. The men entered the elevator which passed one floor in safety, but, as it was passing the next floor, the employee sustained injuries resulting in his death. *Held*, that deceased, at the time of the injury, being away from his work and performing a voluntary act for his own pleasure or satisfaction was engaged in an act outside the scope of his employment, that the injuries causing his death did not arise out of and in the course of his employment, and that compensation therefor was not recoverable under the Michigan Workmen's Compensation Act. Spooner v. Detroit Saturday Night Co., — Mich. —, 153 N. W. 657, 9 N. C. C. A. 647.

[87] In re Sundine, 218 Mass. 1, 5 N. C. C. A. 616, L.R.A.1916A 318.

But see Hills v. Blair, 182 Mich. 20, 7 N. C. C. A. 409 which was an application for compensation under the Michigan act for the death of a workman employed as a section hand. It appeared that when the crew stopped work about noon to eat their dinner, the deceased, who had not brought his dinner with him as was customary, received permission from the foreman to go to his house for it. His house, which was less than half a mile away, could be reached by going on the highway, but deceased went along the track, as the railroad employees usually did. As he was leaving, the foreman warned him of an approaching train. As he was going along the track, the train overtook him, throwing him against a switch stand near the track and causing his death. It was held that the evidence was not sufficient to support a conclusion of law that the injury arose out of and in the course of the employment.

assault was compensable. The uncertainty was cleared up by a decision of the House of Lords holding that such injuries were the result of an "accident" within the act. In that case, a schoolmaster was killed in an attack by students which was the outgrowth of a conspiracy on their part. Compensation was allowed to the mother of the deceased.[88] Prior to this decision, the Irish [89] and English [90] courts of appeal had reached the same conclusion while the Scottish Court of Session held that such injuries were not within the act. It is now thoroughly established in Great Britain that injuries to an employee growing out of an assault are compensable where they arise out of and in the course of the employment.[91] This rule has also been adopted by the American courts.[92]

§ 1385. Dependency. In case of the death of an employee, the award provided for in the act is payable only to his dependents. The question as to who are dependents,[93] and the extent

[88] Trim Joint Dist. School v. Kelly, [1914] W. C. & Ins. Rep. 359, 136 L. T. J. 605, 6 N. C. C. A. 1010n.

[89] Anderson v. Balfour, [1910] 2 Ir. R. 497, 3 B. W. C. C. 588, 3 N. C. C. A. 275.

The murder and robbery of a cashier while traveling in a railway carriage to a colliery with a large sum of money for the payment of his employers' workmen, is an "accident" from the standpoint of the person murdered and arises "out of" his employment, and, therefore, his widow is entitled to receive compensation under the Workmen's Compensation Act of 1906. Nisbet v. Rayne & Burn, [1910] 2 K. B. 689, 3 N. C. C. A. 268.

[90] Murray v. Denholm & Co., [1911] S. C. 1087, 48 Sc. L. R. 896.

[91] Assault on foreman resulting in his death by applicant to whom he had refused position held to arise out of employment. Weekes v. William Stead, Ltd., [1914] W. C. & Ins. Rep. 434, 6 N. C. C. A. 1010.

[92] The death of a mill superintendent who was fatally shot by a trespasser when, following an express instruction of his superior, he ordered him out of the mill, held to have been the result of an injury "arising out of and in the course of" his employment within the meaning of the Massachusetts Workmen's Compensation Act. In re Reithel, 222 Mass. 163, 11 N. C. C. A. 235, L.R.A.1916A 304.

[93] In an action for compensation for accidental injuries under the Workmen's Compensation Act of 1911, proof that plaintiff's mother has no property, that plaintiff and his sisters take care of her and that they all keep house together, held sufficient proof that there were persons dependent on plaintiff. Stevenson v. Illinois Watch Case

of the dependency[94] are ordinarily questions of fact, which must be established by the evidence,[95] except where the relation is such as, under the act, creates a presumption of dependency.[96]

Co., 186 Ill. App. 418, 5 N. C. C. A. 858.

Dependent as used in the New Jersey Act means dependent for the ordinary necessaries of life. Jackson v. Erie R. Co., 86 N. J. L. 550, 6 N. C. C. A. 944.

Wife living voluntarily apart from husband and earning her own living as a dependent under English Compensation Act, New Monckton Collieries, Ltd. v. Keeling, [1911] A. C. 648, 80 L. J. K. B. 1205, 105 L. T. 337, 27 T. L. R. 551, 55 Sol. J. 687, 4 B. W. C. C. 332, 6 N. C. C. A. 240.

[94] In a proceeding under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751) to recover compensation for the death of a sister, there was evidence that the sister whose dependency was in question had long been an invalid; that she was liable to die suddenly at any time; that she had a life interest in a house and land which were worth about $2,000. There was no evidence as to the cost of the upkeep of the house nor whether or not it was incumbered. There was evidence that she and the deceased sister lived in the house. It was held that a finding of total dependency was not erroneous as a matter of law. In re Buckley, 218 Mass. 354, 5 N. C. C. A. 613.

Under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 6), where a minor employee turned over the whole of his earnings to his father, in awarding compensation for such employee's death, the amount paid by the father for the employee's maintenance cannot be deducted. In re Murphy, 218 Mass. 278, 5 N. C. C. A. 716.

Where a daughter, eighteen years of age, had had no income for three years before her father's death, except a small amount allowed her by her father and a small compensation which she had earned for two weeks during such period, and she had saved one hundred dollars from the allowance given by her father, but since his death had used fifty or sixty dollars thereof, the evidence warranted a finding that she was wholly dependent upon her father at the time of his death. In re Carter, 221 Mass. 105, 9 N. C. C. A. 579.

[95] Proof of *actual* dependency upon a deceased employee must be made to entitle the applicant to compensation. Miller v. Public Service Ry. Co., 84 N. J. L. 174, 3 N. C. C. A. 593n.

[96] In construing the provision of the Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 7, [a]) that a wife shall be conclusively presumed to be wholly dependent upon a husband "with whom she lives" at the time of his death, the ordinary acceptation in common understanding is to be given to the words "with whom she lives," and the presumption cannot be held to arise where the husband and wife were voluntarily living apart at the time of the injury, each earning a living, the husband having given her money at irregular intervals only. In such a case, the

§ 1386. **Notice.** Following the British act, the American acts usually require that notice of the accident be given to the employer "as soon as practicable," and, as a general rule, limit the period in which notice may be given. Failure to give such notice will not usually bar a recovery where it is shown that the employer was not prejudiced thereby,[97] or had knowledge

board must ascertain the extent of dependency. In re Nelson, 217 Mass. 467, 5 N. C. C. A. 694.

Evidence, in a proceeding under the New Jersey Workmen's Compensation Act to obtain compensation for the death of an employee, held not to rebut the presumption of the dependency of the deceased's widow and daughter. Taylor v. Seabrook, 87 N. J. L. 407, 11 N. C. C. A. 710.

The mother of a deceased employee is an "actual dependent" within the meaning of subdiv. 1 of section 12 of the New Jersey Workmen's Compensation Act of 1911. Blanz v. Erie R. Co., 84 N. J. L. 35, 3 N. C. C. A. 590n.

Proof of "total dependency" is dispensed with under the Wisconsin Workmen's Compensation Act of 1911 where the husband and wife are "living together" at the time of the death of the injured employee. Northwestern Iron Co. v. Industrial Commission of Wisconsin, 154 Wis. 97, 3 N. C. C. A. 670n, L.R.A.1916A 366.

97 Where it appeared that a miner left home in apparently normal health on April 1, 1913, to go to work at the colliery, but later, when engaged in his work of moving full tubs from the working place to the shunt, was seen by two of the mine boys to sit down and rub his knee, and to limp when he walked, that he complained to the boys that his knee hurt him and the boys helped him to shove the tubs, that on his return home that day he had a slight bruise and breakage of the skin on his knee, that the next day, his knee being sore and swollen, he did not go to work but the two following days he went to work as usual, that on the next day he called in a doctor, that on April 8th, one week after the injury, his wife saw the fireman at the colliery and told him that the injury to her husband was caused by one of the tubs, which injury accounted for his absence from work, that on April 9th the injured employee was taken to an infirmary where he died the next day from blood poisoning in the right knee, and that notice in writing of the accident was given to the employers on April 24th, held that the evidence was sufficient to sustain a finding that the accident occurred in the course of deceased's work at the colliery on April 1st and arose out of and in the course of employment; and that the employers had not been prejudiced in their defense by the absence of notice as required by the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58, § 2). Hayward v. West Leigh Colliery, Ltd., [1915] A. C. 540, W. C. & Ins. Rep. 233, 9 N. C. C. A. 966, rev'g [1914] W. C. & Ins. Rep. 21.

of the accident, either in person or through his agent.[98] Delay in giving notice in cases of inflammation,[99] cancer,[1] injuries to the eyes,[2] septic infection,[3] heart disease,[4] hernia,[5] dermatitis,[6] pyæmia and periostitis,[7] slight injuries causing death,[8] and injuries resulting from a second accident,[9] has been held to bar compensation on the ground that such failure was not reasonably excusable and there was no showing of want of prejudice.

[98] State ex rel. City of Northfield v. District Court Rice Co., 131 Minn. 352, 11 N. C. C. A. 366.

Where the employer has actual knowledge of the happening of the accident and of the resulting injury, the giving of notice thereof is not necessary. State ex rel. Duluth Diamond Drilling Co. v. District Court St. Louis Co., 129 Minn. 423, 9 N. C. C. A. 1119.

The actual knowledge of the occurrence of any injury required by the workmen's compensation act does not mean the first-hand knowledge of an eyewitness, but what would be called knowledge in common parlance. In the case of a corporation, it means knowledge of the proper corporate agent. Allen v. City of Millville, 87 N. J. L. 356, 9 N. C. C. A. 749.

[99] Ford v. Gaiety Theatre, Ltd., [1914] W. C. & Ins. Rep. 53, 7 B. W. C. C. 197, 9 N. C. C. A. 967n.

[1] Potter v. John Welch & Sons, Ltd., [1914] 3 K. B. 1020, W. C. & Ins. Rep. 607, 7 B. W. C. C. 738, 9 N. C. C. A. 1035n.

[2] Fox v. Barrow Hematite Steel Co., Ltd., [1915] W. C. & Ins. Rep. 321, 9 N. C. C. A. 1035n; Miller v. Richardson, [1915] 3 K. B. 76, W. C. & Ins. Rep. 381, 9 N. C. C. A. 970n.

[3] Dalgleish v. J. H. Gartside & Co., Ltd., [1914] W. C. & Ins. Rep. 319, 7 B. W. C. C. 535, 9 N. C. C. A. 975n; Eydmann v. Premier Accumulator Co., Ltd., [1915] W. C. & Ins. Rep. 82, 9 N. C. C. A. 977n; Snelling v. Norton Hill Colliery Co., [1913] W. C. & Ins. Rep. 497, 9 N. C. C. A. 970n; Plumley v. Ewart & Son, Ltd., [1915] W. C. & Ins. Rep. 317, 9 N. C. C. A. 972n; Unger v. Howell, [1914] W. C. & Ins. Rep. 58, 7 B. W. C. C. 36, 9 N. C. C. A. 972n; Wassall v. James Russell & Sons, Ltd., [1915] W. C. & Ins. Rep. 88, 9 N. C. C. A. 1036n.

[4] Ing v. Higgs, [1914] W. C. & Ins. Rep. 84, 7 B. W. C. C. 65, 9 N. C. C. A. 974n.

[5] Nichols v. Briton Ferry Urban Dist. Council, [1915] W. C. & Ins. Rep. 14, 9 N. C. C. A. 974n.

[6] Petschelt v. Preis, [1915] W. C. & Ins. Rep. 11, 9 N. C. C. A. 978n.

[7] Coltman v. Morrison & Mason, Ltd., [1914] W. C. & Ins. Rep. 43, 7 B. W. C. C. 194, 9 N. C. C. A. 979n.

[8] Hunt v. Highley Min. Co., Ltd., [1914] W. C. & Ins. Rep. 406, 7 B. W. C. C. 716, 9 N. C. C. A. 979n.

[9] Lacey v. John Mowlem & Co., [1914] W. C. & Ins. Rep. 63, 7 B. W. C. C. 135, 9 N. C. C. A. 980n; Hodgson v. Robins, Hay, Waters & Hay, [1914] W. C. & Ins. Rep. 65, 9 N. C. C. A. 982n.

7 B. W. C. C. 232, 9 N. C. C. A. 980n; Taylor v. Nicholson & Son, Ltd., [1915] W. C. & Ins. Rep. 42,

On the other hand, delay in giving notice has been excused in cases where the injury remained latent and its seriousness did not become apparent until a considerable period had elapsed.[10] The notice must be given to the person specified in the act.[11]

§ 1387. Award of compensation. The amount of compensation to be awarded is prescribed by the acts, and depends upon the earnings of the injured employee, the nature of the injury

[10] Haward v. Rowsell & Matthews, [1914] W. C. & Ins. Rep. 314, 7 B. W. C. C. 552, 9 N. C. C. A. 1030n; Zillwood v. Winch, [1914] W. C. & Ins. Rep. 87, 7 B. W. C. C. 60, 9 N. C. C. A. 1030n; Thompson v. Northeastern Marine Engineering Co., [1914] W. C. & Ins. Rep. 13, 7 B. W. C. C. 49, 9 N. C. C. A. 1031n.

An employee, while engaged in his duties as stableman on December 2, 1913, struck his hand against the edge of a pail containing horse feed, which accident caused a small wound near the nail of the middle finger of his left hand. Verbal notice of the accident was given to the foreman on December 4, 1913 (who did not report same), and formal notice of claim on April 22, 1914. The arbitrator found (1) that the statutory notice was not given as soon as practicable; (2) that the employers were prejudiced by such want of notice; and (3) that the want of statutory notice was occasioned by mistake or other reasonable cause. The latter finding was based on the following facts: That the employee was illiterate and could neither read nor write; that, at the time of the accident, and for some time thereafter, he did not regard the injury as serious, the finger being treated at first by the doctor as a septic finger; that he continued at his work for about three months; that in March, 1914, another doctor advised him to go to an infirmary, and, while a patient there, he began to consider the question of compensation; that his giving notice to the foreman and wearing a dressing on his finger while at work were circumstances inducing him to suppose that the accident was known to his employers; and that the disease with which he was affected was of an obscure character, there being some difference of medical opinion as to its precise character. On appeal from an award of compensation under the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58) a question of law was raised, namely, whether the employee was barred from maintaining proceedings for the recovery of compensation. *Held*, that where an employee labors under an error as to the seriousness of the injury suffered by him, such error is reasonable cause for not giving the required statutory notice of injury, and whether an employee is under such an error, is a question exclusively for the arbitrator to determine. Flood v. Smith & Leishman, [1915] 1 Sc. L. T. 340, W. C. & Ins. Rep. 212, 9 N. C. C. A. 1027.

[11] Pimm v. Clement Talbot, Ltd., [1914] W. C. & Ins. Rep. 350, 7 B. W. C. C. 565, 9 N. C. C. A. 1040n.

and the extent of the resulting incapacity, being fixed at a certain percentage of such earnings. Awards of compensation in a lump sum are also authorized under certain circumstances.[12] The compensation provided for is not wages, but is in place of all the rights of action which belonged to the injured employee.[13]

Injuries resulting in permanent incapacity, either total or partial, are usually specifically scheduled, compensation being arbitrarily fixed at a certain percentage of the earnings of the employee for a definite period, the award in the case of partial permanent incapacity being in addition to such compensation as may be awarded during the period of total incapacity. It has been held that injuries not scheduled which do not impair the earning capacity of the employee are not within the act, and hence, an action at common law may be maintained therefor,[14] although some of the acts specifically allow compensation for injuries causing disfigurement.[15] Concurrent awards for distinct

[12] Multiplying the weekly minimum by the number of weeks and making the necessary credits is not a commutation, but an allowance of compensation in excess of that fixed by the New Jersey Workmen's Compensation Act of 1911, and it was error to commute the periodical payments to a lump sum on such a basis, as a deduction should have been made sufficient to make the lump sum equal to the present value of the periodical payments. James A. Banister Co. v. Kriger, 84 N. J. L. 30, 3 N. C. C. A. 585n.

[13] King v. Viscoloid Co., 219 Mass. 420, 7 N. C. C. A. 254.

[14] Where an employee was injured by being bitten on the ear by one of the horses he was driving, his remedy was not under the workmen's compensation act, since the injury was not covered in the schedule of compensation for various disabilities (section 15), but his right to recover for the injury remained as it was before the passage of the act. Shinnick v. Clover Farms Co., 169 N. Y. App. Div. 236, 9 N. C. C. A. 342.

[15] Where an employee sustained injuries resulting in the amputation of the fore-finger of his right hand at the second joint and also an injury to the thumb and was unable to return to work until fifteen weeks after the injury, when he was able to earn as much wages as before the injury, *held* that he was entitled to recover under paragraphs "a" and "b" of § 5 of the Workmen's Compensation Act of 1912, J. & A. ¶ 5453, and also under paragraph "c" of such section, for disfigurement of his hand. Watters v. P. E. Kroehler Mfg. Co., 187 Ill. App. 548, 8 N. C. C. A. 352.

Where an employee, in operating a press, lost the tips of two fingers of his right hand, impairing the sense of feeling in those fingers and permanently incapacitating him in

injuries are not permitted under some of the acts,[16] but, on the other hand, it has been held that, where the injuries resulting from the same accident are different in character, separate awards for each injury are proper.[17]

whole or in part from doing the particular kind of work in which he was engaged at the time of the accident, *held* that he was entitled to compensation for disfigurement of his hand under the provisions of clause C of section 5 of the Workmen's Compensation Act of 1911, J. & A. ¶ 5453. Stevenson v. Illinois Watch Case Co., 186 Ill. App. 418, 5 N. C. C. A. 858.

[16] A motorman in defendant's employ while standing on top of a trolley express car removing the trolley pole from its socket was injured by one end of the trolley pole coming in contact with the trolley wire while his right foot was against the socket, severely burning both hands and both feet, and injuring other parts of his body, the injuries necessitating the amputation of his right foot and temporarily totally incapacitating him from using his left foot or either hand. An award was made by the workmen's compensation commission, in proceedings under the workmen's compensation act (N Y. L. 1914, c. 41), of two-thirds of the employee's weekly wages for 205 weeks for the loss of his right foot, and a further award of compensation for 14 weeks for disability caused by injuries other than to the foot. *Held*, that the claimant having, by the first award, been allowed compensation to the full amount for total disability, could not by the second award be allowed further compensation for total disability on account of other injuries arising out of the same accident, the second award to run concurrently with the first award, as concurrent awards are not permitted by the statute. Fredenburg v. Empire United Rys., 168 N. Y. App. Div. 618, 9 N. C. C. A. 773.

The Michigan Workmen's Compensation Act (Pub. Acts Ex. Sess. 1912, No. 10, How. Ann. St. 2d Ed. § 3939) cannot be construed as meaning that where an employee loses a foot in an accident and also receives other injuries which disable him, he shall receive not only the specific indemnity provided for the loss of a foot but also during the same period, compensation for the disability from the other injuries. The compensation for the disability from the other injuries can be allowed only for such time, within the statutory limit, as it continues after the period for which indemnity is allowed for the loss of the foot. Limron v. Blair, 181 Mich. 76, 5 N. C. C. A. 866.

[17] Where the fingers of an employee's right hand were crushed and fingers of the left hand were also injured causing an infection of the left hand, it was proper to allow the statutory damages for partial but permanent injury to the fingers, and also for the temporary disability from the infection, as the two injuries, although the result of the same accident, were different in character. Nitram Co. v. Creagh, 84 N. J. L. 243, 3 N. C. C. A. 587n.

Compensation for injury to a member can be allowed only as prescribed by the act,[18] but the determining factor is the effect of the injury upon the member, and not necessarily the physical injury of the member itself.[19] Where the injury affects different portions of the same member, compensation must be based upon the extent to which the member, as a whole, is affected.[20]

Where the injury results in permanent disability, which is total merely because of the existence of some prior disability, such as the previous loss of an eye, reason would suggest that compensation should be based upon the theory of total disability. This appears to be the prevalent view.[21] Owing to the express provisions of the Minnesota act, however, the supreme court of that state was compelled to take a contrary view.[22]

[18] The Massachusetts Workmen's Compensation Act (St. 1911, c. 751, pt. 2, § 11, as amended by St. 1913, c. 696) does not authorize an award of additional compensation given by reason of the nature and permanency of an injury consisting of the loss of two-thirds of the first phalange of the left index finger, even though the injury renders the phalange permanently incapable of use, where the entire finger is not incapacitated. In re Ethier, 217 Mass. 511, 5 N. C. C. A. 611.

[19] Under the Massachusetts Workmen's Compensation Act, where an employee sustains a fracture of the spine and a severance of the spinal cord which result in a paralysis of the lower limbs and a loss of power and sensation below the seat of the injury, compensation is properly allowed for the permanent incapacity of both legs to the extent allowed by the act (St. 1911, c. 751, part 2, § 11, as amended by St. 1913, c. 696), although the feet and limbs themselves sustained no actual lesion. In re Burns, 218 Mass. 8, 5 N. C. C. A. 635.

[20] In a hearing under the workmen's compensation act to ascertain the compensation to be awarded to an injured employee, where there are permanent injuries to the hand and arm below the elbow, the court should determine the percentage of total disability of the hand and fix the compensation accordingly. Where the same accident results also in permanent partial disability to the arm above the elbow, the court should determine the percentage of total disability of the arm as a whole, including the forearm and hand, and fix the compensation accordingly. It is improper in such a case to divide the injuries into two units, those to the hand, and those to the arm. State ex rel. Kennedy v. District Court Clay Co., 129 Minn. 91, 8 N. C. C. A. 478.

[21] Schwab v. Emporium Forestry Co., 167 N. Y. App. Div. 614, 8 N. C. C. A. 1054n; aff'd 111 N. E. 1099 (mem. dec.); Weaver v. Maxwell Motor Co. (Mich.), 1 Nat. Comp. Journ. (No. 11, 1914) 6, 8 N. C. C. A. 1055n, rev'd 186 Mich. 588.

[22] Prior to the time relator entered respondent's service he had

Under most acts the extent of the impairment of the employee's earning capacity is to be determined with reference to the employment in which he was working at the time of the injury, and, unless his earning capacity in that employment has been impaired, there can be no recovery for permanent disability,[23] and an "incapacity for work resulting from the injury" exists where, by reason of the injury, the employee is unable to procure employment, though he would be able to perform it if he could secure it.[24]

A provision for the reduction of compensation in case of permanent injury to an employee who is over fifty-five years of age, is not to be construed as providing for a reduction of death benefits where the injury to an employee over fifty-five years of age results in death.[25] The computation of the average earnings of the employee is regulated by the acts. As a general rule, it is determinable by the earnings during a fixed period of employment by the same employer,[26] and, where the employment has

lost the sight of one eye by accidental means. After entering respondent's service he lost, by accident happening during the course of his employment, the sight of his other eye, thus rendering him totally blind. It is held that under section 15 of the compensation act the last employer is liable for a permanent partial disability only, for that was the extent of the injury which the employee suffered while in his service. State ex rel. Garwin v. District Court of Cass Co., 129 Minn. 156, 8 N. C. C. A. 1052.

[23] Under the Wisconsin Workmen's Compensation Act, compensation cannot be awarded an injured employee because his injury, the loss of sight in one eye, may result in impairing his earning capacity in other employments. International Harvester Co. v. Industrial Commission of Wisconsin, 157 Wis. 167, 5 N. C. C. A. 822.

[24] In re Sullivan, 218 Mass. 141, 5 N. C. C. A. 735, L.R.A.1916A 378.

[25] City of Milwaukee v. Ritzow, 158 Wis. 376, 7 N. C. C. A. 498.

[26] Where an employee had for a period of exactly 3 years before his death by accident arising out of and in the course of his employment been employed in the same employment of carter by the same employer, during which period he had been absent from work for 163 weekly days, 45 of which were unaccounted for, 35 of which he was sick, and 83 of which he was absent on account of injury, the longest period of absence being 6 weeks and 1 day on account of injury, it was held that the compensation payable was an amount equal to the actual earnings of the deceased during the said 3

not continued during the prescribed period, by the average earnings of persons in the same class in the same employment in the locality, if practicable.[27] Provision is also made for employments which are not continuous during the year, or where the rate of wages is not fixed.[28] The British act makes allowance for absence from work due to unavoidable causes, such as strikes,[29] illness,[30] and the like. Loss of employment due to

years, as provided by schedule 1, clause 1 (a) (i) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). Greenwood v. J. Nall & Co., Ltd., [1915] 3 K. B. 97, 8 B. W. C. C. 503, 84 L. J. K. B. 1356, 11 N. C. C. A. 787.

27 Andrejwski v. Wolverine Coal Co., 182 Mich. 298, 6 N. C. C. A. 807.

Where the condition of a longshoreman is continuous labor in regular employment with different employers, the loss of his capacity to earn, as demonstrated by his conduct in such regular employment, is the basis upon which his compensation for injuries should be based under the clause in the Massachusetts Workmen's Compensation Act providing compensation on "average weekly earnings." Gillen v. Ocean Accident & Guarantee Corporation, 215 Mass. 96, 3 N. C. C. A. 612n, L.R.A.1916A 371.

28 The New Jersey Workmen's Compensation Act (P. L. 1913, p. 313) enacts that the term "wages" shall be construed to mean the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the accident to the employee; that, where the rate of wages is fixed by the output of the employee, his weekly wages shall be taken to be six times his daily average earnings for a working day of ordinary length, excluding overtime; and that this rate of weekly wages shall be calculated by dividing the total value of the employee's output during the actual number of full working days during the preceding six months by the number of days the employee was actually employed. Applied, where an employee, paid by the hour, was at the time of the injury earning twenty-five cents an hour and at other times more or less per hour, it being held that while the foregoing provisions were not precisely applicable, the language indicated that in a case where weekly wages were not fixed they shall be taken to be six times the daily wages, and that the daily wages shall be the wages for a working day of ordinary length, excluding overtime. Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26, 9 N. C. C. A. 531.

29 Where an employee had been employed by the same employer in the same grade of work for a year previous to his injury, and during that period his work had been interrupted by a strike in another trade to which his trade was related, it was held that such period of absence from work on account of the strike was unavoidable, there being no termination of the contract of employment, and was not to be included in the computation of aver-

slackness in trade apparently is not excluded.[31] Payments to the employee to cover special expenses entailed upon him by the nature of the employment, and payments made by the employee, assistants are excluded in determining the average earn-

age weekly earnings, as such absence was within the meaning of schedule 1, cause 2(c) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). Griffiths v. Gilbertsens & Co., Ltd., 8 B. W. C. C. 548, 11 N. C. C. A. 666.

[30] Under schedule 1, clause 1(b) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58), provision is made for compensation in case of injury to an employee resulting in incapacity; under clause 2(a) "average weekly earnings" are to be computed in a manner best calculated to give the rate per week at which the injured employee was being remunerated; and under clause 2(c) "employment by the same employer" means in the grade in which the employee was employed at the time of accident, "uninterrupted by absence from work due to illness or any other unavoidable cause." Griffiths v. Gilbertsens & Co., Ltd., 8 B. W. C. C. 548, 11 N. C. C. A. 666.

[31] Where an employee had been employed by the same employer in the same grade of work for a year previous to his injury, and, during that period, his work had been interrupted by a docker's strike, and later there were trade fluctuations during a period of 9 weeks, involving a shut-down of the works for 4 weeks and a short-time schedule for 5 weeks, alleged to have been caused by the war, but it was found by the arbitrator that the trade slackness had commenced some considerable time before the war and was not caused entirely by the war, and that it would have continued independently of the war, it was held that the period of absence from work on account of such trade slackness was not to be excluded from the computation of average weekly earnings, as such absence was not due to an unavoidable cause within the meaning of schedule 1, clause 2(c) of the Workmen's Compensation Act of 1906 (6 Edw. VII, c. 58). Griffiths v. Gilbertsens & Co., Ltd., 8 B. W. C. C. 548, 11 N. C. C. A. 666.

On a proceeding under the Massachusetts Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571), it appeared that the employee had been re-employed by his employer, after his injury, and that, while so re-employed, the employer's mill was shut down for three and five-sevenths weeks on account of slack work. Thereafter, the employee filed a claim for compensation, and it was found that he was totally incapacitated during the time that the mill was shut down. It was found by the arbitration committee that the character of his injury, which consisted in the loss of all his fingers except the forefinger of the right hand and the little finger of his left hand, was such as to render it probable that he would not have been able to obtain work or earn anything elsewhere. It was held that the finding that he was totally incapacitated during the time the mill was closed was not unwar-

ings.[32] An interesting question on the computation of the average earnings of an employee was recently decided by the Wisconsin Supreme Court. A police officer having difficulty in making an arrest called upon a citizen to assist him, and, rendering said assistance, the latter was shot and killed by the prisoner. Decedent's usual occupation was that of a plumber. Under the law, the police officer had power to require assistance in such cases and it was the duty of those called upon to obey. The court held that decedent's earnings were to be determined upon the basis of the compensation paid police officers in the locality rather than his usual earnings as a plumber.[33]

Compensation may be terminated by the unreasonable refusal of the injured employee to submit to an operation, not dangerous to his life, which would have remedied his disability;[34] or malingering on his part;[35] or by the intervention of natural causes prolonging disability.[36]

ranted. In re Septimo, 219 Mass. 430, 7 N. C. C. A. 906.

32 Where an employer pays to an employee having general charge of the affairs of the employer's business a fixed sum of money each month, from which the employee is required to pay an assistant, if one is employed by him to assist in the work, such sum as may be agreed upon between the employee and the assistant, the sum so paid the assistant forms no part of the salary or compensation of the employee, and in determining the salary of such employee the amount paid the assistant must be deducted from the total amount paid by the employer. State ex rel. Gaylord Farmers Co-operative Creamery Ass'n v. District Court Sibley Co., 128 Minn. 486, 9 N. C. C. A. 86.

33 Village of West Salem v. Industrial Com., 162 Wis. 57.

34 Refusal to submit to operation held unreasonable preventing further compensation for incapacity resulting therefrom. Walsh v. Locke & Co., [1914] W. C. & Ins. Rep. 95, 6 N. C. C. A. 675.

35 A minor employee met with an accident in 1909 resulting in the loss of his right arm, for which a weekly compensation was paid until 1911 when, the employee having attained the age of 21 years, the compensation was increased. In June, 1914, the employers applied for a review on the ground that the employee was able to do light work. The evidence showed that, apart from the loss of his arm, the employee was a strong, healthy man, and was not totally incapacitated from earning wages; that in 1911 he had married; that he was in the habit of carrying baskets of pigeons for his brother-in-law; that he had never done any work since his accident; that in 1909 he had applied to the employers for light work which they were unable to give him;

The acts contain provisions making allowances for medical [37]

and that, since that time, he had made no effort to get work of any kind. On appeal by the employee, the Court of Appeal sustained the decision of the county court judge, being of the opinion that the circumstances showed a bad case of malingering. Silcock & Sons v. Golightly, [1915] 1 K. B. 748, [1915] W. C. & Ins. Rep. 164, 11 N. C. C. A. 31.

On a proceeding for compensation under the Massachusetts Workmen's Compensation Act (Laws 1911, c. 751, as amended by Laws 1912, c. 571), where the Industrial Accident Board finds that the injured employee was totally incapacited during a certain period, a finding of the arbitration committee that he made no effort to obtain employment during that period is immaterial. In re Septimo, 219 Mass. 430, 7 N. C. C. A. 906.

[36] An employee, 60 years of age, sustained injuries by being crushed by a fall of coal in the mine in which he was working, the accident having arisen out of and in the course of his employment. He was paid a weekly compensation for the total incapacity for about 3 years when the employers discontinued payment of compensation on the ground that the employee had recovered from the effects of the accident and was no longer incapacitated for work. An application for further compensation was denied, the arbiter finding that the employee had recovered from the direct effects of the accident although he was affected with partial incapacity for work, and that such partial incapacity was due to age and obesity, the physical condition resulting from a natural tendency to obesity which was increased owing to his having done no hard work since the accident. *Held*, reversing the decision of the Court of Session, that the arbiter did not err in ending the compensation. Clark v. George Taylor & Co., [1914] W. C. & Ins. Rep. 448, [1914] 2 Sc. L. T. 145, 11 N. C. C. A. 54.

[37] An injured employee reported his injury to his foreman who did not advise him as to his right to medical assistance. Later the employee went to the office of a physician who notified the employer's superintendent that he had such a patient, under the Massachusetts Workmen's Compensation Act (St. 1911, c. 751), but no attention was furnished in response. The notice to employees as to medical assistance which was posted in the employer's place of business was in English, a language which the injured employee could not read. *Held*, that the employee was entitled, under section 5 of the act, to recover the amount pail by him to the physician attending him the first two weeks after his injury. In re Panasuk, 217 Mass. 589, 5 N. C. C. A. 688.

Where there is evidence that an injured employee, applying for compensation under the California Workmen's Compensation, Insurance and Safety Act, was dissatisfied with the advice given him by the surgeon selected by the insurance carrier, that he notified the latter of his dissatisfaction, that he was directed by it to go to another surgeon, and that it was only after finding that such other surgeon was out of town that he went

and funeral expenses, also for attorney's fees.[38] But, under some of the acts, allowance cannot be made for medical and funeral expenses where decedent left dependents to whom compensation has been awarded.[39]

§ 1388. Injuries caused by negligence of third persons. The right of the injured employee to sue third persons whose negligence caused the injury is usually not affected, the employee being given the option of proceeding against his employer under the act, or the negligent third person at common law. But there can be only one recovery. In Washington, Minnesota and Illinois, however, this right has been very seriously abridged. Under the construction placed upon the Washington act, the remedy provided for therein against the employer is exclusive even where the injury is the result of the negligence of a third person, except where such injury occurs "away from the plant of the employer." [40]

The provisions of the Minnesota and Illinois acts are somewhat similar. Where the third person whose negligence caused the injury is also under the act, the amount of the recovery is limited to the amount recoverable under the act. This restriction has been upheld.[41]

Where the employee elects to proceed against the employer under the act, and the latter pays the compensation for the injury, he becomes subrogated to the employee's right of action against the person whose negligence caused the injury, to the ex-

to his family physician for treatment, the reasonable value of the latter's services may properly be allowed him, the evidence supporting the conclusion that the employer and the insurance carrier neglected seasonably to provide the surgical treatment reasonably required, within the meaning of section 15, subdivision (a) of the act. Massachusetts Bonding & Insurance Co. v. Pillsbury, 170 Cal. 767, 11 N. C. C. A. 426.

38 Power to fix attorneys' fees is limited to the superior court and the supreme court is not warranted in fixing the same or granting an additional allowance. Boyd v. Pratt, 72 Wash. 306, 3 N. C. C. A. 604n.

39 Central R. Co. of New Jersey v. Kellett, 86 N. J. L. 84, 5 N. C. C. A. 529; Taylor v. Seabrook, 87 N. J. L. 407, 11 N. C. C. A. 710.

40 Peet v. Mills, 76 Wash. 437, 4 N. C. C. A. 786, L.R.A.1916A 358; Northern Pac. Ry. Co. v. Meese, 239 U S. 614, 10 N. C. C. A. 939.

41 Mathison v. Minneapolis St. Ry Co., 126 Minn. 286, 5 N. C. C. A. 871.

tent of the amount paid. But this right of subrogation is a creature of the statute and does not exist independently of it.[42]

Under the Wisconsin act which provides that, when an employee who is injured in the course of his employment by the actionable negligence of a third person, elects to pursue his remedy against the employer for compensation, the latter thereupon, by succession, becomes the owner of the employee's common-law remedy against the third person and may enforce it in his own name, and the right of action thus accruing to the employer may be assigned by him.[43]

A provision that the making of a lawful claim against an employer for compensation shall operate as an assignment of any cause of action in tort which the employee may have against any other party for his injury, does not cause the making of a claim to operate as an assignment of a cause of action not in existence at the time thereof.[44]

[42] Where an employee was injured prior to the Act of 1913 (P. L. 1913, p. 320), through the negligence of one not his employer, under such circumstances as to entitle him to compensation from his employer under the Act of 1911 (P. L. 1911, p. 520), the employer could not recover of the tort-feasor for the compensation paid to the employee under the statute; the statutory compensation is a part of the compensation of the employee by services rendered for which the employer receives a *quid pro quo*. The loss to the employer is the value of the services of the employee to him, not the necessary expense of securing them. Interstate Telephone & Telegraph Co. v. Public Service Elec. Co., 86 N. J. L. 26, 5 N. C. C. A. 524.

[43] And where the employer assigns it, it is not necessary that the assignee, on bringing an action, make the employer a party. McGarvey v. Independent Oil & Grease Co., 156 Wis. 580, 5 N. C. C. A. 803.

[44] The making of a claim by an injured employee for compensation under the Wisconsin Workmen's Compensation Act does not operate under subdivision 1 of section 2394—25 of such act, to assign to the employer a cause of action for malpractice which accrues to the employee as a result of the negligent treatment of his injury by the physician employed by him when immediately upon his discovery, in the exercise of ordinary diligence, that the physician had been negligent, he refuses to accept from his employer any more of the compensation awarded him. Pawlak v. Hayes, 162 Wis. 503, 11 N. C. C. A. 752.

TABLE OF CASES

[REFERENCES ARE TO PAGES]

A

— v. Moor, 1 M. & S. 284 470, 4574, 4575
A. D. Patchin, The, 1 Blatch. 414 2718
A. R. Dunlap, The, 1 Low. 350 737
Aarnes v. Windham, 137 Ala. 513 2666, 2667
Aaron v. Missouri & K. Tel. Co., 89 Kan. 186 1512, 4930, 4934
v. Moore, 34 Mo. 79 2524
v. Second Ave. R. Co., 2 Daly 127 3488
v. Southern R., 68 S. C. 98 1353
v. Ward, 203 N. Y. 351, 136 App. Div. (N. Y.) 818 333, 342
Abbie v. Jones, 82 Ark. 414 1561
Abbitt v. St. Louis T. Co., 104 Mo. App. 534 4736, 4740
Abbot v. Banfield, 43 N. H. 152 819
v. Chapman, 2 Lev. 81 507
v. Heath, 84 Wis. 314 1472
v. McCadden, 81 Wis. 563 4872, 4882
v. Shepherd, 4 Phila. 90 3100
v. Tolliver, 71 Wis. 64 336, 4749, 4784
Abbott v. Abbott, 51 Me. 575 3734
v. Allen, 2 Johns. Ch. 519 555, 2209, 2211
v. Allen, 14 Johns. 252 2054, 2056
v. Brown, 131 Ill. 108 2772
v. Detroit, 150 Mich. 245 4673, 4690
v. Draper, 4 Denio 51 2516, 2517
v. Gatch, 13 Md. 314 2625, 2626
v. Gillespy, 75 Ala. 180 1621
v. Hancock, 123 N. C. 99 4961
v. Hapgood, 150 Mass. 248 2343, 2616
v. Hendricks, 1 M. & G. 791 1853, 1866, 1867
v. Herron, 90 Ark. 206 816
v. Inskip, 29 Ohio St. 59 2466
v. Kellogg, 18 Cal. App. 429 1949
v. Mills, 3 Vt. 521 3933
v. Milwaukee L., H. & T. Co., 126 Wis. 634 3969, 4101
v. Southern Pac. R. Co., 109 Cal. 282 3981
v. Stinchfield, 71 Me. 214 1221
v. Thorne, 34 Wash. 692 4608
v. Williams, 15 Colo. 512 1789
v. Wilmot, 22 Vt. 437 759
v. Wyse, 15 Conn. 254 2230
v. 76 Land & W. Co., 101 Cal. 567 3789
v. 76 L. & W. Co., 161 Cal. 42 371, 384
Abby v. Wood, 43 Wash. 379 4941
A'Beckett v. Warburton, 14 Vict. L. R. 308 6, 3914
Abeles v. Bransfield, 18 Kan. 16 4701
v. Cohen, 8 Kan. 180 2873
v. Western U. Tel. Co., 37 Mo. App. 554 3559, 3560
Abell v. Munson, 18 Mich. 306 1439
Abell v. Penn. Mut. L. Ins. Co., 18 W. Va. 400 3086
Abell Note B. & B. Co. v. Hurd, 85 Iowa 559 1815
Aber v. Bratton, 60 Mich. 357 4311, 4314, 4322
Abercrombie v. Goode, 187 Ala. 310 748
v. Owings, 2 Rich. 127 533, 2202
v. Vandiver, 126 Ala. 513 2650
v. Windham, 127 Ala. 179 3766
Aberdeen v. Blackmar, 6 Hill 324 296, 2873, 2892, 2894, 2898
v. Bradford, 94 Md. 670 3861
Aberdeen C. & M. Co. v. Evansville, 14 Ind. App. 621 3111
Abernathy v. Black, 2 Cold. 314 2524
v. South & W. R. Co., 159 N. C. 340 4150
Abilene v. Wright, 4 Kan. App. 708 1363, 1373, 4732
Abingdon Mills v. Grogan, 167 Ala. 146 4644
v. Grogan, 175 Ala. 247 4628, 4646
Able v. McMurray, 10 Tex. 350 1152, 1184, 1879
Abmeyer v. First Nat. Bank, 76 Kan. 877 1825, 4380
Abner v. York, 19 Ky. L. Rep. 643 1186, 1957, 2205
Abney v. Mize, 155 Ala. 391 432, 460, 467
Aboltin v. Heney, 62 Wash. 65 4796
Aborn v. Mason, 14 Blatch. 405 4262
Abraham v. Kidney, 104 Mass. 222 4966
v. New Orleans B. Ass'n, 110 La. 1012 1211
Abrahams v. Cooper, 81 Pa. 232 4616, 4836, 4837
v. Jones, 20 Ill. App. 83 2755
Abrahamson v. Cummings, 65 Wash. 35 2404
v. Lamberson, 68 Minn. 454 1968
v. Lamberson, 72 Minn. 308 555
v. Lamberson, 79 Minn. 135 2031
Abrams v. Columbia, etc., R. Co., 73 S. C. 542 1243
v. Ervin, 9 Iowa 87 3812
v. Kounts, 4 Ohio 214 887
v. Milwaukee, etc., R. Co., 87 Wis. 485 3336
v. Pomeroy, 13 Ill. 133 1853
v. Smith, 8 Blackf. 95 4586, 4599
v. United States F. & G. Co., 127 Wis. 579 1646
Abrashkov v. Ryan, 130 App. Div. (N. Y.) 429 1504
Abrath v. Northeastern R. Co., 11 Q. B. Div. 440 4638
Abshire v. Corey, 113 Ind. 484 786, 795
Abt v. American Bank, 159 Ill. 467 1146
Acanthus, The, 112 L. T. 153, [1902] Prob. 17 486
Accumulator Co. v. Dubuque St. R. Co., 64 Fed. 70 2387, 2415, 2429

[REFERENCES ARE TO PAGES]

Acebal v. Levy, 10 Bing. 376 2216, 2217
Acers v. Curtis, 68 Tex. 423 2836, 2861, 2862, 2863
Acheson v. Miller, 2 Ohio St. 203 2858
v. Western U. Tel. Co., 96 Cal. 641 1355
Achey v. Hull, 7 Mich. 423 3742
v. Marion, 126 Iowa 47 4683
Achorn v. Piper, 66 Iowa 694 4552
Acken v. Tinglehoff, 83 Neb. 296 60, 1479, 4767, 4782
Ackenburgh v. McCool, 36 Ind. 473 2904
Acker v. Knoxville, 117 Tenn. 224 3952, 3964, 3988, 4028, 4115
v. Phoenix, 4 Paige 305 754
Ackerland & Co. v. Louisville & N. R. Co., 83 Ohio 293 3345, 3349
Ackerman v. Ackerman, 14 Abb. Pr. 229 591
v. Emmott, 4 Barb. 626 1205
v. Green, 195 Mo. 124 4277
v. King, 29 Tex. 291 2886
v. Rubens, 167 N. Y. 405 2241, 2247
v. True, 175 N. Y. 353 491, 3839, 3877, 3929
Ackerson v. Erie R. Co., 32 N. J. L. 254 1338, 3515
Ackley v. Hunter, 154 Ala. 416 2061, 2114
v. Hunter, Benn & Co.'s Co., 166 Ala. 295 2279
v. Kellogg, 8 Cow. 223 3425
Ackman v. Third Ave. R. Co., 52 App. Div. (N. Y.) 483 1383
Acme C. P. Co. v. Westman, 20 Wyo. 143 1473
Acme F. Co. v. Older, 64 W. Va. 255 664, 1837, 2228, 2235, 2237
Acme H. Co. v. Axtell, 5 N. D. 315 655, 664
Acme H. Mach. Co. v. Gasperson, 168 Mo. App. 558 2374, 2393, 2456
Acme M. & E. Co. v. Johnson, 141 Ky. 718 2274
v. Rives, 141 Ky. 783 2274
Acquiring Property on North River, In re, 118 App. Div. (N. Y.) 865 3996
Acrea v. Brayton, 75 Iowa 719 3803, 3823
Acrel v. Bufford, 80 Miss. 565 4345
Acres v. Frederick & Nelson, 79 Wash. 402 5150
Activ, The, 17 Times L. Rep. 351 5017
Acton v. Blundell, 12 M. & W. 324 7
v. Smith, 150 Ky. 703 1373, 4661, 4730
Ada St. M. E. Church v. Garnsey, 66 Ill. 132 2476
Adair v. Bogle, 20 Iowa 238 3196, 3199, 3227
v. United States, 208 U. S. 161 5024
Adairs v. Wright, 14 Iowa 22 1875
Adam v. British, etc., S. S. Co., [1898] 2 Q. B. 430 4856
v. Chicago, etc., R. Co., 139 Mo. App. 204 3798, 3806
v. Gomila, 37 La. Ann. 479 1707
Adamant P. Mfg. Co. v. National Bank, 5 Wash. 232 2657
Adams v. Acme L. & C. Works, 182 Mich. 157 5189
v. Adams, 10 Leigh 527 1079, 1085
v. Adams, 55 N. J. Eq. 42 1087, 1110
v. Addington, 16 Fed. 89 1924
v. Bank, 3 La. Ann. 351 711
v. Barber, 157 Mo. App. 370 4391
v. Barnes, 17 Mass. 365 638
v. Barry, 10 Gray 361 1363, 3943
Adams v. Beach, 6 Hill 27 1043
v. Beaver Valley T. Co., 41 Pa. Super. 403 1280, 3450, 3471, 3473
v. Bicknell, 126 Ind. 211 4640
v. Blankinstein, 2 Cal. 413 3425
v. Blodgett, 47 N. H. 219 364, 3737, 3784, 3823, 3824, 4230, 4232, 4239, 4259
v. Bowman, 51 Mich. 189 2384
v. Bridges, 141 Ga. 418 40
v. Brosius, 69 Ore. 513 339, 348
v. Burton, 107 Me. 223 4391
v. Chicago, etc., R. Co., 39 Minn. 286 3861, 4097
v. Clark, Brayton 196 2749
v. Clark, 36 Colo. 65 1077
v. Collins, 196 Mass. 422 4385
v. Conover, 87 N. Y. 422 2058
v. Conover, 22 Hun 424 2112
v. Cordis, 8 Pick. 260 616, 1221
v. Cox, 10 Ont. L. R. 96 1253
v. Cox (Tex. Civ. App.) 150 S. W. 1195 2097, 2101, 2136, 2143
v. Cumberland Co., 117 Tenn. 470 125
v. Drake, 11 Cush. 504 637
v. Durham & N. R. Co., 110 N. C. 325 3882
v. Emerson, 6 Pick. 57 429
v. Filer, 7 Wis. 306 2229
v. Fitzpatrick, 56 N. Y. Super. Ct. 580 2522
v. Fitzpatrick, 125 N. Y. 124 2522
v. Flanagan, 36 Vt. 400 2855
v. Fort Plain Bank, 36 N. Y. 255 1097, 1099
v. Freeman, 9 Johns. 118 435
v. Gardner, 78 Ill. 568 1364, 1369
v. Hackensack I. Com., 44 N. J. L. 638 687, 688
v. Hall, 2 Vt. 9 443, 3938
v. Hastings, 6 Cal. 126 936
v. Hastings & D. R. Co., 18 Minn. 260 402, 413, 414, 3759, 3861, 3876
v. Haught, 14 Tex. 243 3287
v. Helm, 55 Mo. 468 813, 816
v. Hill, 16 Me. 215 542
v. Huggins, 73 Mo. App. 140 2780
v. Junger, 158 Iowa 449 4685
v. Kearney, 2 E. D. Smith 42 685
v. Kelly. Ry. & M. 157 157
v. Keystone Mfg. Co., 41 Fed. 595 4475
v. Kline, 119 N. Y. Supp. 280 2598
v. Lambard, 80 Cal. 426 1124
v. Lancashire, etc., R. Co., L. R. 4 C. P. 739 161
v. Lawson, 17 Gratt. 250 4528
v. Loraine Mfg. Co., 29 R. I. 333 1415, 3740, 3827
v. McGreevy, 17 Manitoba 115 2670
v. McKenzie, 32 L. J. (C. P.) 92 3014
v. McMillan, 7 Port. 73 1355, 1941, 1946, 1947
v. Mahnken, 41 N. J. Eq. 332 721
v. Main, 3 Ind. App. 232 4979
v. New Jersey S. Co., 151 N. Y. 163 3530, 3539
v. Nichols, 19 Pick. 275 764, 2607
v. O'Connor, 100 Mass. 515 4173
v. Oklahoma City, 20 Okla. 519 12
v. Palmer, 30 Pa. 346 1009, 1240
v. Pugh, 7 Cal. 150 2545
v. Rivers, 11 Barb. 390 1390
v. Robertson, 37 Ill. 45 1171, 1879
v. Robinson, 65 Ala. 586 35, 2922
v. Rutherford, 13 Ore. 78 806
v. St. Louis, etc., R. Co., 149 Mo. App. 278 1288, 1325
v. Saunders, 89 Miss. 784 1583
v. Saunders, 93 Miss. 520 1132

[REFERENCES ARE TO PAGES]

Adams v. Sayre, 70 Ala. 318 2902
v. Seaman, 82 Cal. 636 1924
v. Spaulding, 12 Conn. 350 1634
v. Squires, 61 Ill. App. 513 665, 668
v. Stadler, 78 Ill. App. 432 3893
v. Stevens, 26 Wend. 451 2489
v. Sullivan, 100 Ind. 8 369, 2294, 2297
v. Thompson, 18 Neb. 541 1792
v. Tucker, 6 Colo. App. 393 724
v. Turrentine, 8 Ired. 147 1618
v. Waggoner, 33 Ind. 531 465, 501, 4783
v. Way, 33 Conn. 419 962
v. Weissner, — Misc. (N. Y.) —, 147 N. Y. Supp. 946 665
v. Werner, 120 Mich. 432 3126, 3127
v. Wildes, 107 Mass. 123 361
v. Wilson, 12 Metc. (Mass.) 138 1857
v. Woonsocket Co., 11 Metc. (Mass.) 327 2468
v. Wordley, 1 M. & W. 374 1853, 1857
v. Wright, 74 Conn. 551 4351, 4357
v. Wylie, 1 Nott & McC. 78 533, 2047
v. Young, 44 Ohio St. 80 68
Adams Exp. Co. v. Berry, 35 App. D. C. 208 1415, 3418
v. Byers, 177 Ind. 33 4938
v. Cook, 162 Ky. 592 3339
v. Croninger, 226 U. S. 491 3337, 3338
v. Egbert, 36 Pa. 360 269, 2584, 2638
v. Green, 112 Va. 527 3412, 3413, 3419
v. Harris, 120 Ind. 73 803
v. Hoeing, 9 Ky. L. Rep. 814 3398
v. Milton, 11 Bush 49 1005, 1102
v. Stettaners, 61 Ill. 184 3335
v. Walker, 119 Ky. 121 3419
v. Welborn, — Ind. App. —, 108 N. E. 163 3338
Adams Mach. Co. v. Castleberry, 92 Ark. 310 2415, 2435
v. Senter, 26 Mich. 73 2226
v. South State L. Co., 2 Ala. App. 471 2339, 2636
Adams & F. H. Co. v. Tomlinson, 58 Iowa 129 2815
Adamson v. Izor, 76 Ohio 64 1691
v. Jarvis, 4 Bing. 66 2858, 2977, 2978
v. Norfolk & P. T. Co., 111 Va. 556 147
v. Petersen, 35 Minn. 529 4284
v. Raymer, 94 Wis. 242 4585, 4586, 4588
v. Reid, 6 Vict. L. R. (Eq.) 164 1121, 1131
v. Rose, 30 Ind. 380 3196
Aday v. Echols, 18 Ala. 353 2047
Adcock v. Marsh, 8 Ired. 360 4524
v. Oregon R. Co., 45 Ore. 173 1379, 1502, 1506, 4683
Addams v. Heffernan, 9 Watts 529 1085, 1086
Adden v. White Mts. N. H. R., 55 N. H. 413 3977, 3978, 4020, 4107, 4115
Addie v. National City Bank, 45 N. Y. 735 630
Addington v. Allen, 11 Wend. 374 4387
v. Cullinane, 28 Mo. App. 238 4493, 4494, 4495
v. Western & A. R. Co., 93 Ga. 566 39, 1522
Addis v. Gramophone Co., [1909] App. Cas. 488 343, 355, 2549, 2561, 2572
Addison v. Williamson, 5 Jurist 466 1482
Adelaide T. Carleton, The, 215 Fed. 932 2717, 2726
Aderholt v. Embry, 78 Ala. 185 703
v. Seaboard A. L. R., 152 N. C. 411 766
Adger v. Pringle, 11 S. C. 527 664, 678
Adkin v. Pillen, 136 Mich. 682 4644
Adkins v. Indianapolis S. R. Co., 165 Ill. App. 300 766
v. Kendrick, 131 Ky. 779 1399, 4981, 4983
v. Tomlinson, 121 Mo. 487 2056, 2061
v. Ware, 35 Tex. 577 1134
v. Williams, 23 Ga. 222 4514
Adlard v. Muldoon, 45 Ill. 193 2667, 2674
Adler v. Desser (Misc.), 110 N. Y. Supp. 196 4742
v. Fenton, 24 How. 407 4428
v. Kiber, 5 Tex. Civ. App. 415 2237
v. Martin, 179 Ala. 97 4867
v. Newcomb, 22 Dill. 45 1599
v. Potter, 57 Ala. 571 1789
v. Pruitt, 169 Ala. 213 158, 3858, 3936
Adlin v. Grove, 41 N. H. 465 1503
Adoue v. Wettermark, 36 Tex. Civ. App. 585 1281, 1322
Adreon v. Hawkins, 4 Har. & J. 319 3102
Adriance v. Brooks, 12 Tex. 279 1010
Adsit v. Brady, 4 Hill 630 1594
Adventure, The, 8 Cranch 221 2725
Advertiser Co. v. Jones, 169 Ala. 196 4503, 4508, 4510, 4548, 4585, 4590
Ady v. Freeman, 90 Iowa 402 1725
Ætna Ind. Co. v. Fuller, 111 Md. 321 2589, 2685
v. Waters, 110 Md. 673 2744
Ætna Ins. Co. v. Church, 21 Ohio St. 492 2902
v. Fowler, 108 Mich. 557 2796
v. Johnson, 11 Bush 587 836, 3023, 3042
v. Sabine, 6 McLean 393 2969
v. Stevens, 48 Ill. 31 3020
v. Tyler, 16 Wend. 385 3019, 3063
Ætna L. Ins. Co. v. Bowling Green G. Co., 150 Ky. 732 2873, 2878, 2879
v. Nexsen, 84 Ind. 347 235, 2552, 2574
v. Paul, 10 Ill. App. 431 3083
Ætna S. & I. Works v. Kossuth County, 79 Iowa 40 2682
A. F. Shapleigh Hardware Co. v. Pritchard, 42 Okla. 252 1616
Agate v. Lowenbein, 6 Daly 291 3836
Agawam Bank v. Straver, 18 N. Y. 502 2761
A. G. Breitweiser Lumber Co. v. Crick, 55 Pa. Super. Ct. 72 2357
Age-Herald Pub. Co. v. Waterman, 188 Ala. 272 4518
Agen v. Nelson, 51 Wash. 431 3121
Agincourt S. S. Co. v. Eastern Extension, etc., Tel. Co., [1907] 2 K. B. 305 286, 303
Agius v. Great Western C. Co., [1899] 1 Q. B. 413 50, 194, 197, 298, 303, 2350
Agler v. Michigan Agr. College, 181 Mich. 559 5183
Agne v. Skewis, 98 Minn. 32 4286
Agnew v. Bell, 4 Watts 31 2853, 2865
v. Johnson, 22 Pa. 471 1363, 1368, 4211
Agra v. Leighton, L. R. 2 Ex. 56 1816, 1833
Agricultural Nat. Bank v. Sheffield, 4 Hun 421 1161, 1878, 1879
Agricultural, etc., Ass'n v. State, 71 Md. 86 4931
A. Guckenheimer & Bros. Co. v. Kann, 243 Pa. 75 2853
Aguire v. Packard, 14 Cal. 171 1186

[REFERENCES ARE TO PAGES]

Ahearn v. Connell, 72 N. H. 238 340, 4163
Ahern v. Steele, 115 N. Y. 203 3842, 3844
Ahl v. Ahl, 60 Md. 207 1555
Ahler v. Smiley, 163 Cal. 200 2260
Ahlers v. Harrison, 131 Iowa 289 834
Ahrens v. Adler, 33 Cal. 608 4392
v. Fenton, 138 Iowa 559 825, 1310, 1311, 1506, 1513, 4629
v. Rochester, 97 App. Div. (N. Y.) 480 3850, 3881
Ah Thaie v. Quan Wan, 3 Cal. 216 306, 1705, 1719
Aid, The, 1 Hagg 84 2727
Aiken, In re, 262 Mo. 403 3961, 3965, 4107
Aiken v. Benedict, 39 Barb. 400 3839
v. Bridgman, 37 Vt. 249 525
v. Buck, 1 Wend. 466 4173
v. Leathers, 40 La. Ann. 23 1721, 1725, 1728
v. McDonald, 43 S. C. 29 2112, 2122
v. Telegraph Co., 5 S. C. 358 3546
v. Western U. Tel. Co., 69 Iowa 31 3547
Aikin v. Peay, 5 Strobh. 15 1019, 1020, 2854
v. Perry, 119 Ga. 263 3243
v. Philadelphia, 9 Pa. Super. Ct. 502 4694
Ailstock v. Moore L. Co., 104 Va. 565 4601, 4605
Ainley v. Manhattan R. Co., 47 Hun 206 4759
Ainslie v. Mayor, etc., 1 Barb. 168 3696
v. Wilson, 7 Cow. 668 2842
Ainsworth v. Allen, Kirby 145 422
v. Bowen, 9 Wis. 348 539
v. Lakin, 180 Mass. 397 1137
v. Partillo, 13 Ala. 461 2946
v. Ritt, 38 Cal. 89 3142
Aird v. Alexander, 72 Miss. 358 2053
v. Fireman's Journal Co., 10 Daly 254 4571
Aireton v. Davis, 9 Bing. 740 1628
Airey v. Pullman P. C. Co., 50 La. Ann. 648 3449, 3456
Aitken v. Ernsthausen, [1894] 1 Q. B. 773 3269, 3275
v. Wells River, 70 Vt. 308 11
Ajax-Grieb R. Co. v. Byars, — Tex. Civ. App. —, 153 S. W. 921 531, 2237
Ajello v. Worsley, [1898] 1 Ch. Div. 274 13
Akaba, The, 54 Fed. 197 2728
Akard v. Western U. Tel. Co. (Tex. Civ. App.) 44 S. W. 538 3625
Aken v. Clark, 146 Iowa 436 1443, 2242
Akerly v. Vilas, 21 Wis. 88 555, 2212
v. Vilas, 21 Wis. 109 2073, 2209, 2212
Akin v. Bradley E. & M. Co., 48 Wash. 97 151, 152
v. Rice, 137 Mo. App. 147 1721
Alabama, The, 92 U. S. 695 5017
Alabama C. Co. v. Geiss, 143 Ala. 591 170, 203, 205, 2273, 2345
Alabama Cent. R. Co. v. Musgrove, 169 Ala. 424 3963, 4034, 4127
Alabama City G. & A. R. Co. v. Appleton, 171 Ala. 324 4758
v. Brady, 160 Ala. 615 475, 3381
v. City of Gadsden, 185 Ala. 263 745, 1196, 1206
v. Sampley, 169 Ala. 372 3468
Alabama Co. v. Reynolds, 79 Ala. 497 1279
Alabama Consol. Coal & Iron Co. v. Cowden, 175 Ala. 108 1279
v. Turner, 145 Ala. 639 1443
Alabama Consol. Coal & Iron Co. v. Vines, 151 Ala. 398 3846, 3856, 3860, 3886, 3892
Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51 3083
Alabama G. S. R. Co. v. Arnold, 84 Ala. 159 1281, 1385
v. Arrington, 1 Ala. App. 385 1309, 3508
v. Bailey, 112 Ala. 167 4657, 4660, 4815
v. Burgess, 114 Ala. 587 4657
v. Burgess, 119 Ala. 555 4830, 4834
v. Burkett, 42 Ala. 83 1433, 4094, 4120
v. Carroll, 84 Fed. 772 413, 4728
v. Chapman, 80 Ala. 615 111
v. Chapman, 83 Ala. 453 146
v. Davis, 119 Ala. 572 4657, 4663, 4730, 4733
v. Elliott, 150 Ala. 381 140, 141
v. Frazier, 93 Ala. 45 1279, 1344, 4692, 4774
v. Hill, 90 Ala. 71 1268, 1462, 1467
v. Hill, 93 Ala. 514 1281, 4654
v. Knox, 184 Ala. 485 3529
v. Little, 71 Ala. 611 20
v. McAlpine, 75 Ala. 113 1141
v. McWhorter, 156 Ala. 269 4872
v. Ouarles, 145 Ala. 436 140, 141
v. Roberts, 113 Tenn. 488 1502
v. Sellers, 93 Ala. 9 1276, 1325, 3447, 3450, 3453, 3508
v. Siniard, 123 Ala. 557 4730
v. Tapia, 94 Ala. 226 3444, 3474
v. Wilkinson, 77 Ga. 75 3452
v. Yarbrough, 83 Ala. 238 4679, 4692, 4714
Alabama I. Works v. Hurley, 86 Ala. 217 2632
Alabama Midland R. Co. v. Coskry, 92 Ala. 254 475, 487
Alabama Mineral R. Co. v. Jones, 114 Ala. 519 4872, 4878, 4882
v. Jones, 121 Ala. 113 38, 4912
Alabama Power Co. v. Carden, — Ala. —, 66 So. 596 3961, 3971, 4001
v. Keystone Lime Co., — Ala. —, 67 So. 833 3961, 4066
Alabama S. Co. v. Dewey, 156 Ala. 530 2462, 2482
Alabama S. & J. Co. v. Kratzer I. C. Co., 2 Ala. App. 604 477, 1414
Alabama S. & W. Co. v. Griffin, 149 Ala. 423 4909, 4937, 4939
v. Wrenn, 136 Ala. 475 2699
Alabama State L. Co. v. Reed, 99 Ala. 19 1694, 1701
v. Slaton, 120 Ala. 259 4161
Alabama & V. R. Co. v. Baldwin (Miss.) 52 So. 358 72
v. Bloom, 71 Miss. 247 3951, 3952
v. Hanes, 69 Miss. 160 134, 1391, 3456
v. King, 93 Miss. 379 3841
v. Livingston, 84 Miss. 1 3506
v. McKenna, 104 Miss. 843 3323
v. Morris, 103 Miss. 511 1507, 3544
Alair v. Northern Pac. R. Co., 53 Minn. 160 3333, 3335, 3414
Alameda v. Cohen, 133 Cal. 5 4130
Alamo, The, 75 Fed. 602 2728
Alamo M. Co. v. Hercules I. Works, 1 Tex. Civ. App. 683 2627, 2634, 2655
Alaska, The, 44 Fed. 498 5010, 5012
Alaska E. Co. v. United States, 44 Ct. of Cls. 392 2726
Alaska F. & L. Co. v. Chase 128 Fed. 886 2548, 2558
Alaska S. Co. v. Standard B. Co., 158 Cal. 567 2296

[REFERENCES ARE TO PAGES]

Alaska S. S. Co. v. Collins, 127 Fed. 937 4185, 4197
v. Inland Nav. Co., 211 Fed. 840 4993
Alau v. Everett, 7 Hawaii 82 4840
Albany v. Abbott, 61 N. H. 157 977
Albany City Ins. Co. v. Whitney, 70 Pa. 248 3033
Albany Northern R. Co. v. Lansing, 16 Barb. 68 3972
Albany P. Co. v. Hugger, 4 Ga. App. 771 188, 197, 2627, 2629, 2630
Albany St., In re, 11 Wend. 149 4040
Albany & N. R. Co. v. Merchants' & F.'s Bank, 137 Ga. 391 3390
v. Wheeler, 6 Ga. App. 270 143, 1136
Albea v. Griffin, 2 Dev. & B. Eq. 9 2005
Albee v. Webster, 16 N. H. 362 361
Albeitz v. d'Arcambol, 109 Ill. App. 505 991
Albemarle L. Co. v. Wilcox, 105 N. C. 341 2221
Alber v. Froelich, 39 Ohio St. 245 1801
Albers v. Norton, 147 Ky. 751 1036
v. Western U. Tel. Co., 98 Iowa 51 3555
Albers C. Co. v. Spencer (Mo. App.) 139 S. W. 321 1730, 1734, 1737
Albert, The, 56 Fed. 721 2719
Albert v. Bleeker St., etc., R. Co., 2 Daly 389 218, 4179, 4183
v. Mutual L. Ins. Co., 122 N. C. 92 3050
v. Sanford, 201 Mo. 117 1120
Albert Miller & Co. v. Wilkins, 126 Fed. 404, 209 Fed. 582 4751
Alberti v. New York, etc., R. Co., 118 N. Y. 77 327, 1474
Alberts v. Albertz, 78 Wis. 72 3671, 3686, 3687, 3688, 3689
v. Husenetter, 77 Neb. 699 3774
v. Stearns, 50 Mich. 349 2545, 2575
Albes v. Southern R. Co., 164 Ala. 356 12
Albey v. Weingart, 71 N. J. L. 92 3197, 3203
Albin Co. v. Mumford, 21 Ky. L. Rep. 1613 4633
Albion Lincoln, The, 2 Low. 71 2734
Albion L. Co. v. Lowell, 20 Cal. App. 782 2359, 2368
Albion L. Works v. Citizens' Ins. Co., 3 Fed. 197 1221
Albion P. M. Co. v. Wyllie, 77 Fed. 541 2509
Albrecht v. Patterson, 12 Vict. L. R. 821 4541
v. Raemus, 4 Current Notes 39 4268
v. Treitschke, 17 Neb. 205 15
Albright v. Phoenix Ins. Co., 72 Kan. 591 2902
Albury v. Cargo of Lugano, 215 Fed. 963 2726, 2728, 2731, 2732, 2737
Alcorn v. Adams Exp. Co., 148 Ky. 352 3486
v. Powell, 22 Ky. L. Rep. 1353 4519
Alcott v. Davison, 2 How. Pr. 44 589
Aldaz v. Gay, 7 Phillip. Isl. 268 2547, 2561
Alden v. Camden A. R. Mach. Co., 107 Me. 508 674
v. Mayfield, 163 Cal. 200 3209
v. Pearson, 3 Gray 342 3386
v. Wright, 47 Minn. 225 4425
Alder v. Keighley, 15 M. & W. 117 188, 458, 2280
Alderman v. French, 1 Pick. 1 471, 4568, 4577
v Roesel, 52 S. C. 162 1655
Alderson v. Houston, 154 Cal. 1 384, 407, 409, 410, 502, 2573
v. Kahle, 73 W. Va. 690 468, 4588, 4592
v. Mendes, 16 Nev. 298 452
Alderton v. Williams, 139 Mich. 296 282, 294
Aldis v. Stewart, 4 N. Y. Misc. 389 3679
v. Union E. R. Co., 203 Ill. 567 4085
Aldrich v. Aldrich, 56 Vt. 324 2870
v. Bay State C. Co., 186 Mass. 489 1442
v. Blatchford, 175 Mass. 396 589
v. Boston, etc., Co., 100 Mass. 31 3512
v. Campbell, 4 Gray 284 525
v. Cheshire R. Co., 21 N. H. 359 399, 3975
v. Chubb, 35 Mich. 350 2788
v. Cooper, 8 Ves. 391 572
v. Dunham, 16 Ill. 403 1014
v. Goodell, 75 Ill. 452 677
v. Gorham, 77 Me. 287 103
v. Higgins, 77 Conn. 370 4210, 4222, 4223
v. Inland Empire Tel. & T. Co., 62 Wash. 173 1531, 4623, 4647
v. Jackson, 5 R. I. 218 2383
v. Lyman, 6 R. I. 98 1527
v. Maher, 153 Ill. App. 413 1121
v. Metropolitan West Side E. R. Co., 195 Ill. 456 3952
v. Palmer, 24 Cal. 513 1495, 4792
v. Parnell, 147 Mass. 409 448, 773
v. Press P. Co., 9 Minn. 133 1332
v. Reynolds, 1 Barb. Ch. 613 1719, 1732, 1753
v. Sager, 9 Hun 537 57, 60
v. Scribner, 154 Mich. 23 4383
v. Stockwell, 9 Allen 45 1824, 1826, 1828
v. Wetmore, 56 Minn. 20 3907, 3919
v. Wilmarth, 3 S. D. 523 2665
Aldridge v. Board of Education, 15 Okla. 354 4053
v. Johnson, 7 El. & B. 885 2227
v. McClelland, 36 N. J. Eq. 288 1023, 1121
Aldworth v. Lynn, 153 Mass. 53 3853, 3869
Aledo T. R. Co. v. Butler, 246 Ill. 406 3987
Aleppo, The, 7 Benc. 121, Fed. Cas. No. 158 3393
Alerding v. Allison, 31 Ind. App. 397 639
Alexander v. Alexander, 52 Ill. App. 195 3097
v. Baltimore, 5 Gill 383 3957
v. Bishop, 59 Iowa 572 178, 250, 3189, 3190, 3220
v. Bradley, 3 Bush 667 3725
v. Breeden, 14 B. Mon. 154 254
v. Bridgford, 59 Ark. 195 2159, 2163
v. Byers, 19 Ind. 301 645
v. Byrd, 75 Va. 690 2814, 2821
v. Caldwell, 61 Ala. 543 827
v. Capitol Lumber Co., 181 Ind. 527 2794
v. Colcord, 85 Ill. 323 306, 1725, 1742
v. Continental Ins. Co., 67 Wis. 422 3051
v. Durkee, 112 N. Y. 655 580
v. Gardner, 1 Bing. N. C. 671 2227
v. Gardner, 130 Ky. 785 1713
v. Gish, 88 Ky. 13 1718, 1759, 1760
v. Hazelrigg, 123 Ky. 677 1849
v. Henry, 12 Rep. of Pat. Cas. 360 4447, 4485
v. Herr, 11 Pa. 537 3698, 3701, 4627
v. Jacoby, 23 Ohio St. 358 306, 1426, 1690, 1693, 1703, 1704, 1707

[REFERENCES ARE TO PAGES]

Alexander v. Jenkins, [1892] 1 Q. B. 797 4503
v. Kerr, 2 Rawle 83 3846
v. Macauley, 6 Md. 359 2309, 2318, 2330, 2333
v. New Orleans R. & L. Co., 129 La. 959 3468
v. Oneida County, 76 Wis. 56 1042
v. Railway Co., 34 L. J. [Q. B.] 152 4582
v. St. Louis S. R. Co., 57 Tex. Civ. App. 407 95, 97
v. St. Louis S. R. Co. (Tex. Civ. App.) 122 S. W. 572 3820
v. Schreiber, 10 Mo. 460 2148
v. Staley, 110 Iowa 607 2136, 2139
v. Stewart B. Co., 21 Pa. Super. Ct. 526 3848
v. Thomas, 25 Ind. 268 1495
v. Troutman, 1 Ga. 469 971
v. United States, 39 Ct. of Cls. 383 3097, 3834
v. United States, 57 Fed. 828 742
v. Western U. Tel. Co., 66 Miss. 161 3566, 3595
v. Western U. Tel. Co., 126 Fed. 445 3644
v. Western U. Tel. Co., 141 N. C. 75 3635
v. Western U. Tel. Co., 158 N. C. 473 3556, 3611, 3631
v. Worman, 6 H. & N. 100 2469
Alexander's Est., 156 Pa. 368 771
Alexandre v. Sun Ins. Co., 51 N. Y. 253 3028
Alexandria, City of, 40 Fed. 697 4995
Alexandrie v. Saloy, 14 La. Ann. 327 820
Alexian Brothers v. Oshkosh, 95 Wis. 221 4044
Alfaro v. Davidson, 40 N. Y. Super. 87 2551, 2574
Alfonso v. United States, 2 Story 421 1419
Alford v. Baker, 53 Ind. 279 661
Alfred v. Farrow, 8 Q. B. 854 1529
v. Fitzjames, 3 Esp. 3 2471
Alfson v. Bush, 182 N. Y. 393 4856
Algeo v. Algeo, 10 S. & R. 235 2556, 2662
Alger v. Kennedy, 49 Vt. 109 3126
Alger-F. Co. v. Tracy, 98 Minn. 432 2236, 2255
Algitha, The, 17 Fed. 551 2724
Alice, etc., Tel. Co. v. Billingsley, 33 Tex. Civ. App. 452 104
Alie v. Nadeau, 93 Me. 282 371
Alison's Case, L. R. 15 Eq. 394 1115
Alkahest Lyceum System v. Curry, 6 Ga. App. 625 237
Alkire G. Co. v. Tagart, 60 Mo. App. 389 384
Allaire v. Hartshorne, 21 N. J. L. 665 1822, 1830
v. Ouland, 2 Johns. Cas. 54 2977
v. St. Luke's Hospital, 184 Ill. 359, aff'g 76 Ill. App. 441 30
v. Whitney, 1 Hill 484 26, 38, 533, 2456, 3196, 3260, 4382
Allaire Works v. Guion, 10 Barb. 55 538, 564, 2581
Allamon v. Mayor, 43 Barb. 33 2693, 2709
Allan v. Eldred, 50 Wis. 135 670
v. Kenning, 9 Bing. 618 2749
v. Lake, 18 Q. B. 560 2379, 2388
v. Mawson, 4 Camp. 115 2930
v. Suydam, 17 Wend. 371 2930
Allanback v. Utt, 51 N. Y. 654 1269
Allegaert v. Smart, 2 Penny. 320 3128
Alleghany v. Black, 99 Pa. 152 4117
v. Campbell, 107 Pa. 530 1043, 1139
Alleghany County v. Van Campen, 3 Wend. 49 1558
Alleghany I. Co. v. Teaford, 96 Va. 372 47, 2251
Allegheny County v. Gibson, 90 Pa. 397 5
Allegheny R. Co. v. Casey, 79 Pa. 84 631
Allegre v. Insurance Co., 6 H. & J. 408 3022
Allen v. Addington, 7 Wend. 9 4372
v. American B. & L. Ass'n, 49 Minn. 544 4296
v. American B. & L. Ass'n, 55 Minn. 86 4301
v. Ames College R. Co., 106 Iowa 602 1477, 4752
v. Anderson, 3 Humph. 581 2390, 2405
v. Anderson, 2 Bibb 415 1986
v. Atkinson, 21 Mich. 351 1989, 2008, 2052
v. Bainbridge, 145 Mich. 366 1536
v. Baker, 86 N. C. 91 3675, 3683, 3684, 3688
v. Barrett, 100 Iowa 16 489
v. Bates, 1 Hilt. 221 3289
v. Bear Creek C. Co., 43 Mont. 269 311, 436, 1506, 4787
v. Bland, — Tex. Civ. App. —, 168 S. W. 35 1373
v. Boston, 137 Mass. 319 3996, 4040, 4041, 4055
v. Boston, 159 Mass. 324 3904, 3909
v. Brazier, 2 Bailey 55 889, 892
v. Brightmire, 20 Johns 365 2768
v. Brown, 5 Lans. 511 1732
v. Brown, 39 Iowa 330 736
v. Brown, 51 Barb. 86 2926
v. Burns, 201 Mass. 74 2666
v. Butman, 138 Mass. 586 4359
v. Cable, 180 Ill. App. 472 1270, 4272
v. Camden & P. S. F. Co., 46 N. J. L. 198 3476
v. Carman, 1 E. D. Smith 692 630
v. Central Counties L. Co., 21 Cal. App. 163 1032, 2465
v. Charlestown, 109 Mass. 243 4114
v. Cheever, 61 N. H. 32 770, 820
v. Chicago P. T. Co., 205 Mass. 569 2552
v. Chicago & N. W. R. Co., 145 Wis. 263 1454, 4178
v. Clark, 11 Week. Rep. 304 2943
v. Coates, 29 Minn. 46 531, 550, 4298
v. Codman, 139 Mass. 136 4610, 4634, 4645
v. Craig, 13 N. J. L. 294 1534
v. Crofoot, 2 Wend. 515 11
v. Culver, 3 Denio 284 704, 714, 725, 728, 736, 3150
v. Darby, 1 Show. 99 4348
v. Davis, 53 Mo. App. 15 4176
v. Deacon, 21 Fed. 122 4437
v. Doyle, 33 Me. 420 1621
v. Durham T. Co., 144 N. C. 288 4735
v. Dykers, 3 Hill 593 4211
v. Eneroth, 111 Minn. 395 403, 2758
v. Fairbanks, 45 Fed. 445 1019
v. Field, 130 Fed. 641 231, 320, 377, 1419, 1427, 2255, 2259, 2261, 2264
v. Ford, 19 Pick. 217 2228
v. Forsythe, 160 Mo. App. 262 4980, 4982

[REFERENCES ARE TO PAGES]

Allen v. Fox, 51 N. Y. 562 1664, 4314, 4327, 4351
v. Fromme, 141 App. Div. (N. Y.) 362 4837, 4840
v. Furbish, 4 Gray 504 534, 1866
v. Globe G. & M. Co., 156 Cal. 286 1998
v. Gray, 63 N. Y. Misc. 219 1449
v. Grider, 24 Ark. 271 1570
v. Hammond, 11 Pet. 63 1828
v. Harris, 113 Ga. 107 1447
v. Henn, 197 Ill. 486 1835, 1847
v. Hillman, 12 Pick. 101 4504
v. Hitch, 2 Curtis 147 1388
v. Hooker, 25 Vt. 137 536
v. Hopkins, 13 M. & W. 93 2396
v. Jarvis, 20 Conn. 38 2236
v. Jones, 8 Minn. 202 706
v. Jones, 79 Fed. 698 1752, 1761
v. Judson, 71 N. Y. 77 4359
v. Kelly, 55 App. Div. (N. Y.) 454 1639, 1644
v. Kelly, 171 N. Y. 1 1654
v. Kemble, 6 Moore P. C. 314 1151, 1905
v. Kennedy, 91 Mo. 324 2057, 2069
v. Kimball, 23 Pick. 473 715, 717
v. Los Molinos Land Co., 25 Cal. App. 206 2617
v. McConihe, 124 N. Y. 342 2950, 2951
v. McCoy, 8 Ohio 418 3717
v. McKibbin, 5 Mich. 449 494, 537, 542, 2529, 2532, 2667, 2671, 2682
v. McNew, 8 Humph. 46 2664
v. Macon, etc., R. Co., 107 Ga. 838 3734, 3758, 3759
v. Manhattan R. Co., 60 N. Y. Super. Ct. 230 4759
v. Maronne, 93 Tenn. 161 2548, 2558, 2564
v. Merchants' Bank, 22 Wend. 215 1151
v. Miller, 99 Miss. 75 2097, 2115, 2117, 2120
v. Millville, 87 N. J. L. 356 5202
v. Murray, 87 Wis. 41 2688, 2697, 2701, 2706
v. Napier, Maynard & Plunkett, — Ga. —, 85 S. E. 1013 5115
v. New York, etc., R. Co., 85 Conn. 709 1500
v. O'Donald, 23 Fed. 573 2804, 2818
v. Oxnard, 152 Pa. 621 1248
v. Pioneer Press Co., 40 Minn. 117 4592
v. Ramey, 4 Strobh. 30 1600
v. Robinson, 2 Barb. 341 543
v. Roundtree, 1 Spears 80 2397
v. Ruland, 79 Conn. 405 424, 432
v. Rundle, 50 Conn. 1 2787, 2788
v. Rundle, 50 Conn. 588 2789
v. St. Louis & S. F. R. Co., 184 Mo. App. 492 4745
v. Savings Bank, 4 Mo. App. 66 2750
v. Shackelton, 15 Ohio St. 145 533
v. Smith, 12 N. J. L. 159 1358
v. Smith, 63 Mo. 103 3706
v. South Boston R. Co., 150 Mass. 200 4404
v. State, 6 Blackf. 252 1561, 1579
v. Suydam, 17 Wend. 368 26
v. Suydam, 20 Wend. 321 287, 495, 2929, 2930, 2931, 2969
v. Thayer, 17 Mass. 299 3733
v. Thrall, 36 Vt. 711 2696, 2714
v. Todd, 6 Lans. 222 2392
v. Tompkins, 136 N. C. 208 2436
v. Truesdell, 135 Mass. 75 2420, 4370
Allen v. Tuscarora Val. R. Co., 229 Pa. 97 5126
v. Urdangen, 141 Iowa 280 2478
v. Watson, 16 Johns. 205 1556
v. Watt, 79 Ill. 284 692
v. Wells, Fargo & Co., 48 N. Y. Misc. 610 3425
v. Whitlark, 99 Mich. 492 2561
v. Wood, 3 Ired. Eq. 386 2868
v. Woodard, 125 Mass. 400 2790
v. Woonsocket Co., 13 R. I. 146 1074
v. Worthy, L. R. 5 Q. B. 193 3850
Allen County v. United States F. & G. Co., 122 Ky. 825 2743, 2748
Allender v. C., R. I. & P. R. R. Co., 37 Iowa 264 312, 323
Allendorph v. Banks, 8 Kan. App. 219 3236
Allentown & Co. T. Co. v. Lehigh Valley T. Co., 174 Pa. 273 4078
Allerton v. Allerton, 50 N. Y. 670 4416
Alley v. Adams, 44 Ala. 609 361
v. Charlotte P. & F. Co., 159 N. C. 327 4661, 4665, 4681
v. Daniel, 76 Ala. 403 4167
v. Neeley, 5 Blackf. 200 4512
v. Rogers, 19 Gratt. 366 611, 612, 658, 664
Allgor v. Stillwell, 6 N. J. L. 166 4609
Alliance Review P. Co. v. Valentine, 9 Ohio C. C. 387 4520, 4523
Alliance T. Co. v. Nettleton, H. Co., 74 Miss. 584 3733
v. Stewart, 115 Mo. 236 1715, 1721, 1729, 1735, 1757
Allied Silk Mfgrs. v. Erstein, — App. Div. — (N. Y.), 153 N. Y. S. 976 225
Allies v. Probyn, 5 Tyrwh. 1079 762
Alling v. Boston, etc., R. Co., 126 Mass. 121 3532
v. Trevor, 25 N. Y. Misc. 390 381
Allington & C. Mfg. Co. v. Detroit Red. Co., 133 Mich. 427 294
Allis v. Billing, 2 Cush. 19 759
v. Day, 14 Minn. 518 2478, 2486
v. McLean, 48 Mich. 428 245, 2617, 2626
v. Nanson, 41 Ind. 154 1391
v. Nininger, 25 Minn. 525 2117
Allison v. Chandler, 11 Mich. 542 47, 213, 245, 265, 267, 359, 1282, 1391, 1415, 1418, 3209, 3215, 3225, 3822, 4160
v. Cocke, 21 Ky. L. Rep. 434 2019
v. Cocke, 112 Ky. 212 1942
v. Dunwody, 100 Ga. 51 841, 863
v. Fredericksburg, 112 Va. 243 131
v. Hobbs, 96 Me. 26 433, 438, 4839
v. Horning, 22 Ohio St. 138 2481
v. Montgomery, 107 Pa. 455 1986, 2004
v. People, 6 Colo. App. 80 1602, 1604
v. People, 45 Ill. 37 1482
v. Pilkins, 11 Tex. Civ. App. 655 2069
v. Rutledge, 5 Yerg. 193 2767
v. Taylor, 3 B. Mon. 363 3710
Alloway v. Nashville, 88 Tenn. 510 1062, 3962, 4002, 4003, 4033, 4049, 4103, 4150, 4153
Allport v. Kelley, 2 Mont. 343 1728
Allred v. Bray, 41 Mo. 484 3825, 4179
Allshouse v. Ramsey, 6 Whart. 331 615, 807
Allsop v. Allsop, 5 H. & N. 534 157, 166, 3644, 4555
Allstan v. Contee, 4 Har. & J. 351 737
Allyn v. Providence R., 4 R. I. 457 4093
Almon v. Chicago & N. W. R. Co., 163 Iowa 449 3385

[REFERENCES ARE TO PAGES]

Almquist v. Wilcox, 115 Minn. 37 371, 4853
Almy v. Hunt, 48 Ill. 45 2147
v. Probate Court, 18 R. I. 612 1129
Alna v. Plummer, 4 Me. 258 1936
Aloff v. Scrimshaw, 2 Salk. 573 781
Alpena v. Title G. & S. Co., 159 Mich. 329 2754
Alpha C. Co. v. Bradley, 105 Iowa 537 2374, 2404, 2415
Alpha Mills v. Watertown S. E. Co., 116 N. C. 797 2363, 2451
Alpha Portland C. Co. v. Oliver, 125 Tenn. 135 2251, 2277
Alpin v. Morton, 21 Ohio St. 536 4513
Alsop v. Commercial Ins. Co., 1 Sumn. 451 3006
v. Lidden, 130 Ala. 548 4604
Alston v. Brashears, 4 Ark. 422 984
v. Connell, 145 N. C. 1 3710
v. Herring, 11 Ex. 822 456
v. Huggins, 2 Brev. 309 1363
Alsup v. Ray, 175 Ill. App. 621 4516
Alsworth v. Reppert, — Tex. Civ. App. —, 167 S. W. 1098 2444
Alt v. Weindenburg, 6 Bosw. 176 4173
Altair, The, [1897] Prob. Div. 105 2718
Althorf v. Wolfe, 22 N. Y. 355 489, 490, 4885
Althouse v. Alvord, 28 Wis. 577 1456, 2218
Altman v. Bungay Co. of New York, 161 App. Div. (N. Y.) 583 697
v. Fowler, 70 Mich. 57 1924
v. Rittershofer, 68 Mich. 287 1924
v. Western U. Tel. Co. (Misc.), 84 N. Y. Supp. 54 3575
Alton v. Chicago, etc., R. Co., 107 Minn. 457 1494
Alton, etc., R. Co. v. Carpenter, 14 Ill. 190 3957
Altoona E. E. & S. Co. v. Kittanning, etc., R. Co., 126 Fed. 559 2650, 2688, 2693
Altschuler v. Atchison, T. & S. F. R. Co., 155 Wis. 146 3367
Aluminum Co. v. Ramsey, 89 Ark. 522 4802
Aluminum Cooking Utensil Co. v. Chastain, 113 Ark. 31 2769
Alves v. Hodgson, 7 T. R. 241 1146
v. National Bank, 89 Ky. 126 978
Alvin F. & T. Ass'n v. Hartman, 146 Mo. App. 155 2387
Alvis v. Oglesby, 87 Tenn. 172 1124
Alvord v. United States, 13 Blatchf. 279 1586
Alwin v. Liesch, 86 Minn. 281 4506
Amann v. Chicago Con. T. Co., 148 Ill. App. 151 1330, 4676, 4693
v. Chicago Consol. Traction Co., 243 Ill. 263 208, 1416, 1502, 4721, 4736, 4747
Amarillo Nat. Life Ins. Co. v. Brown, — Tex. Civ. App. —, 166 S. W. 658 3082
Amas v. Milwaukee & N. R. Co., 67 Wis. 46 4883
Ambridge Borough v. Pittsburg & B. St. R. Co., 234 Pa. 157 888
Ambs v. Atchison, etc., R. Co., 114 Fed. 317 4613, 4614, 4615, 4633, 4634, 4635
Amdsen v. Atwood, 69 Vt. 527 3199
Am Ende v. Seabury, 43 Fed. 672 4458, 4461, 4474
Amer v. Longstreth, 10 Pa. 148 1260
America v. Burgett, 36 Ind. App. 453 868
American, The, 11 Blatch. 485 4998
American Acc. Co. v. Reigart, 92 Ky. 142 1792
American Agricultural C. Co. v. Rhodes, 139 Ga. 495 259
American Ass'n v. Short, 97 Ky. 502 1956
American B. N. Co. v. New York E. R. Co., 129 N. Y. 252 4084
American B. Soc. v. Wells, 68 Me. 572 1199
American B. W. Co. v. Thompson, 7 Rep. of Pat. Cas. 152 4447
v. Thompson, 44 Ch. Div. 274 4474
American B. & C. Co. v. Bullen B. Co., 29 Ore. 549 243
American B. & S. M. Co. v. Thornton, 28 Minn. 418 385
American Bank v. Baker, 4 Metc. (Mass.) 164 2804, 2810, 2811, 2819
American Bonding Co. v. Hurd, 143 Ky. 799 1674
v. Morrow, 80 Ark. 49 3094
v. National M's Bank, 97 Md. 598 2798
v. People, 46 Colo. 394 1645
v. Progressive P., etc., Ass'n, 101 Md. 323 2754
v. Pueblo I. Co., 150 Fed. 17 2743, 2798, 2804, 3121
v. Regents of University, 11 Idaho 163 1436, 2743, 2797, 3976
v. Richardson, 214 Fed. 897 2741
v. Welts, 193 Fed. 978 1592
American Brewing Co. v. United States, 33 Ct. of Cls. 349 657
American Bridge Co. v. American Dist. S. Co., 107 Minn. 140 2634
v. Boston, 202 Mass. 374 527
v. Camden R. I. Co., 135 Fed. 323 543, 2624
American C. Co. v. Cross, 8 Bush 472 3531
American C. B. & I. Works v. Galland-B. B. & M. Co., 30 Wash. 178 833, 886
American C. C. Co. v. Seitz, 101 Ind. 182 2091
American C. L. Co. v. Wilson, 198 Mass. 182 1713
American C. & F. Co. v. Clark, 32 Ind. App. 644 1417
v. Hill, 226 Ill. 227 4701
v. Spears, 146 Ky. 736 3858
American Canning Co. v. Flat Top G. Co., 68 W. Va. 698 2237, 2241, 2249, 2379
American Caramel Co. v. Mills, 162 Fed. 147 4437
American Cas. Ins. Co.'s Case, 82 Md. 535 1091
American Cent. Ins. Co. v. Antram, 86 Miss. 224 3008
v. Burkert, 11 Pa. Super. Ct. 427 2916
v. McLanahan, 11 Kan. 533 3067
v. Noe, 75 Ark. 406 3011
American China D. Co. v. Boyd, 148 Fed. 258 389, 2549, 2554, 2561
American Const. Co. v. Caswell (Tex. Civ. App.) 141 S. W. 1013 254, 3903, 3934
v. Davis, 141 S. W. 1019 3903, 3934
American Credit & Trust Co. v. Witz, 186 Ill. App. 184 2755
American Exchange Nat. Bank v. Goubert, 210 N. Y. 421 2749
v. Gregg, 138 Ill. 596 630
v. Swope, 46 Tex. Civ. App. 64 3127

[REFERENCES ARE TO PAGES]

American Exp. Co. v. Burke, 104 Miss. 275 3323, 3414
v. Jennings, 86 Miss. 329 172, 3322, 3371
v. Lesem, 39 Ill. 312 3425
v. Merten, 42 Okla. 492 3338
v. Parsons, 44 Ill. 312 4273
v. Patterson, 73 Ind. 430 4843
v. Sands, 55 Pa. 140 20, 3335
v. Second Nat. Bank, 69 Pa. 394 3385
American F. & F. Co. v. Settergren, 130 Wis. 338 2219
American F. & M. Co. v. Lindsay C. Co., 139 Ill. App. 548 1015
American Freehold L. M. Co. v. Brown, 54 Tex. Civ. App. 448 4531, 4549
American G. Co. v. Rayburn, 150 Mich. 616 2409, 2455
American-G. Nat. Bank v. Gray H. Co., 129 Ky. 105 4324
American Grocer Pub. Ass'n v. Grocer Pub. Co., 25 Hun 402 4487
American-H. E. & C. Co. v. Butler, 17 Cal. App. 764 1093
American H. L. Co. v. Dent, 151 Mo. App. 614 2279
American-H. Pub. Co. v. Miles, 68 N. Y. Misc. 334 294, 295
American-H. S. S. Co. v. Morse Dry D. & R. Co., 169 Fed. 678 2626, 2643
American H. & D. Co. v. Frey, 127 La. 183 4190, 4191
American H. & L. Co. v. Chalkley, 101 Va. 458 2225, 2241, 2244
American Home Sav. Bank Co. v. Guardian T. Co., 210 Pa. 320 2373, 2376
American I. Co. v. Luff, 12 Pa. Dist. 381 918
v. Pocomo Spring W. I. Co., 183 Fed. 193 3185
American I. & S. Mfg. Co. v. Beall, 101 Md. 423 2793
American Ins. Co. v. Bailey, 6 Ga. App. 424 3046
v. Durham, 12 Wend. 463 3000
v. Griswold, 14 Wend. 399 3009, 3022
v. Johnson, 1 Blatch. & H. 9 2737
v. McGehee L. Co., 93 Ark. 62 655
v. Ogden, 20 Wend. 287 3031
American L. Co. v. Hoffman, 108 Va. 363 3853
American L. Ins. Co. v. McAden, 109 Pa. 399 3084
American L. Ins. & T. Co. v. Schultz, 82 Pa. 46 3089
American L. M. Mfg. Co. v. Belcher (Tex. Civ. App.) 152 S. W. 853 2436
American L. P. Co. v. Davis, 108 Tenn. 251 1276
American Life & H. Ins. Co. v. Robertshaw, 26 Pa. 189 3077
American M. Co. v. Southern B. Co., 194 Mass. 89 659
v. Virginia M. Co., 91 Va. 272 626
American Mfg. Co. v. Klarquist, 47 Minn. 344 2229
American Motor Car Co. v. Robbins, 181 Ind. 417 4922, 4923, 4925
American Mut. Ins. Co. v. Bertram, 163 Ind. 51 1117
v. Fidelity & D. Co., 129 Ga. 126 2797
v. Hammond, 25 Colo. 367 4378, 4379, 4390, 4411
v. Morey, 69 S. W. 759 278
v. National W. P. Co., 77 Fed. 85 1245
American P. F. Co. v. Elliott, 151 N. C. 393 207, 208, 253, 1417, 2437
American P. Works v. Lawrence, 23 N. J. L. 9, 21 N. J. L. 248 11
American P. & E. Co. v. Walker, 87 Mo. App. 503 2257, 2260
American R. Co. of Porto Rico v. Birch, 224 U. S. 547 5022, 5131
v. Coronas, 230 Fed. 545 5123
v. Didrickson, 227 U. S. 145 rev'g 5 Porto Rico Fed. Rep. 401 4861, 5022, 5102, 5106
American Realty Co. v. Thompkins, 37 App. D. C. 87 477
American Rio Grande L. & I. Co. v. Mercedes P. Co. (Tex. Civ. App.) 155 S. W. 286 478, 2618, 3800
American S. Co. v. Ballman, 104 Fed. 634 2792
v. Fidelity T. Co., 179 Fed. 699, aff'g 175 Fed. 200 384
v. Foust, 12 Ind. App. 421 4673
v. Koen, 49 Tex. Civ. App. 98 1797
v. Lyons, 44 Tex. Civ. App. 150 2596, 2599
v. Morton, 32 Okla. 687 2982, 2986
v. Pacific S. Co., 81 Conn. 252 1038, 2873
v. Pauly, 170 U. S. 133 3094
v. Piatt, 67 Kan. 294 1631, 1635, 1637
v. Souers, 50 Ind. App. 475 60, 432
v. Vinsonhaler, 92 Neb. 1 2849
v. Woods, 105 Fed. 741, reh'g 106 Fed. 263 2605
American S. F. Co. v. Dean D. Co., 136 Iowa 312 1669
v. Futrall, 73 Ark. 464 4210
v. Shell, 160 N. C. 529 1136
American S. P. Co. v. De Grasse P. Co., 190 Fed. 39 4440, 4441
American S. S. Co. v. Rush, 100 N. Y. Supp. 1019 40
American S. & M. Co. v. St. Louis T. Co., 120 Mo. App. 410 4174
American S. & W. Co. v. Copeland, 159 N. C. 556 284, 2276
American Sand & Gravel Co. v. Spencer, 55 Ind. App. 523 1312, 3791, 3792, 3793, 4165
American Sav. Bank & T. Co. v. Mafridge, 60 Wash. 180 3118
American Seeding Mach. Co. v. Baker, 55 Ind. App. 625 753
American Silk D. & F. Co. v. Fuller's Exp. Co., 82 N. J. L. 704 3415
American Slicing Machine Co. v. Kuchukian, — Misc. (N. Y.) —, 147 N. Y. Supp. 352 697
American States S. Co. v. Milwaukee N. R. Co., 139 Wis. 199 3962, 4108, 4124, 4135
American Surety Co. of New York v. Pangburn, 182 Ind. 116 2745
American T. Co. v. Siegel, 221 Ill. 145 521, 2214
American T. P. Co. v. Guy, 25 Ind. App. 558 180
v. Williams, 30 Ind. App. 46 4665
American T. & B. Co. v. Boone, 102 Ga. 202 1134
American T. & L. Co. v. Baker-W. C. Co., 111 Md. 504 2524, 2575
American Tel. & T. Co. v. Pearce, 71 Md. 535 4146
v. St. Louis, etc., R. Co., 202 Mo. 656 4068
American U. Tel. Co. v. Daugherty, 98 Ala. 191 3549, 3562, 3563

[REFERENCES ARE TO PAGES]

American W. Co. v. Maaget, 86 Conn. 234 714, 730, 731, 736
v. Ray (Tex. Civ. App.) 150 S. W. 763 2380, 2439, 2443
American W. W. Co. v. Dougherty, 37 Neb. 373 4657, 4664
Americus v. Tower, 3 Ga. App. 159 4133
Americus G. Co. v. Brackett, 119 Ga. 489 2374, 2406
v. Roney, 129 Ga. 40 2547, 2558
Amerman v. Deane, 57 N. Y. Super. 175 1963
v. Deane, 132 N. Y. 355 387, 407, 414
Ames v. Bates, 119 Mass. 397 580, 584
v. Benjamin, 74 Minn. 335 1164
v. Chirburg, 152 Iowa 278 1685, 1695, 1707
v. Gilman, 10 Metc. (Mass.) 239 2489
v. Hilton, 70 Me. 36 3827
v. Huse, 55 Mo. App. 422 2801
v. Lamont, 107 Wis. 531 2508
v. Mississippi B. Co., 8 Minn. 467 361
v. Norwich L. Co., 122 App. Div. (N. Y.) 319 2404
v. Palmer, 42 Me. 197 4208, 4283
v. Schuesler, 14 Ala. 600 3099
v. Scudder, 11 Mo. App. 168, 83 Mo. 189 1124
v. Sutherland, 11 Ont. L. R. 417, 9 Ont. L. R. 631 2964
v. Williams, 74 Miss. 404 1642
Ames I. Works v. Rea, 56 Ark. 450 553
Ames P. & P. Co. v. Tucker, 8 Mo. App. 95 682
Amherst Bank v. Root, 2 Met. 522 1592
Ami Co. v. Tide Water L. Co., 51 Wash. 171 3927
Amiable Nancy, The, 3 Wheat. 546 1272, 1338, 2919, 4995, 4996, 5015
Amis v. Smith, 16 Pet. 303, 311 1050
Ammerman v. Jennings, 12 B. Mon. 135 571
Ammonett v. Harris, 1 Hen. & Munf. 488 1531
Ammons v. People, 11 Ill. 6 1642
v. Railroad, 138 N. C. 555 3460
v. Railroad, 140 N. C. 196 3502
Amonson v. Idaho Development Co., 25 Idaho 615 2003
Amor v. Fearon, 1 Perry & D. 398 2526
Amoretty v. City of Melbourne Bank, 13 Vict. L. R. 431 4255
Amory v. Delamirie, 1 Str. 504 4173
v. Hamilton, 17 Mass. 103 2907, 2956
v. McGregor, 15 Johns. 24 1107, 3401
v. Merryweather, 2 B. & C. 573 1825
v. Reliance Ins. Co., 208 Mass. 378 1089
v. Vreeland, 125 App. Div. (N. Y.) 850 4544
Amos v. Atlanta R. Co., 104 Ga. 809 4772
v. Cosby, 74 Ga. 793 2156
v. Delaware River F. Co., 228 Pa. 362 3341, 4747, 4753
v. Heatherly, 7 Dana 48 1121
v. Oakley, 131 Mass. 413 488
v. Western U. Tel. Co., 79 S. C. 259 3654, 3655
Amoskeag Mfg. Co. v. Garner, 4 Am. L. Times (N. S.) 176 4488
v. Goodale, 46 N. H. 53 37
v. Manchester, 70 N. H. 336 1021, 1065
v. Spear, 2 Sandf. 599 4484
v. Worcester, 60 N. H. 522 4038
Amperse v. Winslow, 75 Mich. 234 1620
Ampleman v. Citizens' Ins. Co., 35 Mo. 308 3012
Amsden v. Atwood, 69 Vt. 527 3190, 3206
v. Blaisdell, 60 Vt. 386 3102
v. Dubuque, etc., R. Co., 28 Iowa 542 2633
Amusement Syndicate Co. v. Milwaukee Mechanics' Ins. Co., 91 Kan. 67 3058
Amy v. Supervisors, 11 Wall. 136 495
Anchor M. Co. v. Walsh, 20 Mo. App. 107 4351
v. Walsh, 24 Mo. App. 97 4314, 4315
Ancrum v. Camden W., L. & I. Co., 82 S. C. 284 20, 833
v. Slone, 2 Spear 594 1101, 1138
Anctil v. Quebec, 33 Can. Sup. Ct. 347 400
Andalman v. Chicago & N. R. Co., 153 Ill. App. 169 4374
Anders v. Ellis, 87 N. C. 207 32
Anderson v. Anderson, 4 Dana 352 1814
v. Anderson, 55 Mo. App. 268 1728
v. Aupperle, 51 Ore. 556 4960, 4962, 4964, 4965
v. Balfour, [1910] 2 Ir. R. 497, 3 B. W. C. C. 588 5199
v. Beard, [1900] 2 Q. B. 260 2317
v. Blair, 118 Ga. 211 1559
v. Blair, 121 Ga. 120 1591
v. Board of Supervisors, 154 Iowa 497 3812
v. Brammer, 4 Ala. App. 596 2696
v. Buckton, 1 Str. 192 3815
v. Carlin, 24 Fla. 199 4315
v. Chicago, etc., Ins. Co., 21 Ill. 601 3129
v. Chicago, etc., R. Co., 35 Neb. 95 4870, 4906
v. Chicago, etc., R. Co., 84 Neb. 311 1443, 1445
v. Chicago, etc., R. Co., 85 Minn. 337 3841, 3907
v. Duffield, 8 Tex. 237 2405
v. Durant, 18 N. Y. 496 4290
v. Edams, The, 13 Fed. 135 2724, 2729
v. Evansville B. Ass'n, 49 Ind. App. 403 55, 430, 1304, 4430
v. Ewing, 3 Litt. 245 2329, 2330
v. Falconer, 30 Miss. 145 1760
v. Fielding, 92 Minn. 42 1395
v. First Nat. Bank, 5 N. D. 451 4213
v. First Nat. Bank, 6 N. D. 497 1929
v. First Nat. Bank, 144 Iowa 251 2793
v. Fisk, 36 Cal. 629 3709
v. Foley, 110 Minn. 151 4802
v. Frank, 42 Mo. App. 482 2242, 2249
v. Georgia, 2 Ga. 370 1119
v. Great Northern R. Co., 15 Idaho 513 4860, 4923, 4930
v. Green, 46 Ga. 361 1491
v. Griffith, 51 Ore. 116 721, 818
v. Halverson, 126 Iowa 125 443
v. Hayes, 101 Wis. 538 3234
v. Heileman B. Co., 104 Minn. 327 4363
v. Hilker, 38 Wash. 635 2696, 2701
v. Hillies, 12 C. B. 499 667
v. Hilton & D. L. Co., 121 Ga. 688 2352
v. International H. Co., 104 Minn. 49 1279, 1310, 1343
v. Issaquena County, 75 Miss. 873 1041
v. Joliet, 14 La. Ann. 114 1607
v. Kirby, 125 Ga. 62 3663, 3666
v. Knox, 20 Ala. 156 2164, 2187
v. Levan, 1 W. & S. 334 779
v. Lincoln, 5 How. (Miss.) 279 2197, 2212

[REFERENCES ARE TO PAGES]

Anderson v. Louisville & N. R. Co., 210 Fed. 689 5132
v. McDonald, 31 Wash. 274 2689
v. Maddox, 3 McCord 237 1642
v. Mason, 6 Dana 217 743
v. Merrill Lumber & Forestry Co., 77 N. H. 275 2139
v. Miller, 96 Tenn. 35 489, 3424, 3751
v. Missouri Pac. R. Co., 196 Mo. 442 4859
v. Nesbitt, 43 Ind. App. 703 123
v. Nordstrom, 60 Minn. 231 2592, 2593, 2594
v. Odd Fellows Hall Ass'n, 84 N. J. L. 176 2663
v. Ohnoutka, 84 Neb. 517 2008, 2011
v. Olson, 109 Minn. 432 2500
v. Oregon M. Co., 8 Idaho 418 970
v. Pacific Bank, 112 Cal. 598 1118
v. Pittsburgh L. Co., 47 Fed. 67 4457
v. Provident L. & T. Co., 26 Wash. 192 4620
v. Rapelye, 9 Paige 483 2786
v. Reardon, 46 Minn. 185 1815
v. Red Metal M. Co., 36 Mont. 312 1247
v. Reid, 14 D. C. App. Cas. 54 3708
v. Reynolds. 14 S. & R. 439 3263
v. Rigg, 64 N. J. L. 407 , 4959, 4961
v. Robbins, 82 Me. 422 3123, 3131, 3132
v. Ryan, 8 Ill. 583 4965
v. St. Louis, etc., R. Co., 129 Mo. App. 384 1445, 3800
v. Savoy, 137 Wis. 44 2274, 2284
v. Savoy, 142 Wis. 127 317
v. Settergren, 100 Minn. 294 125
v. Shattuck, 76 N. H. 240 2663
v. Shockley, 159 Mo. App. 334 1387, 4508, 4510, 4535, 4547, 4585
v. Silcox, 82 S. C. 109 1131
v. Simple, 7 Ill. 455 1529
v. Sloane, 72 Wis. 566 215, 223, 4190, 4194, 4196, 4267, 4334
v. Smith, 104 Minn. 40 152
v. Snyder, 21 W. Va. 632 4396
v. South Carolina & G. R. Co., 81 S. C. 1 3467
v. Standard G. Co., 92 Me. 429 814
v. Talcott, 6 Ill. 365 1673
v. Taylor, 56 Cal. 131 314
v. Thompson, 10 Bush 132 1590
v. Truitt, 52 Mo. App. 590 1945, 1947
v. United States, 152 Fed. 87 4222, 4257
v. Wallace, 6 T. B. Mon. 381 1761
v. Wetter, 103 Me. 257 4852
v. Winton, 136 Ala. 422 3122
v. Wood, 125 Minn. 102 4820
v. Young, 98 Minn. 355 4721
v. Zorn (Tex. Civ. App.) 131 S. W. 835 4601
Anderson C. Co. v. Gilmore, 123 Mo. App. 19 2243
Anderson County v. Hays, 99 Tenn. 542 1583, 1586, 1591
Anderson Elec. Co. v. Cleburne W. I. & L. Co., 23 Tex. Civ. App. 328 176
Anderson & Son v. Shattuck, 76 N. H. 240 2649
Anderson, etc., R. Co. v. Kernodle, 54 Ind. 314 402, 3850, 3854
Anderson's Succession, 33 La. Ann. 581 1050
Andes Ins. Co. v. Fish, 71 Ill. 620 3026, 3064
Anding v. Perkins, 29 Tex. 348 2395, 2405, 2410
Andonique v. Carmen, 162 Ky. 154 4778
Andover Sav. Bank v. Adams, 1 Allen 28 637, 939
Andre v. Fitzhugh, 18 Mich. 93 2755
v. Morrow, 65 Miss. 315 554
Andreas v. Hinson, 157 Iowa 43 4512, 4544
Andreini v. Cudahy Packing Co., 1 Cal. Ind. Comm. (1914) 8 5192
Andrejwski v. Wolverine Coal Co., 182 Mich. 298 5147, 5208
Andres v. Hoxie, 5 Tex. 171 1881
Andrew v. Boughey, 1 Dyer 75a 754
v. Costican, 30 Mo. App. 29 1136
v. Deshler, 45 N. J. L. 167 4565
v. Hancock, 1 B. & B. 37 504
v. Wheaton, 23 Conn. 112 1827
Andrews v. Appel, 22 Hun 429 2116
v. Askey, 8 C. & P. 7 1318
v. Belfield, 2 C. B. (N. S.) 779 2235
v. Blake, 1 H. Bl. 529 1397, 1398
v. Booth, 148 Mich. 333 4512
v. Brace, 154 Mich. 126 4380
v. Broughton, 78 Mo. App. 192 2517
v. Brown, 3 Cush. 130 2047
v. Chicago, etc., R. Co., 86 Iowa 677 4939, 4941, 4947
v. Chicago, etc., R. Co., 129 Iowa 162 4700, 4756
v. Clark, 72 Md. 396 4221
v. Creditors, 11 La. 464 1145
v. Davison, 17 N. H. 413 2151, 2152
v. Day B. Co., 132 N. Y. 348 3256
v. Dennison, 16 N. H. 469, 17 N. H. 413 2131
v. Durant, 18 N. Y. 496 3402, 4211
v. Eastman, 41 Vt. 134 2372
v. Fidelity L. & T. Co., 103 Va. 196 1826
v. Frierson, 144 Ala. 470 2480
v. German Nat. Bank, 9 Heisk. 211 665
v. Glenville W. Co., 50 N. Y. 282 305, 1719, 1729, 1731, 1762
v. Hammond, 8 Blackf. 540 1402
v. Hartford, etc., R. Co., 34 Conn. 57 4852
v. Herriot, 4 Cow. 510 1145
v. Hoover, 8 Watts 239 2237
v. Jones, 36 Tex. 149 315, 3243
v. Keeler, 19 Hun 87 951
v. Keith, 168 Mass. 558 2459
v. Kneeland, 6 Cow. 354 2379
v. Kramer, 77 Miss. 151 2383
v. McCoy, 8 Ala. 920 2196, 2211
v. Minter, 75 Ark. 589 3189
v. Monilaws, 8 Hun 65 1355
v. Pond, 13 Pet. 65 1145, 1147, 1163, 1170, 1173, 1825, 1879
v. Portland, 79 Me. 484 694, 2557
v. Russell, 7 Blackf. 474 1194
v. Schreiber, 93 Fed. 367, aff'd 101 Fed. 763 2406
v. Stone, 10 Minn. 72 1363
v. Toledo, etc., R. Co., 19 Ohio C. C. 699 4730
v. Vanduser, 11 Johns. 38 4530, 4574
v. Varrell, 46 N. H. 17 2827
v. Weckerman, 144 Mich. 199 431
v. Wheaton, 23 Conn. 112 1848
v. Word, 17 B. Mon. 518 1953
Andrews Co. v. Delight S. C. Dist., 95 Ark. 26 1041
Andrews' Heirs, 3 Humph. 592 1642
Andries v. Everitt-Metzger-Flanders Co., 177 Mich. 110 218, 4186
Andrus v. Bay Creek R. Co., 60 N. J. L. 10 4148
v. Bealls, 9 Cow. 693 2796
v. Berkshire P. Co., 197 Fed. 1016 1005
v. Bradley, 102 Fed. 54 1110

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v. Harris, 126 App. Div. (N. Y.) 564 4592, 4594
v. Waring, 20 Johns. 153 2874
Andrzejewski v. Northwestern Fuel Co., 158 Wis. 170 4932, 4934, 4937
Anerly, The, 58 Fed. 794 4987
Angell v. Hartford Ins. Co., 59 N. Y. 171 2999, 3026, 3039
v. Pruyn, 126 Mich. 16 2444, 2445
v. Reynolds, 26 R. I. 160 4983
Angerstein v. Martin, 1 Turn. & Russ. 232 1200
Angier v. Taunton P. Mfg. Co., 1 Gray 621 4292
Angle v. Hanna, 22 Ill. 429 2525
Anglin v. Columbus, 128 Ga. 469 1494, 4796
Anglo-Am. P. Co. v. Prentiss, 157 Ill. 506 620
Anglo-Am. P. & P. Co. v. Baier, 31 Ill. App. 653 4671
Anglo-Am. S. Co. v. Houlder Line, [1908] 1 K. B. 659 114
Anglow-W. Oil Fields v. Miller, 117 Ill. App. 552 2458
Angus v. Chicago T. & S. Bank, 170 Ill. 398 664
v. Clifford, [1891] 2 Ch. 449 4384
v. Rudin, 5 N. J. L. 815 1390
v. Scully, 176 Mass. 357 2607, 2611
Anhalt v. Waterloo, C. F. & N. R. Co., 166 Iowa 479 4056
Ankeny v. Clark, 1 Wash. 549 1027
v. Clark, 148 U. S. 345 2026, 2477
Anketel v. Converse, 17 Ohio St. 11 740
Ankrum v. Marshalltown, 105 Iowa 493 4683, 4691
Ann Arbor R. Co. v. Amos, 85 Ohio 300 3505
Ann D. Richardson, The, 1 Abb. Adm. 499 3287
Anna, The, 6 Bene. 166 2736
Anna Maria, The, 2 Wheat. 327 236
Annapolis, etc., R. Co. v. Ross, 68 Md. 310 2655
Annas v. Milwaukee, etc., R. Co., 67 Wis. 48 4874
Annett v. Terry, 35 N. Y. 256 295, 2871, 2898
Annie, The, [1909] Prob. Div. 176 99
Annie Henderson, The, 15 Fed. 550 2726
Annie Leland, The, 1 Low. 310 2721
Annis v. Upton, 66 Barb. 370 569, 1357
Anniston C. Co. v. Western U. Tel. Co., 161 Ala. 216 3609
Anniston E. & G. Co. v. Rosen, 159 Ala. 195 1391
Anonyme v Western D. Co., 46 Fed. 921 4489
Anonymous, Martin & Hayw. 149 1155, 1878
Anonymous, Martin & Hayw. 169 1214
Anonymous, Martin & Hayw. 182 1061
Anonymous, Martin & Hayw. 363 1227
Anonymous, 1 Hayw. 183 818
Anonymous, 8 How. Pr. 434 4572
Anonymous, 11 Ill. 87 1806
Anonymous, 1 Johns. 315 1107
Anonymous, 1 Salk. 94 4348
Anonymous, 1 Salk. 154 1572
Anonymous, 1 Vent. 127 4348
Anonymous, 2 Wils. 150 938
Anonymous, 60 N. Y. 262 4502, 4560
Ansett v. Marshall, 22 L. J. [Q. B.] 118 131
Ansley v. Jordan, 61 Ga. 482 1238, 2561
v. Mock, 8 Ala. 444 1568
Anslyn v. Frank, 8 Mo. App. 242 4392
Anson v. Dwight, 18 Iowa 241 1457
Antarctic, The, 1 Sprague 206 743
Antcliff v. June, 81 Mich. 477 4607, 4610
Antelope, The, 1 Low. 130 2723
Antelope, The, 10 Wheat. 123 1174
Anthanissen v. Dart, 94 Ga. 543 2718
Anthony v. Boyd, 15 R. I. 495 757
v. Comstock, 1 R. I. 454 1710
v. Gilbert, 4 Blackf. 348 1306
v. Moore, 135 App. Div. (N. Y.) 203 1094, 2598
v. New York, etc., R. Co., 162 Mass. 60 3743, 3744, 4174
v. Norton, 60 Kan. 341 4963
v. Percifull, 8 Ark. 494 2843, 2865, 2874, 2885
v. Slaid, 11 Metc. (Mass.) 290 126
v. Stephens, 1 Mo. 254 471, 4577
Antisdel v. Williamson, 165 N. Y. 372 2792
Antle v. Sexton, 137 Ill. 410 4372, 4392, 4395
Antonio v. Kreusel, 71 Tex. Civ. App. 594 4664
Antrim v. Noonan, 186 Ill. App. 360 4733
Antrobus v. Smith, 3 Meriv. 569 2841
Anustaskas v. International C. Co., 51 Wash. 119 4856
Anvil G. M. Co. v. Hoxsie, 125 Fed. 724 1685, 1702, 1704
Anvil M. Co. v. Humble, 153 U. S. 540 248, 2253
Aortson v. Ridgway, 18 Ill. 23 3685
Apache, The, 124 Fed. 905 2717, 2729
Apgar v. Hiler, 24 N. J. L. 812 307, 2840, 2848
v. Wooston, 43 N. J. L. 57 4602, 4640
Apollinaris Co. v. Venable, 136 N. Y. 46 1716, 1717
Apothecaries Co. v. Burt, 5 Ex. 363 1574
Appel v. Chicago, etc., R. Co., 34 S. D. 306 3962, 3963
v. Woltmann, 38 Mo. 194 602
Appleby v. Meyers, L. R. 2 C. P. 651 1561, 2307, 2609, 2612
v. South Carolina & G. R. Co., 60 S. C. 48 1386
v. State, 45 N. J. L. 161 1601, 1608, 2645
Appledorn v. Streeter, 20 Mich. 9 683
Applegate v. Franklin, 109 Mo. App. 293 8, 343, 1280, 3850
v. Jacoby, 9 Dana 206 887
v. Koons, 74 Ind. 347 714
v. Quincy, etc., R. Co., 252 Mo. 173 1382, 4750, 4799
v. Ruble, 2 A. K. Marsh. 128 4969
Applegrove v. Penn. Sch. U. R. Co., 132 Pa. 540 3960
Appleton v. Donaldson, 3 Pa. 381 803, 828
v. Marx, 191 N. Y. 81, 117 App. Div. (N. Y.) 206 3155, 3162, 3163
Appleton Bank v. McGilvray, 4 Gray 518 1869
Appleton W. W. Co. v. Appleton, 136 Wis. 395 1046, 1112
Application of Mayor, Matter of, 99 N. Y. 569 4104
Aprops v. Costello, 8 Wash. 149 1395
Arapahoe County v. Denver, 30 Colo. 13 1005, 1116
Arbaugh v. Shockney, 34 Ind. App. 268 2754
Arbuckles v. Chadwick, 146 Pa. 393 703
Arbuthnot v. Big Pine Lumber Co., 134 La. 529 2097
Arcambel v. Wiseman, 3 Dall. 306 306
Archdale v. Moore, 19 Ill. 565 2375

[REFERENCES ARE TO PAGES]

Archer v. Archer, 8 Gratt. 539 2874
v. Bamford, 3 Stark. 175, 1 C. & P. 64 1848
v. Bogue, 4 Ill. 526 416
v. Bowling, 166 Ky. 139 5110
v. Dunham, 89 Hun 387 4404
v. Dunn, 2 W. & S. 327 1144, 1878
v. Long, 47 S. C. 556 4357
v. Milwaukee A. E. & S. Co., 144 Wis. 476 1361, 2404, 2436
v. Noble, 3 Me. 418 1600
v. Turrell, 66 Ark. 171 2045
v. Williams, 2 C. & K. 26 26, 4340
Archibald v. Banks, 203 Ill. 380 697
v. Lincoln County, 50 Wash. 55 4906
v. Pruden, 7 Vict. L. R. (Law) 422 4796
Arctic Bird, The, 109 Fed. 167, 175 3390, 3391, 3433
Arden v. Cornell, 5 B. & Ald. 885 1397
v. Goodacre, 11 C. B. 371 476, 496, 499, 1619, 1629
v. Pullen, 10 M. & W. 321 3138
Arden L. Co. v. Henderson I. Works & S. Co., 83 Ark. 240 1922, 1923
Ardesco O. Co. v. North American O. & M. Co., 66 Pa. 381 2189
Arding v. Lomax, 24 L. J. (Ex.) 80, 10 Ex. 734 2526
Ardmore v. Orr, 35 Okla. 305 3849, 3853, 3854, 3880, 3890
Area v. Milliken, 35 La. Ann. 1150 2915
Arentsen v. Moreland, 122 Wis. 167 1990, 1995
Argall v. Sutor, 114 Minn. 371 4541, 4548
Argentine v. Bender, 71 Kan. 422 1502, 1511
Argentino, The, 13 Prob. Div. 191, 14 App. Cas. 519 2398, 5003, 5004
Argo, The, 210 Fed. 872 1054, 1141, 5013
Argotsinger v. Vines, 82 N. Y. 308 3774, 3775, 3779
Arial v. Western U. Tel. Co., 70 S. C. 418 1325, 3547, 3571, 3618
Arizona C. Co. v. Gillespie, 12 Ariz. 190 3933
Arizona Life Ins. Co. v. Lindell, 15 Ariz. 47 1031
Arizona P. Co. v. Racine-S. Co., 13 Ariz. 283 2340
Arizonan, The, 136 Fed. 1016 2728
Arizonan, The, 144 Fed. 81 2723
Arkansas Cent. R. Co. v. Janson, 90 Ark. 494 3471
v. Smith, 71 Ark. 189 3976
Arkansas City v. Payne, 80 Kan. 353 4747
Arkansas M. R. Co. v. Robinson, 96 Ark. 32 4661
Arkansas Nat. Bank of Hot Springs v. Martin, 110 Ark. 578 728, 773
Arkansas S. R. Co. v. German Nat. Bank, 85 Ark. 136 1250
v. Murphy, 83 Ark. 562 3334
Arkansas Valley L. & C. Co. v. Mann, 130 U. S. 69 1518, 4208, 4211
Arkansas Valley T. & L. Co. v. Lincoln, 56 Kan. 145 231, 259, 2773
Arkansas Valley & W. R. Co. v. Witt, 19 Okla. 262 3951, 3983, 3993, 3998, 4002
Arkansas & L. R. Co. v. Stroude, 77 Ark. 109 3618
v. Stroude, 82 Ark. 117 1054
Arkley v. Union S. Co., 147 Cal. 195 42
Ark-M. Z. Co. v. Patterson, 79 Ark. 506 1115, 2623, 2664
Arkwright v. Newbold, 17 Ch. Div. 301 3685, 4407
Armagost v. Rising, 54 Neb. 763 1364, 4321
Armbruster v. Chicago. R. I. & P. R. Co., 166 Iowa 155 4955, 5034, 5061, 5064
Armentrout v. Baldwin, 163 Iowa 410 1706
Armeny v. Madson & B. Co., 111 Ill. App. 621 204, 2343
Armin v. Loomis, 82 Wis. 86 2484
Armington v. Palmer, 21 R. I. 109 4485, 4487
Arminius C. Co. v. Landrum, 113 Va. 7 9, 491, 3929
Armistead v. Brooke, 18 Ark. 521 719
v. Shreveport, etc., R. Co., 108 La. 171 233, 313, 316, 3323
Armitage v. Haley, 4 Q. B. 917 1495
v. Pulver, 37 N. Y. 494 2859
Armonia, The, 26 C. C. A. 338, 81 Fed. 227 5003
Armor v. Frey, 253 Mo. 447 3700
Armory v. Armory, 91 U. S. 356 1805
v. Delamire, 1 Str. 505, 1 Smith Lead. Cas. 584 430, 1415, 4225
v. Vreeland. 125 App. Div. (N. Y.) 850 4548
Armour v. Czischki, 59 Ill. App. 17 4935
v. Gundersheimer, 23 App. D. C. 210 2403, 2409, 2411
v. Kilmer, 28 Ont. 618 2490
v. Kollmeyer, 161 Fed. 78 56, 4688
v. Western C. Co., 36 Wash. 529 2754
Armour P. Co. v. Orrick, 4 Okla. 661 2899
v. Vinegar Bend L. Co., 149 Ala. 205 721
Armroyd v. Union Ins. Co., 3 Bin. 445 3294
Armstrong v. Auburn, 84 Neb. 842 4735
v. Brown, 1 Wash. C. C. 43 1898
v. Campbell, 3 Yerg. 201 1124
v. Descalzi, 48 Pa. Super. 171 2388, 2404, 2418
v. Dubois, 4 Keyes 291 436
v. Dunn, 163 Mo. App. 701 1938
v. Exch. Nat. Bank, 133 U. S. 433 1036
v. Gilchrist, 2 Johns. Cas. 424 2834
v. Hayward, 6 Cal. 183 773
v. Illinois Cent. R. Co., 162 Ky. 539 3420
v. Jackson, 37 La. Ann. 219 4669
v. McAlpin, 18 Ohio St. 184 361
v. Maryland C. Co., 67 W. Va. 589 2037
v. Maybee, 17 Wash. 24 3151
v. Percy, 5 Wend. 535 2098, 2137, 2142, 2395, 2398, 2399, 2917
v. Pullman Co., — Miss. —, 66 So. 283 3542
v. Rhoades, 4 Penn. (Del.) 151 467, 4783, 4791
v. School Dist., 28 Mo. App. 169 754
v. Smith, 44 Barb. 120 1431
v. Union College, 55 App. Div. (N. Y.) 302 3725
v. Union S. Y. Co., 93 Neb. 258 4907
v. Walkup, 12 Gratt. 608 1129
v. Wheeler, 9 Cow. 88 3133
Armstrong, Whitworth & Co. v. Norton, 15 App. Cas. (D. C.) 223 4435
Armstrong & James Bay R. Co., 12 Ont. L. R. 137 3993
Armytage v. Haley, 4 Q. B. 917 3528
Arnd v. Heckbert, 108 Md. 300 1826
Arndt v. Hosford, 82 Iowa 503 2480
v. Keller, 96 Wis. 274 2597, 2669, 2682

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v. Nerger, 34 S. D. 201 481, 4302
Arnett v. Wright, 18 Okla. 337 1849
Arnold v. Adams, 27 App. Div. (N. Y.) 345 2568
v. Atchison, etc., R. Co., 81 Kan. 400 3443, 3464
v. Bailey, 8 Mass. 145 1656
v. Bennett, 92 Mo. App. 156 3745
v. Blabon, 147 Pa. 372 2275, 2280
v. Broad, 15 Colo. App. 389 3838
v. Bryant, 8 Bush 668 2780
v. C. Hoffman & Son Milling Co., 93 Kan. 54 432
v. Camp, 12 Johns. 409 753
v. Chicago, etc., R. Co., 86 Kan. 12 3911, 3936
v. Clark, 45 N. Y. Super. 252 3250
v. Commonwealth, 8 B. Mon. 109 1556, 1616
v. Covington Bridge, 1 Duv. 372 4097
v. Delano, 4 Cush. 40 2225
v. Georgia R. & B. Co., 50 Ga. 304 3281
v. Illinois Cent. R. Co., 83 Ill. 273 3336
v. Johnson, 2 Ill. 196 717, 721
v. Kelly, 4 W. Va. 642 4209
v. Macungie Sav. Bank, 71 Pa. 287 2396
v. Maryville, 110 Mo. App. 254 1376, 1416
v. Park, 8 Bush 3 749, 752, 761, 780
v. Potter, 22 Iowa 194 1161, 1162, 1164, 1175
v. Producers' F. Co., 128 Cal. 637 420
v. Producers' F. Co., 141 Cal. 738 2596
v. Prole, 4 M. & G. 860 723
v. Rhode Island Co., 28 R. I. 118 1340, 3450, 3465
v. Savings Co., 76 Mo. App. 159 4511, 4525, 4544, 4549
v. Sedalia Nat. Bank, 100 Mo. App. 474 4233
v. State, 77 Miss. 463 1578
v. State, 163 App. Div. (N. Y.) 253 2883, 4861, 4871, 4895, 4908, 4939
v. Suffolk Bank, 27 Barb. 424 2329, 2331
v. Wilts, 86 Ind. 368 1828
v. Woodward, 14 Colo. 164 3715
v. Wurlitzer, 12 Ohio C. C. (N. S.) 309 4351
Arnot v. Post, 6 Hill 65 826
Arnott v. Redfern, 3 Bing. 353 962, 1034
v. Redfern, 2 C. & P. 88 1154
v. Spokane, 6 Wash. 442 273
v. Standard Ass'n, 57 Conn. 87 4596
Aronson v. Claflin (N. Y. Misc.), 115 N. Y. Supp. 97 2281
v. Oppgard, 16 N. D. 595 1511, 4267
Arpin v. Burch, 68 Wis. 619 363, 369, 1135
Arrington v. Gee, 5 Ired. 590 1147, 1156, 1877
v. Mobile, etc., R. Co., 30 Miss. 470 1537
v. Wilmington, etc., R. Co., 6 Jones 68 3426
Arrogante Barcelones, The, 7 Wheat. 496 18
Arrott v. Brown, 6 Whart. 9 1414, 2958
Arrow S. Co. v. Bennett, 73 Hun 81 4532
Arrowsmith v. Rappelge, 19 La. Ann. 327 1804
Arrowsmith v. Van Arsdale, 21 N. J. L. 471 1543
Arterburn v. Beard, 86 Neb. 733 2150
Artherholt v. Erie E. M. Co., 27 Pa. Super. Ct. 141 3764
Arthur v. Chicago, etc., R. Co., 61 Iowa 648 1136
v. Grand Trunk R. Co., 22 Ont. App. 89 3874
v. Harty, 17 N. Y. Misc. 641 3121
v. Henry, 157 N. C. 438 86, 3820, 3829
v. Moss, 1 Ore. 193 2395
v. Ship Cassius, 2 Story 81 3389
v. Wheeler & W. Mfg. Co., 12 Mo. App. 335 1134
Artisans' Bank v. Park Bank, 41 Barb. 599 1151, 1905
Artley v. Morrison, 73 Iowa 132 685
Arzaga v. Villalba, 85 Cal. 191 4318, 4319, 4321
Asendorf v. Meyer, 8 Daly 278 2874
Asevado v. Orr, 100 Cal. 299 1715
Asfar v. Blundell, [1895] 1 Q. B. 123, 2 Q. B. 196 3290
Ash v. Beck (Tex. Civ. App.), 68 S. W. 53 2370, 2371, 2406, 2410
v. International H. Co., 101 Miss. 542 2416
v. Marlowe, 20 Ohio 119 1321, 4635, 4645
v. Prunier, 44 C. C. A. 675, 105 Fed. 722 4970
Ashbrook v. Hite, 9 Ohio St. 357 2017
Ashburn v. Poulter, 25 Conn. 553 785, 797, 1235
Ashburner v. Balchen, 7 N. Y. 262 3269, 3270
Ashburnham v. Thompson, 13 Ves. 402 1125
Ashby v. Ashby, 7 B. & C. 444 1638
v. Ashby, 59 N. J. Eq. 536 3255
v. Johnston, 23 Ark. 163 2814
v. Sharp, 1 Litt. 156 1786
v. Shaw, 82 Mo. 76 1243
v. Washburn, 23 Neb. 571 735
v. White, 1 Salk. 19, 2 Ld. Raym. 938 32, 37, 43
Ashby B. Co. v. Ely D. G. Co., 151 Ala. 272 423
Ashcraft v. Allen, 4 Ired. 98 2698
v. Chapman, 38 Conn. 230 334, 4704
v. Knoblock, 146 Ind. 169 426
Ashdown v. Ely, 140 Iowa 739 3236, 3243, 3247, 3254
Ashe v. De Rossett, 5 Jones 299 177, 2636
v. Harris, 55 Tex. 49 1043
Asher v. Cabell, 50 Fed. 818 1602
v. Greenleaf, 68 Kan. 29 746
v. Louisville & N. R. Co., 87 Ky. 391 3964, 4121
v. Stacey, 23 Ky. L. Rep. 1586 233
Ashford v. Choate, 20 Up. Can. C. P. 471 4566
Ashhurst v. Field, 28 N. J. Eq. 315 1116
Ashland C. & C. Co. v. Hull C. & C. Co., 67 W. Va. 503 559
Ashland L. & C. Co. v. Shores, 105 Wis. 122 2597, 2599, 2682
Ashland Mut. F. Ins. Co. v. Housinger, 10 Ohio St. 10 3041, 3055
Ashley v. Harrison, 1 Esp. 48 115, 157, 210, 1746, 4558
v. Marshall, 29 N. Y. 494 529
v. Peterson, 25 Wis. 621 1683
v. Rocky Mountain Bell Tel. Co., 25 Mont. 286 325, 3614
v. Root, 4 Allen 504 2901
v. Warner, 11 Gray 43 3193, 3222

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Ashworth v. Tramwell, 102 Va. 852 1056
v. Wells, 14 T. L. Rep. 227 (1898) 2412
Asia v. Pool, 47 Wash. 515 267, 3919
Asiatic Prince, The, 108 Fed. 287 725
Aske v. Duluth & I. R. R. Co., 83 Minn. 197 1462
Askegaard v. Dalen, 93 Minn. 354 1826
Asker v. Cabell, 50 Fed. 818 1600
Askew v. Odenheimer, 1 Baldwin 380 1414, 1416
Askins v. Hearns, 3 Abb. Pr. 184 550
Aslin v. Parkin, 2 Burr. 668 3692, 3696
Aspegren v. Wallerstein P. Co., 111 Va. 570 2227
Aspinwall v. Chicago, etc., R. Co., 41 Wis. 474 4100, 4106
v. Torrance, 1 Lans. 381 2983
Aspy v. Botkins, 160 Ind. 170 1461, 1468
Assignment of Murdoch, In re, 129 Mo. 288 1121
Associated Artists v. Clement, 142 Wis. 490 1036
Association v. Eagleson, 60 How. Pr. 9 951, 952, 1190, 1192
v. Stonemetz, 29 Pa. 534 2500
Astill v. South Yuba W. Co. 146 Cal. 55 3845
Astley v. Evans & Co. Ltd. [1911] 1 K. B. 1036, aff'd [1911] App. Cas. 674 5186, 5188, 5197
v. Reynolds, 2 Str. 916 799
v. Weldon, 2 Bos. & Pul. 346 849, 853, 857, 870, 876, 912, 914, 917
Astor v. Miller, 2 Paige 68 3132, 3136
Astoria Southern R. Co. v. Pacific Surety Co., 68 Ore. 569 2793
Astrakan, The, [1910] Prob. Div. 172 5002
Astruc v. Star Co., 195 Fed. 349 4549
Aswell v. Scranton, 175 Pa. 173 4109, 4112
Atchinson v. Baker, Peake's Add. Cas. 103, 104 3661
v. King, 9 Kan. 550 412, 4693
v. Plunkett, 61 Kan. 297 1494, 1503
v. Steamboat, 14 Mo. 63 4185
Atchison, etc., R. Co. v. Allen, 70 Kan. 743 4607, 4637
v. Ayres, 56 Kan. 176 1142
v. Bales, 16 Kan. 252 68
v. Baty, 6 Neb. 37 4
v. Bivins, — Tex. Civ. App. —, 136 S. W. 1180 3407
v. Blackshire, 10 Kan. 477 3964
v. Boerner, 34 Neb. 240 3951, 4125
v. Bourdett, 74 Kan. 137 3330, 3343
v. Briggs, 2 Kan. App. 154 3761
v. Calhoun, 18 Okla. 75 109
v. Chamberlain, 4 Okla. 542 1281
v. Chance, 57 Kan. 40 4663, 4671, 4693, 4699, 4720, 4754
v. Chicago, etc., R. Co., 162 Ill. 632, 654 1026, 1965, 1966
v. Citizens' T. & P. Co., 16 N. M. 163 215
Atchison, etc., R. Co. v. Classin (Tex. Civ. App.), 134 S. W. 358 774, 776
v. Cross, 58 Kan. 424 4935, 4941
v. Dickerson, 4 Kan. App. 345 3465
v. Eldridge, 41 Okla. 463 3992
v. Fajardo, 74 Kan. 314 4856, 4870, 4927
v. Forney, 35 Neb. 607 4145
v. Fronk, 74 Kan. 519 22
v. Gabbert, 34 Kan. 132 1140
v. Gants, 38 Kan. 608 3464
v. Geiser, 68 Kan. 281 3774
v. Gough, 29 Kan. 94 4028, 4125
v. Grant, 6 Tex. Civ. App. 674 3387, 3389
v. Henry, 55 Kan. 715 3468, 3469, 4840, 4841
v. Henry, 78 Kan. 490 139
v. Hogue, 50 Kan. 40 3503, 3521
v. Hughes, 55 Kan. 491 4877
v. Huitt, 1 Kan. App. 788 4169
v. Johns, 36 Kan. 769 1473
v. Jones, 110 Ill. App. 626 3858, 3881
v. Lamoreux, 5 Kan. App. 813 4663
v. Lawler, 40 Neb. 356 3335, 3387
v. Lee, 8 Kan. App. 24 4663
v. Long, 5 Kan. App. 644 3501
v. Lyon, 24 Kan. 745 3979
v. McGinnis, 46 Kan. 109 78, 345, 4686, 4700
v. Melson, 40 Okla. 1 1465, 1467
v. Midget, 1 Kan. App. 138 4663
v. Miller, 16 Neb. 661 3280
v. Mills, 53 Tex. Civ. App. 359 143
v. Moore, 31 Kan. 197 4802
v. Palmore, 68 Kan. 545 1467
v. Parry, 67 Kan. 515 112, 3470
v. Pitts, 44 Okla. 604 5066, 5068, 5136
v. Rice, 36 Kan. 593 1363, 1380, 4616, 4839
v. Richards, 58 Kan. 344 1503
v. Ringle, 71 Kan. 839 1280, 4778
v. Rowe, 56 Kan. 411 4699, 4797
v. Ryan, 62 Kan. 682 4913, 5098
v. Schneider, 127 Ill. 144 3997, 4011
v. Schriver, 72 Kan. 550 3425, 4209
v. Seeger (Tex. Civ. App.), 126 S. W. 1170 152
v. Smythe, 55 Tex. Civ. App. 557 3397, 3400, 3419, 3430
v. Stanford, 12 Kan. 354 68
v. Stewart, 55 Kan. 667 1281
v. Swearingen, 239 U. S. 339 5084
v. Thomas, 70 Kan. 409 226, 254
v. Thul, 29 Kan. 466 1462
v. Townsend, 71 Kan. 524 4869
v. Veale, 39 Tex. Civ. App. 37 3398
v. Victoria, F. & W. R. Co., 234 U. S. 1 5037
v. Washburn, 5 Neb. 117 3335
v. Weber, 33 Kan. 543 1395
v. Wilkinson, 55 Kan. 83 1431
v. Willey, 57 Kan. 764 1381
v. Wilson, 48 Fed. 57 4906
Athens Mfg. Co. v. Rucker, 80 Ga. 291 324
Atherton v. Cochran, 11 Ky. L. Rep. 185 1076
v. Fowler, 46 Cal. 323 4350
v. Whitcomb, 66 Vt. 447 1074
v. Williams, 19 Wend. 105 2842
Athletic B. Ass'n v. St. Louis S.'s P. & C. Ass'n, 67 Mo. App. 653 287
Atkeson v. Jackson Est., 72 Wash. 233 153, 4942, 4943
Atkin v. Acton, 4 C. & P. 208 2525, 2526
v. Merrell, 39 Ill. 62 3719
v. Mooney, Phil. (N. C. L.) 32 612

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v. Baily, 9 Yerg. 111 1583
v. Barnstable, 97 Mass. 428 356, 2676
v. Chilson, 9 Metc. (Mass.) 52 3155
v. Gladwish, 25 Neb. 390 4689
v. Hosley, 3 Thomp. & C. 322 2395
v. Moore, 82 Ill. 240 1680
v. Southern G. Co., 119 Mo. App. 119 2370, 2372
v. Trowbridge, 162 App. Div. (N. Y.) 161 371
v. Yeoman, 6 Metc. (Mass.) 438 3724
Atkinson v. Atkinson, Cro. Eliz. 391 633
v. Beall, 11 Up. Can. C. P. 245 3155
v. Bell, 8 B. & C. 277 2225
v. Braybrooke, 4 Camp. 380 1052
v. Bullard, 14 Ga. App. 69 5129, 5136
v. Burton, 4 Bush 299 2946
v. Clark, 69 Ga. 460 606
v. Golden Gate T. Co., 21 Cal. App. 168 967, 1103, 1203
v. Goodrich T. Co., 60 Wis. 141 68
v. Hardaway, 10 Ga. App. 389 4915
v. Hewett, 63 Wis. 396 3838
v. Jones, 2 A. & E. 439 1033
v. Kirkpatrick, 90 Kan. 515 312, 476
v. Linden S. Co., 138 Ill. 187 698
v. Lord Braybrooke, 4 Camp. 380 1035
v. Manks, 1 Cow. 707 1902
v. Mercer, 11 Ga. App. 462 33
v. Morse, 63 Mich. 276 2260, 2687, 2693
v. Newcastle, L. R. 2 Ex. Div. 441 124
v. Newcastle, etc., Co., L. R. 6 Ex. 404 101
v. New York T. Co., 76 N. J. L. 608 3415
v. Pack, 114 N. C. 597 2502, 2507, 2508
v. Smith, 14 M. & W. 695 2231
v. Stewart, 2 B. Mon. 348 659, 2869
v. Stewart, 46 Mo. 510 3728
v. Taylor, 13 Ga. App. 100 4727, 4834
v. Van Cleave, 25 Ind. App. 508 4620, 4629, 4646
v. Wabash R. Co., 143 Ind. 501 3393
v. Ward, 47 Ark. 533 2905, 2924
Atkinson & B. Co. v. Pike County, 73 Miss. 348 1801
Atkisson v. Castle Garden, The, 28 Mo. 124 3389
v. Steamboat C. G., 28 Mo. 124 2367
Atkyns v. Kinnier, 4 Ex. 776 853, 887, 911, 914
Atlanta, City of, 56 Fed. 252 2721
Atlanta v. Central R. Co., 53 Ga. 120 4119
v. Chattanooga F. & Pipeworks, 61 C. C. A. 387 100
v. Chattanooga F. & Pipeworks, 127 Fed. 23 435
v. Dooley, 74 Ga. 702 4179
v. Green, 67 Ga. 386 3953, 4111
v. Hampton, 139 Ga. 389 4676, 4727
v. Hunnicutt, 95 Ga. 138 4018
v. Nelson, 142 Ga. 324 3982, 4018, 4032, 4035
v. Williams, 15 Ga. App. 654 4139
v. Word, 78 Ga. 276 3928, 3956, 4123
Atlanta B. & C. Co. v. Mizo, 4 Ga. App. 407 1449, 3535
Atlanta E. Co. v. Fulton B. & C. Mills, 106 Ga. 427 386
Atlanta Ins. Co. v. Manning, 3 Colo. 224 3020
Atlanta Nat. Bank v. Davis, 96 Ga. 334 277
v. Four States G. Co. (Tex. Civ. App.), 135 S. W. 1135 1222
Atlanta Sav. Bank v. Spencer, 107 Ga. 629 740
Atlanta T. C. Co. v. Georgia R. & E. Co., 132 Ga. 537 4037, 4107
Atlanta & R. P. Co. v. Maddox, 117 Ga. 181 1384
Atlanta, etc., R. Co. v. American C. Co., 103 Ga. 254 2454
v. Arnold, 100 Ga. 566 4938
v. Barnwell, 138 Ga. 569 4832
v. Bates, 103 Ga. 333 4693
v. Beauchamp, 93 Ga. 6 1499, 4693
v. Broome, 3 Ga. App. 641 3334
v. Brown, 158 Ala. 607 313, 316, 1430, 3118, 3741, 3798, 3809
v. Gardner, 122 Ga. 82 1471, 1478, 4793
v. Gravitt, 93 Ga. 369 109, 110
v. Haralson, 133 Ga. 231 4718
v. Hardage, 93 Ga. 457 3482
v. Hodnett, 29 Ga. 461 4417
v. Jacobs, 88 Ga. 647 4707, 4727
v. Johnson, 66 Ga. 259 4748
v. Keeny, 99 Ga. 266 596, 1348
v. Minchew, 7 Ga. App. 566 1806
v. Potts, 128 Ga. 397 3506
v. Smith, 94 Ga. 107 4700
v. Texas G. Co., 81 Ga. 602 3428
v. Thomas, 60 Fla. 412 188, 303, 420, 1961, 2620
v. Venable, 67 Ga. 697 4904, 4915
v. Walker, 93 Ga. 462 1429, 1472
v. Wood, 160 Ala. 657 1454, 3877, 3887, 3888, 3903, 3911
v. Wyly, 65 Ga. 120 478
Atlantic Bank v. Harris, 118 Mass. 147 1116, 1134, 4394
Atlantic D. Co. v. Mayor, 53 N. Y. 64 679
Atlantic Ins. Co. v. Manning, 3 Colo. 224 3021
Atlantic M. Co. v. Robinson, 20 Fed. 217 4493, 4498
v. Rowland, 27 Fed. 24 4489
Atlantic P. Co. v. Graffin, 114 U. S. 492 1101
Atlantic R. Co. v. Hudson, 62 Ga. 679 4186
Atlantic Ref. Co. v. Sylvester, 231 Pa. 491 2148
Atlantic T. & D. Co. v. Laurinburg, 163 Fed. 690 2758
Atlantic & P. Tel. Co. v. Barnes, 64 N. Y. 385 1592
Atlantic, etc., C. Co. v. Maryland C. Co., 62 Md. 135 3739, 3791, 3827
Atlantic, etc., R. Co., Ex parte, 190 Ala. 132 5124, 5129
Atlantic, etc., R. Co. v. Atlantic, etc., R. Co., 147 N. C. 368 2876
v. Beazley, 54 Fla. 311 22
v. Brown, 158 Ala. 607 1138
v. Burnette, 239 U. S. 199, rev'g 163 N. C. 186 5123, 5130
v. Campbell, 4 Ohio St. 583 1431, 1433, 4138
v. Coachman, 59 Fla. 130 3416
v. Davis, 5 Ga. App. 214 3742
v. Delaware C. Co., 98 Va. 503 234, 2607, 2611, 2650
v. Dexter, 50 Fla. 180 3415
v. Douglas, 119 Ga. 658 4659, 4676, 4793
v. Dunn, 19 Ohio St. 162 1331, 1332, 1341, 3506, 3507
v. Goodwin, 1 Ga. App. 351 3351, 3418
v. Grubbs, 113 Va. 214 1141
v. Howard S. Co., 125 Ga. 478 3389, 3438
v. Ironmonger, 95 Va. 625 108

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v. Jones, — Ala. App. — 63 So. 693 5044
v. Jones, 9 Ala. App. 499, rev'd 190 Ala. 132 5129
v. Jones, 132 Ga. 189 4908
v. Knapp, 139 Ga. 422 3880, 3906, 3907
v. Koblentz, 21 Ohio St. 334 1062, 1064, 4155
v. McDonald, 135 Ga. 635 4914
v. McKnight, 125 Ga. 328 3983
v. Moore, 8 Ga. App. 185 4752
v. Newton, 85 Ga. 517 4878, 4884, 4913
v. Postal Tel. C. Co., 120 Ga. 268 4019, 4048, 4066, 4068
v. Powell, 127 Ga. 805 321, 509
v. Reaves, 208 Fed. 141 5067
v. Robbins, 35 Ohio St. 531 3854, 3876
v. Snodgrass & Co., A. T., 14 Ga. App. 668 531
v. Stephens, 14 Ga. App. 173 33
v. Thompson, 211 Fed. 889 1385
v. Wauchula Manufacturing & Timber Co., 67 Fla. 27 769
v. Weir, 63 Fla. 69 4200
v. Whitney, 65 Fla. 72 4680, 4751
v. Wood, 48 Ga. 565 4670
Atlas, The, 93 U. S. 302 4990, 5017
Atlas Bank v. Brownell, 9 R. I. 168 2796
Atlas P. C. Co. v. Hopper, 116 App. Div. (N. Y.) 445 2274, 2344
Atlee v. Backhouse, 3 M. & W. 633 759
v. Northwestern Union P. Co., 21 Wall. 389 4989
Atler v. Erskine, 50 Tex. Civ. App. 576 1333
Atoka C. & M. Co. v. Miller, 7 Ind. T. 104 4792
Atrops v. Costello, 8 Wash. 149 1271, 4939, 4940, 4942
Atston v. Connell, 145 N. C. 1 3710
Attacapas, The, 3 Ware 65 2732
Attack v. Bramwell, 3 B. & S. 520 4202, 4303
Atterbury v. Edwa, 61 N. Y. Misc. 234 664
Attersol v. Stevens, 1 Taunt. 183 2036, 3743
Attix v. Pelan, 5 Iowa 336 3227
Attleborough v. Middleborough, 10 Pick. 378 700
Attorney-General v. Alford, 4 De G., Macn. & G. 676 1127
v. Cape Fear N. Co., 2 Ired. Eq. 444 1040, 1043
v. Christ Church, 13 Sim. Ch. 214 1026
v. Guardian Mut. L. Ins. Co., 82 N. Y. 336 3085
v. Huon, 7 Vict. L. R. (Eq.) 30 2810
v. Stewart, 20 N. J. Eq. 417 3839
v. Supreme Council, 206 Mass. 131 1222
v. Tomline, 5 Ch. Div. 750 3748
Attwood v. Bangor, 83 Me. 582 3841
v. Taylor, 1 M. & G. 301 1013
Atwater v. Rodofson, 4 Am. L. Reg. 549, 2 Handy 19 1163
v. Whiteman, 41 Fed. 427 4407
Atwell v. Miller, 11 Md. 348 3302
v. Towles, 1 Munf. 175 1568
v. Zeluff, 26 Mich. 118 1065
Atwill v. Mackintosh, 120 Mass. 177 4506
Atwood v. Boston F. & T. Co., 185 Mass. 557 312, 1137, 4170, 4185, 4188
v. Brown, 72 Iowa 723 755
v. Chapman, 68 Me. 38 3685
Atwood v. Cornwall, 28 Mich. 336 645, 647
v. Fagan, — Tex. Civ. App. —, 134 S. W. 765 835, 841, 862
v. Gillespie, 4 Mo. 423 1503
v. Lucas, 53 Me. 508 2225
v. Norton, 27 Barb. 638 379
v. Union Mut. F. Ins. Co., 28 N. H. 234 3026, 3055
v. Utah Light & Railway Co., 44 Utah 366 1374
v. Vincent, 17 Conn. 575 2211
v. Walker, 179 Mass. 514 1980, 1984
Au v. New York, L. E. & W. R. Co., 29 Fed. 72 4874, 4889
Aubery v. Fiske, 36 N. Y. 47 2905
Auburn, etc., P. R. Co. v. Douglass, 12 Barb. 557 4484
Auchmuty v. Ham, 1 Denio 495 443, 3938
Audenried v. Woodward, 28 N. J. L. 265 3117
Auditors v. Benoit, 20 Mich. 176 693, 694
v. Crise, 20 Ark. 540 4094
v. Dugges, 3 Leigh 241 1043
Audubon B. Co. v. Andrews, 187 Fed. 254 384, 2511
Auer v. Hoffman, 132 Wis. 620 3110
v. Penn. 99 Pa. 370 3110
Augur v. Gulfport L. I. Co., 95 Miss. 292 1721
v. Smith, 90 Tenn. 729 4393
August v. Finnerty, 10 Ohio C. C. (N. S.) 433 1267, 1313
Augusta v. Lombard, 101 Ga. 724 3847, 3859
v. Marks, 50 Ga. 612 4119
v. Owens, 111 Ga. 464 4669, 4709
v. Schrameck, 96 Ga. 426 3990
Augusta B. Co. v. Central R. Co. 121 Ga. 48 3424
Augusta N. S. Co. v. Forlaw, 133 Ga. 138 246, 390
Augusta Nat. Bank v. Hewins, 90 Me. 255 967
Augusta R. Co. v. Glover, 92 Ga. 132 1502, 4918
Augusta S. L. Co. v. Debow, 98 Me. 496 887, 928
Augusta & S. R. Co. v. Randall, 79 Ga. 304 135
v. Randall, 85 Ga. 297 4666, 4832
Augustien v. Challis, 1 Ex. 279 1628
Aulger v. Clay, 109 Ill. 487 816
Aull v. Bowling Green O. H. Co., 130 Ky. 789 3099
Ault v. Dustin, 100 Tenn. 366 2702
Aultman v. Case, 68 Wis. 612 2415, 2436
v. Daggs, 50 Mo. App. 280 2229
v. Ginn, 1 N. D. 402 2405, 2409
v. Lee, 43 Iowa 404 2944
v. Mason, 83 Ga. 212, 218 1838, 1853, 2456
v. Meade, 121 Ky. 241 4210
v. Shelton, 90 Iowa 288 2404, 2422
Aultman Co. v. McDonough, 110 Wis. 263 538, 2415, 4329, 4358, 4361
v. Sout, 15 Neb. 586 2433
v. Stichler, 21 Neb. 72 4325
v. Wheeler, 49 Iowa 647 536
Aultman & T. Co. v. Hefner, 67 Tex. 54 2827
v. Hetherington, 42 Wis. 622 546, 557, 564, 569
v. Jett, 42 Wis. 488 546, 557, 569
Aultman & T. Mach. Co. v. Burchett, 15 Okla. 490 1597
Aurentz v. Porter, 56 Pa. 115 603

[REFERENCES ARE TO PAGES]

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v. Gillett, 56 Ill. 132 3904
v. Reed, 57 Ill. 29 3948
v. West, 7 Wall. 82 1210
Aurora F. & M. Ins. Co. v. Kranick, 36 Mich. 289 3021
Aurora Hill M. Co. v. Eighty-five M. Co., 12 Sawyer 355, 34 Fed. 515 3791
Aurora Nat. Bank v. Dils, 18 Ind. App. 319 1826
Aurora, etc., R. Co. v. Gary, 221 Ill. 29 4831
Aust v. Rosenbaum, 74 Miss. 893 786
Austen v. Willward, Cro. Eliz. 860 1534
Austill v. Crawford, 7 Ala. 335 2948
Austin v. Augusta T. R. Co., 108 Ga. 671 3947, 3952
v. Austin, 47 Vt. 311 356, 2661, 2667
v. Bacon, 49 Hun 386 4525, 4563
v. Barrows, 41 Conn. 287 4429
v. Belknap, 54 Vt. 495 2805
v. Chicago, etc., R. Co., 93 Wis. 496 312
v. Cummings, 10 Vt. 26 452
v. Debnam, 3 B. & C. 139 4605, 4606
v. Dorwin, 21 Vt. 39 752, 2823
v. Field, 7 Abb. Pr. (N. S.) 29 3142
v. Foster, 9 Pick. 341 522
v. Hall, 13 Johns. 286 770
v. Hamilton, 7 Wash. 382 1923
v. Hanchet, 2 Root 148 4600
v. Hudson River R. Co., 25 N. Y. 334 429
v. Huntsville C. & M. Co., 72 Mo. 534 3788
v. Hyndman, 119 Mich. 615 4508, 4587
v. Imus, 23 Vt. 286 1148, 1881
v. Jones, Gilmer 341 4342
v. Metropolitan St. R. Co., 108 App. Div. (N. Y.) 249 4858, 4891, 4907
v. Millspaugh, 90 Miss. 354 1454, 3397
v. Moore, 16 La. Ann. 218 1808
v. Ritz, 72 Tex. 391 4781
v. Terry, 13 Colo. App. 141 4312
v. Wilson, 4 Cush. 273 1296, 1305
Austin E. R. Co. v. Faust (Tex. Civ. App.), 133 S. W. 449 1379, 1489, 1531
Austin & N. R. Co. v. Cluck, 97 Tex. 172 1463, 1467
Australian J. S. Bank v. Hetherington, 14 New South Wales L. R. 503 2810
Australian S. Co. v. British Broken Hill P. Co., 22 Vict. L. R. 190 2287
v. British Broken Hill P. Co., 2 The Argus, L. R. 173 2346
Autenrieth v. St. Louis, etc., R. Co., 36 Mo. App. 254 3878
Auzerais v. Naglee, 74 Cal. 60 948, 1008, 1011
Avakian v. Noble, 121 Cal. 216 1340, 4165, 4167
Avant v. Watson (Tex. Civ. App), 122 S. W. 586 2236
Avent v. Hord, 3 Head. 458 3693, 3695
Avenue between Ft. Washington & H. Aves., In re, 153 App. Div. (N. Y.), 164 4020
Avenue C, In re, 151 App. Div. (N. Y.), 83 4018
Avera v. Williams, 81 Miss. 714 3827
Averall v. Wade, — Lloyd & Goold, 252 572
Averett v. Brady, 20 Ga. 523 3699, 3705, 3710
Averill v. United States, 14 Ct. of Cls. 200 2483
v. Wood, 78 Mich. 342 746
Avery v. Brown, 31 Conn. 398 515, 532, 3260
v. Case P. Works, 163 Fed. 842 10
v. Dougherty, 102 Ind. 443 3192, 3260
v. Fitch, 4 Conn. 362 386
v. Halsey, 14 Pick. 174 2977
v. Howell, 91 Kan. 297 2501
v. Meikle, 85 Ky. 435 4488, 4489, 4490, 4493
v. Ray, 1 Mass. 12 460, 465, 4683, 4782, 4783
v. Segura S. Co., 111 La. 891 2614
v. Willson, 81 N. Y. 341 2230
Avery Mfg. Co. v. Leathers, 130 Mo. App. 202 715
Avinger v. South Carolina R. Co., 29 S. C. 265 3424
Avoca, The, 39 Fed. 567 2724
Avon M. Ins. Co. v. Barteaux, 2 Nova Scotia Dec. 195 3034
Avondale Mills v. Bryant, 10 Ala. App. 507 1311, 1331, 1343, 4774
Awtrey v. Campbell, 118 Ga. 464 1559
Axe v. Tolbert, 179 Mich. 556 862
Axford v. Perrett, 4 Bing. 586 1655
Axman v. Washington G. Co., 38 App. Cas. (D. C.), 150 3820, 4668
Axtel v. Chase, 77 Ind. 74 2074
Axtell v. Northern Pac. R. Co., 9 Idaho 392 1430, 3908
Aydlett v. Brown, 153 N. C. 334 759
Ayer v. Bartlett, 9 Pick. 156 3836, 4230
v. Colgrove, 81 Hun 322 4972
v. Hawkins, 19 Vt. 26 717, 719, 721, 723
v. Hughes, 97 S. C. 255 2742
v. Norwich, 39 Conn. 376 161
v. Spring, 9 Mass. 8 3718
v. Tilden, 15 Gray 178 1180, 1881
v. Western U. Tel. Co., 79 Me. 493 3551, 3615
Ayers v. Duggan, 57 Neb. 750 1765
v. Hite, 97 Va. 467 1590, 1595
v. Hobbs, 41 Ind. App. 576 4258
v. Hubbard, 57 Mich. 322 4261
v. Hutchins, 4 Mass. 370 1825
v. Macoughtry, 29 Okla. 339 4664
v. Mahuka, 9 Hawaii 377 3673
v. Metcalf, 39 Ill. 307 1011
v. Probasco, 14 Kan. 175 1194
Aygarn v. Rogers G. Co., 141 Ill. App. 402 1330
Aylesbury M. Co. v. Fitch, 22 Okla. 475 4215, 4297
Aylesworth v. Brown, 31 Ind. 270 781
Aylet v. Dodd, 2 Atk. 238 870
Aylett v. Jewel, 2 W. Bl. 1299 1482
Ayling v. London & I. D. Com., 9 T. L. Rep. 409 2576
Aymar v. Sheldon, 12 Wend. 439 1150, 1151, 1905
Ayre v. Ayre, 128 Mass. 575 1081
v. Craven, 2 Ad. & El. 7 4503
v. Hixson, 53 Ore. 19 360
Ayres v. Chicago & N. R. Co., 71 Wis. 372 3311, 3353
v. Chicago & N. R. Co., 75 Wis. 215 3436
v. Covill, 18 Barb. 260 4572, 4573
v. Delaware, etc., R. Co., 158 N. Y. 254 412, 4742, 4743, 4748
v. French, 41 Conn. 151 26, 4207
v. Hartford Ins. Co., 17 Iowa 176 3019
v. Hayes, 13 Mo. 252 949
v. Hubbard, 57 Mich. 322 3788, 4260
v. Hull, 5 Kan. 419 2473
v. Macoughtry, 29 Okla. 339 4731

[REFERENCES ARE TO PAGES]

Ayres v. O'Farrell, 10 Bosw. 143 570
v. Pease, 12 Wend. 393 839
v. Western U. Tel. Co., 65 App. Div. (N. Y.) 149 3546, 3549, 3550, 3556

B

B——— v. I———, 22 Wis. 372 4529, 4530
B. B. Hill Mfg. Co. v. Stewart, 116 Fed. 927 4437
B. C. Terry, The, 9 Fed. 920 2735
B. & W. Engineering Co. v. Beam, 23 Cal. App. 164 746, 757
Baack, Dyer & Brecht Millinery Co. v. Chicago & A. R. Co., 117 Mo. App. 282 3532
Babb v. Curators of State University, 40 Mo. App. 173 3863, 3886, 3920
v. Talcott, 47 Mo. 343 4361
Babbage v. Babbage, L. R. 2 P. & D. 222 4976
Babbitt v. Bumpus, 73 Mich. 331 2491
v. Finn, 101 U. S. 7 1765
v. Moore, 51 N. J. L. 229 536
Babcock, In re, 3 Story 393 2841
Babcock v. Appleton Mfg. Co., 93 Wis. 124 2561
v. Case, 61 Pa. 247 4382
v. D'll, 43 Barb. 577 753
v. Gill, 10 Johns. 287 4256
v. Hawkins, 23 Vt. 561 746
v. Hubbard, 56 Conn. 284 1105
v. Reeves, 149 Ala. 665 1713, 1718, 1727
v. Trice, 18 Ill. 420 534
v. Urquhart, 53 Wash. 168 1997
Babcock & W. Co. v. Pioneer I. Works, 34 Fed. 338 775
Baber v. Harris, 9 A. & E. 532 2069
Babitt v. Union Pac. R. Co., 78 Neb. 410 1506
Babley v. Wonderland Co., 205 Mass. 238 439
Babonneau v. Farrell, 15 C. B. 360 4531
Baccaria v. Landers, 84 Misc. (N. Y.) 396 748, 750
Bach v. Levy, 101 N. Y. 511 2302, 2379, 2405
v. Miller, 16 La. Ann. 44 1028
Bachelder v. Fiske, 17 Mass. 464 2853, 2864
v. Morgan, 179 Ala. 339 88, 489, 4808
Bachert v. Lehigh C. & N. Co., 208 Pa. 362 3890
Bachman v. Fenstermacher, 112 Pa. 331 1621
Bacigalupi v. Phoenix B. & C. Co., 14 Cal. App. 632 1454, 2598
Backburn v. Alabama G. S. R. Co., 143 Ala. 346 41
Backenstoss v. Stahler, 33 Pa. 257 4353
Backes v. Black, 5 Neb. (Unof.) 74, 97 N. W. 321 2236
Backhouse v. Bonomi, 9 H. of L. Cas. 503 392
v. Hall, 6 B. & S. 507 2753, 2755
v. Patton, 5 Pet. 160 714
Backs v. Schlick, 82 Neb. 289 2225
Backus v. Archer, 109 Mich. 666 2792
v. Black, 5 Neb. (Unof.) 74 2255
v. Coyne, 45 Mich. 584 2854, 2862
v. Gould, 7 How. 798 4480
v. McCoy, 3 Ohio 211 2058, 2060, 2086, 2134, 2173
v. Minor, 3 Cal. 231 1203, 1214
v. Richardson, 5 Johns. 476 4504
Bacon v. Bacon, 76 Miss. 458 4839, 4840
v. Bronson, 7 Johns. Ch. 194 4366
v. Brown, 1 Bibb 334 717, 736, 738
Bacon v. Charlton, 7 Cush. 586 1472
v. Cobb, 45 Ill. 47 2607
v. Cropsey, 7 N. Y. 195 1626
v. Dyer, 12 Me. 19 806
v. Fairman, 6 Conn. 121 643
v. Frisbie, 15 Hun 56 4378
v. Hooker, 153 Mass. 554 786
v. Iowa S. & L. Ass'n, 121 Iowa 449 979
v. Peoria & E. R. Co., 162 Ill. App. 162 416
v. Pullman Co., 159 Fed. 1 3533, 3540, 3541
v. Smith, 2 La. Ann. 441 802
v. Towne, 4 Cush. 217 4634, 4643, 4649
Bacon, M. S., The, v. Erie & W. T. Co., 3 Fed. 344 3304
Baddeley v. Earl Granville, 19 Q. B. Div. 423 22
v. Mortlock, Holt N. P. 151 3680
Badder v. Keefer, 91 Mich. 611 4968
Badders v. Davis, 88 Ala. 367 2655, 2656
Badeley v. Vigurs, 4 El. & B. 71 780, 3167
Baden v. McKenny, 18 D. C. 268 3716, 3717
Bader v. Southern Pac. Co., 52 La. Ann. 1060 3459
Badere v. Goodrich, 63 Wash. 650 2525
Badger, In re, 2 Barn. & Ald. 691 1068
Badger v. Celler, 41 App. Div. (N. Y.) 599 2496
v. Phinney, 15 Mass. 359 2540
v. Titcomb, 15 Pick. 409 378, 380, 385
Badger State L. Co. v. Jones L. Co., 140 Wis. 73 2227, 2231, 2237, 2257
Badgett v. Broughton, 1 Ga. 591 1101, 2405, 2409, 2415
v. Jordan, 32 Ark. 154 976
Badgley v. Decker, 44 Barb. 577 4957, 4961
Badostain v. Grazide, 115 Cal. 425 1291, 4774
Badu v. Satterwhite (Tex. Civ. App.), 125 S. W. 929 3750
Baer v. Heffinger, 152 Wis. 558 4700
v. Mobile C. & B. Mfg. Co., 159 Ala. 491 2273, 2346
v. New York Cent. & H. River R. Co., 83 Misc. (N. Y.) 88 3385
v. Sleicher, 153 Fed. 129 531, 2600
Baer Bros. Mercantile Co. v. Denver, etc., R. Co., 233 U. S. 479 5052
Baerenklau v. Peerless R. Co., 80 N. J. Eq. 26 883, 932, 1941
Baessetti v. Shenango F. Co., 122 Minn. 335 2237, 2257, 2264
Bagby v. Chandler, 9 Ala. 770 1559
v. Harris, 9 Ala. 173 39
Bagg v. Jefferson C. P., 10 Wend. 615 587
Baggett v. Beard, 43 Miss. 120 306, 1722
Bagley v. Bates, Wright 705 2463
v. Cleveland R. M. Co., 22 Blatch. 342 2435
v. Findlay, 82 Ill. 524 2244
v. Mason, 69 Vt. 175 1472, 4676
v. Peddie, 16 N. Y. 469 848, 869, 885, 889, 913
v. Peddie, 5 Sandf. 192 857, 876, 881, 886, 890
v. Smith, 10 N. Y. 489 255
v. Weaver, 72 Ark. 29 574
Baglin v. Southern Surety Co., 41 App. Cas. (D. C.) 530 2758, 2793
Bagnall v. City of Milwaukee, 156 Wis. 642 1098, 4008, 4135, 4152

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Bagueley v. Hawley, L. R. 2 C. P. 625 2382
Bagwell v. American S. Co., 102 Mo. App. 707 931
Baha, etc., R. Co., In re, L. R. 3 Q. B. 584 4251
Bahart v. Republic I. Co., 49 Kan. 94 1935
Bahia & San Francisco R. Co., In re, L. R. 3 Q. B. 583 4404
Bahr v. Boley, 85 Hun 448 3823
v. Northern Pac. R. Co., 101 Minn. 314 4671, 4778
Bahrenburg v. Schopp F. Co., 128 Mo. App. 526 760
Baileu v. Bank, 6 New South Wales St. Rep. 686 277
Bailey v. Agawam Nat. Bank, 190 Mass. 20 2148, 2150, 2152, 2182, 4250
v. American D. & L. Co., 52 App. Div. (N. Y.) 402 4281
v. Bailey, 94 Iowa 598 4519, 4975, 4982
v. Bancker, 3 Hill 188 452
v. Bergen, 2 Hun 520 733
v. Bergen, 67 N. Y. 346 563
v. Boston & P. R. Co., 182 Mass. 537 3981, 4006
v. Briggs, 143 Mich. 303 502
v. Buchanan County, 115 N. Y. 297 811, 1210
v. Centerville, 108 Iowa 20 4703, 4748, 4786
v. Chapman, 41 Mo. 536 2507
v. Chicago, etc., R. Co., 3 S. D. 531 3767, 3773, 3775
v. Clay, 4 Rand. 346 2276
v. Cromwell, 4 Ill. 71 1952
v. Damon, 3 Gray 92 3270, 3272, 3286
v. Day, 26 Me. 88 749
v. Dean, 5 Barb. 297 1306, 4566
v. De Crispigney, L. R. 4 Q. B. 180 2308
v. Delta E. L., P. & Mfg. Co., 86 Miss. 634 774
v. Edwards, 4 B. & S. 761 2806
v. Fredonia G. Co., 82 Kan. 746 2659, 2661, 2691, 2693
v. Galbreath, 100 Tenn. 599 1870
v. Godfrey, 54 Ill. 507 4285
v. Hart, 9 Vict. L. R. (law) 66 4840
v. Hayden, 65 Wash. 57 3788, 3793
v. Heald, 17 Tex. 102 1151, 1878
v. Heintz, 71 Ill. App. 189 3852
v. Hester, 101 N. C. 538 684
v. Hopkins (Tex. Civ. App.), 131 S. W. 624 4234, 4271
v. Hyde, 3 Conn. 463 469, 470, 471, 4574, 4581
v. James, 11 Gratt. 468 1570
v. Kalamazoo P. Co., 40 Mich. 257 4598
v. King, 27 Ont. 703 4974
v. Kline, 21 Pa. Dist. 873 3194
v. Kling, 88 Neb. 699 1511, 4549, 4573
v. Krupp, 59 N. Y. Misc. 459 3189, 3258
v. Larchar, 5 R. I. 530 2745, 2749
v. Louisiana & N. R. Co., 129 La. 1029 4780
v. McAlpin, 121 Ga. 111 1653
v. McClure, 73 Ind. 275 976
v. Mayor, 3 Hill 531 4145
v. Miltenberger, 31 Pa. 37 2060
v. Oatis, 85 Kan. 339 4363
v. Robison, 233 Ill. 614 699
v. Rome, etc., R. Co., 80 Hun 4 4805
v. Scott, 13 Wis. 618 2117, 2157
Bailey v. Shaw, 24 N. H. 297 3389, 3433, 4225
v. Siegel G. F. Co., 54 Mo. App. 50 3742, 3766
v. Smith, 43 N. H. 141 2225, 2227
v. Smith, 103 Ala. 641 2507
v. Stroud, 26 W. Va. 614 611
v. United States, 15 Ct. of Cls. 490 685
v. Walton, 24 S. D. 118 1267, 1270, 1442, 4165
v. Western U. Tel. Co., 227 Pa. 522 2607, 3547, 3553, 3555, 3563, 3568, 3600, 3617
v. Western U. Tel. Co., 150 N. C. 316 3622
v. Woods, 17 N. H. 365 2539, 2650, 2664
Bailiff of Ipswich v. Martin, 1 Roll Abr. 235 3133
Baillie v. Kell, 4 Bing. N. C. 638 494
Baily v. Carnduff, 14 Colo. App. 169 2977
v. Smith, 14 Ohio St. 396 1823
Baily, Succession of, 30 La. Ann. 75 1639
Bain v. Ackworth, 1 S. C. Const. 107 1898
v. Arthur, 129 La. 143 2872
v. Brown, 7 Lans. 506, 56 N. Y. 285 2902, 2904
v. Case, 3 C. & P. 496 1034
v. Clark, 39 Mo. 252 2905
v. Cushman, 60 Vt. 343 1431
v. Fothergill, L. R. 6 Ex. 59, L. R. 7 Eng. & Irish App. 158 284, 355, 1972, 1981
v. Heath, 12 How. 168 1719
v. Savage, 76 Va. 905 1195
Bainbridge O. Co. v. Crawford O. Mill, 138 Ga. 741 2277
v. Wilcocks, Baldw. C. C. 536 1147, 1154, 1155, 1878
Baine v. Williams, 10 Sm. & M. 113 731, 732, 742
Baines v. Coos Bay N. Co., 49 Ore. 192 759
Bair v. Mobile C. & B. Mfg. Co., 159 Ala. 491 2408
v. Sleicher, 153 Fed. 129 2589
Baird v. Boehner, 77 Iowa 622 4968, 4969
v. Carle, 157 Wis. 565 4980
v. Citizens' R. Co., 146 Mo. 265 1396
v. Mathews, 6 Dana 130 2370
v. Ratcliff, 10 Tex. 81 2489, 2529, 2609
v. Schuylkill River East Side R. Co., 154 Pa. 463 4016
v. Shipman, 33 Ill. App. 503, 132 Ill. 16 2994, 2995
v. Tolliver, 6 Humph. 186 861, 864, 868, 885
v. United States, 96 U. S. 430, 372
v. Western U. Tel. Co., 79 S. C. 310 3590
v. Yohn, 26 Pa. 482 440
Baisdrenghien v. Missouri, K. & T. Ry. Co., 91 Kan. 730 338, 4665
Bakeman v. Pooler, 15 Wend. 637 802, 804
Baker, The, 25 Fed. 774 2728
Baker v. Akron, 145 Iowa 485 3, 8
v. Allen, 66 Ark. 271 3844, 3854
v. Arnold, 3 Cai. 279 2783
v. Ashe, 80 Tex. 356 4401
v. Atlantic C. L. R. Co., 82 S. C. 146 3333
v. Baker, 28 N. J. L. 13 1214, 1219
v. Becker, 153 Wis. 369 4380
v. Bolton, 1 Camp. 493 349, 4847
v. Boston, 12 Pick. 184 13, 3936
v. Boston E. R. Co., 183 Mass. 178 4084

[REFERENCES ARE TO PAGES]

Baker v. Briggs, 8 Pick. 122 2769, 2795, 2804, 2812
v. Brinson, 9 Rich. 201 3386
v. Callender, 6 Mass. 303 1527
v. Cartwright, 10 C. B. (N. S.) 124 3661, 3685
v. Connell, 1 Daly 469 554
v. Corbett, 28 Iowa 317 2012, 2157
v. Cornwall, 4 Cal. 15 1562
v. Crane, 138 Fed. 60 4465
v. Cummings, 8 D. C. App. Cas. 515 1061
v. Davis, 127 Ga. 649 436
v. Davis, 3 Camp. 474 504
v. Dewey, 1 B. & C. 704 2067
v. Drake, 53 N. Y. 211 47, 2311, 2891, 2948, 2954, 2966, 4169, 4243
v. Drake, 66 N. Y. 18 4178, 4179, 4243
v. Fawcett, 69 Ill. App. 300 549, 1856
v. Freeman, 9 Wend. 36 480, 4198, 4215, 4305
v. Frellson, 32 La. Ann. 822 1763
v. Fritts, 143 Ill. App. 465 1498
v. Garratt, 3 Bing. 56 1656
v. Gasque, 3 Strobh. 25 796, 830
v. Hagey, 177 Pa. 128 4748
v. Hart, 52 Hun 363 363, 4256, 4261
v. Hart, 123 N. Y. 470 3745
v. Higgins, 21 N. Y. 397 2271
v. Holt, 56 Wis. 100 621
v. Holtpzaffell, 4 Taunt. 45 3098
v. Hunt, 40 Ill. 264 2055
v. Irish, 172 Pa. 528 4657, 4717, 4755
v. Jewell, 6 Mass. 460 422, 772
v. Johnson, 2 Hill 342 399
v. Johnson, 2 Robert. 570 2279
v. Jordan, 5 Humph. 485 1890, 2331
v. Keever, 130 Ga. 257 3201
v. Kellogg, 29 Ohio St. 663 2821
v. Knickerbocker L. Ins. Co., 24 Wis. 630 2558
v. Lafitte, 4 Rich Eq. 392 1120
v. Leka, 48 Ill. App. 353 3853
v. Loomis, 5 Wend. 134 1403
v. McClurg, 198 Ill. 28, 96 Ill. App. 165 3256, 3257
v. Madison, 62 Wis. 137 1499, 1501, 1512, 1518, 4797
v. Mair, 12 Mass. 121 2329
v. Martin, 3 Barb. 634 297, 2848
v. Mayo, 129 Mass. 517 1072, 1073
v. Meisch, 29 Neb. 227 4262
v. Mims, 14 Tex. Civ. App. 413 3767, 4188
v. Morris, 10 Leigh 284 1570
v. N. & S. R. Co., 144 N. C. 36 109
v. North East Borough, 151 Pa. 234 148
v. Pennsylvania R. Co., 236 Pa. 479 3952, 3985, 3986, 4001, 4002, 4125, 4130
v. Philadelphia & R. R. Co., 149 Fed. 882 4934
v. Railroad Co., 56 Vt. 302 1135
v. Railsback, 4 Ind. 533 556
v. Robinson, 63 N. C. 191 2780
v. Root, 4 McLean 572 3099
v. Safe Deposit & T. Co., 93 Md. 368 1087
v. St. Louis, etc., R. Co., 145 Mo. App. 189 3311
v. Sanderson, 3 Pick. 348 1528, 3930, 3933
v. Scott, 62 Ill. 86 1202
v. Seavey, 163 Mass. 522 1453, 4283, 4284
v. Secor, 4 N. Y. Supp. 303 4642
Baker v. Shaw, 78 Wash. 233 2340, 2349
v. Slack, 130 Fed. 514 4484, 4488, 4491, 4493
v. Smith, 44 La. Ann. 925 704
v. Smith, 4 Yeates 185 1547
v. Spruance, — Del. Super. Ct. —, 91 Atl. 203 4209
v. Stackpoole, 9 Cow. 420 703, 704, 717, 723, 725
v. State, 77 App. Div. (N. Y.) 528 2697, 2709
v. Taylorville R., L. H. & P. Co., 164 Ill. App. 232 4732
v. Thompson, 228 Pa. 543 158
v. Todd, 6 Tex. 273 2336
v. Western U. Tel. Co., 84 S. C. 477 3547, 3590
v. Wheeler, 8 Wend. 505 363, 3784, 3792, 4215, 4232, 4256
Baker County v. Huntington, 48 Ore. 593 1102, 1609
Baker Mfg. Co. v. Clayton, 46 Tex. Civ. App. 384 187
Baker S. Co. v. The Excelsior, 19 Fed. 436 2729
Baker T. Co. v. Merchants' R. & I. Mfg. Co., 12 App. Div. (N. Y.) 260 2590, 2593
Baker & L. Mfg. Co. v. Clayton, 40 Tex. Civ. App. 586 4314
Baker's App., 59 Pa. 313 605
Bakka v. Kemmerer C. Co., 43 Utah 345 4778
Balaklala Consol. Copper Co. v. Reardon, 220 Fed. 584 4918
Balbas v. Rogers, 4 Porto Rico Fed. 82 476, 3749
Balbridge v. Dawson, 39 Mo. App. 527 4359
Balch, Ex parte, 2 Low. 440 636
Balderston v. Western U. Tel. Co., 79 S. C. 160 3607, 3618
Baldridge v. Centgraf, 82 Kan. 240 294, 2045
v. Cook, 27 Tex. 565 1952, 1954
v. Dawson, 39 Mo. App. 529 4334
Baldwin v. Bank, 1 La. Ann. 13 2995
v. Bennett, 4 Cal. 392 1416, 2497, 2698
v. Bohl, 23 S. D. 395 3699
v. Boulware, 79 Mo. App. 5 4537, 4577, 4599
v. Capitol S. L. Co., 109 Minn. 38 4644
v. Chicago, etc., R. Co., 35 Minn. 354 400
v. Daly, 41 Wash. 416 752
v. Davidson (Tex. Civ. App.), 127 S. W. 562 4210, 4233, 4236, 4271, 4299
v. Flash, 59 Miss. 61 703
v. Fries, 46 Mo. App. 288 1288, 1305
v. Gordon, 12 Martin 373 2825
v. Greenwoods T. Co., 40 Conn. 238 105, 106
v. Lincoln County, 29 Wash. 509 4786
v. Liverpool, etc., S. Co., 74 N. Y. 125 3283
v. London, etc., R. Co., 9 Q. B. Div. 582 3383
v. Marqueze, 91 Ga. 404 258
v. Munn, 2 Wend. 399 284, 1028, 1985, 1986, 1992, 2153, 2157
v. Porter, 12 Conn. 473 380, 485, 3792, 4215, 4305, 4307
v. Porter, 217 Mass. 15 659, 698
v. Richardson, 39 Tex. Civ. App. 406 3741, 3818
v. San Antonio (Tex. Civ. App.), 125 S. W. 596 1229, 4153

[REFERENCES ARE TO PAGES]

Baldwin v. Soule, 6 Gray 321 4513, 4514
v. Stebbins, 1 Ala. 180 1410
v. Sullivan Timber Co., 142 N. Y. 279 3304, 3307
v. United States, 15 Ct. of Cls. 297 625
v. United States Tel. Co., 44 N. Y. 744 3559
v. United States Tel. Co., 45 N. Y. 744 161, 3375, 3546, 3547, 3597, 3606
v. United States Tel. Co., 45 Barb. 505 3553
v. Van Deusen, 37 N. Y. 487 649
v. Von der Abe, 184 Pa. 116 4620, 4624
v. Von Micheroux, 5 N. Y. Misc. 386 2549
v. Walker, 94 Ala. 514 1701, 1706
v. Western R. Co., 4 Gray 333 1363, 1374, 4693, 4708, 4713
v. Western U. Tel. Co., 93 Ga. 692 1393, 3592
v. Zadig, 104 Cal. 594 1018
Baldwin Star C. Co. v. Quinn, 46 Colo. 590 1728
Baldy v. Stratton, 11 Pa. 316 3669, 3680
Bales v. Wichita, etc., R. Co., 92 Kan. 771 3961, 3963, 4018, 4019, 4032, 4143
v. Wingfield, 4 Q. B. 580 1628, 1630
Balfour v. Davis, 14 Ore. 47 1182
v. Louisville, etc., R. Co., 62 Miss. 508 3964
Balke v. Baltimore, etc., Co., 211 Fed. 116 2717
v. Midland R. Co., 10 Eng. L. & Eq. 437 3472
Balkis C. Co. v. Tomkinson, [1893] App. Cas. 396 289
Balkwill v. Spencer, 45 Wash. 600 1449, 1990
Ball v. Belden (Tex. Civ. App.), 126 S. W. 20 1876
v. Britton, 58 Tex. 57 255, 355
v. Bruce, 21 Ill. 161 4963
v. Campbell, 30 Kan. 177 4304
v. Clark, 28 Fed. 179 2965
v. Elliott, — Misc. (N. Y.) —, 143 N. Y. Supp. 938 699
v. Evening American P. Co., 237 Ill. 592 4513
v. Liney, 48 N. Y. 6 486, 4202, 4300, 4306
v. Loomis, 29 N. Y. 412 435, 437
v. Nye, 99 Mass. 582 3839
v. Ocean Ins. Co., 22 Pick. 472 3036
v. Rawles, 93 Cal. 222 4633, 4635, 4648
v. Setzer, 33 W. Va. 444 574
v. Stanley, 5 Yerg. 199 790, 801, 827
v. Sydney & L. R. Co., 46 Nova Scotia 507 3933
v. Wabash, etc., R. Co., 83 Mo. 574 20
v. Wyette, 8 Allen 275 3151
Ball & Bro. L. Co. v. Simms L. Co., 121 La. 627 3792, 4259
Ballanger v. Shumate, 10 Ala. App. 329 4170
Ballard v. Burton, 64 Vt. 387 2780
v. Child, 34 Me. 355 2055
v. Leavell, 5 Call. 531 493
v. Purcell, 1 Nev. 342 1537
v. Russell, 33 Me. 196 4762
v. Shutt, 15 Ch. Div. 122 1026
Ballentine v. Illinois Cent. R. Co., 157 Ill. App. 295 143, 4702
v. Robinson, 46 Pa. 179 2227, 2228, 2259
Balli v. Rockmore, 111 Fed. 874 2283
Ballingallis v. Gloster, 3 East 482, 4 Esp. 268 1151, 1868, 2930
Ballinger v. Edwards, 4 Ired. Eq. 449 978
v. Rader, 153 N. C. 488 4861
Ballou v. Earle, 17 L. R. A. 441 3335, 3414, 3415
v. Farnum, 11 Allen (Mass.) 73 334, 3491, 4670, 4693, 4714, 5088
Balme v. Hutton, 9 Bing. 471 436
v. Wambaugh, 16 Minn. 116 806, 808
v. Wombough, 38 Barb. 352 1163, 1878
Balmforth's Est., 14 Pa. Dist. 55 1049
Balph v. Rathburn Co., 75 Fed. 971 2453
Balsbaugh v. Frazer, 19 Pa. 95 2458, 2490
Balsley v. Hetzel, 182 Ill. App. 136 781
v. Hoffman, 13 Pa. 603 1654, 1655, 1656, 1660, 1664, 1669
Balte v. Bedemiller, 37 Ore. 27 2382, 2398
Baltimore, The, 8 Wall. 377 323, 4995, 4998
Baltimore v. Garrett, 120 Md. 608 4029
v. Johnson, 123 Md. 320 4112
v. Kahl, 124 Md. 299 3961, 4141
v. Megary, 122 Md. 20 3961, 3981, 4142
v. Merryman, 86 Md. 584 392, 3853
v. Reynolds, 20 Md. 1 2981
v. Rice, 73 Md. 307 4090
v. State, 105 Md. 1 1065
v. State, 166 Fed. 641 109
Baltimore B. B. Club & E. Co. v. Pickett, 78 Md. 375 2548, 2556
Baltimore B. R. Co. v. Sattler, 100 Md. 306 3877, 3887
v. Sattler, 102 Md. 595 47, 1429, 1432, 1445, 3880, 3891
v. Sattler, 105 Md. 264 27, 3877
Baltimore, C. & A. R. Co. v. Hudgins, 116 Va. 27 3387
Baltimore City P. R. Co. v. Baer, 90 Md. 97 1381, 4682, 4688, 4791
v. Kemp, 61 Md. 74 54, 135, 4681
v. Kemp, 61 Md. 619 138
v. Sewell, 35 Md. 238 2309, 2318, 2320
v. Sewell, 37 Md. 443 1247
Baltimore Extension R. Co., [1895] 1 Irish 169 4157
Baltimore F. Ins. Co. v. Loney, 20 Md. 20 1089, 3049
Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 269 4214, 4239, 4288
Baltimore P. B. & L. Soc. v. Smith, 54 Md. 187 1986, 1997, 1998, 2048
Baltimore R. Co. v. Magruder, 34 Md. 79 399
Baltimore S. Co. v. Ammonia Co., 2 Pa. Super. 555 2241
Baltimore S. P. Co. v. Smith, 23 Md. 402 3531
Baltimore T. Co. v. George's Creek C. & I. Co., 119 Md. 21 1110
Baltimore United O. Co. v. Barber, 2 Mackey (D. C.) 4 524
Baltimore & H. T. Co. v. Bateman, 68 Md. 389 105
Baltimore & L. T. Co. v. Cassell, 66 Md. 418 4679
Baltimore & Y. Turnpike Road v. Boone, 45 Md. 344 1269, 1276
Baltimore, etc., R. Co. v. Baldwin (Ohio) 75 C. C. A. 211, 144 Fed. 53 4856
v. Barger, 80 Md. 23 3468, 3502
v. Baugh, 149 U. S. 368 5024
v. Blocher, 27 Md. 277 1331, 1344, 1347, 3467, 3474, 3507
v. Boyd, 67 Md. 32 3740, 3747

[REFERENCES ARE TO PAGES]

Baltimore, etc., R. Co. v. Boyd, 63 Md. 325 3827
v. Breinig, 25 Md. 378 3467
v. Brown's Heirs, 74 W. Va. 149 4033
v. Brydon, 65 Md. 198, 225 2235
v. Camp, 26 C. C. A. 626, 81 Fed. 807 4779
v. Carr, 71 Md. 135 3443, 3449, 3456, 3471
v. Chambers, 73 Ohio St. 16 4955
v. Countryman, 16 Ind. App. 139 3761
v. Darr, 204 Fed. 751, aff'g 197 Fed. 665 5054, 5064
v. Davis, 44 Ind. App. 375 1273, 1305, 1343, 3468, 3473, 3506
v. Dougherty, 7 D. C. App. Cas. 378 1492
v. Ennalls, 108 Md. 75 1332
v. Evans, 188 Fed. 6 5132
v. Fifth Baptist Church, 108 U. S. 317 3841, 3907
v. Fifth Baptist Church, 137 U. S. 568 1412, 3850
v. Fisher, 5 Ohio Dec. 659 3309
v. Golway, 6 App. Cas. (D. C.) 142 4874, 4880, 4899, 4902
v. Hauer, 60 Md. 449 418
v. Henthorne, 19 C. C. A. 623, 73 Fed. 634 4728
v. Hottman, 25 Ohio C. C. 140 4893, 4899
v. Howard County, 111 Md. 176 299
v. Howard County, 113 Md. 404 209
v. Hubbard, 72 Ohio 302 3417
v. Interstate Commerce Comm., 231 U. S. 612 5024
v. Jackson (Pa.) 3 Atl. 100 2757
v. Johnson, 59 Mo. 480 1444
v. Kahl, 124 Md. 299 47, 3982, 3989
v. Kane, 124 Md. 231 3982
v. Keck, 84 Ill. App. 159 4792
v. Keck, 89 Ill. App. 72 4770, 4772
v. Kemp, 61 Md. 74 4679
v. Kirby, 91 Md. 313 3501
v. Kleespies, 39 Ind. App. 151 152, 432
v. Lafferty, 2 W. Va. 104 356, 2667
v. Lansing, 52 Ind. 229 4025
v. Luella Coal Co., 74 W. Va. 289 3309
v. Mackey, 157 U. S. 72 4883, 4899
v. McLaughlin, 73 Fed. 519 3336
v. Morgan, 35 App. Cas. (D. C.) 195 4676
v. Nesbit, 10 How. 395 4147
v. Noell, 32 Gratt. 394 350, 4916
v. Oriental O. Co., 51 Tex. Civ. App. 336 3334
v. Polly, 14 Gratt. 447 2684
v. Pumphrey, 59 Md. 390 3328, 3329, 3370
v. Quillen, 34 Ind. App. 330 3761, 3853, 3854, 3877, 3881
v. Rambo, 59 Fed. 75 1425
v. Ray, 36 Ind. App. 430 25
v. Reaney, 42 Md. 117 58, 67, 138, 3913
v. Reed, 12 Ohio C. C. (N. S.) 177 3468, 3505
v. Schell, 122 Ill. App. 346 1377
v. Smith, 23 Md. 402 3531
v. Sperber & Co., 117 Md. 595 3350
v. Stanley, 54 Ill. App. 215 4893, 4900
v. State, 36 Md. 519 605
v. State, 30 Md. 47 4853
v. State, 24 Md. 271 4858
v. State, 71 Md. 573 4879
v. Steel R. S. Co., 123 Fed. 655 2248
v. Stewart, 79 Md. 487 226, 2697, 2699, 2714
Baltimore, etc., R. Co. v. Stewart, 128 Ill. App. 270 3894
v. Strube, 111 Md. 119 464, 1266, 1332, 1343
v. Taylor, 109 C. C. A. 172, 186 Fed. 828 4860
v. Then, 159 Ill. 535 4935, 4941
v. Thornton, 188 Fed. 868 3449
v. Voigt, 176 U. S. 498 5117
v. Waade, 54 Ill. App. 215 4876
v. Weedon, 78 Fed. 584 1613
v. Whitacre, 124 Md. 411 4751, 5073, 5076
v. Whitehill, 104 Md. 295 3333, 3345, 3375
v. Wightman, 29 Gratt. 431 488, 4875, 4876, 4900, 4906, 4916
v. Wood, 130 Ky. 839 444
Baltwood v. Miller, 112 Mich. 657 2382
Baltzell v. Hickman, 4 Litt. 265 1360
v. Moritz, 85 Ala. 123 2584
Baltzen v. Nicolay, 53 N. Y. 467 2979, 2982
v. Nicolay, 134 N. Y. 108 2979
Baltzer v. Chicago, etc., R. Co., 89 Wis. 257 4811
Bamberge v. Supreme Tribe, 159 Mo. App. 102 1089
Bamberger v. Burrows, 145 Iowa 441 376
v. Citizens' St. R. Co., 95 Tenn. 18 108
Bamfield v. Massey, 1 Camp. 460 4531, 4971
Bamford v. Harris, 1 Stark. 343 458
v. Pittsburg & B. T. Co., 194 Pa. 17 4657
Banberger v. Kahn, 43 Hun 411 1733
Bancroft v. Abbott, 3 Allen 524 2852
v. Boston & W. R. Corporation, 11 Allen (Mass.) 34 5108
v. Cambridge, 126 Mass. 438 4104
v. Dumas, 21 Vt. 456 721, 723
v. Dwinnell, 27 Vt. 668 2837
v. Holton, 59 N. H. 141 736
v. Peters, 3 Mich. 619 3301
v. San Diego, 120 Cal. 432 4102
v. San Francisco T. Co., 120 Cal. 228 2612
v. Scribner, 72 Fed. 988 2907
v. Wardwell, 13 Johns. 489 3098
v. Winspear, 44 Barb. 209 391
Bancroft-W. Co. v. The Queen, 78 Fed. 155 3435
Band v. Reese, 26 Pa. 143 2329
Bandel v. Isaac, 13 Md. 202 984
Bandy v. Cartwright, 8 Ex. 913 3182
Bane v. Gridley, 67 Ill. 388 1003
Banes, The, 147 Fed. 192 2738
Banes v. Gordon, 9 Pa. 426 1945
Banewun v. Levenson, 171 Mass. 1 487
Banfield v. Marks, 56 Cal. 185 2893
Bang v. Farmville Ins. Co., 1 Hughes 290 627
v. Windmill Co., 96 Tenn. 361 970, 978, 979
Bange v. Flint, 25 Wis. 544 1823
Bangor Bank v. Hook, 5 Me. 174 1903, 1927
v. Treat, 6 Me. 207 423
Bangor F. Co. v. Magill, 108 Ill. 656 3266, 3270
Bangor, etc., R. Co. v. McComb, 60 Me. 290 3956, 3964, 3977, 3980, 4027, 4155
Banister v. Wakeman, 64 Vt. 203 1278
Bank, In re, 6 Paige 213 2499
Bank v. Adams, 96 Ga. 529 1825
v. Adams Exp. Co., 93 U. S. 181 20, 3335
v. Ashley, 2 Pet. 327 1503
v. Bank, 120 Ga. 575 2320

[REFERENCES ARE TO PAGES]

Bank v. Barrington, 2 P. & W. 27 2756
v. Bobo, 11 Rich. 597 658
v. Bowdre, 92 Tenn. 723 4504, 4506, 4549
v. Brackett, 4 N. H. 558 510
v. Brady, 3 McLean 268 1146
v. Bright, 77 Fed. 949 282
v. Bright C. C. Co., 139 Mo. App. 110 1528, 1905
v. Brittain, 92 Miss. 545 1920
v. Brown, 3 Wend. 158 2901
v. Brown, 22 Me. 295 743
v. Burkhardt, 100 U. S. 688 630
v. Burton, 27 Ind. 426 601, 4213
v. Byers, 139 Mo. 627, 659 4363, 4383, 4393
v. Carpenter, 7 Ohio 21 710
v. Cary S. Co., 42 App. Div. (N. Y.) 233 2391
v. Colby, 12 N. H. 520 1147
v. Cunningham. 75 Ga. 366 2978
v. Curtiss, 1 Hill 275 495, 496, 497, 1621
v. De Grauw, 23 Wend. 342 762
v. Doherty, 42 Wash. 317 959, 1159
v. Ellis, 2 Fed. 44 1921
v. Farmers' & M. Bank, 10 Vt. 141 645, 647
v. Fordyce, 9 Pa. 275 2808
v. Gibson, 60 Ark. 269 1147
v. Gifford, 79 Iowa 300 663, 2805, 2844
v. Goos, 39 Neb. 437 277, 279
v. Graf, 12 Ariz. 156 2977
v. Gray, 2 Hill 227 2930
v. Guttschlick, 14 Pet. 19 1354
v. Hiatt, 58 Cal. 234 4381, 4383
v. Hollingsworth, 135 N. C. 556 664
v. Hunter, 20 How. Pr. 292 2782
v. Ibbotson, 5 Hill 461 775
v. Ingerson, 105 Iowa 349 686, 687
v. Johnston, 105 Tenn. 521 2074, 2199
v. Jones, 65 Cal. 437 691
v. Lampton, 104 Miss. 427 1223
v. Layne, 101 Tenn. 45 2781
v. Lewin, 45 Barb. 340 1163, 1167
v. Lorwein, 76 Ark. 245 2801
v. Lumber Co., 100 Tenn. 479 2780
v. McAllister, Estate of, 56 Neb. 188 2814, 2820
v. McKenny, 3 Cranch C. C. 361 1461
v. McVeigh, 20 Gratt. 457 611
v. Mann, 94 Tenn. 17 970
v. Meredith, 2 Wash. C. C. 47 712
v. Nicholson, 120 Ga. 622 2783, 2792
v. Opera H. Co., 23 Mont. 34 2851
v. Ornsdorff, 126 Mo. App. 654 1835
v. Osgood, 4 Wend. 607 781, 1907
v. Owens, 2 Pet. 527 982
v. Ownes, 31 Md. 320 3729
v. Owston, L. R. 4 App. Cas. 270 1331
v. Port Townsend, 16 Wash. 450 1355
v. Powers, 102 Mo. App. 415 4273
v. Recknagel, 109 N. Y. 482, 494 2747
v. Reese, 26 Pa. 143 176, 368, 2318, 4212, 4248
v. Robinson, 13 Ark. 214 2822
v. Rogers, 16 N. H. 9 2815
v. Ross, 91 Wis. 320 2743
v. Ryan, 144 Iowa 725 718
v. Simpson, 90 N. C. 467 2821
v. Sinclair, 60 N. H. 100 979, 1111
v. Smedes, 3 Cow. 662 2929
v. Smith, 3 Hill 560 2929
v. Smith, 12 Allen 243 1038, 1570, 1664
v. Smith, 30 Vt. 148 2761
v. Sutherland, 3 Cow. 336 1412
Bank v. Swayne, 8 Ohio 257 986
v. Synnot, 11 Vict. L. R. 589 3253
v. Talbot, 110 App. Div. (N. Y.) 519 1080
v. Triplett, 1 Pet. 25 2929
v. Trumbull, 53 Barb. 459 1541
v. Union P. Co., 60 Wash. 456 2771
v. Vance, 5 Litt. 168 574
v. Waterman, 26 Conn. 324 395
v. Webb, 48 N. Y. Super. Ct. 175 714
v. Western Assur. Co., 7 Ont. 166 3009
v. Western Bank, 13 Bush 526 2962
v. Western U. Tel. Co., 52 Cal. 280 3584
v. Widmer, 2 Up. Can. Jur. (O. S.) 222 4277
v. Wister, 2 Pet. 318 1891, 1929
v. Wright, 10 Mo. 719 1902
v. Young, 101 App. Div. (N. Y.) 88 2754
Bank Com'rs v. New Hampshire B. Co., 74 N. H. 292 1031
v. Security T. Co., 70 N. H. 536 1113, 1249
Bank of Brighton v. Smith, 12 Allen 243 1575
Bank of British North America v. Ellis, 6 Sawyer 96 871
Bank of Charleston Nat. Banking Ass'n v. Zorn, 14 S. C. 444 687
Bank of Commerce v. Hart, 37 Neb. 197 656
v. Union Bank, 3 N. Y. 230 1869
Bank of England v. Newman, 1 Ld. Raym. 442 656
Bank of Illinois v. Brady, 3 McLean 268 1878, 1881
Bank of Michigan v. Green, 33 Iowa 140 1822
Bank of Neelyville v. Lee, 182 Mo. App. 185 2793
Bank of New South Wales v. Milvain, 10 Vict. L. R. 3 276
Bank of Newton Co. v. American Bonding Co., 141 Ga. 326 2741
Bank of Palo Alto v. Pacific Tel. C. Co., 103 Fed. 841 4270
Bank of Pennsylvania, Estate of, 60 Pa. 471 1249
Bank of Peru v. Farnsworth, 18 Ill. 563 1886
Bank of Prince Edward Island v. Turnbull, 35 How. Pr. 8 605
Bank of South Carolina v. Buire, 3 Strobh. 439 1119
Bank of United States v. Bank, 6 Pet. 8, 18, 8 L. ed. 299, 304 2993
v. Bank of Washington, 6 Pet. 8 1543
v. Beirne, 1 Gratt. 239 2860
v. Covert, 13 Ohio 240 733
v. Donnally, 8 Pet. 361 1145
v. Magill, 1 Paine 661 1570
v. Peabody, 20 Pa. 454 674, 677
v. Smith, 4 Cr. C. C. 712 1873
v. United States, 2 How. 711, 737 1151, 1896, 1905, 1906, 1907, 1911
Bank of Victoria v. Smith, 20 Vict. L. R. 450 2811
Bankart v. Bowen, L. R. 1 C. P. 484 2231
Banker v. Caldwell, 3 Minn. 94 4478
Bankers L. & I. Co. v. Spindle, 108 Va. 426 2503
Bankers, etc., Co. v. Elkhorn, etc., Dist., 214 Fed. 342 2585
Bankers' Iowa State Bank v. Jordan, 111 Iowa 324 1926
Bankers' S. Co. v. Linder, 156 Iowa 486 2798, 2799, 2800, 2801, 2804
v. Wyman, 141 Iowa 574 1649

[REFERENCES ARE TO PAGES]

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Bankhead v. Alloway, 6 Cold. 56 4383
Banks v. Braman, 195 Mass. 97 1477
v. Brown, 4 Yerg. 198 1798
v. Eastern R. & L. Co., 46 Wash. 610 14
v. Gay Mfg. Co., 108 N. C. 282 1399
v. Hatton, 1 Nott & McC. 221 4234
v. Howard, 117 Ga. 94 2469, 2470
v. Judah, 8 Conn. 145 2903
v. McDowel, 1 Cold. 84 1766
v. Machen, 40 Miss. 256 1127
v. Shedden F. Co., 11 Ont. L. R. 483 4767
v. Warner, 85 Conn. 613 2276
v. Windham, 7 Ala. App. 616 4292
Bankson v. Illinois Cent. R. Co., 196 Fed. 171 5129
Bankwitz v. Northwestern El. R. Co., 182 Ill. App. 55 4821
Bann v. Dalzel, Moo. & M. 228 962, 1880
v. Dalzell, 3 C. & P. 376 1005, 1035
Bannatyne v. Florence M. & M. Co., 77 Hun 289 259
Banner, Ex parte, 17 Ch. Div. 480, 490 757
Bannerman v. White, 10 C. B. (N. S.) 844 2379
Bannister v. Reed, 6 Ill. 100 2662
v. Roberts, 35 Me. 75 1199
Bannon v. Jackson, 121 Tenn. 381 2683
v. Murphy, 18 Ky. L. Rep. 989 3891
v. Rohmeiser, 17 Ky. L. Rep. 1378 3891, 3934
v. Warfield, 42 Md. 22 2962
Banon v. Frank, 14 Up. Can. C. P. 295 2057
Banta v. Banta, 82 N. Y. Supp. 113 2517
v. Banta, 84 App. Div. (N. Y.) 138 2465, 2515, 2548, 2555
v. Stamford Motor Co., — Conn. —, 92 Atl. 665 329
Bantleon v. Smith, 2 Bin. 146 1069
Banwur v. Levenson, 171 Mass. 1 275
Bappart v. Illinois S. Co., 140 Mo. App. 675 2745, 2758
Baptist Church, Trustees of, v. Brooklyn F. Ins. Co., 19 N. Y. 305 2999
Barbee v. Findlay, 221 Ill. 251 1808, 2684
v. Morris, 221 Ill. 382 728
v. Reese, 60 Miss. 906 111
Barber v. Backhouse, Peake 61 1830
v. Barber, 33 Conn. 335 4524
v. Briscoe, 9 Mont. 341 1053
v. Connecticut, etc., Ins. Co., 15 Fed. 312 2322
v. Dewes, 101 App. Div. (N. Y.) 432 432, 4169
v. Ellingwood, 137 App. Div. (N. Y.) 704 539, 4243, 4294
v. Ellingwood, 144 App. Div. (N. Y.) 512 2965
v. Gillson, 18 Nev. 89 2834, 2843
v. Hathaway, 47 App. Div. (N. Y.) 165, aff'd 169 N. Y. 575 4288
v. Kilbourn, 16 Wis. 485 1322, 1956
v. Lesiter, 7 C. B. (N. S.) 175 121, 210
v. Maden, 126 Iowa 402 1521
v. Merriam, 11 Allen 322 1419, 1427
v. Rose, 5 Hill 76 542, 569, 2828
v. Thomas, 66 Kan. 463 2226
v. Willard, 4 McLean 356 2231
Barber A. P. Co. v. Chicago, 139 Ill. App. 121 1046
v. Field, 134 Mo. App. 668 1048
v. Hayward, 248 Mo. 280 1048
v. Wabash, 43 Ind. App. 167 832, 840, 842, 862
Barbour v. Brookie, 3 J. J. Marsh. 511 1935
v. Flick, 126 Cal. 628 532, 4410
v. National Exch. Bank, 50 Ohio St. 90 2830
v. Nichols, 3 R. I. 187 1981
v. Stephenson, 32 Fed. 66 341, 4964, 4967, 4971
v. Tompkins, 31 W. Va. 410 962, 998
Barbour County v. Horn, 48 Ala. 566 4748
Barboza v. Pacific P. C. Co., 162 Cal. 36 4905
Barbrick v. White Sewing Mach. Co., 180 Mich. 535 4238
Barclay v. Abraham, 121 Iowa 619 7
v. Andrew, [1899] 1 Ch. 674 1123
v. Gooch, 2 Esp. 571 2843, 2844, 2845
v. Kennedy, 3 Wash. C. C. 350 1008
v. Lucas, 1 T. R. 291 2753
v. Pickles, 38 Mo. 143 3145, 3146
Barclay R., etc., Co. v. Ingham, 36 Pa. 194 3998
Barcliff v. Norfolk Southern R. Co., 168 N. C. 268 318
Barclift v. Fields, 145 Ala. 264 984
Barday v. Deyerle, 53 Tex. Civ. App. 236 4383
Bardeen v. Markstrum, 64 Wis. 613 2199
v. Portage, 79 Wis. 126 3889
Barden v. Atlantic C. L. R. Co., 152 N. C. 318 25
v. Felch, 109 Mass. 154 435, 1137, 1330
Bardsley v. Washington V. Co., 54 Wash. 553 621
Bardwell v. Jamaica, 15 Vt. 438 3404, 3405, 4787
v. Lydall, 7 Bing. 489 2807
Bare v. Hoffman, 79 Pa. 71 402, 1107, 3759, 3850, 3854, 3878, 3881
v. Victoria Coal & Coke Co., 73 W. Va. 632 1505, 1515, 2545
Barelli v. Hagan, 13 La. 580 3036
v. O'Connor, 6 Ala. 617 763
Barfield v. Loughborough, L. R., 8 Ch. 7 1013, 1072
Barge v. Van Der Horck, 57 Minn. 497 2851, 2865
Barger v. Barringer, 151 N. C. 433 14
v. Northern Pac. R. Co., 22 Minn. 343 2305
Barham v. Massey, 5 Ired. 192 4361
Barhans v. Sanford, 19 Wend. 417 4605
Barhight v. Tammany, 158 Pa. 545 4647
Barholt v. Wright, 45 Ohio St. 177 463
Barhydt v. Ellis, 45 N. Y. 107 2810
v. Hughes, 33 Barb. 320 531, 550
Baries v. Louisville E. L. Co., 118 Ky. 830 1374, 1494
Baring v. Bohn, 64 Ill. App. 196 2192
v. Clark, 19 Pick. 220 699
Baringer v. Imperial C. M. Co., 164 Ill. App. 467 2295
Barkalow v. Pfeffer, 38 Ind. 214 2667
Barker v. Anderson, 81 Mich. 508 4844
v. Baltimore, etc., R. Co., 22 Ohio St. 43 3036
v. Braham, 2 W. Black. 869 589
v. Braham, 3 Wils. 368 436, 4841
v. Freeland, 91 Tenn. 112 2226
v. Green, 2 Bing. 317 35, 39, 43, 1629
v. Hannibal, etc., R. Co., 91 Mo. 86 4954

[REFERENCES ARE TO PAGES]

Barker v. Hodgson, 3 M. & S. 267 1560, 3066
v. International Bank, 80 Ill. 96 943
v. Janson, L. R. 3 C. P. 303 3006
v. Kansas City, M. & O. R. Co., 88 Kan. 767 5041, 5048
v. Knickerbocker L. Ins. Co., 24 Wis. 630 2545, 2556
v. Lewis S. & T. Co., 78 Conn. 198 47, 4235
v. Mann, 5 Bush 672 2283, 2294
v. Morton, 7 Up. Can. App. 114 1830
v. Perry, 67 Iowa 146 1468, 1475
v. Phenix Ins. Co., 8 Johns. 307 3025
v. Prentiss, 6 Mass. 430 1863
v. Prizer, 150 Ind. 4 4516, 4519
v. Rhode Island Co., 35 R. I. 406 4676, 4737
v. Roberts, 8 Me. 101 2223
v. Rutland & W. R. Co., 27 Vt. 766 2667, 2672
v. Sands & McD. Co., 16 Vict. L. R. 719 4608
v. Sterne, 9 Ex. 684 1878
v. Troy & R. R., 27 Vt. 780 2679
v. Turnbull, 51 Ill. App. 226 1015
v. Western U. Tel. Co., 134 Wis. 147 3563, 3593
v. Wheeler, 60 Neb. 470 1601
Barker A. P. Co. v. Wabash, 43 Ind. App. 167 888
Barkley v. McCue, 25 N. Y. Misc. 738 3129
Barkly v. Copeland, 74 Cal. 1, 15 Pac. 307 471
Barksdale v. Charleston, etc., R. Co., 83 S. C. 287 3933
v. Seaboard A. L. R., 76 S. C. 183 4859, 4865
Barlass v. Braash, 27 Neb. 212 4211
Barley v. Chicago, etc., R. Co., 4 Biss. 430 4858, 4862
Barlow v. Brands, 15 N. J. L. 248 4513
v. Hamilton, 151 Ala. 634 1425
v. Lehigh Val. R. Co., 214 N. Y. 116, aff'g 158 N. Y. App. Div. 768 5048, 5066
v. Lowder, 35 Ark. 492 35, 1268, 4656, 4748
v. McKinley, 24 Iowa 69 2146, 2148, 2149, 2181
v. United States, 35 Ct. of Cls. 514 2656
Barlow Mfg. Co. v. Stone, 200 Mass. 158 384, 534
Barman v. Carhartt, 10 Mich. 338 2791
v. Lithauer, 4 Keyes 317 2114, 4427
Barnard v. Adams, 10 How. 270 3033, 3036
v. Bartholomew, 22 Pick. 291 1102, 1103
v. Coffin, 141 Mass. 37 2995
v. Cushman, 35 Ill. 451 825
v. Darling, 11 Wend. 28 767
v. Graves, 16 Pick. 41 661
v. Harrington, 3 Mass. 228 27
v. Kellogg, 10 Wall. 388 2371
v. National F. Ins. Co., 38 Mo. App. 106, 117 3008, 3012
v. Poor, 21 Pick. 378 182, 306, 1296, 1314, 4190
v. Schuler, 100 Minn. 289 1605
v. Sherley, 135 Ind. 547, 151 Ind. 160 9
v. Whiting, 7 Mass. 358 1489, 1527
Barned v. Hamilton, 2 Eng. Railw. Cas. 624 2317
Barnegat, The, 55 Fed. 92 2717
Barner v. Thompson, 3 Ga. App. 415 40
Barnes, Matter of, 7 App. Div. (N. Y.) 13, aff'd 154 N. Y. 737 1081
Matter of, 140 N. Y. 468 1120
Barnes v. Bamberger, 196 Pa. 123 1221
v. Bartlett, 15 Pick. 71 4338, 4350, 4352
v. Berendes, 139 Cal. 32 266, 3901, 3919, 3922
v. Bluthenthal, 101 Ga. 598 2245
v. Brookman, 107 Ill. 317 1763
v. Brown, 130 N. Y. 371, 382 2314, 2319, 2328, 2921
v. Burt, 38 Conn. 541 1391
v. Campbell, 60 N. H. 27 4521, 4523
v. Century Sav. Bank, 149 Iowa 367 727, 2796
v. Chapin, 4 Allen 444 123
v. Clement, 12 S. D. 270 2020
v. Coal Co., 101 Tenn. 354 379, 380
v. Columbia L. Co., 107 Mo. App. 608 4931, 4940
v. Cushing, 43 App. Div. (N. Y.) 158 1584
v. Danville St. R. & L. Co., 143 Ill. App. 259 1374, 1447
v. Danville St. R. & L. Co., 235 Ill. 566 4720
v. District of Columbia, 22 Ct. of Cls. 366 538
v. Gay, 7 Iowa 26 3727
v. German S. & L. Soc., 21 Wash. 448 2502
v. Hedley, 2 Taunt. 184 992
v. Hill City Lumber Co., 34 S. D. 158 807
v. Hurd, 11 Mass. 57 1528, 4757
v. Keene, 132 N. Y. 13 4740, 4758, 4767, 4768
v. McCrate, 32 Me. 442 11
v. McMullins, 78 Mo. 260 521, 549
v. Marshall, 18 Q. B. 785 3286
v. Martin, 15 Wis. 240 1316, 4757
v. Mayor, 27 Hun 236 1064
v. Mendenhall, 89 Minn. 383 944
v. Michigan A. L. R., 65 Mich. 251 4145
v. Midland R. R. Terminal Co., 161 App. Div. (N. Y.) 621 266
v. Newcomb, 9 Cush. 46 1147
v. Prudlin, 1 Sid. 396 4556
v. Quigley, 59 N. Y. 265 1393
v. Racster, 1 Y. & C. New Cas. 401 572
v. Seligman, 55 Hun 339 2319
v. Sisson, 44 Ill. App. 327 2376, 2575
v. Strudd, 1 Lev. 261 4560
v. Tel. Co., 27 Nev. 438 3590
v. Tibbitts, 164 Mich. 217 4976
v. Viall, 6 Fed. 661 4843
v. Ward, 9 C. B. 392 161
v. Western U. Tel. Co., 24 Nev. 125 3553, 3575
v. Western U. Tel. Co., 27 Nev. 438 353, 3575
v. Whitaker, 22 Ill. 606 1175
v. Whitaker, 45 Wis. 204 1604
Barnes' Appeal, 46 Pa. 350 571
Barnet v. Barnet, 15 S. & R. 72 3719
v. Nat. Bank, 98 U. S. 555 553, 977
v. Passumpsic T. Co., 15 Vt. 757 837
Barnett v. Atlantic City Elec. Co., — N. J. L. —, 93 Atl. 108 4944
v. Caruth, 22 Tex. 173 1540
v. Chicago City R. Co., 167 Ill. App. 87 4659, 4673, 4747
v. Chicago & A. Co., 75 Mo. App. 446 3448
v. Contra Costa County, 67 Cal. 77 102
v. Elwood G. Co., 153 Mo. App. 458 2282

[REFERENCES ARE TO PAGES]

Barnett v. Higgins, 4 Dana 565 (1836) 2021, 2032
v. Hughey, 54 Ark. 195 2060, 2127
v. Lucas, Irish Rep. 6 C. L. 247 4852
v. Reed, 51 Pa. 190 4606
v. St. Anthony Falls W. P. Co., 33 Minn. 265 3763
v. Schlapka, 110 Ill. App. 672 1363, 4684
v. Selling, 70 N. Y. 492 4312
v. Smith, 17 Ill. 565 2767
v. Speir, 93 Ga. 762 4296
v. Terry, 42 Ga. 283 2273
v. United Kansas Portland Cement Co., 91 Kan. 719 4815
Barnett C. Co. v. Art Wall Paper Co., 164 Ala. 547 2667
Barnette S. Co. v. Ft. Harrison L. Co., 126 La. 75 243, 2696, 2700, 2702
Barney v. Clark, 46 N. H. 513 2815
v. Delaware, etc., R. Co., 61 Misc. (N. Y.) 62 3496
v. Dewey, 13 Johns. 224 308, 311, 2399
v. Douglass, 22 Wis. 464 4314
v. Dudley, 42 Ken. 212 4280
v. Frowner, 9 Ala. 901 3717
v. Fuller, 133 N. Y. 608 2458
v. Grover, 28 Vt. 391 2831
v. Newcomb, 9 Cush. 46 1877, 1881
v. Saunders, 16 How. 539 1122
v. Spangler, 131 Mo. App. 58 2484, 2563
Barngrover v. Maack, 46 Mo. App. 407 3807
Barnhart v. Edwards, 128 Cal. 572 1057
v. Hughes, 46 Mo. App. 318 2148, 2156, 2158
v. Pere Marquette R. Co., — Mich. —, 155 N. W. 355 5050
Barningham v. Smith, 31 L. T. (N. S.) 540 2232
Barns v. Barrow, 61 N. Y. 39 2767
v. Learned, 5 N. H. 264 2066, 2068
v. Queensland Nat. Bank, 3 Aust. Com. L. R. 925 289
v. Webb, 1 Tyler 17 469
Barnsley C. Co. v. Turbill, 13 L. J. (Ch.) 406 4036
Barnstable Sav. Bank v. Ballou, 119 Mass. 487 1853, 1865
Barnum v. Chicago, etc., R. Co., 30 Minn. 461 1394, 1396
v. Cochrane, 143 Cal. 642 2396
v. Vandusen, 16 Conn. 200 66, 3815
Baron v. Abeel, 3 Johns. 481 3696
Barr, In re, 234 Pa. 294 1017
Barr v. Gibson, 3 M. & W. 390 1828
v. Hack, 46 Iowa 308 4517
v. Kansas City, 121 Mo. 22 4742
v. Kimball, 43 Neb. 766, 771 3204, 3260
v. Logan, 5 Harr. 52 2238, 2242, 2248
v. Moore, 87 Pa. 385 1305, 4518
v. Omaha, 42 Neb. 341 4114
v. Southern California Edison Co., 24 Cal. App. 22 4872
v. Van Duyn, 45 Iowa 228 2539
Barr's Est. v. Post, 4 Neb. (Unof.) 32 1728
Barrack v. Postal Tel. Co., 12 Ohio Dec. 78 3566
Barrall v. Quick, 111 Ky. 22 4025, 4095
Barrante v. Garratt, 50 Cal. 112 4246
Barre W. Co., In re, 72 Vt. 413 4001
Barre W. Co. v. Carnes, 68 Vt. 23 1723, 1728
Barree v. Cape Girardeau, 197 Mo. 382 1330
Barrel, Ex parte, L. R. 10 Ch. 512 2013
Barrelett v. Bellgård, 71 Ill. 280 481, 4196, 4200, 4266
Barrell v. Joy, 16 Mass. 221 1023
Barrels of Oil, 1 Sprague 91 2735
Barrere v. Somps, 113 Cal. 97 1118
Barrett v. Allen, 10 Ohio 426 2329
v. Bass, 105 Ga. 421 715
v. Boddie, 158 Ill. 479 3127
v. Bowers, 87 Me. 185 1713, 1720
v. Dean, 21 Iowa 423 1935
v. Durbin, 106 Ark. 332 2043
v. Dutton, 4 Camp. 333 3305
v. Goddard, 3 Mason 107 2226
v. Grand Rapids V. Works, 110 Mich. 6 245, 252, 2697
v. Hartley, L. R. 2 Eq. 789 2471
v. Lewis, 2 Pick. 123 705, 708, 724, 726
v. Malden & M. R. Co., 3 Allen 101 4
v. Market St. C. R. Co., 81 Cal. 296 800
v. Minneapolis, etc., R. Co., 106 Minn. 51 1330
v. Mobile, 129 Ala. 179 3833
v. Monro, 69 Wash. 229 840, 889, 931
v. Monroe, 4 Dev. & Bat. 194 1642
v. Morris, 33 Gratt. 273 1087
v. Raleigh C. & C. Co., 55 W. Va. 395 2696, 2714
v. Rockport I. Co., 84 Me. 155 3797
v. Third Ave. R. Co., 45 N. Y. 635 682
v. Verdery, 93 Ga. 526 2236
v. Western U. Tel. Co., 42 Mo. App. 542 3555
v. White, 3 N. H. 210 4203, 4204
v. White, 11 Am. Dec. 365 4203
Barrett's, etc., Dyeing Est. v. Wharton, 101 N. Y. 631 538, 2597
Barrette v. Carr, 75 Vt. 425 1494, 4783
Barretto v. Moquin-O.-W. C. Co., 142 App. Div. (N. Y.) 504 4929
Barrick v. Schifferdecker, 123 N. Y. 52 3853, 3884, 3889
Barrie v. Quimby, 206 Mass. 259 2236, 2256
Barrill v. Phillips, 1 Gall. 360 2972
Barringer v. King, 5 Gray 9 1055, 1180
Barrington v. Bank, 14 S. & R. 405 1605, 1607
Barron v. Collenbaugh, 114 Iowa 71 1431
v. Liedloff, 95 Minn. 474 3250, 4735
v. Mason, 31 Vt. 189 4635, 4638, 4649
v. Morrison, 44 N. H. 226 1061
v. Mullin, 21 Minn. 374 2229
v. Northern Pac. R. Co., 16 N. D. 277 4705, 4833
v. San Angelo Nat. Bank (Tex. Civ. App.), 138 S. W. 142 4232, 4286
v. Vandvert, 13 Ala. 232 753
v. Watertown, 211 Mass. 46 107
Barron Est. Co. v. Woodruff Co., 163 Cal. 561 4376, 4389, 4431
Barrott v. Pullman P. C. Co., 51 Fed. 796 3540
Barrow v. Arnaud, 8 Q. B. 595 316, 1627, 2276, 4186, 4264
v. Hill, 13 How. 54 1804
v. Reab, 9 How. 366 1102
v. Rhinelander, 1 Johns. Ch. 550 1202
v. Rhinelander, 3 Johns. Ch. 619 677
v. Window, 71 Ill. 214 541
Barry v. Bennett, 7 Metc. (Mass.) 354 4211
v. Cavanagh, 127 Mass. 394 2295
v. Chicago, etc., R. Co., 149 Ill. App. 626 3760, 3763, 3772
v. Harris, 49 Vt. 392 885
v. Palmer, 19 Me. 303 2227

[REFERENCES ARE TO PAGES]

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v. Pike, 21 La. Ann. 221 2983
v. Ransom, 12 N. Y. 462 2856
v. Rogers, 2 Bibb 314 421
v. Third Ave. R. Co., 51 App. Div. (N. Y.) 385 4601
Barry-W. Mach. Co. v. Thompson, 83 Ark. 283 2403, 2429
Barse L. S. C. Co. v. Adams, 2 Indian T. 119 4358
v. McKinster, 10 Okla. 708 4353
Barson v. Mulligan, 191 N. Y. 306 3703
Barstow I. Co. v. Black, 39 Tex. Civ. App. 80 3840, 3921
Barstow S. Co. v. Consolidated A. Co., 175 Ill. App. 449 2773
Bartee v. Andrews, 12 Ga. 407 1097
Bartel v. Brown, 104 Wis. 493 688
Bartels v. Redfield, 23 Blatchf. 486 1005
Bartelt v. Braunsdorf, 57 Wis. 1 1356
Barth v. Burt, 43 Barb. 628 534, 561
v. Graf, 101 Wis. 27, 38 2831, 2873
v. Kansas City E. R. Co., 142 Mo. 535, 556, 4862, 4865, 4873
v. Merritt, 20 Mo. 567 1499
v. Union Nat. Bank, 67 Ill. App. 131 4283
v. Ward, 63 App. Div. (N. Y.) 193 2148, 2158
Barthelotte v. Melanson, 35 New Bruns. 652 388, 862
Bartholf v. Bensley, 234 Ill. 336 690
Bartholomew v. Candee, 14 Pick. 167 2056, 2058
v. First Nat. Bank, 57 Kan. 594 2801
v. Jackson, 20 Johns. 28 2650
v. Metropolitan L. Ins. Co., 1 Ohio Dec. 267 4608
v. Yaw, 9 Paige 165 740
Bartle v. Plane, 68 Iowa 227 1540
Bartlett, Petitioner, 163 Mass. 509 1079, 1080
Bartlett v. Blanchard, 13 Gray 429 2275
v. Blanton, 4 J. J. Marsh. 426 1029, 1059, 1540
v. Brickett, 14 Allen 62 4313
v. Budd, 1 Low. 223 4309, 5015
v. Carnley, 6 Duer 194 3286
v. Chicago, etc., R. Co., 21 Okla. 415 1395
v. Collins, 109 Wis. 477 1145, 1147
v. Farrington, 120 Mass. 284 548, 3183, 3260
v. Hamilton, 46 Me. 425 361, 2945
v. Hawaiian C. Mfg. Co., 13 Hawaii 311 2556
v. Hawley, 38 Minn. 308 4616
v. Holmes, 13 C. B. 630 517, 528, 531
v. Hooksett, 48 N. H. 18 161
v. Hoppock, 34 N. Y. 118 2373
v. Hoyt, 29 N. H. 317 4284
v. Kidder, 14 Gray 449 430, 1676
v. Kochel, 88 Ind. 425 4960, 4971
v. Marshall, 2 Bibb 467 1108, 1880
v. Odd Fellows' Sav. Bank, 79 Cal. 218 1355, 2495, 2497
v. Rogers, 3 Sawyer 62 754
v. Slater, 53 Conn. 102 1079
v. Smith, 146 Mich. 188 2018
v. Western U. Tel. Co., 62 Me. 209 3546, 3547, 3554
v. Wheeler, 195 Ill. 445 1582, 2755, 2762
v. Williams, 1 Pick. 288 2817
Bartlett Est. Co. v. Fairhaven L. Co., 56 Wash. 434 509
Bartlette v. Crittenden, 4 McLean 300 4478
Bartley v. Frorlicht, 49 Mo. App. 214 4705
v. Richtmyer, 4 N. Y. 38 4957, 4960, 4961, 4963
Barton v. Barton, 119 Mo. App. 507 436, 4980
v. Farmers' & Merchants' Nat. Bank, 122 Ill. 352 1917
v. Fisk, 30 N. Y. 166 305, 1745, 1746, 1788
v. Holmes, 16 Iowa 252 1480
v. Moore, 45 Minn. 98 2801
v. Shull, 62 Neb. 570 1675
v. Smith, 49 Ala. 293 1705
v. Southwick, 185 Ill. App. 24 4731
v. Steamship Co., 3 Wall. Jr. 229 3400
Barton C. Co. v. Cox, 39 Md. 1 365, 3790, 3795
Bartram v. Hering, 18 Pa. Super. 395 1989, 3189
v. Ohio, etc., R. Co., 141 Ky. 100 1448, 1720, 1722, 1728, 1758
v. Sharon, 71 Conn. 686 103, 110
v. Stone, 31 Conn. 159 4776, 4782
Bartright v. Tammany, 158 Pa. 545 4640
Barwell v. Adkins, 1 Man. & Gr. 807 4515
Basch v. Humboldt Ins. Co., 35 N. J. L. 429 3021
Bascom v. Manning, 53 N. H. 132 568
Basford v. Pearson, 9 Allen 387 1958
Bash v. Howland, 27 Okla. 462 1705
Bashinsky v. Western U. Tel. Co., 1 Ga. App. 761 3569
Baskerville v. Culver, 33 S. D. 424 2773
Basler v. Nichols, 8 Ind. 260 378
v. Sacramento G. & E. Co., 158 Cal. 514 110
Bass v. Chicago, etc., R. Co., 36 Wis. 450 1347, 3507
v. Chicago, etc., R. Co., 39 Wis. 636 3528, 4831
v. Chicago, etc., R. Co., 42 Wis. 654 1338, 1340, 1495, 3513, 3527
v. Postal Tel.-C. Co., 127 Ga. 423 3568
v. Railway Co., 36 Wis. 450 1307
v. Railway Co., 42 Wis. 672 1307
v. Rollins, 63 Minn. 226 3126
v. Starnes, 108 Ark. 357 42, 2155
v. Wellesley, 192 Mass. 526 646
v. West, 110 Ga. 698 6, 3192, 3211, 3736, 3744, 3809
Bass F. Co. v. Glasscock, 82 Ala. 452 1431
Bassett v. Avery, 15 Ohio St. 299 1818
v. Bassett, 55 Me. 127 1958
v. Elmore, 48 N. Y. 194 4555
v. Fairchild, 132 Cal. 637 2468, 2499
v. Fidelity & D. Co., 184 Mass. 210 1038, 1640
v. French, 10 N. Y. Misc. 672 2550, 2551, 2559, 2561
v. French, 155 N. Y. 46 (1898) 1411
v. O'Neil C. & C. Co., 140 Ky. 346 2743
v. Rogers, 165 Mass. 377 2902
v. St. Joseph, 53 Mo. 300 103
v. Salisbury Mfg. Co., 43 N. H. 569 7
v. Sanborn, 9 Cush. 58 2667, 2672, 2676, 2688
Bassford v. Johnson, 172 N. Y. 488 2495
v. White, 61 N. Y. Super. 457 2496
Bassick G. M. Co. v. Beardsley, 49 Colo. 275 1104, 1105, 1199
Bassil v. Elmore, 65 Barb. 627 15

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Bastable v. Denegre, 22 La. Ann. 124 2970, 2976
Bastard v. Bastard, 2 Show. 81 3279
Basten v. Butter, 7 East 479 494, 511, 516, 1834, 1835, 2828
Bastow v. Bennett, 3 Camp. 220 2748
Basye v. Ambrose, 28 Mo. 39 846, 901
Batchelder v. Bartholomew, 44 Conn. 494 494, 509
v. Sturgis, 3 Cush. 201 178, 2157, 2181, 2183, 2186, 2187
Bate v. McDowell, 49 N. Y. Super. Ct. 106 2925, 2958
Bateman, Ex parte, 20 Jur. (N. S.) 365 2916, 3178
Bateman v. Bailey, 5 T. R. 512 667
v. Blake, 81 Mich. 227 623, 4350, 4354
v. Daniels, 5 Blackf. 71 759
v. Goodyear, 12 Conn. 575 3825, 3827, 3829
v. Illinois Cent. R. Co., 162 Ill. App. 125 4894, 4905
v. Lumbermen's Ins. Co., 189 Pa. 465 3050
v. Lyall, 7 C. B. (N. S.) 638 156
v. Middlesex, 24 Ont. L. R. 84 326
v. Middlesex County, 27 Ont. L. R. 122 1519
v. Ryder, 106 Tenn. 712 4181, 4235
v. Warfield, 12 Ga. App. 259 2421, 2428, 2441, 2455
Bateman's Est., 21 Pa. Dist. 475 1087
Bater v. Bater, 2 Ga. App. 62 1804
Bates v. Butler, 46 Me. 387 1830
v. Callender, 3 Dak. 256 1268, 4272
v. Cherry Valley R. Co., 3 Thomp. & C. 16, 59 N. Y. 641 2331, 2333
v. Clark, 95 U. S. 204 4194, 4198, 4299
v. Courtwright, 36 Ill. 518 485, 4201, 4305
v. Fish W. Co., 50 App. Div. (N. Y.) 38, 169 N. Y. 587 2405, 2421
v. Gerber, 82 Cal. 550 1211
v. Hamilton, 144 Mo. 1 1036
v. Holbrook, 89 App. Div. (N. Y.) 548 1418, 1459, 3881, 3902
v. Hudson, 6 Dowl. & R. 3 2543
v. Kitchel, 166 Mich. 695 4836
v. Murphy, 2 Stew. 161 4291
v. Pilling, 6 B. & C. 38 436
v. Rosekrans, 37 N. Y. 409 664
v. St. Johnsbury, etc., R. Co., 32 Fed. 628 4441
v. School Dist., 45 Wash. 498 2482
v. Stansell, 19 Mich. 91 4239
v. Stanton, 1 Duer 79 4284
v. Terrell, 7 Ala. 129 1956, 1957
v. United Shoe Machinery Co., 216 Fed. 140 374
v. Warrick, 76 N. J. L. 108 3816
v. Warrick, 77 N. J. L. 387 3768
v. Weir, 121 App. Div. (N. Y.) 275 3412
v. White, 138 Ill. App. 112 834
v. Wills Point Bank, 11 Tex. Civ. App. 73 782
v. Wilson, 18 Colo. 287 1056
Bates St. Shirt Co. v. Place, 76 N. H. 448 2225
Bateson v. Gosling, L. R. 7 C. P. 9 2823
Bath G. L. Co. v. Claffy, 151 N. Y. 24 18, 3109
Bathgate v. North Jersey St. R. Co., 75 N. J. L. 763 3737
Bathke v. Krassin, 78 Minn. 272 4980
Batman v. Cook, 120 Ill. App. 203 1270, 4389, 4432
Batson v. Donovan, 4 B. & Ald. 29 3282, 3412
v. Higginbothem, 7 Ga. App. 835 32, 1324, 3739
v. Murrell, 10 Humph. 301 643
v. Paris Mountain W. Co., 73 S. C. 368 1713
Battell v. Lowery, 46 Iowa 49 1540
Batten v. St. Louis T. Co., 102 Mo. App. 285 4662, 4713, 4747
v. Wedgwood C. & I. Co., 31 Ch. Div. 346 2994
Batterman v. Pierce, 3 Hill 171 519, 543, 558, 1835, 2828
Batterson v. Chicago, etc., R. Co., 49 Mich. 184 4672
Battey v. Holbrook, 11 Gray 212 1557
Battishill v. Reed, 18 C. B. 696 414, 3876
Battle v. Atkinson, 9 Ga. App. 488 3301
v. Columbia, etc., R. Co., 70 S. C., 329 3533
v. Rochester City Bank, 5 Barb. 414 2013, 2017
v. Thompson, 65 N. C. 406 521
v. Western U. Tel. Co., 151 N. C. 629 3655
v. White (Tex. Civ. App.) 124 S. W. 216 1222
Battle Creek v. Haak, 139 Mich. 514 1480, 1482
Battles v. Tyson, 77 Neb. 563 4508
Battley v. Faulkner, 3 B. & Ald. 288 2412
Batton v. Public Service Co., 75 N. J. L. 857 58, 4682, 4860
Batty v. Snook, 5 Mich. 231 1854
Baucus v. Barr, 107 N. Y. 624, aff'g 45 Hun 582 1640
v. Stover, 24 Hun 109 1122
Bauer v. Clay, 8 Kan. 580 4639
v. Gottmanhauser, 65 Ill. 499 1269
v. Hindley, 222 Ill. 319 1031, 2667
v. Jerolman, 124 Ill. App. 151 1031
v. Richter, 103 Wis. 412 4874
v. Taylor, 4 Neb. (Unof.) 710 4383
v. Teasdale, 25 Mo. App. 25 521
Baugh v. Baugh, 139 Ky. 830 2472
v. Fist, 84 Kan. 740 758
Baugh's Est., 12 Pa. Dist. 303 1085
Baugham v. New York, P. & N. R. Co., 241 U. S. 237 5072
Baughan v. Brown, 122 Ind. 115 2595
Baugher v. Wilkins, 16 Md. 35 3182
Baughman v. Gould, 45 Mich. 481 554, 4383
v. Lowe, 41 Ind. App. 1 664
Bauld v. Smith, 40 Nova Scotia 294 3345, 3361
Baum v. Birchall, 150 Pa. 164 1146, 1148
v. Buntyn, 62 Miss. 10 764
v. Daniels, 55 Tex. Civ. App. 273 996, 1038, 1048, 1539
v. Harrison, 9 Ohio N. P. (N. S.) 257 4324
v. Hartmann, 226 Ill. 160 1569
v. Moon, 1 Hayw. 323 1214
v. Palmer, 165 Ind. 513 1824
v. Reed, 74 Pa. 322 1056
v. Trantham, 42 S. C. 104 705, 709, 714, 723
Baum I. Co. v. Union Sav. Bank, 50 Neb. 387 4212
Bauman v. Bean, 57 Mich. 1 4782
Baumann v. New York, etc., R. Co., 35 N. Y. Misc. 223 3354
Baumbach v. Gulf, etc., R. Co., 4 Tex. Civ. App. 650 3310, 3342
Baumeister v. Markham, 101 Ky. 122, 141 4700
Baumgarten v. Alliance Assur. Co., 159 Fed. 275 273, 1258
v. Chipman, 30 Utah 466 309

[REFERENCES ARE TO PAGES]

Baumgarth v. Firemen's Fund Ins. Co., 152 Mich. 479 3017
Baumgartner v. Hodgdon, 105 Minn. 22 460, 1267
Baumier v. Antiau, 79 Mich. 509 3196, 3230
Baun v. Craven, 175 Ill. 401 346
Bauskett v. Jones, 2 Spear 68 2202
Baustian v. Young, 152 Mo. 317 1474, 1475
Bautista v. Calixto, 7 Philip. Isl. 733 1110
Bavins v. London & S. Bank, 1 Q. B. 270 4272
Bawder v. Bawder, 7 Barb. 560 1109
Baxendale v. Eastern, etc., R. Co., 4 C. B. (N. S.) 63 3280
v. London, etc., R. Co., L. R. 10 Ex. 35 194, 298, 302, 310, 2350, 2969, 3323
Baxley v. Tallassee & M. R. Co., 128 Ala. 183 3317
Baxter v. Beckwith, 25 Colo. App. 322 1149
v. Bradbury, 20 Me. 260 2074, 2087, 2088
v. Brand, 6 Dana 296 1027
v. Brooklyn L. Ins. Co., 119 N. Y. 450 3050
v. Campbell, 17 S. D. 475 1281, 4831
v. Chicago, etc., R. Co., 87 Iowa 488 4692
v. Chicago, etc., R. Co., 104 Wis. 307 1476, 1505, 1516, 1518
v. Coughlin, 70 Minn. 1 16
v. Dominion Tel. Co., 37 Up. Can. Q. B. 470 3553, 3558
v. Duren, 29 Me. 434 1870
v. Magill, 127 Mo. App. 392 1261, 1267, 1316, 1317
v. Massasoit Ins. Co., 13 Allen 320 2999
v. Roberts, 44 Cal. 187 2611
v. Ryerss, 13 Barb. 267 1028, 2121, 2129, 3196
v. St. Louis T. Co., 103 Mo. App. 597 4768
v. Smack, 17 How. Pr. 183 2791
v. State, 56 Ark. 312 3204
v. Taylor, 4 B. & Ad. 72 3835
v. United States, 51 Fed. 671 1039
v. Wales, 12 Mass. 365 867
v. Winooski T. Co., 22 Vt. 114 16, 3935
Bay v. Cook, 22 N. J. L. 343 2982
v. Merrill & Ring Lumber Co., 211 Fed. 717 5037, 5039, 5070
Bay of Naples, The, 48 Fed. 737 2725, 2734
Bay Shore R. Co. v. Harris, 67 Ala. 6 412
Bay View B. Co. v. Tecklenberg, 19 Wash. 469 1835
Bayamo, The, 171 Fed. 65 2720
Bayard v. Shunk, 1 W. & S. 94 648, 650, 656
v. Smith, 17 Wend. 88 1392
Bayle v. Norris (Tex. Civ. App.) 134 S. W. 767 4259, 4263
Bayles v. Burgard, 48 Ill. App. 371 4957, 4962
v. Kansas Pac. R. Co., 13 Colo. 181 3280
Bayley v. Cleveland R. M. Co., 22 Blatch. 342, 21 Fed. 159 2393, 2408
v. French, 2 Pick. 590 633
v. Homan, 3 Bing. N. C. 915 762
v. Wynkoop, 10 Ill. 449 703, 728
Baylies v. Bent, 185 Ill. App. 437 2598, 2601
v. Fettyplace, 7 Mass. 325 2308
Baylis v. Dinely, 3 M. & S. 477 1067
Baylis v. Lintott, L. R. 8 C. P. 345 3529
v. Usher, 4 Moore & P. 790 26
Bayliss v. Fisher, 7 Bing. 153 26, 4161
Baylor v. Stephens, 16 Pa. Super. Ct. 365 3774
Bayly v. Lawrence, 1 Bay. 499 3143
Baynard v. Harritty, 1 Houst. 200 295, 297
Bayne v. Fox, 18 La. 80 558
v. Riverside S. & C. Co., 181 Mich. 378 5190
v. Stephens, 8 Aust. Com. L. R. 1 1119
Bayon v. Beckley, 89 Conn. 154 5149, 5180
Bazemore v. Bridgers, 105 N. C. 191 531
v. Bynum, 127 N. C. 11 1568
Bazin v. Steamship Co., 3 Wall. Jr. 229 3349, 4194
Beach v. American S. G. & V. Mfg. Co., 202 Mass. 177 1941
v. Beach, 160 Iowa 346 4373, 4380, 4385, 4406
v. Berdell, 2 Duer 327 4284
v. Bird & W. L. Co., 135 Wis. 550 1508
v. Brown, 20 Wash. 266 4978
v. Cooke, 14 N. Y. 508 786
v. Crain, 2 N. Y. 86 391, 414, 2614, 3150, 3155
v. Endress, 51 Barb. 570 755, 779
v. Fulton Bank, 3 Wend. 573 976, 978
v. Hancock, 27 N. H. 223 340
v. Hotchkiss, 2 Conn. 697 422
v. Hudson River L. Co., 65 N. J. Eq. 426 2149
v. Huntsman, 42 Ind. App. 205 661
v. Johnson, 102 Miss. 419 226, 229, 3209
v. Miller, 51 Ill. 206 2148, 2181
v. Morgan, 67 N. H. 529 3740
v. Mullin, 34 N. J. L. 343 2545
v. Nordman, 90 Ark. 59 2136
v. Packard, 10 Vt. 96 2068
v. Ranney, 2 Hill 314 113, 4552, 4554, 4555, 4562
v. Raritan, etc., R. Co., 37 N. Y. 457 4300
v. Rex, 9 Can. Ex. 287, 37 Can. Sup. Ct. 259 3210
v. Schmultz, 20 Ill. 185 361
v. Scranton, 25 Pa. Super. 430 395
v. Stouffer, 84 Mo. App. 395 2467
v. Waddill, 8 N. J. Eq. 299 2212
v. Wakefield, 107 Iowa 567 627
Beachey v. Brown, El. Bl. & El. 796 3685
Beaconsfield, The, 67 Fed. 144 2717
Beaconsfield, The, 158 U. S. 303 5017
Beadle v. Whitlock, 64 Barb. 287 4197, 4199
Beadles v. Hartmus, 7 Baxt. 476 2950
Beagles v. Robertson, 135 Mo. App. 306 2490
Beakes v. Holzman, 47 N. Y. Misc. 384 3236, 3243
Beakey v. Vander Meerschen, 78 Kan. 538 559
Beakley v. Cunningham, 112 Ark. 71 1644, 1647, 1651, 2741, 2795
Beal v. Alexander, 1 Rob. (La.) 277 1712
v. Crafton, 5 Ga. 301 1200
v. Finch, 11 N. Y. 128 1532
v. Railroad Co., 136 N. C. 298 3969
v. Robeson, 8 Ired. 276 4647
v. Thompson, 3 B. & P. 405 2527
Beale v. Beale, 1 P. Wms. 244 28
v. Boston, 166 Mass. 53 3963, 4004
v. Cochran, 18 Ga. 38 2822
v. Hayes, 5 Sandf. 640 833, 849, 876
v. Railway Co., 1 Dill. 568 1344
v. Sanders, 3 Bing. N. C. 850 3153

[REFERENCES ARE TO PAGES]

Beale v. Seiveley, 8 Leigh 658 2212
Bealey v. Shaw, 6 East 208 35
Beall v. Hudson County W. Co., 185 Fed. 179 664
v. January, 62 Mo. 343 2969
v. Pearre, 12 Md. 550 566, 568
v. Robinson, 91 Ill. App. 247 2479
v. Rust, 68 Ga. 744 4265
v. Silver, 2 Rand. 401 1051
Bealle v. Schoal, 1 A. K. Marsh. 475 1520
Beals v. Commonwealth, 7 Watts 183 1606
v. Guernsey, 8 Johns. 446 1135
v. Home Ins. Co., 36 N. Y. 522 3029, 3065
v. Olmstead, 24 Vt. 114 2375, 2388
v. Supervisors, 28 Cal. 449 1041
v. Terry, 2 Sandf. 127 2237
Beam v. Barnum, 21 Conn. 202 667
v. Hayden, 5 Bush 426 1537
Beamer v. Stuber, 164 Iowa 309 2501
Bean v. Atkins, — Vt. —, 89 Atl. 643 3708, 3711
v. Brown, 54 N. H. 395 721
v. Carleton, 12 N. Y. Supp. 519 244
v. Carleton, 51 Hun 318 244
v. Chapman, 62 Ala. 58 954, 1227, 1228
v. Drew, 15 La. Ann. 461 2969
v. Green, 33 Ohio St. 444 1289
v. Harrington, 88 Me. 460 2198
v. Mayo, 5 Me. 94 2147, 2151, 2153
v. The Grace Brown, 2 Hughes 112 2722
v. Travelers' Ins. Co., 94 Cal. 581 3081
v. Wells, 28 Barb. 465 148, 4392, 4419
Beane v. Continental Casualty Co., 106 Miss. 813 3080
Beans v. Denny, 141 Iowa 52 1440, 3678, 3681
Bear v. Harris, 118 N. C. 476 4178
Bear Gulch P. M. Co. v. Walsh, 198 Fed. 351 4052
Bearce v. Dudley, 88 Me. 410 2462
Beard v. Brooklyn, 31 Barb. 142 711
v. Kirk, 11 N. H. 397 1442, 2670
v. Murphy, 37 Vt. 99 3913, 3916
v. Roth, 35 Fed. 397 1647, 1649, 1651
v. Shannon, 73 N. Y. 292 1569
v. Straw, 38 Ind. 128 2280
v. Van Wickle, 3 Cow. 335 1403
Bearden v. Smith, 11 Rich. 554 860
Beardmore v. Barton, 108 Minn. 28 4658, 4668, 4793
Beardslee v. Columbia, 188 Pa. 496 1475
v. Horton, 3 Mich. 560 936, 1102, 1103, 1107
v. Richardson, 11 Wend. 25 2906, 2937
Beardsley v. Beardsley, 86 Fed. 16 811, 816
v. Bridgman, 17 Iowa 290 4513, 4514, 4577, 4580
v. Davis, 52 Barb. 159 2914, 2916, 3178
v. Maynard, 4 Wend. 336 468
v. Smith, 61 Ill. App. 340 230
v. Swann, 4 McLean 333 4657, 4730
v. Webber, 104 Mich. 88 949
Beardsley S. Co. v. Foster, 36 N. Y. 561 1251
Beardstown v. Smith, 150 Ill. 169 1375
Beare v. Wright, 14 N. D. 26 4391
Bearse v. Lebowich, 212 Mass. 344 573, 2793
v. Pigs of Copper, 1 Story 314 2719, 2725
Bearsley v. Smith, 61 Ill. App. 340 2237
Beasley v. Aberdeen & R. R., 147 N. C. 362 3760
v. Meigs, 16 Ill. 139 4568, 4570
v. New Orleans & N. R. Co., 91 Miss. 268 1399
v. Phillips, 20 Ind. App. 182 2093, 2095, 2123, 2126
v. Swinton, 46 S. C. 426 4392
v. Western U. Tel. Co., 39 Fed. 181 352, 3551, 3555, 3621, 3656
Beath v. Rapid R. Co., 119 Mich. 512 1380, 1381, 4673, 4682, 4684
Beaton v. Intelligencer P. & P. Co., 22 Ont. App. 97 4586
Beatrice G. Co. v. Thomas, 41 Neb. 662 3850, 3901, 3922
Beatrice Havener, The, 50 Fed. 232 4997
Beattie v. Detroit, 137 Mich. 319 326, 4656, 4740
v. New York, etc., C. Co., 196 N. Y. 346 2262, 2263
v. New York, etc., R. Co., 84 Conn. 555 3, 41
Beattie Mfg. Co. v. Heinz, 120 Mo. App. 465 760, 930, 2655
Beatty v. Howe L. Co., 77 Minn. 272 2658, 2693
v. Oille, 12 Can. Sup. Ct. 706 41
Beatty L. Co. v. Western U. Tel. Co., 52 W. Va. 410 3553, 3563, 3569
Beattyville Bank v. Roberts, 117 Ky. 689 1818
Beaty v. Gibbons, 16 East 116 4173
v. Johnston, 66 Ark. 529 1435, 1458
Beaubien v. Cicotte, 12 Mich. 501 1423
Beauchamp v. Saginaw M. Co., 50 Mich. 163 138, 4682
Beaudette v. Gagne, 87 Me. 534 4960, 5962
Beaudin v. Bay City, 136 Mich. 333 4715
Beaudrot v. Southern R., 69 S. C. 160 1275, 1310, 3826
Beauerle v. Michigan Cent. R. Co., 152 Mich. 345 4676, 4742
Beaulieu v. Great Northern R. Co., 103 Minn. 47 342, 356, 3382, 3486
v. Parsons, 2 Minn. 37 1495
Beaumont v. Greathead, 2 C. B. 499 32
Beaumont, etc., R. Co. v. Elliott (Tex. Civ. App.), 148 S. W. 1125 4101
Beaupland v. McKeen, 28 Pa. 130 2208
Beaupre v. Pacific, etc., Tel. Co., 21 Minn. 155 3559, 3597, 3605
Beavan v. Delahay, 1 H. Bl. 8 3153
Beaver, The, 219 Fed. 139 4990
Beaver v. Beaver, 23 Pa. 167 2841
v. Porter, 129 Iowa 41 760
Beaver County v. Beaver Valley T. Co., 229 Pa. 565 3096, 3104
Beaver Hill C. Co. v. Lassilla, 176 Fed. 725 1498
Beavers v. Bowen, 24 Ky. L. Rep. 882 1317
v. Putnam, 110 Va. 713 4855
v. Smith, 11 Ala. 32 1086, 3719
v. Trimmer, 25 N. J. L. 97 3842
Bebout v. Pense, 31 S. D. 619 435
Beck v. Devereaux, 9 Neb. 109 386
v. Dowell, 40 Mo. App. 71, 111 Mo. 506 1317, 1318, 4775, 4781
v. Haas, 111 Mo. 264 719
v. Indianapolis L. & P. Co., 36 Ind. App. 600 838
v. Pennsylvania, etc., R. Co., 148 Pa. 271 4139
v. Simmons, 7 Ala. 76 2212
v. Staats, 80 Neb. 482 1981, 1994
v. Thompson, 31 W. Va. 459 1268, 1302
v. Thompson, 108 Ga. 242 2547
v. West, 87 Ala. 213 259, 2572

[REFERENCES ARE TO PAGES]

Beck D. Co. v. Fulghum, 118 Ga. 836 569
Beck & G. H. Co. v. Knight, 121 Ga. 287 16, 1620, 1622, 1629
Becker v. Albany R., 35 App. Div. (N. Y.) 46 4701, 4737, 4830
v. Baker, 146 Ky. 233 2371, 2403
v. Bluemel, 129 Wis. 491 656
v. Boon, 61 N. Y. 317 820, 822
v. Donalson, 133 Ga. 864 397, 555
v. Dunham, 27 Minn. 32 4285
v. Dupree, 75 Ill. 167 1268, 1327, 1344
v. First Nat. Bank, 15 N. D. 279 2938
v. Headsten, 137 Mich. 478 993
v. Hopper, 22 Wyo. 237 730
v. Lebanon & M. St. R. Co., 30 Pa. Super. Ct. 546 3754, 3759, 3828
v. Lincoln R. E. & B. Co., 118 Mo. App. 74 4690, 4703, 4727
v. Northway, 44 Minn. 61 2827, 2830
v. People, 164 Ill. 267 1786
v. Philadelphia & R. T. R. Co., 177 Pa. 252 1064, 3997, 4021, 4022, 4134, 4151
v. Public Ledger, 6 Pa. Dist. 89 4543
v. Staub, 114 Iowa 319 4348
v. Vrooman, 13 Johns. 302 513
v. Western U. Tel. Co., 11 Neb. 87 3550
Becker's Est., 21 Pa. Dist. 97 1120, 1130
Beckerle v. Brandon, 229 Ill. 323 1320, 1328
Beckett v. Beckett (1901) Prob. 85 1359
Beckford v. Hood, 7 T. R. 620 1594
v. Tobin, 1 Ves. Sr. 308 1083
Beckham v. Collins, 54 Tex. Civ. App. 241 4623, 4631, 4643
v. Drake, 9 M. & W. 79 919
Beckhead v. George, 8 Hill 635 2755
Beckler v. Merringer, 131 Iowa 614 143
Beckley v. Miller, 96 Ark. 379 1539
v. Munson, 22 Conn. 299 307, 2836, 2849
Beckman v. Birchard, 48 Neb. 805 807
v. Lincoln & N. R. Co., 85 Neb. 228 3976, 3979
v. Manlove, 18 Cal. 388 523, 583
v. Shouse, 5 Rawle 179 2906, 2938
Beckwith v. Angell, 6 Conn. 315 2779
v. Baldwin, 12 Ala. 720 2568
v. Carleton, 14 Ga. 691 1523
v. Clark, 188 Fed. 171 2031, 2037
v. Griswold, 29 Barb. 291 395, 414
v. New York, 121 App. Div. (N. Y.) 462 1102, 2705
v. Powers, — Tex. Civ. App. —, 157 S. W. 177 4412
v. Shordike, 4 Burr. 2092 1390
v. Sibley, 11 Pick. 482 2972
v. Talbot, 2 Colo. 639 253
v. Trustees of Hartford, etc., R. Co., 29 Conn. 268 957, 962, 968, 1192
Becher v. Great Eastern R. Co., L. R. 5 Q. B. 241 3531
Bedard v. Mahoney, 30 R. I. 469 2757
Beddall v. Maitland, 17 Ch. Div. 174 528, 3824
Beddoe v. Wadsworth, 21 Wend. 120 2123
Beddome v. Holbrooke, 1 B. & P. 450 1619
Beddow v. Flage, 22 N. D. 53 2031, 2931
Bedell v. Christy, 62 Kan. 760 2095
v. Janney, 9 Ill. 193 1014
v. Powell, 13 Barb. 183 1363, 4555
v. Shaw, 59 N. Y. 46 3710
Bedford v. Bedford, 136 Ill. 354 3719, 3724
v. Blythe, 74 Miss. 720 2890
Bedford v. Deakin, 2 Stark. 178 754
v. Hol-Tan Co., 143 App. Div. (N. Y.) 372 2302
v. J. Henry Miller, Inc., 212 Fed. 368 894, 2585
v. Shilling, 4 S. & R. 401 1189
Bedingfield v. Onslow, 3 Lev. 209 3742
Bedsole v. Atlantic C. L. R. Co., 151 N. C. 152 3467, 3473
Bedwell v. Gephart, 67 Iowa 44 2810
Bee P. Co. v. Hichborn, 4 Allen 63 537
Bee Pub. Co. v. Shields, 68 Neb. 750 4510, 4513
v. World Pub. Co., 59 Neb. 713 1297, 1512, 1517, 4506, 4507, 4532, 4533, 4549, 4569
Beebe v. Greene, 34 R. I. 171 4704
v. Hatfield, 67 Mo. App. 609 624, 4224
v. Johnson, 19 Wend. 500, 21 Utah 239, 247 2527
v. Knapp, 28 Mich. 53 796, 4383
v. Miller, Minor 364 422
v. Newark, 24 N. J. L. 47 1063, 1064
v. Swartout, 8 Ill. 162 2211, 2212
v. Tolerton, 117 Iowa 593 4490
v. Worth, 146 N. Y. Supp. 146 746, 754, 759, 760
Beebee v. Robert, 12 Wend. 413 2271, 2379
Beecham v. Hanlon, 12 New Zeal. L. R. 554 4499
Beecher v. Baldwin, 55 Conn. 419 529, 557, 2110, 2153, 2156, 2159
v. Denniston, 13 Gray 354 1436, 1445, 2303
v. Derby B. Co., 24 Conn. 132 1314
v. Duffield, 97 Mich. 423 3097
v. Long Island R. Co., 53 App. Div. (N. Y.) 324 4907
v. Schuback, 4 N. Y. Misc. 54 2684
Beechwood I. Co. v. American I. Co., 176 Fed. 435 4210, 4216
Beecker v. Vrooman, 13 Johns. 302 518
Beed v. Blanford, 2 Y. & J. 278 2018
Beede v. Lamprey, 64 N. H. 510 4211, 4260, 4261, 4263
Beedle v. Grant, 1 Tyler 423 1050
Beeher v. Jones, 2 Camp. 428n 1880
Beek v. Nelson, 126 Minn. 10 1366
Beekman v. Bemas, 7 Cow. 29 1488
v. Chalmers, 1 Cow. 584 1536
v. Van Dolsen, 70 Hun 288 2759
Beekman L. Co. v. Kittrell, 80 Ark. 228 2693
Beeler v. Butte & L. C. D. Co., 41 Mont. 465 4690, 5108
Beeman v. Banta, 118 N. Y. 538 190, 2423, 2432, 2614
v. Hexter, 98 Iowa 378 848
Beers v. North Milwaukee T. S. Co., 93 Wis. 569 2711
v. Pinney, 12 Wend. 309 308
v. Shannon, 73 N. Y. 292 1039
v. Walhizer, 43 Hun 254 59, 60, 61
v. Williams, 16 Ill. 69 2376
v. Wolf, 116 Mo. 179 2657
Beeson v. Elliott, 1 Del. Ch. 368 1025
v. Gossard Co., 167 Ill. App. 561 4507, 4512, 4526, 4544, 4545
v. Green Mountain G. M. Co., 57 Cal. 20 350, 4861
v. Southard, 10 N. Y. 236 4605
Beeston v. Colyer, 4 Bing. 309 2522
Beetem v. Follmer, 87 Nev. 514 2008, 2011
Beetle v. Anderson, 98 Wis. 5 416, 4402
Befay v. Wheeler, 84 Wis. 135 3788, 3789
Begale v. McKinzie, 34 Mich. 470 2230
Begg v. Whittier, 48 Me., 314 1397, 1400

[REFERENCES ARE TO PAGES]

Beggs v. Postal Tel.-C. Co., 159 Ill. App. 247 3556
Begin v. Begin, 98 Minn. 122 2472
Behaly v. Hatch, Walk. (Miss.) 369 804
Behling v. Southwest Pipe Lines, 160 Pa. 359 52
Behm v. Damm (N. Y. Misc.) 91 N. Y. Supp. 735 1450
v. Western U. Tel. Co., 8 Biss. 131 3560
Behn v. Burness, 3 B. & S. 755 2379
Behre v. National R. C. Co., 100 Ga. 213 4509
Behrens v. Illinois Cent. R. Co., 192 Fed. 581, s. c. 233 U. S. 473 5049
v. McKenzie, 23 Iowa 333 57, 306, 1705, 1719
v. Mountz, 37 Pa. Super. Ct. 326 3800, 3818, 3825
Beickler v. Guenther, 121 Iowa 419 2026
Beidler v. Consolidated Tel. Co., 21 Pa. Dist. 680 3773
v. Fish, 14 Ill. App. 623 250
v. Sanitary Dist., 211 Ill. 628 3947, 3968, 4032
Beihofer v. Loeffert, 159 Pa. 365 4640, 4645, 4648
Beil v. Supreme Council American Legion of Honor, 42 App. Div. (N. Y.) 168 823
Bein v. Heath, 12 How. 168 1715
Beirne v. Dord, 5 N. Y. 95 2271, 2379
Beisel v. Gerlach, 221 Pa. 232 4980
Beiser v. Cincinnati, etc., R. Co., 152 Ky. 522 52, 143
v. Grever & T. Co., 11 Ohio Dec. 444 208
Beissel v. Vermillion Farmers' E. Co., 102 Minn. 229 2561
Beiswanger v. American B. & T. Co., 98 Md. 287 1344, 4607
Bekker v. White River Valley R. Co., 28 S. D. 84 4, 1393, 1536
Belch v. Big Store Co., 46 Wash. 1 226, 2521
Belcher v. Case T. M. Co., 78 Neb. 798 318, 721
v. Chambers, 53 Cal. 635 5034
v. Costello, 122 Mass. 189 4374, 4376
v. M'Intosh, 8 C. & P. 720 3151, 3153
v. Missouri, etc., R. Co., 92 Tex. 593 3404, 3405
v. Sellards, 19 Ky. L. Rep. 1571 2275, 2369
Belck v. Belck, 97 Ind. 73 4510
Belden v. Boston & M. R. R., 88 Vt. 300 3426
v. Chase, 150 U. S. 674 4985
v. Krom, 34 Wash. 184 2309
v. Perkins, 78 Ill. 449 539, 4287
v. Seymour, 8 Conn. 304 2066, 2068
Belding v. Black Hills, etc., R. Co., 3 S. D. 369 4851
Beldt v. Budwig, 19 Neb. 739 1297
Belfast W. Com'rs, In re, 15 L. R. Ir. 13 4150, 4154
Belfast, etc., R. Co. v. Keys, 9 H. of L. Cas. 556 3534
Belford v. Beatty, 145 Ill. 414 946
v. Scribner, 144 U. S. 488 4479, 4482
Belfour v. Weston, 1 T. R. 310 3138
Belgenland, The, 36 Fed. 504 5003, 5004, 5010
Belger v. Dinsmore, 51 N. Y. 166 3412, 3415
Belknap v. Boston & M. R., 49 N. H. 358 1518, 4159
v. Godfrey, 22 Vt. 288 510
v. Railroad, 49 N. H. 358 1311, 1315, 1316
Bell v. Alexander, 21 Gratt. 1 677
v. Atlantic R. Co., 58 N. J. L. 227 4645
v. Atlantic City R. Co., 202 Pa. 178 4646
v. Barnet, 2 J. J. Marsh. 516 3706, 3710
v. Bartlett, 7 N. H. 178 1655, 1665, 4352
v. Bell, 20 Ga. 250 4422
v. Bell, 20 S. C. 34 705
v. Bell, 25 S. C. 149 958
v. Boyd, 76 Tex. 133 2847
v. Bruen, 1 How. 169 1147, 2749
v. Butler, 34 Wash. 131 1480
v. Camm, 10 Cal. App. 388 1922
v. Cunningham, 3 Pet. 69, 7 L. ed. 606 284, 368, 2919, 2954
v. Cunningham, 3 Pet. 85, 7 L. ed. 612 2920
v. Dagg, 60 N. Y. 528 1869, 1870, 2382, 2383, 2384
v. Farnsworth, 11 Humph. 608 4573, 4574
v. Fergus, 55 Ark. 536 979
v. Germain Boyd Lumber Co., 134 La. 397 2903
v. Giberson, 30 New Bruns. 10 3667
v. Great Northern R. Co., 26 L. R. Ir. 428 90, 94, 3484, 4667
v. Gulf & C. R. Co., 76 Miss. 71 3495, 4794
v. Hansley, 3 Jones 131 463, 4783
v. Hapworth, 52 Hun 616 576
v. Hatfield, 121 Ky. 560 2236
v. Hewitt, 24 Ind. 280 2469
v. Howard, 4 Litt. 117 4549
v. Jasper, 2 Ired. Eq. 597 1651, 2859
v. Jordan, 102 Me. 67 1031, 2274
v. Keepers, 37 Kan. 64 4614
v. Lee, 78 Ala. 511 419
v. Logan, 7 J. J. Marsh. 593 1017, 1117
v. Mayor, 10 Paige 49 950, 956, 3728
v. Mendenhall, 78 Minn. 57 1012, 1106
v. Midland R. Co., 10 C. B. (N. S.) 287 1269
v. Mills, 68 App. Div. (N. Y.) 531 2369, 2443
v. Morrison, 27 Miss. 68 1316, 1318
v. Morse, 48 Kan. 601 1495
v. Mutual Mach. Co., 150 N. C. 111 537, 2598, 2601, 2646
v. New York, N. H. & H. R. Co., 217 Mass. 408 4668
v. Norris, 79 Ky. 48 1392
v. Ober & S. Co., 96 Ga. 214 4278
v. Ober & S. Co., 111 Ga. 668 4288
v. Offutt, 10 Bush 632 2242, 2271
v. Parke, 11 Ir. C. L. Rep. 413 4579
v. Pearcy, 5 Ired. 83 4635, 4643
v. Peper T. W. Co., 205 Mo. 475 2462, 2522
v. Perry, 43 Iowa 368 425, 774
v. Puller, 2 Taunt. 285 3278
v. Reed, 4 Bin. 127 141
v. Reynolds, 73 Ala. 511 232, 241, 542, 2284, 2349
v. Rice, 50 Neb. 547 1117
v. San Francisco S. Union, 153 Cal. 64 959, 975
v. Scranton C. M. Co., 59 Wash. 659 918
v. Sheridan, 21 D. C. 370 532
v. Siemans & H. E. Co., 101 Wis. 320 2502
v. Smith, 2 Johns. 97 3036, 3037
v. Steele, 16 Pa. Dist. 197 3828
v. Teague, 85 Ala. 211 2667
v. The Ann, 2 Pet. Adm. 278 2735

[REFERENCES ARE TO PAGES]

Bell v. United States S. Co., 32 Fed. 549 4447, 4456
Bell-K. C. Co. v. Gregory, 152 Ky. 415 4791
Bell's Case, L. R. 9 Eq. Cas. 706 3085
Bell's Estate, In re, 168 Cal. 253 521, 1049
Bellairs v. Ellsworth, 3 Camp. 52 2754
Bellamy v. Burch, 16 M. & W. 590 4504
v. Whitsell, 123 Mo. App. 610 4849
Bellaty v. Curtis, 41 Fed. 479 3306
Belle of Bourbon Co. v. Leffler, 87 App. Div. (N. Y.) 302 2236, 2259
Belleview L. & B. Ass'n v. Jeckel, 104 Ky. 159 2796
Bellevue Mills Co. v. Baltimore Trust Co., 214 Fed. 817 1032, 1121
Bellevue P. & F. Co., In re, 189 Fed. 169 2258
Bellin v. Wein, N. Y. Misc. 104 Supp. 360 2512
Bellinger v. Craigue, 31 Barb. 534 2534
v. Gervais, 1 Desaus. 174 2945
v. New York, etc., R. Co., 23 N. Y. 42 1422
v. Thompson, 26 Ore. 320 1559, 1638, 1639, 1648, 1649
Bellingham Bay, etc., R. Co. v. Strand, 4 Wash. 311 4022, 4129
v. Strand, 14 Wash. 144 4053, 4155
Bellino v. Columbus C. Co., 188 Mass. 430 158
Bello Corrunes, The, 6 Wheat. 152 2737
Belloc v. Davis, 38 Cal. 243 601
Belloni v. Freeborn, 63 N. Y. 383 2745, 2893
Bellows v. Folsom, 2 Robert. 138 1857
v. Litchfield, 83 Iowa 36 2054, 2060
v. Lovell, 4 Pick. 153, 5 Pick. 307 2814
v. McKinzie, 212 Mass. 601 2214
Belmont v. McAllister, 116 Va. 285 2484
Belmont Branch of State Bank v. Hoye, 35 N. Y. 65 2826
Belmont M. & M. Co. v. Costigan, 21 Colo. 465 1721, 1734, 1741, 2030
Belo v. Fuller, 84 Tex. 450 4506, 4512, 4529, 4537
v. Wren, 63 Tex. 727 1386, 4510
Belohradsky v. Kuhn, 69 Ill. 547 1817
Belshaw v. Bush, 11 C. B. 191 679, 680. 753, 754
Belstner v. Town of Sumner, 157 Wis. 556 4871, 4874
Belt v. Lawes, 12 Q. B. Div. 356 1512, 1518, 1519
v. Washington W. P. Co., 24 Wash. 387 175, 195
v. Worthington, 2 Gill & J. 247 1676
v. Worthington, 3 Gill & J. 252 1675
Belt E. Line Co. v. Allen, 102 Ky. 551 1462
Belting v. Hobbett, 142 Ill. 72 4869, 4875, 4878
Belvidere G. L. & F. Co. v. Wayland, 77 Ill. App. 657 2599
Belyea v. Minneapolis, etc., R. Co., 61 Minn. 224 4737
Bement v. Ohio Valley B. & T. Co., 99 Ky. 109 2056
v. Smith, 15 Wend. 493 1937, 2227, 2228, 2259
Bemis v. Arlington, 114 Mass. 508 104
v. Gannett, 8 Neb. 236 1714
Bemis C. B. Co. v. Brill Co., 200 Fed. 749 4442. 4447, 4462
Bemiss v. Commonwealth, 113 Va. 489 1796
Bemmerly v. Woodward, 124 Cal. 568 1122, 1132
Bench v. Merrick, 1 C. & K. 463 3680, 3685, 3686
v. Sheldon, 14 Barb. 66 4372, 4400
Benchley v. Chapin, 10 Cush. 173, 176 1641
Bender v. Barton, 182 Ala. 181 1981
v. Bean, 52 Ark. 132 793, 803
v. Brooks (Tex. Civ. App.), 127 S. W. 168 3788
v. Fromberger, 4 Dall. 436 273, 1996, 2063, 2065, 2122, 2148
v. Louisville R. Co., 144 Ky. 166 4731
Benderagle v. Cocks, 19 Wend. 207 379, 380
Bendich v. Scobel, 107 La. 242 3826
Bendit v. Annesley, 27 How. Pr. 184 510, 1411
Benedict v. Bray, 2 Cal. 251 1560
v. Dakin, 243 Ill. 384 2509
v. Guardian T. Co., 91 App. Div. (N. Y.) 103 4387, 4391
v. Harlow, 5 How. Pr. 347 592
v. Olson, 37 Minn. 431 2814
v. Sliter, 82 Hun 190 1108
v. Wilson, 10 Cal. App. 719 2501
Benedict P. Co. v. Atlantic C. L R. Co., 55 Fla. 514 142, 478
Benenato v. McDougall, 166 Cal. 405 49
Beneteau v. Stubler, 79 Minn. 259 3229
Benfield v. Croson, 90 Kan. 661 40, 883
Benham v. Dunbar, 103 Mass. 365 1439
Benjamin v. American Tel. & Tel. Co., 196 Mass. 454 3734
v. Benjamin, 15 Conn. 347 3800, 3804, 4258
v. Benjamin, 17 Conn. 110 580, 590, 592
v. Gulf, etc., R. Co., 49 Tex. Civ. App. 473 3882, 3889, 3897, 3910, 3923
v. Hillard, 23 How. 149 2429, 2620, 2773
v. Maloney, 155 Fed. 494 2236
v. Puget Sound C. Co., 12 Wash. 476 207
v. Richards, 51 Mich. 110 534
v. Storr, L. R. 9 C. P. 400, 407 3919, 3934
v. Wheeler, 8 Gray 409 12
Benj. A. Van Brunt, The, 164 Fed. 775 2729
Benjamin F. Hunt, Jr., The, 34 Fed. 816 5010
Benjamin L. & T. Syndicate v. Bradsher, 99 Ark. 348 1066
Benjamin W. & C. Co. v. Merchants' Exch. Bank, 63 Wis. 470 4275
Benkard v. Babcock, 2 Robert. 175 564, 816, 3257, 3260
v. Babcock, 27 How. Pr. 391 807, 811, 1049
Benkert v. Feder, 34 Fed. 534 4487, 4488
Benlarig, The, 14 Prob. Div. 3 2724
Benn v. Kutzchan, 24 Ore. 28 1920, 1923, 1924
Benner v. Atlantic D. Co., 134 N. Y. 156 3738
v. Evans, 3 P. & W. 454 3719
v. Magee, 34 Ind. App. 176 863
v. Phoenix T. & T. Co., 80 Hun 412 2697
v. Truckee River G. E. Co., 193 Fed. 740 4868
Benners v. Clemens, 58 Pa. 24 615, 616
Bennet v. Bittle, 4 Rawle 339 3122, 3183
v. Gilbert, 94 Ill. App. 505 1680, 4284
v. Jenkins, 13 Johns. 50 303, 1028
Bennett v. Allcott, 2 T. R. 166 3825
v. Baker, 1 Humph. 399 1481
v. Bartlett, 6 Cush. 225 2380

[REFERENCES ARE TO PAGES]

Bennett v. Bayes, 5 H. & N. 391 1236
v. Beam, 42 Mich. 346 3663, 3669, 3676, 3679, 3688, 4957
v. Beidler, 16 Mich. 150 1854
v. Bennett, 116 N. Y. 584 417
v. Bennett, 6 C. & P. 588 4599, 4600
v. Brooklyn Heights R. Co., 1 App. Div. (N. Y.) 205 4652, 4653
v. Brown, 20 N. Y. 99 1705, 1783
v. Brown, 31 Barb. 158 1702
v. Buchan, 61 N. Y. 222 2383, 2384, 2403
v. Buchanan, 3 Ind. 47 659, 2846
v. Byram, 38 Miss. 17 3299, 3329
v. Charleston Union S. Co., 90 S. C. 308 4774
v. Chicago, etc., R. Co., 151 Mo. App. 293 3345
v. Columbia El. St. R., L. & P. Co., 92 S. C. 72 1309
v. Dowling, 22 Tex. 660 2848, 2849
v. Draper, 139 N. Y. 266 2753
v. Drew, 3 Bosw. 355 3400
v. Dyer, 102 Me. 361 172, 2254
v. Eastern B. & L. Ass'n, 117 Pa. 233 1164
v. Featherstone, 110 Tenn. 27 3038
v. Federal C. & C. Co., 70 W. Va. 456 1030, 1099, 1196, 1199
v. Foster, — Tex. Civ. App. —, 161 S. W. 1078 4626, 4629, 4632
v. Gibbons, 55 Conn. 450 4431
v. Gregory, 9 Ky. L. Rep. 194 (Ky. Super. Ct.) 2295
v. Hall, 184 Mo. 407 3957
v. Hill, 14 R. I. 322 754, 763
v. Hood, 1 Allen 47 383
v. Hudson, 174 Ill. App. 229 760
v. Hyde, 6 Conn. 24 4524, 4528
v. Jenkins, 13 Johns. 50 2098, 2137
v. Judson, 21 N. Y. 238 4385
v. Keehn, 67 Wis. 154, 162 2150
v. Lambert, 100 Ky. 737 1728, 1730
v. Latham, 18 Tex. Civ. App. 403 1029, 1997
v. Lockwood, 20 Wend. 223 111, 129, 215, 218, 480, 4196, 4307
v. Long Island R. Co., 181 N. Y. 431 9
v. McGillan, 28 Fed. 411 735
v. Marion, 102 Iowa 425 1349
v. Marion, 106 Iowa 628 3957, 3969, 4001
v. Marion, 119 Iowa 473 3850, 3882
v. Matthews, 64 Barb. 410 473, 4530, 4572, 4585
v. Mt. Vernon, 124 Iowa 537 476
v. Northern Pac. R. Co., 2 N. D. 112 1472
v. Odom, 30 Ga. 940 830, 1412
v. Palmer, 128 Ill. App. 626 1110
v. Pardini, 63 Cal. 154 1715
v. St. Louis R. Co., 19 Mo. App. 349 2467
v. Salisbury, 78 Fed. 769 4543, 4548, 4591, 4599
v. Sullivan, 100 Me. 118 3232
v. Taylor, 43 Tex. Civ. App. 30 2804
v. Telegraph Co., 128 N. C. 103 3623, 3637
v. Terrill, 20 Ga. 83 4363
v. Thompson, 13 Ired. 146 362, 364, 2036, 3742, 3790, 4260
v. United States Land, Title & Legacy Co., 16 Ariz. 138 2199
v. Vingard, 34 Mo. 216 1607
v. Virginia T. Co., 80 N. Y. Misc. 222 3416
v. Western U. Tel. Co., 129 Iowa 607 3570
Bennett v. Wolfolk, 80 Hun 390 1430
Bennett Jellico C. Co. v. East Jellico C. Co., 152 Ky. 838 3788, 3791
Bennett L. Co. v. Walnut Lake C. Co., 105 Ark. 421 259
Bennett W. Co. v. Millvale, 200 Pa. 613, 202 Pa. 616 2323, 2699
Benny v. Rhodes, 18 Mo. 147 728
Bensel, In re, 140 App. Div. (N. Y.) 806 4008
In re, 151 App. Div. (N. Y.) 451 3963
Bensel v. Lynch, 44 N. Y. 162 1619
Bensinger v. Erhardt, 74 App. Div. 169 1937, 1941
v. Wren, 100 Pa. 500 2755
Bensley v. Mountain Lake W. Co., 13 Cal. 306 4097
Benson v. Altoona, etc., R. Co., 228 Pa. 290 1467, 4718, 4747
v. Chapman, 6 M. & G. 810 3014
v. Chicago & A. R. Co., 78 Mo. 504 3855
v. Dublin W. Co., 99 Ga. 303 1825
v. Haywood, 86 Iowa 107 587
v. McFadden, 50 Ind. 431 1422
v. Matzdorf, 2 Johns. 369 3692, 3693
v. Murton, 66 Ore. 199 4364
v. New Jersey R. & R. Co., 9 Bosw. 412 3364, 3455
v. Oregon S. L. R. Co., 35 Utah 241 3333
v. Port Huron E. & T. Co., 83 Minn. 321 2408
v. Superior Mfg. Co., 147 Wis. 20 4673
v. Walden, etc., G. L. Co., 6 Allen 149 214
v. Waukesha, 74 Wis. 31 41
Benson M. & S. Co. v. Alta M. & S. Co., 145 U. S. 428 3791, 4256
Bent v. Hartshorn, 1 Metc. (Mass.) 24 2748
v. Lauve, 3 La. Ann. 88 1147, 1878
v. Stone, 184 Mass. 92 1038
Bentaloe v. Pratt, Wall. C. C. 60 3037
Bentley v. Atlanta, 92 Ga. 623 3931
v. Brown, 37 Kan. 14 2480
v. Edwards, 125 Minn. 179 2540
v. Fidelity & D. Co., 75 N. J. L. 828 2490
v. Fischer L. & Mfg. Co., 51 La. Ann. 451 3911
v. Harris, 2 Gratt. 357 2859
v. Reynolds, 1 McMull. 16 157
v. Sill, 35 Ill. 414 3122
v. Standard F. Ins. Co., 40 W. Va. 729 3032
v. State, 73 Wis. 416 2612
Benton v. Brookline, 151 Mass. 250 3964, 4030, 4106
v. Collins, 125 N. C. 83 1495, 1497
v. Dale, 1 Cow. 160 1536
v. Fay, 64 Ill. 417 193, 234, 317, 2362
v. Fletcher, 31 Vt. 418 2788
v. McCord, 96 Ga. 393 4286
v. Martin, 52 N. Y. 570 1857
v. Mullen, 61 N. H. 125 781
v. North Carolina R. Co., 122 N. C. 1007 4906
v. Pratt, 2 Wend. 385 4374, 4390, 4428
v. Sikyta, 84 Neb. 808 1815, 1817, 1828
Benton County v. Rutherford, 33 Ark. 640 2056
Benton County Sav. Bank v. Boddicker, 105 Iowa 548 2792
Benton F. Co. v. Shipman, 136 Mich. 523 2277
Benton-Shingler Co. v. Mills, 13 Ga. App. 632 703

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Benyaker v. Scherz, 103 App. Div. 192 250
Benziger v. Miller, 50 Ala. 206 207, 293, 476, 2558, 2569
Beopple v. Railroad, 104 Tenn. 420 112
Beranek v. Beranek, 95 Neb. 311 634
v. Beranek, 113 Wis. 272 1357
Bercich v. Marye, 9 Nev. 312 4313, 4328
Berdell v. Bissell, 6 Colo. 162 745
Berengere, The, 155 Fed. 439 3327, 3387, 3393
Berg v. Baldwin, 31 Minn. 541 4159
v. Chicago, etc., R. Co., 50 Wis. 427 1477
v. Great Northern R. Co., 70 Minn. 272 57
v. Humptulips B. & R. I. Co., 38 Wash. 342 1430
v. Kaiser, 137 App. Div. (N. Y.) 1 3110
v. St. Paul City R. Co., 96 Minn. 513 1310, 3502
Berge v. Minneapolis G. Co., 60 Minn. 296 3905
Bergen v. Hitchings, 22 App. Div. (N. Y.) 395 2520
Berger v. Abel, 141 Wis. 321 1362
v. Berger, 44 Pa. Super. Ct. 305 664
v. Commercial Bank, 5 Ohio Dec. 277 1077
v. Freeman Tribune P. Co., 132 Iowa 290 4507, 4508, 4522, 4597
v. Independent Bros. (Misc.) 147 N. Y. Supp. 934 3080
v. Jacobs, 21 Mich. 215 4757
v. Minneapolis G. L. Co., 60 Minn. 296 9, 3891, 3907
v. Nants, 172 Ill. App. 623 841, 889
v. St. Paul City R. Co., 95 Minn. 84 4685, 4829
Bergeron v. Miles, 88 Wis. 397 4366
v. Peyton, 106 Wis. 377 4839, 4840, 4844
Berghaus v. Alter, 9 Watts 386 742
Bergheim v. Blaenavon I. & S. Co., L. R. 10 Q. B. 319 888, 893
Berghoff v. Heckwolf, 26 Mo. 511 1663, 4349, 4351
Berghuis v. Schultz, 119 Minn. 87 188, 842, 887, 912, 3201
Bergin v. Southern New England Tel. Co., 70 Conn. 54 1400
v. Wemple, 30 N. Y. 319 2462
Bergman v. Solomon, 143 Ky. 581 4981
Bergman P. Co. v. Brown (Tex. Civ. App.), 156 S. W. 1102 748, 757
Bergmann v. Jones, 94 N. Y. 51 1268, 1290, 4535, 4538, 4544
Bergstrom v. Ridgway Co., 138 App. Div. (N. Y.) 178 4573, 4588
Berkey v. Berwind W. C. M. Co., 229 Pa. 417 3768
v. Lefbure, 125 Iowa 76 1357
Berkey & G. F. Co. v. Hascall, 123 Ind. 502 2351
Berkheimer v. Geise, 82 Pa. 64 1411
Berkley v. Wilson, 87 Md. 219 426
Berkmeir v. Peters, 111 Mo. App. 717 1079
Berkshire W. Co. v. Proctor, 7 Cush. 428 3530
Berkson v. Kansas City C. R. Co., 144 Mo. 211 434
Berley v. Columbia, etc., R. Co., 82 S. C. 232 621
v. Hilton, 55 N. H. 444 3854
v. Seaboard A. L. R., 83 S. C. 411 3441, 3442, 3446, 3485
Berlin v. Cusachs, 114 La. 744 2571
v. Schermerhorn, 21 Vt. 189 1835
v. Thompson, 61 Mo. App. 234 1412, 3848, 3911
Berlin I. B. Co. v. American B. Co., 76 Conn. 1 296
Berlin Mach. Works v. Miller, 59 Wash. 572 376
Bernar v. Dunlap, 94 Pa. 329 4645
Bernard v. Adams Exp. Co., 205 Mass. 254 3414
v. Duncan, 38 Mo. 184 1947
Berner v. German State Bank, 125 Iowa 438 715
Berney v. Adriance, 157 App. Div. 628 32, 4974, 4976
v. Dinsmore, 141 Mass. 42 1442
Bernhard v. Curtis, 75 Conn. 476 312, 3189, 3200
v. Rochester German Ins. Co., 79 Conn. 388 1090, 1098
Bernhardt v. Baltimore, etc., R. Co., 165 Ill. App. 408 3882
Bernheimer v. Adams, 70 App. Div. (N. Y.) 114, aff'd 175 N. Y. 472 3256
v. Becker, 102 Md. 250 436, 1280
v. Charak, 170 Mass. 179 1712
v. Hartmayer, 50 App. Div. (N. Y.) 316 546
Bernier v. St. Paul G. Co., 92 Minn. 214 4652
Bernos v. Canepa, 114 La. 517 1267
Bernstein v. Meech, 130 N. Y. 354 244, 246, 291, 294
v. Traverso, 82 Misc. (N. Y.) 411 831
Beronio v. Southern Pac. R. Co., 86 Cal. 415 383, 396, 3760, 4145
Berrian v. Mayor, 4 Robert. 538 719, 736
v. Olmstead, 4 E. D. Smith 279 3237
Berridge v. Berridge, 44 Ch. Div. 168 2865
Berrien v. Wright, 26 Barb. 208 1163
Berringer v. Dubuque St. R. Co., 118 Iowa 135 4733
Berrinkott v. Traphagen, 39 Wis. 219 869, 879
Berry v. Adamson, 6 B. & C. 528 4608
v. Anderson, 2 How. (Miss.) 649 1539
v. Bakeman, 44 Me. 164 3680, 3681, 3685
v. Bates, 2 Blackf. 118 782
v. Campbell, 118 Ill. App. 646 4189
v. Chicago, etc., R. Co., 24 S. D. 611 1442, 3334, 3418, 3436
v. Collins, 9 Ohio C. C. 656 2474, 2482
v. Cooper, 28 Ga. 543 3386
v. Da Costa, L. R. 1 C. P. 331 3669
v. Davis, 34 Iowa 594 2485
v. Diamond, 19 Ark. 262 537
v. Dwinel, 44 Me. 255 291, 1435, 1437, 1985, 2295, 2305, 2309
v. Fletcher, 1 Dill. 67 1276
v. Folkes, 60 Miss. 576 1072
v. Gillis, 17 N. H. 9 778, 781, 782
v. Harris, 43 N. H. 376 416, 2596
v. Hoeffner, 56 Me. 170 4340
v. Ingalls, 199 Mass. 77 1442, 4270
v. Kelly, 4 Robert. 106 431
v. Kingsbaker, 118 Ill. App. 198 1244
v. Mutual Ins. Co., 2 Johns. Ch. 603 579
v. Powell, 18 Ill. 98 576
v. St. Louis, etc., R. Co., 214 Mo. 593 109, 151, 432
v. San Francisco, etc., R. Co., 50 Cal. 435 112
v. Shannon, 98 Ga. 458 2404, 2406
v. Vantries, 12 S. & R. 89 4271, 4353

[REFERENCES ARE TO PAGES]

Berry v. Van Winkle, 2 N. J. Eq. 390 3257
v. Virginia State Ins. Co., 83 S. C. 13 763, 1089
v. Vreeland, 21 N. J. L. 183 1492, 3677, 4167
v. West Virginia & P. R. Co., 44 W. Va. 538, 545 3336
v. Wisdom, 3 Ohio St. 241 857, 918, 925
Berryhill v. Byington, 10 Iowa 223 1952
Berryman v. Cox, 73 Mo. App. 61 4781
v. Hewitt, 6 J. J. Marsh. 462 2047
v. Pennsylvania R. Co., 228 Pa. 621 1329
Berthold v. Fox, 13 Minn. 51 4328, 4352
v. Reyburn, 37 Mo. 586 818
Bertholf v. O'Reilly, 8 Hun 16 57, 60
v. O'Reilly, 74 N. Y. 509 59
Bertram v. Bergquist, 153 Ill. App. 43 2589
Bertrand v. Byrd, 5 Ark. 651 356, 2667, 2682
Bertuch v. Tel. & C. Co., 79 N. Y. Misc. 10 3561
v. United States & H. Tel. & C. Co., 79 N. Y. Misc. 10 3548, 3560, 3613
Bertulis v. Illinois S. Co., 152 Wis. 49 4800
Berwald v. Ray, 165 Pa. 192 1696, 1706
Besch v. Western C. Mfg. Co., 36 Mo. App. 333 2467
Besozzi v. Harris, 1 Fost. & F. 92 475
Bessemer C. Co. v. Gleason, 223 Pa. 84 2793
Bessemer L. & I. Co. v. Jenkins, 111 Ala. 135 3735, 3819
Bessent v. Harris, 63 N. C. 542 2925
Besser v. Hawthorn, 3 Ore. 129 962
Bessinger v. Dickerson, 20 Iowa 260 1588
Bessler v. Laughlin, 168 Ind. 387 58
Besso v. Southworth, 71 Tex. 765 3911, 3920
Best v. Allen, 30 Ill. 30 3831
v. City of Chehalis, 82 Wash. 601 3969
v. Columbia St. R., L. & P. Co., 85 S. C. 422 1465, 3501
v. Flint, 58 Vt. 543 2371
v. Great Northern R. Co., 159 Wis. 429 3431
v. Johnson, 78 Cal. 217 2760
v. Kessler, 130 Fed. 24 4573
v. McAuslan, 27 R. I. 107 1446, 2463
Best B. Co. v. Klassen, 85 Ill. App. 464 1801
Best M. Co. v. Brewer, 50 Colo. 455 2240, 2241, 2245
Best Mfg. Co. v. Hutton, 49 Mont. 78 2393, 2456
Betcher v. Hodgman, 63 Minn. 30 1214
Bethany v. Lee, 124 Ill. App. 397 326, 4675, 4681
Bethea v. McLennon, 1 Ired. 530 4342
v. Western U. Tel. Co., 97 S. C. 385 1325, 1522
Bethel v. Salem I. Co., 93 Va. 354 273, 2693
Bethel St. M. Co. v. Brown, 57 Me. 9 2226
Bethell v. Bethell, 54 Ind. 428 2099
v. Mellor & Rittenhouse Co., 135 Fed. 445 1005, 5011
Bethlehem v. Hemingway, 14 Pa. Dist. 656 1005
Bethlehem S. Co. v. United States, 41 Ct. of Cls. 19 858, 860
Bethune v. McCreary, 8 Ga. 114 1820
Betram v. Herring, 18 Pa. Super. Ct. 395 3185
Betsey Carnes, The, 2 Hagg. 28 4994
Betteley v. Stainsby, 12 C. B. (N. S.) 477 2916, 3178
Betterbee v. Davis, 3 Camp. 71 799
Betterton v. Roope, 3 Lea 215 672
Bettes v. Farewell, 15 Up. Can. C. P. 450 1214
Bettinger v. Loring, 168 Iowa 103 4909, 4948
Betts v. Burch, 4 H. & N. 506 835, 836
v. Church, 5 Johns. 348 4209
v. Gallais, L. R. 10 Eq. 392 2050
v. Gibbins, 2 A. & E. 57 2978
v. Hancock, 139 Ga. 198 4699, 4834
v. Jackson, 6 Wend. 180 1414
v. Lee, 5 Johns. 348 363, 4256
v. Southern California F. E., 144 Cal. 402 2946
v. Union Bank, 1 Har. & G. 175 2067
v. Williamsburgh, 15 Barb. 255 3956
Betts Co. v. Hancock, 139 Ga. 198 4799
Betz v. Heebner, 1 P. & W. 280 733
Beugnot v. Tremoulet, 111 La. 1 1121
Beulah Park Est., In re, L. R. 15 Eq. 43 1073
Beury v. Fay, 73 W. Va. 460 889
Beutel v. American M. Co., 144 Ky. 57 2165
Bevan, Ex parte, 9 Ves. 223 1013, 1213
Bevan v. Cullen, 7 Pa. 281 2905
v. Muir, 53 Wash. 54 2396, 2399
Bevans v. Ramsey, 15 How. 179 1607
v. Rees, 5 M. & W. 306 799, 807
Bever v. North, 107 Ind. 544 2131
Beveridge v. Lewis, 137 Cal. 619 4119
v. Park Com'rs, 100 Ill. 75 1049
v. Welch, 7 Wis. 465 1282, 4194, 4334, 4351
v. West Chicago Park Com'rs, 100 Ill. 75 1063
v. West Side C. Co., 130 App. Div. (N. Y.) 139 833, 835, 889
Beverly v. Williams, 4 Dev. & Batt. 236 2629
Bevier v. Covell, 87 N. Y. 52 1874
v. D. & H. C. Co., 13 Hun 254 314
Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244 3071, 3072
v. Linguard, 1 Brev. 503 1534
Beyer v. Marks, 2 Sweeny 715 1953, 2051
v. Peoria, etc., T. Co., 156 Ill. App. 47 4882
Beyerle v. Hain, 61 Pa. 226 1586
Beymer v. McBride, 37 Iowa 114 312, 317, 325, 476, 2564
Bezzell v. White, 13 Ala. 422 2871
Bialbloca's Petition, 50 Pa. Super. 181 1115
Bianchi v. Maggini, 17 Nev. 322 2608
Biays v. Chesapeake Ins. Co., 7 Cranch 415 3022
Bibb v. Allen, 149 U. S. 481, 498, 37 L. ed. 819, 826 2970, 2971
v. American C. & I. Co., 109 Va. 261 2156
v. Freeman, 50 Ala. 612 2060
v. Jones, 12 Ky. L. Rep. 605 4194
Bibb Broom C. Co. v. Atchison, etc., R. Co., 94 Minn. 269 140
Bibb County v. Ham, 110 Ga. 340 1373
Bibend v. Liverpool, etc., Ins. Co., 30 Cal. 78 1060
Bick v. Lang, 15 Ind. App. 503 1688
Bickell v. Colton, 41 Miss. 368 4209, 4272
Bickerstaff v. Dellinger, 1 Murphy 272 1545

[REFERENCES ARE TO PAGES]

Bickford v. First Nat. Bank, 42 Ill. 238 665
v. Hyde Park, 173 Mass. 552 4023
v. Page, 2 Mass. 455 2056, 2058, 2060, 2076, 2083, 2123
v. Travelers' Ins. Co., 67 Vt. 418 3079
Bickham v. Hutchinson, 50 La. Ann. 765 476
Bicknall v. Buck, 58 Ind. 354 2229
v. Waterman, 5 R. I. 43 368, 1101, 2309, 2331
Biddeford Sav. Bank v. Dwelling House Ins. Co., 81 Me. 566 3059
Bidder v. Bridges, 37 Ch. Div. 406 752, 753
Biddinger v. Pratt, 50 Ohio St. 719 1655
Biddle v. Hussman, 23 Mo. 597 3132, 3146, 4086, 4088
v. Jenkins, 61 Neb. 400 4647
Biddlecom v. General Acc. Assur. Co., 167 Mo. App. 581 757, 758
Bidell v. Janney, 9 Ill. 193 1119
Bidwell v. Douglas T. Co., 183 Fed. 93 739
v. Madison, 10 Minn. 13 2929
Bieber v. Gans, 24 App. D. C. 517 832
Biederman v. Interstate T. & B. Co., 172 Mo. App. 1 1509
Biedler v. Malcolm, 121 App. Div. (N. Y.) 245 979
Biehler v. Irwin (Misc.), 84 N. Y. Supp. 574 4284
Biela v. Urbanczyk, 38 Tex. Civ. App. 213 3661, 3800
Biele v. Levy (N. Y. Misc.), 107 N. Y. Supp. 607 2286, 2455
Bien v. Hess, 102 Fed. 436 3236, 3237, 3239, 3247, 3248
v. Robinson, 208 U. S. 423 664
Bierbach v. Goodyear Rubber Co., 54 Wis. 208 228, 1375, 4194, 4694
Bierbauer v. New York, etc., R. Co., 15 Hun 559 1495, 1512, 3527, 3529
Bierce v. Waterhouse, 219 U. S. 320 1667, 1672, 1674, 1681, 1784
Bierer v. Fretz, 32 Kan. 329 1981, 1996
Bierhaus v. Western U. Tel. Co., 8 Ind. App. 246 3550, 3552, 3585
Bieri v. Fonger, 139 Wis. 150 3735
Bierman v. City Mills Co., 151 N. Y. 482 2376, 2390, 2392
Biescar v. Pratt, 4 Cal. App. 288 883
Big Goose & B. D. Co. v. Morrow, 8 Wyo. 537 129, 132
Big Jack Min. Co. v. Parkinson, 41 Okla. 125 4861, 4871, 4872, 4893, 4905
Big Sandy R. Co. v. Bays, 31 Ky. L. Rep. 288 3891
v. Blankenship, 133 Ky. 438 339, 4662, 4685
v. Boyd County, 125 Ky. 345 3758
v. Dils, 120 Ky. 563 3963, 4025, 4121
v. Rice, 146 Ky. 619 333, 2588
v. Rice, 147 Ky. 645 1093
Big Valley I. Co. v. Hughes (Tex. Civ. App.), 146 S. W. 715 2458
Bigaouette v. Paulet, 134 Mass. 123 4978
Bigbee F. Co. v. Scott, 3 Ala. App. 333 55, 267, 1418, 3893, 3894, 3924, 3931
Bigelow v. American F. P. Mfg. Co., 39 Hun 599 2564
v. Bridge, 8 Mass. 275 1582, 1596
v. Burnham, 83 Iowa 120 1145, 1155, 1161, 1163
v. Burnham, 90 Iowa 300 1164
v. Chicago, etc., R. Co., 104 Wis. 109 3317, 3403, 3404
v. Collamore, 5 Cush. 226 3150
v. Doolittle, 36 Wis. 115 1136, 1503, 4312, 4325
Bigelow v. Goble, 9 App. Div. (N. Y.) 391 4284
v. Hubbard, 97 Mass. 195 2147
v. Jones, 4 Mass. 512 2110
v. Legg, 102 N. Y. 652 2242
v. Maine Cent. R. Co., 110 Me. 105 2378
v. Metropolitan St. R. Co., 48 Mo. App. 367 4748, 4752
v. Reed, 51 Me. 325 161
v. Reynolds, 68 Mich. 344 416
v. Rising, 42 Vt. 678 3741
v. Sprague, 140 Mass. 423 4515
v. Walker, 24 Vt. 149 2945
v. West Wisconsin R. Co., 27 Wis. 478 3964, 3976
Bigelow C. Co. v. Dobson, 10 Fed. 385 4447, 4457
v. Heintze, 53 N. J. L. 69 4298, 4299, 4300, 4301
Bigg v. London, L. R. 15 Eq. 376, 5 Moak's Eng. 887 3971
Biggers v. Matthews, 147 N. C. 299 6
Biggs v. Benger, 2 Ld. Raym. 1372 1531
v. D'Aquin, 13 La. Ann. 21 1282
v. Dwight, 1 M. & Ry. 308 720
v. Langhammer, 103 Md. 94 3318
v. McCurley, 76 Md. 409 3235, 3236, 3240, 3244, 3255
v. Maulding, — Tex. Civ. App. —, 147 S. W. 681 504
Bigham v. Pittsburg C. Co., 29 Pa. Super. Ct. 86 3757
v. Wabash-P. T. R. Co., 223 Pa. 106 1356, 1417, 2589
Bigler v. Leonori, 103 Mo. App. 131 4232
v. Morgan, 77 N. Y. 312 1953, 2009
v. Waller, 14 Wall. 297 601
v. Waller, Chase's Dec. 316 1228
Bigley v. National Fidelity & Casualty Co., 94 Neb. 813 4534, 4549
Bignall v. Gould, 119 U. S. 495 860, 918
Bignell v. Buzzard, 3 H. & N. 217 4556
Bignold, Ex parte, 1 Deac. 712 2937
Bigony v. Tyson, 75 Pa. 157 860, 887, 899
Bill v. Barker, 16 Gray 62 2755, 2767
v. Fuller, 146 Cal. 50 2226
v. Porter, 9 Conn. 23 673
Bill's Case, L. R. 9 Eq. Cas. 706 3086
Billany v. Smith, 4 Houst. 113 3121
Billingheimer v. Scott, 145 Ill. App. 395 1014
Billings v. Albright, 66 App. Div. (N. Y.) 239 4976
v. Atchison, etc., R. Co., 76 Kan. 325 1522, 4623
v. Mason, 80 Me. 496 656
Billingsby v. Billingsby, 24 Ala. 518 1109
Billingsley v. Dean, 11 Ind. 331 871
v. Maas, 93 Wis. 176 4624, 4635, 4645
v. St. Louis, etc., R. Co., 84 Ark. 617 4854
Billingsly v. Cahoon, 7 Ind. 184 974, 1876
Billiot v. Robinson, 13 La. Ann. 529 794
Billman v. Indianapolis, etc., R. Co., 76 Ind. 166 154
Billmeyer v. Wagner, 91 Pa. 92 2358
Bills v. New York Cent. R. Co., 84 N. Y. 5 3426
Biloxi City R. Co. v. Maloney, 74 Miss. 738 1281
Bilz v. Powell, 50 Colo. 482 898
Bindell v. Kenton County A. F. Ins. Co., 128 Ky. 389 57
Binder v. Chicago & N. W. R. Co., 162 Iowa 550 4159

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Binford v. Alston, 4 Dev. 354 633
v. Grimes, 26 Ind. App. 481 1721
v. Johnston, 82 Ind. 426 70
v. Young, 115 Ind. 174 4524
Bing v. Atlantic C. L. R. Co., 86 S. C. 528 3505
Bing Gee v. Ah Jim, 7 Fed. 811 1707
Bingham v. Allport, 1 N. & M. 398 794
v. Browning, 197 Ill. 122, aff'g 97 Ill. App. 442 758, 760
v. Garnault, Buller's N. P. 17 465
v. Gaynor, 135 App. Div. (N. Y.) 426 4520, 4522, 4543
v. Lipman, 40 Ore. 363 1268, 1348, 4841, 4843
v. Richardson, 1 Winston 217 886
v. Spruill, 97 Ill. App. 374 2491
v. Weiderwax, 1 N. Y. 509 2066, 2068, 2087, 2088
Binicker v. Hannibal, etc., R. Co., 83 Mo. 660 383, 1391
Binks v. Lord Rokeby, 2 Swanst. 223 1026, 1969
Binn v. Chester, 5 Day 360 754
v. McCorkle, 2 Browne 79 4599
v. Vitagraph Co., 147 App. Div. (N. Y.) 783 371
v. Vitagraph Co., 71 N. Y. Misc. 203 4538
Binsee v. Wood, 47 Barb. 624 3147
Birch v. Benton, 26 Mo. 153 15
v. Clifford, 8 T. L. Rep. 103 3162
v. Joy, 3 H. of L. Cas. 565 1027, 1969
v. Lake Roland E. R. Co., 83 Md. 362 3955, 3989, 4084
v. Tebbutt, 2 Starkie 74 722
v. Wood, 111 Ill. App. 336 3189, 3201
v. Wright, 1 T. R. 387 3097
Birchall v. Third Nat. Bank, 17 Phila. 139 277
Birchard v. Booth, 4 Wis. 67 412, 464, 1307, 1316, 1363, 1481, 1495
Bircher v. Boemler, 204 Mo. 554 2472
v. Watkins, 13 Mo. 521 2066
Birchfield v. Russell, 3 Cold. 228 4530
Birchler v. Boemler, 204 Mo. 554 371
Bird v. Benton, 127 Ga. 371 711
v. Hannibal, etc., R. Co., 30 Mo. App. 365 3925
v. Holbrook, 4 Bing. 628 99
v. Kleiner, 41 Wis. 134 4383
v. Lobdell, 10 La. Ann. 159 739
v. Press Pub. Co., 154 App. Div. (N. Y.) 491 4519, 4535
v. St. John's Episcopal Church, 154 Ind. 138 862, 884, 894, 2683
v. Thompson, 96 Mo. 424 3663
v. Wilmington & M. R. Co., 8 Rich. Eq. 46, 57 1272
v. Womack, 69 Ala. 390 483
Bird T. Co. v. Krug, 30 Ind. App. 602 108
Birdie, The, 7 Blatch. 238 2717, 2727
Birdley v. Eden, 3 Har. & McHen. 167 1227
Birdsall v. Carter, 11 Neb. 143 2405, 2421
v. Coolidge, 93 U. S. 64 4437, 4439, 4441, 4450, 4452, 4474
v. Palmer, 74 Md. 201 2405
v. Twenty-third St. Ry. Co., 8 Daly 419 862
Birdsell Mfg. Co. v. Brown, 96 Mich. 213 2902, 2913, 2956
Birdsey v. Butterfield, 34 Wis. 52 532
Birdsinger v. McCormick H. Mach. Co., 183 N. Y. 487 171, 2413
Birdsong v. Ellis, 62 Miss. 418 2564
Birkel v. Chandler, 26 Wash. 241 4715
Birket v. Williams, 30 Ill. App. 451 3780
Birkett v. Knickerbocker Ice Co., 110 N. Y. 504 4931, 4935, 4937, 4939
v. Postal Tel.-C. Co., 107 App. Div. (N. Y.) 115 1332
v. Western U. Tel. Co., 103 Mich. 361 3550
Birmingham v. Gordon, 167 Ala. 334 4744
v. Kennedy, 9 Ala. App. 541 3961, 3963, 4107
v. Land, 137 Ala. 538 3854, 3858
Birmingham B. R. Co. v. Lockwood, 150 Ala. 610 3963
Birmingham D. G. Co. v. Finley, 122 Ala. 534 1685, 1693, 1694
Birmingham F. Ins. Co. v. Pulver, 126 Ill. 329 3032
Birmingham Ledger Co. v. Buchanan, 10 Ala. App. 527 1266, 4841
Birmingham R., L. & P. Co. v. Anderson, 163 Ala. 72 326
v. Baker, 161 Ala. 135 4767, 4772
v. Brown, 150 Ala. 327 1383
v. Camp, 161 Ala. 456 1416
v. Chastain, 158 Ala. 421 1391, 4768, 4769, 4770
v. Clemons, 142 Ala. 160 1480, 1484
v. Colbert, — Ala. —, 67 So. 513 32, 4691
v. Coleman, 181 Ala. 478 460, 1310, 3507, 3527
v. Enslen, 144 Ala. 343 1471
v. Friedman, 187 Ala. 562 32, 4713
v. Girod, 164 Ala. 10 1376, 4759
v. Glenn, 179 Ala. 263 3468, 3483, 3507
v. Goldstein, 181 Ala. 517 1373
v. Harden, 156 Ala. 244 4725
v. Hinton, 157 Ala. 630 1444, 3397
v. Hinton, 158 Ala. 470 69
v. Humphries, 172 Ala. 495 4733, 4735, 4737, 4758
v. Humphries, 171 Ala. 291 4792
v. Landrum, 153 Ala. 192 1276
v. Lee, 153 Ala. 386 1357, 3473, 3500, 3506
v. Long, 5 Ala. App. 510 475, 3968, 3982
v. McLeod, 9 Ala. App. 637 3502
v. Moore, 148 Ala. 115 1132, 1481, 1482, 4711, 4730, 4735
v. Mosely, 164 Ala. 111 4927
v. Mullen, 138 Ala. 614 460, 461
v. Murphy, 2 Ala. App. 588 1262
v. Nolan, 134 Ala. 329 3507
v. Norris, 2 Ala. App. 610 405, 461
v. O'Brien, 185 Ala. 617 3470
v. Oden, 146 Ala. 495 3968, 4030, 4086
v. Roach, — Ala. —, 66 So. 82 1391, 1427, 1471
v. Rutledge, 142 Ala. 195 1468, 1471, 4654, 4793
v. Simpson, 177 Ala. 475 4722
v. Smyer, 181 Ala. 121 3935
v. Taylor, 6 Ala. App. 661 3505
v. Turner, 154 Ala. 542 3456
v. Williams, 158 Ala. 381 1277, 3508
v. Wise, 149 Ala. 492 1280
v. Wright, 153 Ala. 99 1476, 4661, 4690, 4729
Birmingham R. & E. Co. v. Baird, 130 Ala. 334 3466, 3467, 3470, 3506
v. Ward, 124 Ala. 409 339
Birmingham S. R. Co. v. Lintner, 141 Ala. 420 404, 4753, 4758, 4761
Birmingham T. & T. Co. v. Still, 7 Ala. App. 556 3478, 3504

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Birmingham W. Co. v. Keiley, 2 Ala. App. 629 1262, 1276
v. Martini, 2 Ala. App. 652 55, 3905
Birmingham W. W. Co. v. Bailey, 5 Ala. App. 474 1518
v. Ferguson, 164 Ala. 494 172, 175, 331
v. Vinter, 164 Ala. 490 172, 331
Birmingham & A. R. Co. v. Maddox, 155 Ala. 292 821
Birney v. Haim, 2 Litt. 262 2124
v. Hann, 3 A. K. Marsh. 322 2124, 2129
v. New York, etc., Tel. Co., 18 Md. 341 3550, 3553
v. Wabash, etc., R. Co., 20 Mo. App. 470 3349, 3432
Birnie v. Main, 29 Ark. 591 3727
Birtman v. Thompson, 136 Ill. App. 621 303, 3202, 3236, 3248, 3257
Bisbee v. Torinus, 26 Minn. 165 1837
Bisbey v. Shaw, 12 N. Y. 67 470, 473, 4568, 4581, 4585, 4586
Bischof v. Lucas, 6 Ind. 26 509, 1847, 1848
Bischoff v. New York E. R. Co., 138 N. Y. 257 3757
Bischoffsheim v. Baltzer, 21 Fed. 531 1118, 1128, 1143, 1155, 1181
Bisher v. Richards, 9 Ohio St. 495 325, 476
Bishop v. Alcott, 86 N. Y. 503 2757
v. American P. Co., 105 Fed. 845 10, 18
v. Autographic R. Co., 19 App. Div. (N. Y.) 268 2260
v. Baker, 19 Pick. 517 1390, 3823
v. Church, 2 Ves. 371 1552
v. Felch, 7 Mich. 371 1854
v. Garcia, 14 Abb. Pr. (N. S.) 69 591
v. Globe Co., 135 Mass. 132 4952
v. Hayward, 4 T. R. 470 452
v. Hendrick, 82 Hun 323, aff'd 146 N. Y. 398 223, 4270
v. Journal N. Co., 168 Mass. 327 4549, 4551, 4589
v. Minderhout, 128 Ala. 162 2225
v. New Haven, 82 Conn. 51 4106, 4151
v. Perkins, 19 Conn. 300 667, 767
v. Price, 24 Wis. 480 537, 542, 2667
v. Readsboro Mfg. Co., 85 Vt. 141 1348, 1432, 3887, 3911
v. Small, 63 Me. 12 4375
v. Williamson, 11 Me. 495 102, 4185
Bishop Hill Colony v. Edgerton, 26 Ill. 54 1003, 1030, 1032
Bissell v. Dickerson, 64 Conn. 61, 73 1823
v. Ford, 176 Mich. 64 3752
v. Hopkins, 4 Cow. 53 1135, 1243, 4232
v. Lloyd, 100 Ill. 214 3235
v. Marine Co., 55 Ill. 165 1204
v. Saxton, 67 N. Y. 55 1582
v. Starr, 32 Mich. 297 2302
v. Zorn, 122 Mo. App. 688 2462, 2545
Bistline v. Ney, 134 Iowa 172 60
Bitner v. Brough, 11 Pa. 127 1987, 1995
v. Utah Cent. R. Co., 4 Utah 502 4795
Bitting v. Ten Eyck, 82 Ind. 421 4640
v. Thaxton, 72 N. C. 541 534, 549
Bixby v. Barklie, 26 Hun 275 2805
v. Brundige, 2 Gray 129 4601
v. Dunlap, 56 N. H. 462 164, 1294, 1305
Bixby v. Grand Lodge A. O. U. W., 105 Iowa 505 624
v. Parsons, 49 Conn. 483 539, 2581
Bixby-T. L. Co. v. Evans, 167 Ala. 431 243, 273, 274, 286, 295, 320
v. Evans, 174 Ala. 571 282
Bize v. Dickason, 1 T. R. 285 2957
Bizer v. Ottumwa H. Co., 70 Iowa 145 400, 3859, 3866
Bizzell v. Brewer, 9 Ark. 58 1891
Black v. Atlantic C. L. R. Co., 82 S. C. 478 3416, 3480, 3502
v. Baxendale, 1 Ex. 410 3366
v. Black, 15 Ga. 445 2050
v. Black (Tex. Civ. App.), 67 S. W. 928 4220
v. Buckingham, 174 Mass. 102 4644, 4649
v. Camden & A. R. & T. Co., 45 Barb. 40 1137, 3353, 3387
v. Canadian Pac. Ry., 218 Fed. 239 4613, 4618
v. Carrollton R. Co., 10 La. Ann. 33 348, 3487
v. Caruthers, 6 Humph. 87 1556
v. Charleston, etc., R. Co., 87 S. C. 241 3502
v. De Camp, 78 Iowa 718 2275
v. Dudley, 75 App. Div. (N. Y.) 72 2420
v. Goodman, 1 Bailey 201 1134
v. Goodrich T. Co., 55 Wis. 319 3335, 3412
v. Griggs, 74 Conn. 582 1490
v. Hankins, 6 Ala. App. 512 1385, 3911
v. Highland S. S. Co., 98 App. Div. (N. Y.) 409 3897, 3900
v. Hilliker, 130 Cal. 190 4347, 4354
v. Lusk, 69 Ill. 70 601
v. Michigan Cent. R. Co., 146 Mich. 568 4860, 4926
v. Midland R. Co., 18 Q. B. 93 4857
v. Minneapolis, etc., R. Co., 122 Iowa 32 56, 242, 822, 3800, 3804, 3805, 3809, 3951
v. Moore, 35 Tex. Civ. App. 613 1538, 1601
v. Morse, 7 N. J. Eq. 509 572
v. Munson, 14 Blatch. 265 4465
v. Queen, 29 Can. Sup. Ct. 693 1591
v. Reybold, 3 Harr. 528 1008, 1107
v. Robinson, 61 Miss. 54 4168, 4169
v. Robinson, 62 Miss. 68 4211
v. Shooler, 1 McCord 293 711
v. Smith, Peake 88 799, 803
v. Thorne, 111 U. S. 122 4456
v. Ward, 27 Mich. 191 597, 606, 1884, 1889
v. Woodrow, 39 Md. 194 2687
Black M. & C. Co. v. National S. Co., 61 Wash. 471 2793
Black River Bank v. Page, 44 N. Y. 453 2816
Black River L. Co. v. Warner, 93 Mo. 374 2259, 2260, 2263
Black River & M. R. Co. v. Barnard, 9 Hun 104 4049
Blackall v. Morrison, 170 Ill. 152 3100
Blackburn v. Alabama G. S. R. Co., 143 Ala. 346 42
v. Hayes, 59 Ark. 366 837
v. Kentucky Cent. R. Co., 15 Ky. L. Rep. 303 (Ky. Super. Ct.) 3564, 3604
v. Mann, 85 Ill. 222 3671
v. Reilly, 48 N. J. L. 82 581
v. Stupart, 2 East 243 632
Blackburne, Ex parte, 10 Ves. 204 648
Blackeney v. Ferguson, 18 Ark. 347 384
Blacker v. Slown, 114 Ind. 322 2405

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Blackie v. Cooney, 8 Nev. 41 1135
v. Hudson, 117 Mass. 181 2147, 2148
Blackley v. Sheldon, 7 Johns. 32 1485, 1490
Blackman v. Gardiner Bridge, 75 Me. 214 334
v. Leonard, 14 La. Ann. 59 720
v. Mauldin, 164 Ala. 337 3919, 3920
v. Simpson, 120 Mich. 377 424, 434
v. West Jersey, etc., R. Co., 126 Fed. 252 4640
v. Wheaton, 13 Minn. 299 4360
Blackmar v. Thomas, 28 N. Y. 67 2970
Blackmer v. Cleveland, etc., R. Co., 101 Mo. App. 557, 73 S. W. 913 4214, 4271
v. McCabe, 86 Vt. 303 778
Blackmer Co. v. Mobile & O. R. Co., 137 Mo. App. 479 3387
Blackmer & P. P. Co. v. Mobile & O. R. Co., 168 Mo. App. 22 1521
Blackmore v. Ellis, 70 N. J. L. 264 1267
v. Flemyng, 7 T. R. 442 1397, 1563
Blackshear v. Dekle, 120 Ga. 766 700
Blackshear Mfg. Co. v. Stone, 8 Ga. App. 661 531, 1874
Blackstock v. New York & E. R. Co., 20 N. Y. 48 3329
Blackstone v. Allemania F. Ins. Co., 56 N. Y. 104 3092
Blackstone Bank v. Hill, 10 Pick. 129 705, 720
Blackwell, The, 10 Wall. 1 2726
Blackwell v. Acton, 38 Ind. 425 4321
v. Hill, 76 Mo. App. 46 4739, 4768, 4770
v. Justices, 2 Blackf. 143 2060
v. Landreth, 90 Va. 748 4543, 4550
v. Lynchburg, etc., R. Co., 111 N. C. 151 3738
v. McBride (Ky. Super. Ct.), 14 Ky. L. Rep. 760 2069, 2097, 2112, 2117, 2181
v. Memphis St. R. Co., 124 Tenn. 516 4770
v. Southern Pac. Co., 184 Fed. 489 3417
Blackwell, etc., R. Co. v. Bebout, 19 Okla. 63 1538
Blackwood v. Brennan, Harp. 144 2275
v. Leman, Harp. 143 1101
v. Liebke, 87 Ark. 545 834, 843, 887
v. Tanner, 112 Ky. 672 289
Bladen v. Cockey, 1 Har. & McHen. 230 1482
Blades v. Des Moines City R. Co., 146 Iowa 580 4801
v. Dewy, 136 N. C. 176 2751
Blaechinska v. Howard Mission, etc., 56 Hun 322 4761
v. Howard Mission, etc., 130 N. Y. 497 4700, 4702, 4703
Blaen Avon C. Co. v. McCulloch, 59 Md. 403 3737, 3791
Blagen v. Thompson, 23 Ore. 239 188, 194, 195, 226, 1443, 2605, 2619
Blagg v. The Bicknell, 1 Bond. 270 2724
Blagge v. Ilsley, 127 Mass. 191 4964, 4966
Blain v. Pacific Exp. Co., 69 Tex. 74 2541
v. Taylor, 19 Abb. Pr. 228 2147
Blair v. Chamblin, 39 Ill. 521 976
v. Charleston, 43 W. Va. 62 3951, 3953, 3964, 4108, 4109, 4112
v. Chicago & A. R. Co., 89 Mo. 334 4757, 4758, 4759
Blair v. Chicago & A. R. Co., 89 Mo. 383 417, 770
v. Childs, 10 Heisk. 199 2950
v. Claxton, 18 N. Y. 529 547, 3122, 3257
v. Clayton E. Co. (Del.) 77 Atl. 740 1030, 1222, 1241
v. Johnson, 111 Tenn. 111 2404, 4361
v. Kilpatrick, 40 Ind. 312 234
v. Kinch, 10 L. R. Ir. 234 179
v. Laflin, 127 Mass. 518 2552
v. Lewiston, A. & W. St. Ry., 111 Me. 586 1502, 1509
v. Milwaukee, etc., R. Co., 20 Wis. 262 228, 4194
v. Pelham, 118 Mass. 420 1474, 1475
v. Reading, 99 Ill. 600, 615 1728
v. Reid, 20 Tex. 310 782
v. Riddle, 3 Ala. App. 292 4240
v. Sioux City, etc., R. Co., 109 Iowa 369 1037
v. Teel (Tex. Civ. App.), 152 S. W. 878 705
v. Wells Fargo & Co., 155 Iowa 190 3336
v. White, 61 Vt. 110 639
v. Wilson, 28 Gratt. 165 664
Blair Co. v. Rose, 26 Ind. App. 487 1367, 1369, 4221, 4224, 4245
Blaird v. Bland, 5 Munf. 492 1116
Blaireau, The, 2 Cranch 240 2723
Blaisdale Co. v. Lee, 127 N. C. 365 2950
Blaisdell v. Steinfeld, 15 Ariz. 155 978
Blake v. Buchanan, 22 Vt. 548 676
v. Burnham, 29 Vt. 437 2061, 2135, 3196
v. Dick, 15 Mont. 236 3126, 3127
v. Everett, 1 Allen 250 2148
v. Exchange Mut. Ins. Co., 12 Gray 265 3049, 3056
v. Greenwood Cemetery, 21 Blatch. 222 4442, 4446
v. Hunsberger, 46 Pa. Super. 32 1490
v. Midland R. Co., 18 Q. B. 93, 21 L. J. (Q. B.) 233 350, 3643, 4852
v. Midland R. Co., 81 Q. B. 110 4662
v. Robertson, 94 U. S. 728 4442, 4447
v. Smith, 19 R. I. 476 436
v. Stevens, 4 F. & F. 239 4582
v. Traders' Nat. Bank, 145 Mass. 13 2798
Blakeley v. Bennecker, 59 Mo. 193 2979
Blakely's Trustee v. Bogard, 143 Ky. 377 1690, 1705
Blakeman v. Blakeman, 31 Minn. 396 4549
v. Sherwood, 32 Conn. 324 1631, 1634
Blakeney v. Blakeney, 6 Port. 109 27
v. Ferguson, 18 Ark. 347 376, 1760
v. Pegus, 6 N. S. W. 323 (1885) 3607
Blakeslee v. Holt, 42 Conn. 226 2669, 2682
v. Hughes, 50 Ohio St. 490 4529
Blakeslee Mfg. Co. v. Hilton, 5 Pa. Super. 184 2359, 2369
Blakey v. Blakey, 2 Dana 460 422
Blakley v. Pittsburgh Rys. Co., 243 Pa. 250 4656, 4745
Blalock v. Atwood, 154 Ky. 394 3773, 3826
v. Blacksher, 11 Ala. App. 545 488
Blanc v. Murray, 36 La. Ann. 165 3841
Blanchard v. Anderson, 27 Okla. 732 1559, 1711
v. Baker, 8 Me. 253 38
v. Blanchard, 48 Me. 174 2089, 2147
v. Burbank, 16 Ill. App. 375 4836, 4842, 4844
v. Ellis, 1 Gray 193 2072, 2087, 2088

[REFERENCES ARE TO PAGES]

Blanchard v. Ely, 21 Wend. 342 233, 564, 2359, 2531, 2627, 3213, 3253
v. Hill, 2 Atk. 484 4485
v. Hoxie, 34 Me. 376 2091
v. Ilsley, 120 Mass. 487 4960
v. Naquin, 116 La. 806 571
v. New Jersey S. Co., 59 N. Y. 292 1449
v. Olds G. E. Works, 142 Mo. App. 319 488
v. Page, 8 Gray 281 3408
v. Wood, 26 Me. 358 2768
Bland v. Hixenbaugh, 39 Iowa 532 4025, 4026, 4114
v. Mobile, 142 Ala. 142 1362
Blandeau v. Sheridan, 81 Mo. 545 2177
Blanding v. Wilsey, 107 Iowa 46 2814, 2821
Blaney v. Hendricks, 2 W. Black. 761, 3 Wils. 205 1019, 1033, 1034, 1107
v. Salem, 160 Mass. 303 4041
v. Sansum, 2 Call 495 1540
Blank v. Aronson, 189 Fed. 241 2903
v. Illinois Cent. R. Co., 182 Ill. 332 3341
Blanton v. Rice, 5 T. B. Mon. 253 710, 738, 741
Blanz v. Erie R. Co., 84 N. J. L. 35 5201
Blasdale v. Babcock, 1 Johns. 517 2130, 2399, 2401, 2978
Blass v. Linsley, 78 N. Y. Misc. 422 40
Blate v. Clary, 50 N. Y. Misc. 668 1997
v. Third Ave. R. Co., 44 App. Div. (N. Y.) 163 326
Blaul v. Tharp, 83 Iowa 665 1690, 1695, 1696
v. Wandel, 137 Iowa 301 2274, 2278, 4348, 4351, 4352
Blazek v. McCartin, 106 Minn. 461 4623
Bleaden v. Charles, 7 Bing. 246 297
Bleakley v. Sheridan, 120 App. Div. (N. Y.) 471 318
v. White, 4 Paige 654 679
Bleakney v. Farmers', etc., Bank, 17 S. & R. 64 1193
Blech v. Balleras, 3 E. & E. 203 3302
Blecher v. Sellards, 19 Ky. L. Rep. 1571 2357
Blecker v. Hyde, 3 McLean 279 2767
Bledsoe v. Gonzales County, 31 Tex. 636 2684
v. Nixon, 69 N. C. 89 1206
v. West, 186 Mo. App. 460 3525
Bleecker v. Colorado & S. R. Co., 50 Colo. 140 3468, 3483
v. Smith, 13 Wend. 530 414
Blenheim, The, 18 Fed. 47 5013
Blesch v. Chicago, etc., R. Co., 43 Wis. 183 401, 402, 3753, 3876
v. Chicago, etc., R. Co., 48 Wis. 168 4016
Blessing v. Beatty, 1 Rob. (Va.) 287 2061
Blethen v. Lovering, 58 Me. 437 1869, 1870
Blevins v. Smith, 104 Mo. 583 2181
Blew v. Ritz, 82 Minn. 530 3693
Blewett v. Front St. C. R. Co., 49 Fed. 126 1039
v. Front St. C. R. Co., 51 Fed. 625 1569
v. Miller, 131 Cal. 149 480, 1610, 4264, 4297
Blich v. Edwards, 96 Ga. 606 2043
Blick v. Fabian (N. Y. Misc.), 86 N. Y. Supp. 207 2238
Blickenstaff v. Perrin, 27 Ind. 527 470, 4576
Blight v. Ashley, 1 Pet. C. C. 15 802
Blincoe v. Choctaw, etc., R. Co., 16 Okla. 286 3954, 3997, 3998, 4131, 4134
Blinn v. Chester, 5 Day 359 747, 761
Bliss v. Ball, 99 Mass. 597 3814
v. Baltimore & O. Tel. Co., 30 Mo. App. 103 3590
v. Beck, 80 Neb. 290 4661
v. Brainard, 41 N. H. 261 1850
v. Buffalo T. C. Co., 131 Fed. 51 234, 2284, 2340
v. Collins, 5 B. & Ald. 876 3133
v. Cutter, 19 Barb. 9 685
v. Hall, 4 Bing. N. C. 183 3839
v. Heasty, 61 Ill. 338 1685
v. New York Cent., etc., R. Co., 160 Mass. 447 378, 405
v. Olmstead, 3 Dema. 273 1079
v. Sickles, 142 N. Y. 647 4387
v. Smith, 1 Ala. 273 2195
Blitch v. Edwards, 96 Ga. 606 2029
Blizzard v. Hays, 46 Ind. 166 4613, 4649
Block v. Dorman, 51 Mo. 31 631
v. Ebner, 54 Ind. 544 3236
v. Estes, 92 Mo. 318 2859
v. Haseltine, 3 Ind. App. 491 6
v. Milwaukee St. R. Co., 89 Wis. 371 411, 4744
v. Myers, 35 La. Ann. 220 1738
v. Sweeney, 63 Tex. 419 4169, 4179, 4201
v. United States Exp. Co., 75 N. J. L. 455 3342
v. Walker, 72 Fed. 650 2505
v. Worcester, 186 Mass. 526 107
Block-P. I. Co. v. Cincinnati C. I. Co., 10 Ohio Dec. 51 (Cincinnati Super. Ct.) 2635, 2642, 2646
Blocker v. Owensboro, 129 Ky. 75 299
v. Schoff, 83 Iowa 265 4543, 4586, 4587
Blodget v. Columbia L. S. Co., 164 Fed. 305 887
Blodgett v. Brattleboro, 30 Vt. 579 1282, 1620, 1623
v. Durgin, 32 Vt. 361 1147
v. Jensen, 2 Neb. (Unof.) 543 3195
v. Park, 76 N. H. 435 1037, 1482
v. Seals, 78 Miss. 522 361
v. Stone, 60 N. H. 167 35, 38
Blodgett's Est. v. Converse's Est., 60 Vt. 410 1119
Blofield v. Payne, 4 B. & Ad. 410 4485, 4486
Blogg v. Johnson, L. R. 2 Ch. 225 1034, 1078
Blomquist v. Minneapolis F. Co., 112 Minn. 143 4676, 4732
Blondheim v. Moore, 11 Md. 365 1779
Blood v. Enos, 12 Vt. 625 543, 764, 2537
v. Erie Dime Sav. & L. Co., 164 Pa. 95 4212
v. Herring, 22 Ky. L. Rep. 1725 2697
v. Wilkins, 43 Iowa 565 283, 2116, 2907
Bloodgood v. Ingoldsby, 1 Hilt. 388 537
v. Mohawk, etc., R. Co., 18 Wend. 9 3946
Bloodworth v. Jacobs, 2 La. Ann. 24 711
v. Stevens, 51 Miss. 475 3132
Bloom v. Lehman, 27 Ark. 489 537
v. McGehee, 38 Ark. 329 828
v. Manhattan R. Co., 17 N. Y. Supp. 812 1374
v. National United B. S. & L. Co., 152 N. Y. 114 127, 305
Bloomer v. Bernstein, L. R. 9 C. P. 588 2231
Bloomfield v. Pinn, 84 Neb. 472 4512, 4517

[REFERENCES ARE TO PAGES]

Bloomington v. Chamberlain, 104 Ill. 268 1375
v. Miller, 84 Ill. 621 3964
Bloomington H. Co. v. Garthwait, 227 Ill. 613 931, 2685
Bloomington M. Co. v. Searles, 63 N. J. L. 47 2759
Bloss v. Plymale, 3 W. Va. 393 425, 773, 774, 778
Blossom v. Knox, 3 Pin. 262 2060
v. Lycoming F. Ins. Co., 64 N. Y. 166 3021
v. Van Court, 34 Mo. 394 2147
Blot v. Boiceau, 1 Sandf. 111 2947
v. Boiceau, 3 N. Y. 78 39, 287, 2907, 2946, 2947, 4246
Blount v. Garen, 3 Hayw. 88 3692
Blount Mfg. Co. v. Bardsley, 66 Fed. 761 4437
Blow v. Joyner, 156 N. C. 140 1267, 1311, 1403. 1407
v. Maynard, 2 Leigh 29 2837
v. Russell, 1 C. & P. 365 799
Bloxham, Ex parte, 6 Ves. 448, 600 1817
Blue v. Bank, 145 Ind. 518 273, 2500
Blue Earth County v. St. Paul, etc., R. Co., 28 Minn. 503 3983, 3984, 4044, 4101
Blue Grass T. Co. v. Grover, 135 Ky. 685 102
v. Ingles, 140 Ky. 488 1357, 1377, 1391, 4690. 4705, 4711. 4732, 4755
Bluegrass C. Co. v. Luthy, 98 Ky. 583 2343
Blum v. Davis, 56 Tex. 423 1698
v. Gaines, 57 Tex. 135 1687, 1691
v. Merchant, 58 Tex. 400 4211
v. Southern Pullman P. C. Co., 1 Flip. 500 3539, 3540
Blumantle v. Fitchburg R. Co., 127 Mass. 322 3534
Blume v. Scheer, 83 Minn. 409 4549
Blumen, In re, 13 Fed. 623 2854
Blumenthal v. Brainerd, 38 Vt. 402 3389, 3400
v. Bridges, 91 Ark. 212 2507
v. Prescott, 70 App. Div. (N. Y.) 560 3241, 3248
v. Stahle, 98 Iowa 722 2347
Blumhardt v. Rohr, 70 Md. 328 4503, 4518, 4535
Blun v. Holitzer, 53 Ga. 82 2549, 2556
Blunck v. Chicago & N. R. Co., 142 Iowa 146 3741, 3798, 3980
Blunk v. Atchison, etc., R. Co., 38 Fed. 311 4618, 4635
Blunt v. Aikin, 15 Wend. 522 3858
v. Egeland, 104 Minn. 351 832, 858
v. Egeland, 114 Minn. 113 840
v. Little, 3 Mason 102 1495
v. McCormick, 3 Denio 283 391, 3853, 4850
Blute v. Third Ave. R. Co., 29 App. Div. (N. Y.) 388 4694
Bly v. Edison E. I. Co., 172 N. Y. 1 3932, 3933
v. Edison E. I. Co., 111 App. Div. (N. Y.) 170 3881
v. United States, 4 Dill 466 4257
Blydenburgh v. Bingham, 38 N. Y. 371 2810
v. Welsh, Baldwin 331 2291
Blyer v. Monholland, 2 Sandf. Ch. 478 2896
Blynn v. Pontiac, 185 Mich. 35 5182
Blyston-Spencer v. United R. Co., 152 Mo. App. 118 149, 1360, 1377
Blyth v. Smith, 5 M. & Gr. 405 3161, 3196
Blythe, In re, 103 Cal. 350 1049
Blythe v. Pratt, 62 Miss. 707 3146
v. Speake, 23 Tex. 429 2388
v. Thompkins, 2 Abb. Pr. 468 4836
Board v. Head, 3 Dana 489 4306
v. Luigart, 150 Ky. 791 4160, 4168
v. Moore, 12 Ky. L. Rep. 682 (Ky. Super. Ct.) 1671
v. Nelms, 82 Miss. 416 4136
Board of Chosen Freeholders v. Emmerich, 57 N. J. Eq. 535 4089
v. Paxson Co., 196 Fed. 156 6, 58
Board of Com'rs v. Arnett, 116 Ind. 438 313
v. Castetter, 7 Ind. App. 309, 321 4738
v. Dorsett, 151 N. C. 307 2842, 2861
v. Flanagan, 21 Colo. App. 467 941, 1093
v. Greer, 108 Fed. 478 1041
v. Legg, 93 Ind. 523 4889, 4890, 4900
v. Sappenfield, 10 Ind. App. 609 1493
v. Sullivan, 94 Minn. 201 1592
Board of County Com'rs v. Bedell, 13 Colo. App. 261 2533
v. Security Bank, 75 Minn. 174 1592
Board of Directors v. Myers, 79 Ark. 14 2060
v. Roach, 174 Fed. 949 273, 673, 2654
Board of Education, Matter of, 169 N. Y. 456 4113
Board of Education v. Cooper, 98 Minn. 535 1133
v. Frank, 64 Ill. App. 367 3112
v. Jewell, 44 Minn. 427 1578
v. Kanawha & M. R. Co., 44 W. Va. 71 3957, 3964
v. National S. Co., 183 Mo. 166 1563
v. Robinson, 81 Minn. 305 1584, 1586
v. Shaw, 15 Kan. 33 2684
v. United States F. & G. Co., 155 Mo. App. 109 2744
v. United States F. & G. Co., 166 Mo. App. 410 2743
Board of Justices v. Fennimore, 1 N. J. L. 242 1132, 1578, 1579, 1628
Board of Levee Com'rs v. Hendricks, 77 Miss. 488 4131, 4132
v. Lee, 85 Miss. 508 4034
v. Nelms, 82 Miss. 416 4133, 4134
Board of Levee Dist. v. Webb, 188 Fed. 67 3946, 4014
Board of Park Com'rs v. Donahue, 140 Ky. 502 4, 3849, 3875, 3877, 3879, 3880, 3887
Board of Supervisors v. Clark, 25 Hun 282 1132
v. Verkerke, 128 Mich. 202 1133
Board of Trade v. Employers' L. Assur. Co., [1910] 2 K. B. 649 2754
Board of Trade B. Co. v. Cralle, 109 Va. 246 144
Board of Trade Tel. Co. v. Darst, 192 Ill. 47 4001, 4025, 4027
Board of Water Com'rs, In re, 71 App. Div. (N. Y.) 544 4079
In re, 195 N. Y. 502 4153, 4154
Board of Water Com'rs v. Perry, 69 Conn. 461 2
Board of Water Supply, In re, 81 N. Y. Misc. 19 3959
In re, 211 N. Y. 174 4018, 4024
Boardman v. Blizzard, 36 Fed. 26 689
v. Carrington, 2 Wils. 233 1283
v. Goldsmith, 48 Vt. 403 1311, 3827
v. Hanks, 185 Mass. 555 2509
v. Keeler, 2 Vt. 65 419, 1938
v. Marshalltown G. Co., 105 Iowa 445 10, 41, 1321, 1322
v. Paige, 11 N. H. 431 2835, 2855, 2864, 2870

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Boast v. Firth, L. R. 4 C. P. 1 1561, 2534
Boatmen's Sav. Bank v. Johnson, 24 Mo. App. 316 2821, 2822
Boatwright v. Stewart, 37 Ark. 614 1687, 1690, 1702
Boaz v. Tate, 43 Ind. 60 435
Bobb-M. Co. v. Straus, 210 U. S. 339 4478
Bobe v. Stickney, 36 Ala. 492 703, 715, 717
Bobo v. Patton, 6 Heisk. 172 4342
v. Vaiden, 20 S. C. 271 1649
Bobrick C. Co. v. Prest-O-Lite Co., 160 Cal. 209 2374
Bocard v. State, 79 Ind. 270 1133, 1578
Bock v. Bohn, 29 N. Y. Misc. 102 1728
v. Grooms, 2 Neb. (Unof.) 803 69
Bockelcamp v. Lackawanna, etc., R. Co., 232 Pa. 66 413, 4715, 4833
Bockenstedt v. Perkins, 73 Iowa 23 1642
Bockes v. Lansing, 74 N. Y. 437 3692
v. McAfee, 165 Mich. 7 3774, 3777
Bockoven v. Board of Supervisors, 13 S. D. 317 3971, 4025
Boddam v. Riley, 2 Bro. Ch. 2 943
Boddie v. Ely, 3 Stew. 182 1358
Boddy v. Henry, 113 Iowa 462 4385, 4392
v. Henry, 126 Iowa 31 4380
Boden v. Schlotz, 101 App. Div. (N. Y.) 1 3251
Bodenham v. Bennett, 4 Price 31 3335
v. Purchas, 2 B. & Ald. 39 703, 717
Bodin v. Duluth St. R. Co., 117 Minn. 513 4920
Bodine v. Glading, 21 Pa. 50 836
v. Wayne T. & T. Co., 33 Pa. Super. 68 305, 2943
Bodkin v. Arnold, 48 W. Va. 108 3695, 3699, 3702, 3703, 3704, 3710, 3712
v. Merit, 86 Ind. 560 2841
v. Western U. Tel. Co., 31 Fed. 134 3558
Bodlewell, The, [1907] Prob. Div. 286 266
Bodley v. Bellamy, 1 W. Black. 267 1188
v. McChord, 4 J. J. Marsh. 477 2046
v. Reynolds, 8 Q. B. 779 4237, 4265
Bodurtha v. Phelon, 13 Gray 413 568
Bodwell v. Osgood, 3 Pick. 379 4518, 4524, 4532
v. Swan, 3 Pick. 376 469, 471, 4514, 4516, 4522, 4577, 4580
Boecken v. Naperville, 166 Ill. 151 4091
Boehm v. Detroit, 141 Mich. 277 110
v. Duluth, etc., R. Co., 91 Wis. 592 3471
Boehmer v. Schuylkill County, 46 Pa. 452 1583, 1597, 1606
Boehne v. Murphy, 46 Mo. 57 2745, 2749, 2767
Boeler v. Butte & L. C. D. Co., 41 Mont. 465 4664
Boening v. North American Union, 155 Ill. App. 528 1089, 1360
Boesch v. Graff, 133 U. S. 697 4475
Boetcher v. Staples, 27 Minn. 308 1268, 1305
Bogan v. Wright, 22 N. Y. Misc. 94 2496
Bogardus v. Parker, 7 How. Pr. 303 3260, 3721
Bogart v. Pitchless L. Co., 72 Wash. 417 1446, 2696
Bogert v. Burkhalter, 2 Barb. 525 1363, 1371
Boggan v. Bennett, 102 Ala. 400 1368
Boggess v. Goff, 47 W. Va. 139 1202, 1214
v. Metropolitan St. R. Co., 118 Mo. 328 475
Boggs v. Bush, 137 Ky. 95 2045
v. Douglass, 105 Iowa 344 3105
v. Lancaster Bank, 7 W. & S. 331 1825
v. Martin, 13 B. Mon. 239 540
v. Missouri Pac. R. Co., 18 Mo. App. 274 156
Bogudski v. Backes, 83 Conn. 208 1267
Bogue v. Gunderson, 30 S. D. 1 1267, 1317, 4795
Bohan v. Port Jervis G. L. Co., 122 N. Y. 18 3840, 3841
v. Record Pub. Co., 1 Cal. App. 429 4502, 4508, 4533, 4577
v. Taylor, 6 Cow. 313 1532, 1534
Bohannons v. Lewis, 3 T. B. Mon. 376 3150
Bohemian-Am. Workingmen's G. Ass'n v. Northern Bank (N. Y. Misc.), 120 Supp. 134 275, 282
Bohlcke v. Buchanan, 94 Mo. App. 320, 327 2190
Bohm v. Dunphy, 1 Mont. 333 474, 3207
v. Metropolitan E. R. Co., 129 N. Y. 576 3962, 3964, 4081, 4118, 4124
Bohn v. Cleaver, 25 La. Ann. 419 3314, 3319
v. Taylor, 6 Cow. 313 1531
Bohrer v. Dienhart H. Co., 19 Ind. App. 489 6, 3916, 3917
v. Otterback, 21 D. C. 32 1084
Boice v. Coffeen, 158 Iowa 705 2097, 2157
Boies v. Vincent, 24 Iowa 387 2276
Boise Valley C. Co. v. Kroeger, 17 Idaho 384 369, 3749, 3750, 3760, 3762, 3809, 3860, 3960, 3961
Boland v. Glendale Q. Co., 127 Mo. 520 2548, 2551, 2561
Bold v. O'Brien, 12 Daly 160 3234
Boldewell, The, [1907] Prob. Div. 286 5003
Bolen C. Co. v. Whittaker B. Co., 52 Kan. 747 386
Boley v. Griswold, 20 Wall. 486 4326
v. Wood M. & R. Mach. Co., 62 Mo. App. 139 4273
Bolger v. Boston E. R. Co., 205 Mass. 420 4759
Bolick v. Railroad, 138 N. C. 370 4852
Boling v. St. Louis, etc., R. Co., 189 Mo. 219 3504
Bolinger v. Beacham, 81 Kan. 746 5098
v. Brake, 57 Kan. 663, 4 Kan. App. 180 2054, 2056, 2061, 2073, 2082
v. St. Paul, etc., R. Co., 36 Minn. 418 4889
Bolivar Mfg. Co. v. Neponset Mfg. Co., 16 Pick. 246 35
Bolles v. Kansas City S. R. Co., 134 Mo. App. 696 1316, 3476, 3504
v. Outing Co., 175 U. S. 262 4480, 4481
v. Sachs, 37 Minn. 315 2546
Bolling v. Lersner, 26 Gratt. 36 2032, 3699, 3706
v. Tate, 65 Ala. 417 306, 1722, 1728, 1730, 1752
Bollinger v. McMinn, 47 Tex. Civ. App. 89 3750
Bolt v. Dawkins, 16 S. C. 198, 214 626
Bolton v. Ballard, 13 Mass. 227 3728
v. Gifford, 45 Tex. Civ. App. 140 423, 797, 1918
v. Hendrix, 84 S. C. 35 3739

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v. O'Brien, 16 L. R. Ir. 97, 110 4523
v. Street, 3 Cold. 31 1147, 1164, 1878
v. Vellines, 94 Va. 393 223, 4836, 4840, 4841
v. Western U. Tel. Co., 84 S. C. 67 3618
Bolware v. Crohn, 122 Mo. App. 571 918
Bomar v. Wynn, — Tex. Civ. App. —, 164 S. W. 1038 2754
Bombolis v. Minneapolis, etc., R. Co., 128 Minn. 112, aff'd 241 U. S. 211 5097, 5121
Bomeval v. American C. Co., 127 La. 57 460
Bommarius v. New Orleans R. & L. Co., 123 La. 615 1051
Bona, The, [1895] Prob. 125 3033
Bonaffe v. Woodberry, 12 Pick. 463 711
Bonafous v. Rybot, 3 Burr. 1370 1552
Bonaparte v. Camden, etc., R. Co., Baldwin 226 3946
Bonato v. Peabody C. Co., 156 Ill. App. 196 4870, 4882
Bond v. Armstrong, 88 Ind. 65 1652
v. Bond, 16 Up. Can. C. P. 327 1812
v. Chapin, 8 Metc. (Mass.) 31 4612
v. Clark, 35 Vt. 577 2387, 2388
v. Cora, The, 2 Wash. C. C. 80 2723, 2726, 2729, 2732
v. Dolby, 17 Neb. 491 1046
v. Farwell, 172 Fed. 58 2771, 2773
v. Fitzpatrick, 4 Gray 89 1817
v. Greenwald, 4 Heisk. 453 800
v. Griffin, 74 Misc. 599 3788
v. Holton, 2 Jones 149 39
v. Jones, 8 Sm. & M. 368 739, 977
v. Mitchell, 3 Barb. 304 4283
v. Pacheco, 30 Cal. 530 1355
v. Philadelphia, 218 Pa. 475 3991, 4032
v. Pickett Cotton Mills, 166 N. C. 20 1220
v. Quattlebaum, 1 McCord 584 2061, 2098
v. Storrs, 13 Conn. 412 2779
v. United R., 159 Cal. 270 1494, 1498, 4858, 4864, 4905, 4934
v. Ward, 7 Mass. 123 361
Bondies v. Sherwood, 22 How. 214 2719
Bondrett v. Hentigg, Holt's N. P. 147 2999
Bonds v. Garvey, 87 Miss. 335 10
Bondurant v. Crawford, 22 Iowa 40 4381
Bondy v. Hardina, 216 Mass. 44 721
Bone v. Torry, 16 Ark. 83 2843
Bonellit v. Bowen, 70 Miss. 142 4266, 4271, 4272
Bonesteel v. Bonesteel, 30 Wis. 511 306, 1321, 4836
v. Bonesteel, 128 Cal. 511 1927
v. Orvis, 22 Wis. 523 1135
Bonetti v. Treat, 91 Cal. 223 3129
Bonham v. Bonham, 38 N. J. Eq. 419 1079
Boniel v. Block, 44 La. Ann. 514 3184
Bonifay v. Hassell, 100 Ala. 269 2697, 2705
Bonino v. Caledonio, 144 Mass. 299 460, 4783
Bonneau v. North Shore R. Co., 152 Cal. 406 4720
Bonnel v. Chamberlin, 26 Conn. 487 658, 667, 767
v. Dunn, 28 N. J. L. 153 435
v. Wilder, 67 Ill. 327 721
Bonner v. Coleman, 3 B. Mon. 464 4349
v. Copley, 15 La. Ann. 504 306, 1247
v. Peterson, 44 Ill. 253 3724, 3731
v. Welborn, 7 Ga. 296 3918
Bonness v. Felsing, 97 Minn. 227 4380
Bonnet v. Foote, 47 Colo. 282 1474, 4654
v. Galveston, etc., R. Co., 89 Tex. 72 269
Bonney v. Blaisdell, 105 Me. 121 2236
v. Bonney, 29 Iowa 448 424, 2804, 2810
v. Seely, 2 Wend. 481 298, 2835, 2842, 2843
Bonnin v. Elliott, 19 La. Ann. 322 4543
Bonnon's Est. v. Urton, 3 G. Greene 128 2069
Bonnoval v. American C. Co., 127 La. 57 4668
Bonomi v. Backhouse, El. B. & E. 622, 654 392, 3917
Bonsall v. McKay, 1 Houst. 520 3831
v. Taylor, 1 McCord 503 1570
Bonsteel v. Vanderbilt, 21 Barb. 26 3445
Bonta v. Curry, 3 Bush 678 677
v. Miller, 1 Litt. 250 2060
Bonvillian v. Bodenheimer, 117 La. 793 2057, 2058, 2112
Bonzer v. Garrett, — Tex. Civ. App. —, 162 S. W. 934 2183
Boody v. K. & C. Mfg. Co., 77 N. H. 208 5185, 5186, 5188
v. United States, 1 Woodb. & M. 150 707
Boogher v. Bryant, 86 Mo. 42 4630
v. Hough, 99 Mo. 183 4640
Booher v. Goldsborough, 44 Ind. 490 2403, 2433
v. Trainer, 172 Mo. App. 376, 157 S. W. 848 164, 4774
Book v. Chicago, etc., R. Co., 85 Mo. App. 76 3452
Booker v. Anderson, 35 Ill. 66 991, 993
v. Bell, 3 Bibb 173 2098, 2114, 2122, 2134
v. Eller, 150 N. C. 555 1849
v. Merriweather, 4 Litt. 212 2094
v. Venice & C. R. Co., 101 Ill. 333 4037, 4089
Books v. Wichita, 114 Fed. 297 884
Bookstaver v. Jayne, 60 N. Y. 146 1857
Bookwalter v. Clark, 11 Biss. 126, 10 Fed. 793 2259
Boom v. St. Paul F. & Mfg. Co., 33 Minn. 253 1654, 1655, 1673
Boom Co. v. Patterson, 98 U. S. 403 273, 4038
Boon v. Horn, 3 Strobh. 159 1534
v. McHenry, 55 Iowa 202 2057, 2074
v. Quance, 102 L. T. 443, 3 B. W. C. C. 106 5176
Booren v. McWilliams, 26 N. D. 588 3666
Boorman v. American Exp. Co., 21 Wis. 152 3415
v. Johnston, 12 Wend. 566 2379
v. Nash, 9 B. & C. 145 2248, 2256, 2276, 2531
Boos v. Minneapolis, St. P. & S. S. M. R. Co., 127 Minn. 381 4871, 4875, 4876, 5109
Booth v. Ableman, 20 Wis. 602 1136
v. Andrus, 91 Neb. 810 1464
v. Arnold, [1895] 1 Q. B. 571 4503
v. Coulton, L. R. 5 Ch. 684 1078
v. Coulton, 30 L. J. (Ch.) 378 1034
v. Hall, 6 Md. 1 1557
v. Hodgson, 6 T. R. 405 1849
v. Manchester St. R., 73 N. H. 529 4758
v. Milliken, 127 App. Div. (N. Y.) 522 1941, 1942, 1948
v. Pittsburgh, 154 Pa. 482 1033
v. Powers, 56 N. Y. 22 4275, 4278
v. Rome, etc., R. Co., 140 N. Y. 267 3839
v. Saffold, 46 Ga. 278 2199
v. Sherwood, 12 Minn. 426 3734, 3735

[REFERENCES ARE TO PAGES]

Booth v. Smith, 3 Wend. 66 747, 754, 761
v. Smith, 3 Woods 19 779
v. Spuyten Duyvil R. M. Co., 60 N. Y. 487 175, 196, 201, 207, 284, 2308, 2368, 2427, 3367, 3377
v. Starr, 1 Conn. 244 2123, 2129, 2130, 2189, 2191
v. Tyson, 15 Vt. 515 553, 2658
Boothby v. Androscoggin & K. R., Co., 51 Me. 318 3913
v. Grand Trunk R., 66 N. H. 342 3458
v. Scales, 27 Wis. 626 2370, 2391
v. Sowden, 3 Camp. 175 747, 752, 756
Boothe v. Fiest, 80 Tex. 141 4420
Boott Mills v. Boston & M. R. R. Co., 218 Mass. 582 4865
v. Lowell, 159 Mass. 383 1114
Booty v. Cooper, 18 La. Ann. 565 1184, 1879
Bopp v. Fox, 63 Ill. 540 3729
v. Wittich, 88 Mo. App. 129 725
Borchardt v. People's I. Co., 106 Minn. 134 773, 774
Borcherling v. United States, 35 Ct. of Cls. 311, 329 692
Bordeaux v. Cave, 1 Bailey 250 1956, 2201
Borden v. Borden, 5 Mass. 67 802, 804
v. Fine, 212 Mass. 425 2379
v. Fraser, 118 Ill. App. 655 1014
v. Gilbert, 13 Wis. 670 2787
v. Hingham Mut. F. Ins. Co., 18 Pick. 423 3047
v. Vinegar Bend L. Co., 2 Ala. App. 354 325, 748, 760, 2298
v. Vinegar Bend L. Co., 7 Ala. App. 335 2281
Borden M. Co. v. Barry, 17 Md. 419 314
Borden & S. Co. Fraser, 118 Ill. App. 655 1103
Border City I. & C. Co. v. Adams, 69 Ark. 219 191, 205, 231, 2284, 2343
Borders v. Barber, 81 Mo. 636 962, 963
Bordewell v. Colie, 1 Lans. 141, 45 N. Y. 494 2396, 2397
Bordley v. Eden, 3 Har. & McH. 167 1197
Boreel v. Lawton, 90 N. Y. 293 3124, 3127
Boreing v. Faris, 127 Ky. 67 1121
v. McHargue, 152 Ky. 360 1215
Borgnis v. Falk Co., 147 Wis. 327 5153, 5155, 5156, 5159, 5167, 5168, 5179
Boring v. Williams, 17 Ala. 510 1589
Bork v. Norton, 2 McLean 422 3291
Borkenstein v. Schrack, 31 Ind. App. 200 1304
Borland v. Barrett, 76 Va. 128 1268, 1287, 4669
Borlander v. Gentry, 36 Cal. 110 4204
Borley v. McDonald, 69 Vt. 309 887
Born v. First Nat. Bank, 123 Ind. 78 665
v. Rosenow, 84 Wis. 620 4543
Borngesser v. Harrison, 12 Wis. 544 385, 386
Bornholdt v. Louillard, 36 La. Ann. 103 4639
Bornman v. Star Co., 174 N. Y. 212 4503
v. Tooke, 1 Camp. 377 540, 3301
Bornstein v. Faden, 84 Misc. (N. Y.) 256 1397
Borough C. Co. v. New York, 200 N. Y. 149 1504
Borough D. Co. v. Harmon, 154 App. Div. (N. Y.) 689 35, 2700, 2701
Borradaile v. Brunton, 8 Taunt. 535 193, 294, 2431, 2436
Borrekins v. Bevan, 3 Rawle 23 2380
Borries v. Hutchinson, 18 C. B. (N. S.) 445 193, 194, 197, 2297, 2350
Borst v. Lynch, 133 Iowa 567 2902
Borthwick v. Elderslie S. S. Co., [1905] 2 K. B. 516 1248
Bortle v. Northern Pac. R. Co., 60 Wash. 552 4918
Borup v. Nininger, 5 Minn. 523 2938
v. Von Kokeritz, 162 App. Div. (N. Y.) 394 2669, 2681, 2685, 2687, 2690, 2694, 2695
Bosakowski v. American R. Co., 1 Porto Rico Fed. 277 4918
Bosanquet v. Wray, 6 Taunt. 597 703, 717, 722
Bosch v. Burlington, etc., R. Co., 44 Iowa 402 101
v. Miller, 136 Mo. App. 482 1311, 3190, 4609
Bosley v. Baltimore & O. R. Co., 54 W. Va. 563 3334
v. Chesapeake Ins. Co., 3 Gill & J. 473 1482
v. Porter, 4 J. J. Marsh. 621 703, 704, 742
v. Smith, 3 Humph. 406 1602, 1603, 1606
v. Taylor, 5 Dana 157 2859, 2863, 2864
Bosman v. Akeley, 39 Mich. 710 2787
Boss v. Atlantic C. L. R. Co., 156 N. C. 70 3430
Bossout v. Rome, etc., R. Co., 131 N. Y. 37 1410
Bossu v. New Orleans, etc., R. Co., 49 La. Ann. 1593 3
Bost v. Carbarrus County, 152 N. C. 531 3993, 4015, 4108
Boster v. Chesapeake & O. R. Co., 36 W. Va. 318 3523
Bostick v. Jacobs, 133 Ala. 344 732
v. Rutherford, 4 Hawks 83 4639, 4649
Boston, The, 1 Sumn. 328 2735, 2737
Boston, The, 1 Low. 464 3395, 3425
Boston v. Alexander, 185 Mo. App. 16 34
v. Gibson, 111 Ill. App. 457 2133
v. Moore, 3 Allen 123 1606
v. Ocean S. S. Co., 197 Mass. 561 763, 780, 2569
v. Simmons, 150 Mass. 461 4364
v. White, 21 Pick. 58 1634
v. Worthington, 10 Gray 496 299, 2131
Boston B. Co. v. Boston, 183 Mass. 254 3969, 4004, 4006
Boston C. Co. v. Journeay, 36 N. Y. 384 2906
Boston Chambers of Commerce v. Boston, 217 U. S. 189, aff'g 195 Mass. 338 4055
Boston L. Co. v. Myers, 143 Mass. 446 4315, 4351
Boston Mfg. Co. v. Fiske, 2 Mason 119 1272
Boston Store v. Schleuter, 88 Ark. 213 2685
Boston W. P. Co. v. Boston, 9 Metc. (Mass.) 199 1113
v. Boston, etc., R. Co., 23 Pick. 360 3946
Boston Waterpower Co. v. Gray, 6 Metc. (Mass.) 131 2685
Boston Woven H. & R. Co. v. Kendall, 178 Mass. 232 2430
Boston & A. R. Co. v. Cambridge, 159 Mass. 283 4057, 4058, 4059
v. Charlton, 161 Mass. 32 2164
v. Greenbush, 5 Lans. 461 4059
v. O'Reilly, 158 U. S. 334 4694

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v. Shanly, 107 Mass. 568 100, 433
Boston & M. R. Co. v. County Com'rs, 79 Me. 386 236
v. Hunt, 210 Mass. 128 4018, 4034
v. Montgomery, 119 Mass. 114 4014
v. Portland, etc., R. Co., 119 Mass. 498 772
v. State, 63 N. H. 571 1020
v. Union Mut. F. Ins. Co., 83 Vt. 554 763
Boston & S. G. Co. v. Boston, 4 Metc. (Mass.) 181 1113, 1134
v. Moore, 119 Mass. 435 2755
Boston & S. I. Co. v. Royal Ins. Co., 12 Allen 381 3063
Boston & W. R. v. Old Colony R., 12 Cush. 605, 611, 2 Allen 142 4072, 4111
Boston, etc., R. Co., In re, 22 Hun 176 4049
Boston, etc., R. Co. v. Middlesex, 1 Allen 324 236
v. Old Colony, etc., R. Co., 3 Allen 142 1425, 1426
Bostrom v. Becker, 172 Ill. App. 410 520, 530, 542, 559
v. Gibson, 111 Ill. App. 457 1804
Bostwick v. Beach, 103 N. Y. 414 1026, 1027
v. Bryant, 113 Ind. 448 2822
v. Lewis, 1 Day 34 1532
v. Lewis, 2 Day 447 17
v. Losey, 67 Mich. 554 3244, 3253
v. United States, 94 U. S. 53 625
v. Williams, 36 Ill. 65 2092, 2094
Bostwick's Est., In re, 49 N. Y. Misc. 186 1081
Boswell v. Barnhart, 96 Ga. 521 4874, 4876, 4887
v. Lake Shore Elec. Ry., 35 Ohio Cir. Ct. 522 5100
Bosworth v. Swansey, 10 Met. 363 19
v. Tallman, 66 Wis. 533 591
v. Union R. Co., 25 R. I. 202 3467
v. Union R. Co., 26 R. I. 309 3467
Botclar v. Bell, 1 Mo. 173 4595
Botkin v. Kleinschmidt, 21 Mont. 1 1639
v. Miller, 190 Mass. 411 3821
Botsford v. Chase, 108 Mich. 432 4509, 4519, 4525, 4531
v. Wilson, 75 Ill. 132 14
Bottomley v. Nuttall, 5 C. B. (N. S.) 122, 134, 135 621
Bottoms v. Clark, 38 Okla. 243 4361
Bottorff v. Wise, 53 Ind. 32 3702
Bottum v. Charleston, etc., R. Co., 72 S. C. 375 3412
Bouchaud v. Dias, 3 Denio 238 2870
Boucher v. Clyde S. Co., 2 Irish 129 4980
v. Sherwan, 14 Up. Can. C. P. 419 4238
v. Wisconsin Cent. R. Co., 141 Wis. 160 4858, 4941
Boucicault v. Wood, 2 Biss. 33 4478, 4481
Bough v. Metropolitan St. R. Co., 82 App. Div. (N. Y.) 215 3499
Boughner v. Brooks, 7 Ky. L. Rep. 599 1111
v. Hall, 24 W. Va. 249 2864, 2865
Boughton v. Flint, 74 N. Y. 476 1117
v. Petigny, 72 App. Div. (N. Y.) 76 2647
Bouillon v. Laclede G. L. Co., 148 Mo. App. 462 56, 87, 96, 99, 165, 1333, 3818, 3820
Boulden v. Pennsylvania R. Co., 11 Pa. 264 4931
v. Pennsylvania R. Co., 205 Pa. 264 4952
Boulder v. Stewardson, 26 Colo. App. 290 1373, 1377
Bouldin v. Page, 24 Mo. 595 1905
Boultbee v. Gzowski, 24 Ont. App. 502, rev'g 28 Ont. 285 2985
v. Stubbs, 18 Ves. 20 2823
v. Wills, 15 Ont. L. R. 227 289
Boulter v. Hamilton, 15 Up. Can. C. P. 125 2087
v. Webster, 13 Week. Rep. 289 4869, 4914
Boulton v. Moore, 14 Fed. 922 807
Boulware v. Crohn, 122 Mo. App. 571 858
v. Newton, 18 Gratt. 708 609
v. Robinson, 8 Tex. 327 2846
Bount v. Western U. Tel. Co., 126 Ala. 105 3639
Bour v. Illinois Cent. R. Co., 176 Ill. App. 185 227
Bourda v. Jones, 110 Wis. 52 4312
Bourdette v. Sieward, 107 La. 258 32, 33, 114
Bourg v. Brownwell-D. L. Co., 120 La. 1009 4863, 4930
Bourier v. Louisiana W. R. Co., 133 La. 50 4903
Bourke v. Bulow, 1 Bay 49 1493
v. Butte E. P. Co., 33 Mont. 267 1477, 4721, 4728
v. Cork & M. R. Co., 4 L. R. Ir. 682 4912
v. Spaight, 80 Kan. 387 295
v. Whiting, 19 Colo. 1 4182
Bourland v. Choctaw, etc., R. Co., 99 Tex. 407 187, 3324, 3367
v. Edison, 8 Gratt. 27 4581, 4594
Bourne v. Ashley, 1 Low. 27 4211, 4225, 4308, 5015
v. Ward, 51 Me. 191 1824
Boutell v. Warne, 62 Mo. 350 4290
Boutin v. Etsell, 110 Wis. 276 2854, 2862, 2869
v. Lindsley, 84 Wis. 644 2525, 2539
v. Rudd, 82 Fed. 685 195
Boutwell v. Harriman, 58 Vt. 516 4258
v. Marr, 71 Vt. 1, 11 1327
v. Parker, 124 Ala. 341 4207, 4218, 4240
Bovee v. Barrett, 116 App. Div. (N. Y.) 20 502
v. Danville, 53 Vt. 183 334, 339, 4666, 4684
Boville v. Dalton P. Mills, 86 Vt. 305 2696, 2715
Bowas v. Pioneer T. Line, 2 Sawyer 21 50, 51, 113, 4679
Bowden v. Horne, 7 Bing. 716 1520
v. Johnson, 107 U. S. 251 1076
v. Voorheis, 135 Mich. 648 448, 4718
Bowdish v. Page, 81 Hun 170 1449
Bowditch v. Green, 3 Metc. (Mass.) 360 2867
Bowdle v. Detroit St. R. Co., 103 Mich. 272 4756
Bowe v. Bowe, 26 Ohio C. C. 409 4700, 4738
v. Bowe, 5 Ohio C. C. (N. S.) 233 4733, 4739
v. Gage, 127 Wis. 245 2501
v. Gano, 9 Hun 6 723
v. Hunking, 135 Mass. 380 3127, 3233
v. Minnesota M. Co., 44 Minn. 460 379, 407, 1355
v. Wilkins, 105 N. Y. 322 2880
Bowen v. Ætna Ins. Co., 160 Iowa 548 4390

[REFERENCES ARE TO PAGES]

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v. Barksdale, 33 S. C. 142 1201
v. Bradley, 9 Abb. Pr. (N. S.) 395 1166, 1168, 1879
v. Clark, 46 Ind. 405 601
v. Clarke, 11 Ore. 566 3111
v. Clemens, 161 Mich. 493 3143
v. Groover, 77 Ga. 126 2804
v. Hall, 20 Vt. 232 471, 4573, 4574, 4577, 4578
v. Haskell, 53 Minn. 480 3121
v. Kimbell, 203 Mass. 364 2666, 2670, 2676, 2678
v. King, 146 N. C. 385 111, 322, 4311, 4315, 4317, 4319, 4322, 4324
v. Lake Erie Tel. Co., 1 Am. L. Reg. 685 3579
v. Lockwood, 26 Mich. 441 758
v. Morris, 2 Taunt. 385 2986
v. New York Cent. R. Co., 18 N. Y. 408 3467
v. New York Cent., etc., R. Co., 202 Mass. 263 4174
v. Owen, 11 Q. B. 130 807, 808, 809
v. Seaboard A. L. R. (N. C.), 60 S. E. 898 1474
v. Speer, — Tex. Civ. App. —, 166 S. W. 1183 1980, 1988
v. Stoddard, 10 Metc. (Mass.) 375 1814, 1897, 1899, 1908
v. True, 74 S. C. 486 1081
v. Western U. Tel. Co., 77 S. C. 122 3619
v. Western U. Tel. Co., 135 N. C. 504 3629
Bower v. Birdsell, 49 Mich. 5 4290
v. Chicago & N. W. R. Co., 96 Neb. 419 1476, 4814, 5041, 5061
v. Derideker, 37 Iowa 418 4585
v. Fenn, 90 Pa. 359 4379, 4383
v. Walker, 220 Pa. 294, 14 Pa. Dist. 782 730, 739
v. Water Witch, The, 19 How. Pr. 241 390
Bowers v. Bradley, 112 Iowa 537 4296
v. Cobb, 31 Fed. 678 2755, 2843
v. East Tennessee, etc., R. Co., 144 N. C. 684 113
v. Graves, 8 S. D. 385 3198
v. Hammond, 139 Mass. 360 962, 1049
v. Horen, 93 Mich. 420 1442, 1460
v. Kansas City S. R. Co., 131 La. 915 3503
v. Mississippi & R. R. B. Co., 78 Minn. 398 3852, 3853, 3861
v. Tel. Co., 135 N. C. 504 348
v. Union Pac. R. Co., 4 Utah 215 403
v. Western U. Tel. Co., 135 N. C. 504 3633
Bowers H. D. Co. v. Hess, 71 N. J. L. 327 759
Bowersox v. Bowersox, 115 Mich. 24 4892
Bowery Sav. Bank v. Clinton, 2 Sandf. 113 945
Bowes v. Boston, 155 Mass. 344 5118
v. Howe, 5 Taunt. 30 2937
v. Press, 10 T. L. Rep. 55 2579
v. Shand, 2 App. Cas. 455 2232
Bowie v. Berry, 3 Md. Ch. 359 3717
v. Hall, 69 Md. 433 1921
v. Western U. Tel. Co., 78 S. C. 424 284, 3568
Bowker v. Harris, 30 Vt. 425 754
v. Hoyt, 18 Pick. 555 537, 542, 553, 2230
v. Johnson, 17 Mich. 42 1853, 1854
Bowker F. Co. v. Cox, 106 N. Y. 555 383
Bowler v. Braun, 63 Minn. 32 2781
v. Lane, 3 Metc. (Ky.) 311 1269, 1344
Bowles v. Lowery, 5 Ala. App. 555 1269, 1287, 1386
v. Rome, etc., R. Co., 46 Hun 324 4939
Bowley v. Holway, 124 Mass. 395 556, 2198
Bowling v. Varnum, 2 Cranch C. C. 423 2524
v. Walls, 72 W. Va. 638 2323
Bowling C. Co. v. Ruffner, 117 Tenn. 180 3846
Bowman v. Blankenship, 165 N. C. 519 225, 2584
v. Bowman, 153 Ind. 581 3677, 3681, 3682
v. Clemmer, 50 Ind. 10 2373
v. Duling, 39 W. Va. 619 1202
v. Hazel, 69 Kan. 682 432
v. Humphrey, 124 Iowa 744 3846, 3856, 3937
v. Humphrey, 132 Iowa 234 3840, 3923, 3926
v. Lickey, 86 Mo. App. 47 540
v. Neely, 137 Ill. 443 1202
v. Neely, 151 Ill. 37 1202, 1203
v. Ogden City, 33 Utah 196 760
v. Parker, 40 Vt. 410 4404, 4420
v. Teall, 23 Wend. 305 26, 3328
v. Wilson, 2 McCrary 394 1222
Bowman L. Co. v. Anderson, 70 Ohio 16 2272
Bowne v. Mount Holly Nat. Bank, 45 N. J. L. 360 2823
v. Wolcott, 1 N. D. 415 2082
v. Wolcott, 1 N. D. 497 2056, 2058
Bowser v. Cessna, 62 Pa. 148 1942, 1943, 1944
Bowsher v. Chicago, etc., R. Co., 113 Iowa 16 4732, 4735
Bowyer v. Cook, 4 C. B. 236 414
v. Cook, 4 M. G. & S. 236 397, 402, 3845, 3858
Boyce v. Bayliffe, 1 Camp. 58 115
v. Cannon, 5 Houst. 409 1136, 4313
v. Edwards, 4 Pet. 111 1147, 1878, 1881, 1882
v. Ewart, 1 Rice 126 2748
v. Fisk, 110 Cal. 107 948
v. Gingrich, 154 Mo. App. 198 4391, 4399
v. Grundy, 9 Pet. 275 1255, 1803
v. New York City R. Co., 126 App. Div. (N. Y.) 248 4910
v. Pritchett, 6 Dana 231 1025
v. Sinclair, 3 Bush 204 1193
v. Wabash R. Co., 63 Iowa 70 4952
v. Watson, 52 Ill. App. 361 862, 887
Boyd v. Bangor Ry. & Elec. Co., 111 Me. 332 1493, 1494
v. Boyd, 116 Va. 326 4542, 4548
v. Boyd, 1 Watts 365 1570
v. Brown, 17 Pick. 453 236, 4194
v. Browne, 6 Pa. 310 4383
v. Byrd, 8 Blackf. 113 4960
v. Crawford, Addison 150 2376
v. DeLancey, 91 Hun 542 1988
v. DeLancey, 17 App. Div. (N. Y.) 567 2003
v. Desmond, 79 Cal. 250 1607, 1608
v. Fitt, 14 Ir. C. L. (N. S.) 43 277, 278, 2908
v. Gilchrist, 15 Ala. 849 1119
v. Hind, 1 H. & N. 938 756
v. Hitchcock, 20 Johns. 76 755, 761, 764
v. Huffaker, 39 Kan. 525 1684
v. Kerr, 216 Pa. 259 4635

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v. Lite, 1 C. B. 222 2231
v. McCann, 10 Md. 118 1818
v. McDonough, 39 How. Pr. 389 2798
v. Martin, 10 Ala. 700 1689
v. Meighan, 48 N. J. L. 404 2697
v. Merchants' & Farmers' P. Co., 25 Pa. Super. 199 2236
v. Missouri Pac. R. Co., 249 Mo. 110 4865, 4882
v. Moats, 75 Iowa 151 752
v. Myers, 12 Lea 175 2848
v. Negley, 53 Pa. 387 4146
v. Pratt, 72 Wash. 306 5212
v. Quinn, 18 N. Y. Misc. 169, aff'g 17 N. Y. Misc. 278 2282
v. Randolph, 91 Ky. 472 1037
v. Royal Ins. Co., 111 N. C. 372 3044
v. Sales, 39 Ga. 74 612
v. Sappington, 4 Watts 247 2464
v. Swallows, 59 Ill. App. 635 1131
v. Wahl, 175 Mo. App. 181 4394
v. Watt, 27 Ohio St. 259 433, 445, 3938
v. Webster, 59 N. H. 89 724
v. Western U. Tel. Co., 88 S. C. 518 3612
v. Whitfield, 19 Ark. 447 297, 303, 309, 2380, 2395, 2398, 2399
v. Wilson, 83 Pa. 319 2379
Boyd's Lessee v. Cowan, 4 Dall. 128 3692
Boydan v. Haberstumpf, 129 Mich. 137 1301
Boyden v. Burke, 14 How. 575 1364
v. Fitchburg R. Co., 70 Vt. 125 4935
v. Hill, 198 Mass. 477 50, 283, 294, 1990, 1994, 1996, 2012
v. Moore, 5 Mass. 365 796, 830
v. Moore, 11 Pick. 362 431
v. United States, 13 Wall. 17 1577
Boyer v. Amet, 41 La. Ann. 721 2119
v. Barr, 8 Neb. 68 1263, 1297
v Boyer, 1 Cold. 12 3729
v. Chicago, etc., R. Co., 123 Iowa 248 4180
v. Clark, 3 Neb. 161 591
v. Commercial B. I. Co., 110 Iowa 491 3127, 3182
v. Coren, 92 Md. 366 1343
v. Cox, 34 Neb. 813 2275
v. Coxen, 92 Md. 366, 370 1288
v. Northwestern E. R. Co., 174 Ill. App. 161 4882
v. St. Louis, etc., R. Co., 97 Tex. 107 3969, 4033, 4141
Boyers v. Boddie, 3 Humph. 666 978
v. Pratt, 1 Humph. 90 1495
Boyken v. State, 3 Yerg. 426 1539
Boykin v. Ancrum, 28 S. C. 486 1028
Boylan v. Holt, 45 Miss. 277 2469, 2484, 2485
v. Huguet, 8 Nev. 345 4211, 4239, 4264
Boyle v. Boyle, 106 N. Y. 654 2880
v. Canal Co., 22 Pick. 384 2531
v. Case, 18 Fed. 880 336, 1276, 4841
v. Edwards, 114 Mass. 373 2112, 2116, 2132, 2140
v. Parker, 46 Vt. 343 2538
v. Pennsylvania R. Co., 221 Fed. 453 5039, 5042, 5051, 5061
v. Reeder, 1 Ired. 607 2626, 2635
v. Rowand, 3 Desaus. 555 1026
v. Saginaw, 124 Mich. 348 4703, 4738
v. Zacharie, 6 Pet. 635, 648 1147, 1899
Boyle's Lunacy, 20 Pa. Super. Ct. 1 622
Boylston Ins. Co. v. Davis, 70 N. C. 485 4255, 4342
Boyne, The, 98 Fed. 444 2729
Boyne City, etc., R. Co. v. Anderson, 146 Mich. 328 3983
Boynton v. Chase, 3 Wis. 456 3253
v. Clinton, etc., Ins. Co., 16 Barb. 254 3049
v. Kellogg, 3 Mass. 189 3680, 3681, 3687
v. Phelps, 52 Ill. 210 1761
v. Pierce, 79 Ill. 145 2779
v. Salinger, 147 Iowa 537 714, 735
v. Somersworth, 58 N. H. 321 4787
v. Trumbull, 45 N. H. 408 1480
v. Twitty, 53 Ga. 214 2874
Boys v. Ancell, 5 Bing. N. C. 390 862, 899, 917
Boys' Home v. Lewis, 3 Ont. L. R. 208 1131
Bozarth v. Dudley, 44 N. J. L. 304 531, 532, 2663, 2674
Boze v. Davis, 14 Tex. 331 2005
Bozeman v. Rose, 40 Ala. 212 368, 2309
Bozzone v. Stafford, 85 Misc. (N. Y.) 53 2524
Brabazon v. Seymour, 42 Conn. 554 663
Brabham v. Baltimore & O. R. Co., 220 Fed. 35 489, 5109
Bracco v. Merchants' D. T. Co., 61 N. Y. Misc. 60 3322
Brace v. Calder, [1895] 2 Q. B. 253 2564
v. Central R. Co. of New Jersey, 216 Fed. 718 1465
Bracegirdle v. Orford, 2 M. & S. 77 164, 1296, 1390, 3825, 4162, 4164
Bracey v. Kidde, 31 Barb. 273 4967
v. St. Louis, etc., R. Co., 79 Ark. 124 3967, 3985
Brackebush v. Dorsett, 138 Ill. 167 1761
Bracken v. Atlantic T. Co., 167 N. Y. 510 372, 407, 4339
v. Diming, 141 Ky. 265 3686
v. Fidelity Trust Co., 42 Okla. 118 2393
v. Neill, 15 Tex. 109 1314, 4190
v. Pennsylvania R. Co., 32 Pa. Super. Ct. 22 4940
v. Sobra Vista O. Co., 143 Cal. 678 2159
Bracken's Est., 15 Pa. Dist. 71 1121
Brackenridge v. Holland, 2 Blackf. 377 360
Bracket v. McNair, 14 Johns. 170 2276, 3318, 3348
Brackett v. Griswold, 112 N. Y. 454 4364
v. Lubke, 4 Allen 138 1330
v. Morse, 23 Vt. 554 2679
v. Norton, 4 Conn. 517 1145
v. Rich, 23 Minn. 485 2788
v. Sears, 15 Mich. 244 2475, 2484, 2489
v. Southern R. Co., 88 S. C. 447 136, 1465
v. Winslow, 17 Mass. 153 637
Bradburn v. Great Western R. Co., L. R. 10 Ex. 1 3498, 4886
Bradbury v. Benton, 69 Me. 194 1363, 1373
v. Chicago, etc., R. Co., 149 Iowa 51 5125
v. Higginson, 162 Cal. 602 3108, 3110
Bradbury M. Co. v. Laclede G. Co., 128 Mo. App. 96 3848, 3903
Braddy v. Elliott, 146 N. C. 578 1963
Braden v. Walker, 8 Humph. 34 4569
Bradenburg v. Ottawa E. R. C. Co., 19 Ont. L. R. 34 4692
Bradey v. Whitney, 24 Mich. 154 4299
Bradford v. Boley, 167 Pa. 506 61
v. Boylston, etc., Ins. Co., 11 Pick. 161 3022
v. Downs, 126 Pa. 622 3405

[REFERENCES ARE TO PAGES]

Bradford v. Foster, 87 Tenn. 11 803
v. Fox, 38 N. Y. 289 667, 670, 671, 2937, 2940
v. Frederick, 101 Pa. 445 1672
v. Hoiles, 66 Ill. 517 952
v. Manly, 13 Mass. 139 2271, 2379
v. Montgomery F. Co., 115 Tenn. 610 384, 2322, 2326
v. Neil & Mahnke C. Co., 76 Ill. App. 488 664
v. Parkhurst, 96 Cal. 102 2013
v. Smith, 123 Iowa 41 1966
Bradford Academy v. Grover, 55 Vt. 462 739, 1082
Bradford G. Co. v. St. Mary's W. Mfg. Co., 60 Ohio St. 560 3738
Bradford O. Co. v. Blair, 113 Pa. 83 3115, 3148
Bradford, etc., R. Co. v. New York, etc., R. Co., 123 N. Y. 316 282
Bradhurst v. Columbian Ins. Co., 9 Johns. 17 3037, 3290, 3294
Bradlaugh v. Clarke, L. R. 8 App. Cas. 354 17
v. Edwards, 11 C. B. (N. S.) 377 4623
Bradley v. Amis, 2 Hayw. 390 414, 3850
v. Andrews, 51 Vt. 530 153
v. Borin, 55 Kan. 628 1368
v. Burkett, 82 Ga. 255 4285, 4290
v. Burwell, 3 Denio 61 2853, 2854
v. Campbell, 132 Mo. App. 78 4342
v. Cartwright, 36 L. J. (C. P.) 218 548
v. Chicago, etc., R. Co., 94 Wis. 44 200, 3323, 3370
v. Cramer, 66 Wis. 297 4510, 4516, 4521, 4525
v. Davenport, 6 Conn. 1 3097
v. Denton, 3 Wis. 557 312, 3269, 3272
v. Federal L. Ins. Co., 178 Ill. App. 524 1806
v. Fuller, 118 Mass. 239 120, 4427
v. Gamelle, 7 Minn. 331 4325
v. Gardner, 10 Cal. 371 4595
v. Geiselman, 22 Ill. 494 1135
v. Gregory, 2 Camp. 383 747, 752, 756
v. Harwi, 43 Kan. 314 663, 698
v. Iowa Cent. R. Co., 111 Iowa 562 2807, 3780, 3804, 3805
v. Lehigh Valley R. Co., 153 Fed. 350 679
v. McDonald, 157 App. Div. (N. Y.) 572 1099
v. McHale, 19 Pa. Super. 300 2290
v. Merrill, 91 Me. 340 1202
v. Morris, Bushee 395 1269
v. Norris, 63 Minn. 156, 169 2060
v. Ohio River & C. R. Co., 122 N. C. 972 4892, 4899, 4901
v. Poole, 98 Mass. 169 4377
v. Pratt, 23 Vt. 378 1067
v. Rea, 14 Allen 20 533, 564, 2446, 4371
v. Reynolds, 61 Conn. 271, 283 1660, 1661, 1665, 1670, 1675, 1680
v. Richardson, 23 Vt. 721, 2 Blatch. 343 2957
v. Sattler, 156 Ill. 603 4939
v. Walker, 93 Ill. App. 609 3110
v. Washington, etc., Co., 9 Pet. 107 387
Bradley L. & L. Co. v. Eastern Mfg. Co., 104 Me. 203 4285
Bradley Mfg. Co. v. Chicago & S. T. Co., 229 Ill. 170 4132, 4143
Bradley's Lessees v. Bradley, 4 Dall. 112 1483
Bradlie v. Maryland Ins. Co., 12 Pet. 378 3014, 3015, 3031
Bradner v. Faulkner, 12 N. Y. 472 1079, 1082
v. Faulkner, 93 N. Y. 515 460
v. Rockdale P. Co., 115 Mo. App. 102 1417, 2555
v. Roffsell, 57 N. J. L. 32, 412 2683, 2684
Bradshaw v. Bennett, 5 C. & P. 48 1034
v. Buchanan, 50 Tex. 492 1269, 3827
v. Craycraft, 3 J. J. Marsh. 77 833, 884
v. Crosby, 151 Mass. 237 2153, 2156, 2157, 2164
v. Frazier, 113 Iowa 579 55
v. Jones, 103 Tenn. 331 4971
v. Lancashire, etc., R. Co., L. R. 10 C. P. 189 138, 412, 4851
v. Rodgers, 20 Johns. 103 3946
v. South Boston R. Co., 135 Mass. 407 3463
v. Van Valkenburg, 97 Tenn. 316 988
Bradstreet v. Baker, 14 R. I. 546 876, 883
v. Baldwin, 11 Mass. 229 3290
v. Barber, 125 Minn. 479 2756
v. Crosby, 151 Mass. 237 2158
v. Davis, 12 Tex. 336 819
v. Heron, 1 Abb. Adm. 209 540
Bradstreet Co. v. Oswald, 96 Ga. 396 254, 4541, 4557
Bradt v. Holden, 12 R. I. 335 1625
v. Koon, 4 Cow. 416 591
v. New Nonpareil Co., 108 Iowa 449 4537
v. Towsley, 13 Wend. 253 4555
Bradway v. Groenendyke, 153 Ind. 508 660
Brady v. Bank of Commerce of Coweta, 41 Okla. 473 1953, 2053
v. Brady, 8 Allen 101 1445, 2303
v. Brady, 110 Md. 656 699, 2855
v. Butts, 15 Ky. L. Rep. 127 (Ky. Super. Ct.) 1559
v. Cassidy, 9 N. Y. Misc. 107 1366
v. Cassidy, 145 N. Y. 171 2230
v. Daly, 175 U. S. 148 4482
v. Durbrow, 2 E. D. Smith 78 627
v. Erwin, 48 Mo. 533 4609
v. Finn, 162 Mass. 260 4380, 4381
v. Hill, 1 Mo. 225 703, 717
v. Holderman, 19 Ohio 26 1808
v. Jones, 2 D. & R. 305 800, 811
v. Kansas City C. R. Co., 111 Mo. 329 3969
v. McGehee, 1 Tenn. Cas. 154 1905, 2196
v. Mayor, 14 App. Div. (N. Y.) 152 1049
v. New Jersey Fidelity Ins. Co., 180 Mo. App. 214 759
v. Northwestern Ins. Co., 11 Mich. 425 3065
v. Oliver, 125 Tenn. 595 2701
v. Price, 19 Tex. 285 538
v. Shinkle, 40 Iowa 576 13
v. Springfield T. Co., 140 Mo. App. 421 1473
v. Spurck, 27 Ill. 478 2055, 2056, 2117, 2153
v. Whitney, 24 Mich. 154 4216, 4296
Brady-Neely Grocer Co. v. De Foe, — Tex. Civ. App. —, 169 S. W. 1135 531, 4622, 4642
Bragan v. Birmingham R., L. & P. Co., 163 Ala. 93 4019, 4108, 4138
Bragg v. Metropolitan St. R. Co., 192 Mo. 331 435
v. Morrill, 49 Vt. 45 2374, 2375
v. Norfolk & W. N. R. Co. v. Tuggle, 151 Ky. 409 3457
v. Wetzell, 5 Blackf. 95 424

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Braiden v. Mercer, 44 Ohio St. 339 1639
Brainard v. Boston, etc., R. Co., 12 Gray 407 1419, 4139
v. Jones, 18 N. Y. 35 1038, 1568, 1570, 1574
v. Missisquio R. Co., 48 Vt. 107 4025
v. Reynolds, 36 Vt. 614 2791
Brainerd v. Arnold, 27 Conn. 617 3112, 3113
v. Champlain T. Co., 29 Vt. 154 936, 1102
v. State, 74 N. Y. Misc. 100 3959, 3974, 4004, 4008, 4039, 4049, 4106
Braitch v. Guelick, 37 Iowa 212 1850
Braithwaite v. Hall, 168 Mass. 38 405, 4692, 4725
v. Power, 1 N. D. 455 3290, 3329
Brake v. Kansas City, 100 Mo. App. 611 4705, 4780
Brakken v. Minneapolis, etc., R. Co., 20 Minn. 41, 31 Minn. 45 3753, 3759, 3861
Braman v. Bingham, 26 N. Y. 483 2153, 2155
v. Dowse, 12 Cush. 227 295, 2894
v. Hess, 13 Johns. 52 1873, 2784
v. Perry, 12 Pick. 118 1782
Bramblett v. Deposit Bank, 122 Ky. 324 740
v. Hargis, 123 Ky. 141 3077
Brame v. Clark, 148 N. C. 364 341, 1267, 3737, 3826
v. Light, etc., Co., 95 Miss. 26 113
Bramlett v. Southern Ry. Co., 98 S. C. 319 5061
Brammer v. Norfolk & W. R. Co., 107 Va. 206 4853
Branch v. Chappell, 119 N. C. 81 2581
v. Davis, 29 Fed. 888 500, 1626
v. Taylor, 40 Tex. Civ. App. 248 2013
v. Wilson, 12 Fla. 543 537
Brand v. Henderson, 107 Ill. 141 2970
v. Hinchman, 68 Mich. 590 4610
v. Union E. R. Co., 169 Ill. App. 449 3755
Brandamour v. Trant, 45 Ill. 372 1749
Brandenburg v. Flynn, 12 B. Mon. 397 2857
v. Phillips, 18 N. D. 200 1937
Brander v. Phillips, 16 Pet. 121 727
Brandon v. Allen, 28 La. Ann. 60 1695, 4606
v. Newington, 3 Q. B. 915 1234
Brandrup v. Empire State S. Co., 111 Minn. 376 403, 2752, 2758
Brandt v. Bowlby, 2 B. & Ad. 932 2280, 3390
v. Foster, 5 Iowa 287 555, 556, 1398, 2053, 2056, 2060, 2157, 2160
v. Lawrence, 1 Q. B. Div. 344 2232
v. Schuchmann, 60 Mo. App. 70 2697
v. Spokane & I. E. R. Co., 78 Wash. 214 4056
v. Story, 161 Iowa 451 459
Brandts v. Donnelly, 94 Ky. 129 2877
Brangwin v. Perrott, 2 W. Bl. 1190 1038, 1568, 1572
Branigan v. Jefferson Mut. F. Ins. Co., 102 Mo. App. 70 3065
Brannen v. Kokomo, etc., Co., 115 Ind. 115 109
v. McCarley, — Tex. Civ. App. —, 146 S. W. 299 3229, 3231
Brannenburg v. Indianapolis, etc., R. Co., 13 Ind. 103 376, 383
Brannin v. Forees, 12 B. Mon. 506 1523
v. Johnson, 19 Me. 361 4169
Brannon v. Barnes, 111 Ga. 850 1621
v. Hursell, 112 Mass. 63 962, 963
Brannon v. Silvernail, 81 Ill. 434 1305
Brannum L. Co. v. Pickard, 33 Ind. App. 484 2793
Branscombe v. Scarborough, 6 Q. B. 13 1656
Bransom v. Labrot, 81 Ky. 638 71
Brant v. Gallup, 111 Ill. 487 35, 2918
v. Niggins, 10 Mo. 728 4640
Branthwait v. Halsey, 9 N. J. L. 3 1224
Brantigam v. While, 73 Ill. 561 4675, 4777
Brantingham v. Fay, 1 Johns. Cas. 256 41
Brantley v. Johnson, 102 Ga. 850 556, 2059, 2061, 2182
v. Thomas, 22 Tex. 270 2271, 2370, 2379
Braseth v. State Bank, 12 N. D. 486 2678
Brasfield v. Lee, 1 Ld. Raym. 329 414
Brashear v. Chandler, 6 T. B. Mon. 150 3152
v. Philadelphia T. Co., 180 Pa. 392 4682
Brasher v. Davidson, 31 Tex. 190 624, 2311, 2329
v. Holtz, 12 Colo. 201 4211
v. Kennedy, 10 B. Mon. 28 1330
Brass v. Springville, 100 App. Div. (N. Y.) 197 1099
v. Vandecar, 70 Neb. 35 2146, 2150, 2186
v. Worth, 40 Barb. 648 4246
Braswell v. American L. Ins. Co., 75 N. C. 8 3084
Brasyear v. Maclean, 33 L. T. (N. S.) 1 1594
Bratsberg, The, 127 Fed. 1005 5000, 5011
Bratt v. Ellis, Sugd. App. No. 5 2000
v. Swift, 99 Wis. 579 285, 4424
Brattain v. Cannady, 96 Ind. 266 4959
Bratten v. Catawissa R. Co., 211 Pa. 21 2321
Bratton v. Allison, 70 N. C. 498 1219
v. Catawba P. Co., 80 S. C. 260 1272, 3911
Brauer v. Oceanic S. N. Co., 34 N. Y. Misc. 127 182
v. Oceanic S. N. Co., 66 App. Div. (N. Y.) 605 183
v. Portland, 35 Ore. 471 1048, 1060
v. The Almoner, 18 La. Ann. 266 3386
v. Webb, 32 N. Y. Misc. 243, 668 3542
Braun v. Craven, 175 Ill. 401, aff'g 173 Ill. App. 401 77, 4686
v. Metropolitan, etc., R. Co., 166 Ill. 434 3965, 3973, 4011, 4019
v. Peet, 97 Neb. 443 40
Brauns v. Green Bay, 78 Wis. 81 2460, 2482
Braunsdorf v. Fellner, 76 Wis. 1 215
Braunstein v. American B. T. Co. (N. Y. Misc.), 84 Supp. 982 1708
v. People's R. Co., 2 Boyce (Del.) 55 4676
Braveboy v. Cockfield, 2 McMullen 270, 273 4601
Bravis v. Chicago, etc., R. Co., 217 Fed. 234 5062
Brawley v. Copelin, 106 Ark. 256 2113, 2121, 2136
Bray v. Callihan, 155 Mo. 43 4504
v. Crain, 59 Tex. 649 704, 715
v. Gunn, 53 Ga. 144 2969
v. Tardy, 182 Ind. 98 3995, 4032, 4144
Braynard v. Marshall, 8 Pick. 194 1878, 1881

[REFERENCES ARE TO PAGES]

Brayton v. Beall, 73 S. C. 308 4318
v. Chase, 3 Wis. 456 171, 174, 191, 210, 217
v. Cleveland Special Police, 63 Ohio St. 83 4532
Brazell v. Cohn, 32 Mont. 556 2236, 2257, 2258
Brazier v. Bryant, 2 Dowl. P. C. 477 722
Breck v. Barney, 183 Mass. 133 628
Breckenridge v. Brooks, 2 A. K. Marsh. 335 1068, 1202
v. Hoke, 4 Bibb 272 1025
Breckham v. Seaboard A. L. R., 127 Ga. 550 157
Breckinridge v. Rolls, 2 T. B. Mon. 150 2330
v. Taylor, 5 Dana 110 1019, 2859
Brecknock Co. v. Pritchard, 6 T. R. 65 2608
Bredemeier v. Pacific S. Co., 64 Ore. 576 226, 229, 231, 261
Bredow v. Mutual Sav. Inst., 28 Mo. 181 4273
Breed v. Cook, 15 Johns. 241 655, 656
v. Eastern R. Co., 5 Gray 470 4086
v. Hurd, 6 Pick. 356 802, 804, 805
Breeden v. Frankford M., etc., Ins. Co., 220 Mo. 327 424
Breedlove v. Bundy, 96 Ind. 319 435
v. Stump, 3 Yerg. 257 576
Breen v. Iowa Cent. R. Co., 159 Iowa 537 1373, 1479, 4745, 4751
v. St. Louis T. Co., 102 Mo. App. 479 337, 3465, 3476
Breese v. McCann, 52 Vt. 498 548
v. United States Tel. Co., 48 N. Y. 132 3549, 3553
Brehm v. United States F. & G. Co., 124 Wis. 339 1647, 1648
Breiner v. Nugent, 136 Iowa 322 4968
Breitung v. Chicago, 92 Ill. App. 118 5034
Breitweiser Lumber Co., A. G. v. Crick, 55 Pa. Super. Ct. 72 2337
Breman v. Hess, 13 Johns. 52 2783
Bremen, The, 111 Fed. 228 2737, 2738
Bremer v. Minneapolis, etc., R. Co., 96 Minn. 469 1511, 4862
Bremerton, In re, 73 Wash. 565 4130, 4138
Bremisholtz v. Pennsylvania R. Co., 229 Pa. 88 147
Bremyer v. School Ass'n, 86 Kan. 644 1229
Breneman v. Mylin, 51 Pa. Super. Ct. 395 3199
Brenisholtz v. Pennsylvania R. Co., 229 Pa. 88 1477
Brennan v. Clark, 29 Neb. 385 883, 894, 2755, 2805
v. Dowagiac Mfg. Co., 162 Fed. 472 4445, 4447, 4448, 4470
v. Maule, 108 Mo. App. 336 1322
v. St. Louis, 92 Mo. 482 103
v. Streator, 168 Ill. App. 134 4654
Brennan C. Co. v. Cumberland, 29 App. Cas. D. C. 554 56
Brennecke v. Heald, 107 Iowa 376 4411
Brennen v. Brennen, 19 Ont. 327 4373
v. Chicago & C. C. Co., 147 Ill. App. 263 4870, 4883
v. Chicago & C. C. Co., 241 Ill. 610 4882, 4905
Brenner v. Carter, 10 Pa. Dist. 457, 203 Pa. 75 1074
v. Jonesboro, etc., R. Co., 82 Ark. 128 3477, 3487, 3499
Brennert v. Farrier, 47 N. J. L. 75 1065
Brent v. Clevinger, 78 Va. 12 1228
v. Davis, 9 Md. 217 449
Brent v. Parker, 23 Fla. 200 2701
v. Richards, 2 Gratt. 539 2276, 2279
v. Thornton, 106 Fed. 35 1139, 1142, 5012
v. Tivebaugh, 12 B. Mon. 87 422
Brentner v. Chicago, etc., R. Co., 68 Iowa 530 1141
Brenton v. Davis, 8 Blackf. 317 2376
Breon v. Henkle, 14 Ore. 494 4959
Bresnahan v. Michigan Cent. R. Co., 49 Mich. 410 4853
v. Ross, 103 Mich. 483 2220, 2222
Bressler v. Harris, 19 Ill. App. 430 962
v. McVey, 82 Kan. 341 1494
Bresslin v. Star Co., 85 Misc. (N. Y.) 609, aff'd 166 App. Div. (N. Y.) 89 1498, 4510, 4544
v. Star Co., 148 N. Y. S. 295, aff'd 166 App. Div. (N. Y.) 89 4548
Brett v. Berger, 4 Cal. App. 12 3232, 3243
v. Cooney, 75 Conn. 338 4364
v. Universalist Soc., 63 Barb. 610 757
v. Warnick, 44 Ore. 511 3072
Bretz v. Fawcett, 29 Ill. App. 319 536
Bretzfelder v. Waddle, 122 Mo. App. 462 4375
Brevard v. Wimberly, 89 Mo. App. 331 877
Brewer v. American Ins. Co., 123 Mass. 78 3006, 3026
v. Beckwith, 35 Miss. 467 3693
v. Branch Bank, 24 Ala. 440 655
v. Casey, 196 Mass. 384 773
v. Chase, 121 Mich. 526 4574, 4575, 4587, 4593, 4594
v. Dew, 11 M. & W. 625 1269, 1296, 4161, 4204
v. Ernest, 81 Ala. 435 1121
v. Fleming, 51 Pa. 102 363
v. Franklin Mills, 42 N. H. 292 2800
v. Hartie, 3 Call 21 1227
v. Jacobs, 22 Fed. 217 4626, 4634, 4645
v. Knapp, 1 Pick. 332 700, 717
v. Neatherly, — Tex. Civ. App. —, 162 S. W. 1185 2274
v. Norcross, 17 N. J. Eq. 219 2830
v. Palmer, 3 Esp. 213 3098
v. Sowers, 118 Md. 681 2042, 2046
v. Temple, 15 How. Pr. 286 1399
v. Tyringham, 12 Pick. 547 542, 1480
v. Tyson, 5 Jones 173 2659
v. Watson, 65 Ala. 88 1594
v. Watson, 71 Ala. 299 1279
Brewer L. Co. v. Boston & A. R. Co., 179 Mass. 228 659, 660, 661
Brewing Co. v. McCann, 118 Pa. 314 244
Brewster v. Bours, 8 Cal. 501 669
v. Carnes, 103 N. Y. 556 689, 691
v. Countryman, 12 Wend. 446 303, 2399
v. De Fremery, 33 Cal. 341 3233
v. Edgerly, 13 N. H. 275 844, 855
v. Empire State S. Co., 145 App. Div. (N. Y.) 678 1249, 2872, 2876
v. Interborough R. T. Co., 68 N. Y. Misc. 348 3468
v. Kitchell, 1 Salk. 198 1561
v. Silliman, 38 N. Y. 423 1668, 4291, 4327, 4344
v. Silverstein, 133 N. Y. Misc. 473 488, 760
v. Sussex R. Co., 40 N. J. L. 57 3876
v. Van Liew, 119 Ill. 554 2318, 4211, 4239

[REFERENCES ARE TO PAGES]

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v. Wakefield, 1 Minn. 352 943, 962
v. Warner, 136 Mass. 57 4175
v. Western U. Tel. Co., 65 Ark. 537 3566, 3569
Brewster's Est., In re, 113 Mich. 561 1121, 1129
Breyfogle v. Beckley, 16 S. & R. 264 1105
Brezelton v. Campbell, 49 Tex. Civ. App. 218 4234
Brichta v. New York Ins. Co., 2 Hall 372 3059
Brick v. Atlantic C. L. R., 145 N. C. 203 3531, 3532
v. Bual, 73 Tex. 511 682
v. Plymouth County, 63 Iowa 462 814
Bricker v. Conemaugh S. Co., 32 Pa. Super. Ct. 283 3864, 3880, 3902
v. Davis, 21 Pick. 407 4580
Brickill v. Mayor, etc., 60 Fed. 98 4448
Brickman v. Southern R., 74 S. C. 306 4863, 4865
Bridendecker v. Lowell, 32 Barb. 9 578, 714, 717, 721, 732, 742
Bridge v. Calhoun, 57 Wash. 272 1997
v. Grand Junction R. Co., 3 M. & W. 244 161
v. New York Cent. & H. R. Co., 88 Misc. (N. Y.) 3538
v. Oshkosh, 71 Wis. 363 1424, 1472, 4797
v. Wain, 1 Stark. 504 2379, 2424, 2426
Bridgeford v. Crocker, 60 N. Y. 627 2228, 2235, 2238
v. Meagher, 144 Ky. 479 2551, 2555, 2562
Bridgeman v. Hardwick, 67 Vt. 653 4045, 4127, 4153
Bridgeport Ins. Co. v. Wilson, 34 N. Y. 275 295, 297
Bridgeport M. I. Co. v. Iowa C. Works, 130 Iowa 736 2749
Bridger v. Asheville & S. R. Co., 27 S. C. 456 4768
Bridgers v. Dill, 97 N. C. 222 3808
Bridges v. Engers, 167 Ill. App. 425 4633
v. Hall, 13 Cal. 630 2484
v. Lanham, 14 Neb. 369 234, 2626
v. Padford, 6 Ga. App. 689 4395, 4399
v. Smyth, 8 Bing. 29 589
v. Southern R., 86 S. C. 267 4095
v. Stephenson, 10 Ill. App. 369 1404
v. Stickney, 38 Me. 361 171, 182, 202
Bridgewater F. Co. v. Sharon B. Co., 145 Pa. 404 4006
v. Sharon B. Co., 179 Pa. 466 4020
Bridgewater G. Co. v. Home G. F. Co., 59 Fed. 40 354
Bridgford v. Fogg, 12 Ky. L. Rep. 570 1797
Bridgman v. Hopkins, 34 Vt. 532 470, 4574, 4576
v. Robinson, 7 Ont. L. R. 591 4175
v. Steamboat Emily, 18 Iowa 509 3316
Briede v. Babst, 131 La. 159 794, 797
Brier v. Mankey, 47 Ind. App. 7 4391
Brierly v. Kendall, 17 Q. B. 937 4176
Brig Collenberg, The, 1 Black 170, 17 L. ed. 89 3288
Brig Sarah Ann, 2 Sumn. 211 27
Brig Susan, The, 1 Sprague 503 2720
Brigg v. Hilton, 99 N. Y. 517 2393
Briggs v. Barnett, 108 Va. 404 2462
v. Boston, etc., R. Co., 6 Allen 246 4285, 4288
v. Boyd, 65 Barb. 197 2507
Briggs v. Boyd, 37 Vt. 534 295, 2862, 2871
v. Brushaber, 43 Mich. 330 4392
v. Calverly, 8 T. R. 629 785
v. Chicago, etc., R. Co., 56 Kan. 526 4053
v. Cook, 99 Va. 273 41
v. Evans, 5 Ired. 16 4957, 4962
v. Georgia, 10 Vt. 68 2464
v. Greinfeild, 1 Str. 610 1531
v. Hall, 4 Leigh 484 3122, 3124
v. Hinton, 14 Lea 233 2797, 2857, 2870
v. Kennett, 8 N. Y. Misc. 264 4282
v. Life Ins. Co., 155 N. C. 73 4390
v. McDonald, 166 Mass. 37 2881
v. Manning, 80 Ark. 304 1639, 1640
v. Montgomery, 3 Heisk. 673 537
v. Morgan, 104 Mo. App. 62 2231
v. New York Cent. R. Co., 28 Barb. 515 2367, 3329, 3364
v. New York, etc., R. Co., 72 N. Y. 26 489
v. New York, etc., R. Co., 177 N. Y. 59 4745
v. Richmond, 10 Pick. 391 630, 632
v. Rumely Co., 96 Iowa 202 2415
v. Snegham, 45 Ind. 14 1404
v. Walker, 102 Ky. 359 1120
Brigham v. Bussey, 26 La. Ann. 676 1595
v. Carlisle, 78 Ala. 243 239, 258, 2572, 3216
v. Evans, 113 Mass. 538 1959, 1989, 4228
v. Hawley, 17 Ill. 38 537, 538, 2581
v. Lally, 130 Mass. 485 661, 667
v. Marean, 7 Pick. 40 994
v. Morgan, 185 Mass. 27 1120
v. Potter, 14 Gray 522 1850
v. Van Buskirk, 6 B. Mon. 197 1060, 1252
Bright v. Barnett & R. Co., 88 Wis. 299 4921, 4935
v. Boyd, 1 Story 478, 2 Story 607 2027, 2028, 3709, 3710
v. James, 35 R. I. 492 2042, 2046
v. Judson, 47 Barb. 29 1878, 1881
v. Lennon, 83 N. C. 183 2854, 2859
v. Peninsular & O. S. N. Co., 2 Com. Cas. 106 (1897) 3443
v. Quinn, 20 Hawaii 504 2161
v. Rowland, 3 How. (Miss.) 398 857, 883
v. Western U. Tel. Co., 132 N. C. 317 3638, 3654
Brightman, In re, 220 Mass. 17 5190
Brightman v. Bristol, 65 Me. 426 3752
v. Reeves, 21 Tex. 70 4273
Brighton v. Auston, 19 Ont. App. 305 2584, 2593
v. Lake Shore, etc., R. Co., 103 Mich. 420, 112 Mich. 217 2554
Brighton Bank v. Sawyer, 132 Mass. 185 532
Brikel v. Chandler, 26 Wash. 241 4770
Brill v. Flagler, 23 Wend. 354 1419, 1444, 1460, 2304
Brina P. Pendleton, The, 200 Fed. 848 2727
Brincefield v. Allen, 25 Tex. Civ. App. 258 3228
Brinckerhoff v. Greenan, 85 Ill. App. 253 731
v. Phelps, 24 Barb. 100 1989
v. Wemple, 1 Wend. 470 4093
Brinckle v. England, 2 Boyce (Del.) 16 2476
Bringard v. Stellwagen, 41 Mich. 54 4302
Brininstool v. Michigan United R. Co., 157 Mich. 172 4742, 4745

[REFERENCES ARE TO PAGES]

Brink v. Dolsen, 8 Barb. 337 2960
v. Freoff, 40 Mich. 610, 44 Mich. 69 813, 4287
v. Garland, 58 Mo. App. 356 749
v. Hanover F. Ins. Co., 70 N. Y. 593 3021
v. Kansas City, etc., R. Co., 17 Mo. App. 177 57, 147, 3925
v. Mitchell, 135 Wis. 416 1990
v. Wabash R. Co., 160 Mo. 87 116, 126, 4852, 4937
Brink's Chicago City Exp. Co. v. Herron, 104 Ill. App. 269 4832
Brinker v. Leinkauff, 64 Miss. 236 2878
Brinkerhoff v. Foote, 1 Hoff. Ch. 261 980
v. Merselis, 24 N. J. L. 682 1083
Brinkley v. Swicegood, 65 N. C. 626 2545, 2547
v. Walcott, 10 Heisk. 22 3099
Brinkly v. Willis, 22 Ark. 9 1005
Brinkman v. Gottenstroeter, 153 Mo. App. 351 4882
v. St. Landry C. O. Co., 118 La. 835 4767, 4772
v. Taylor, 103 Fed. 773 4533
Brinkmeier v. Missouri Pac. Ry. Co., 224 U. S. 268, aff'g 81 Kan. 101 5124
Brinkmeyer v. Bethea, 139 Ala. 376 3762
Brinley v. National Ins. Co., 11 Metc. (Mass.) 195 3041, 3051, 3065
Brinsfield v. Howeth, 110 Md. 520 1484, 4503, 4513
Brinsley v. Schulz, 124 Wis. 426 4644
Brinsmead v. Harrison, L. R. 6 C. P. 584 4209
Brinton v. Paxton, 134 Fed. 78 4471
v. Thomas, 138 Mo. App. 64 416, 2464
Brisbane v. Pomeroy, 13 Daly 358 2181, 4398, 4410
v. Pratt, 4 Denio 63 1852
Brisbine v. St. Paul, etc., R. Co., 23 Minn. 114 4094
Briscoe v. Kenealy, 8 Mo. App. 76 1830
v. Litt, 19 Misc. (N. Y.) 5 2563
v. McElween, 43 Miss. 556 4169, 4211
v. Powers, 47 Ill. 447 572
Brisendine v. Martin, 1 Ired. 286 2844, 2869
Brisky v. Leavenworth L., B. & W. Co., 68 Wash. 386 3886
Brison v. McKellop, 41 Okla. 374 4980
Bristol, The, 10 Blatch. 537 4998
Bristol v. Hammacher, 30 N. Y. Misc. 426 3121
v. Warner, 19 Conn. 7 1824
Bristol B. L. R. Co. v. Bullock E. Mfg. Co., 101 Va. 652 226
Bristol Mfg. Co. v. Gridley, 28 Conn. 201 155, 1363, 3941, 4708
v. Probasco, 64 Ind. 406 661
Briston v. Braidwood, 28 Mich. 195 4382
Bristowe v. Needham, 7 M. & G. 648 589
Britain v. Barnaby, 21 How. 527, 16 L. ed. 177 3287
Britannia M. Co. v. United States F. & G. Co., 43 Mont. 93 1591
Britannic, The, 39 Fed. 395 5017
British American Assur. Co. v. Colorado & S. R. Co., 52 Colo. 589 2890
v. Wilson, 132 Ind. 278 3034
British Columbia S. M. Co. v. Nettleship, L. R. 3 C. P. 499 197, 2341, 3401
British Columbia S. R. Co. v. Granick, 44 Can. Sup. Ct. 105 5192, 5194
British Consul v. Smith, Bee 178 2726
British Empire, etc., Assur. Co. v. Luxton, 9 Manitoba 169 2796
British I. W. Co. v. Dublin U. T. Co., [1900] 1 Irish 287 4463
British Motor Syndicate v. Taylor, [1900] 1 Ch. 577, [1901] 1 Ch. 122 4442
British Westinghouse E. & Mfg. Co. v. Underground E. R. Co., [1911] 1 K. B. 575 317, 2419
v. Underground E. R. Co., [1912] App. Cas. 673, rev'g [1912] 3 K. B. 128, aff'g [1911] 1 K. B. 575 492
British & A. M. Co. v. Todd, 84 Miss. 522 2121, 2133
British & F. M. Ins. Co. v. Southern Pac. Co., 55 Fed. 82, 72 Fed. 285 3294, 3295
Britt v. Carolina N. R. Co., 148 N. C. 37 4664
Brittain v. Griggs, 88 Ga. 232 3258
Brittain D. G. Co. v. Yearout, 59 Kan. 684 2749
Britten v. Great Northern R. Co., [1899] 1 Q. B. 243 3533
Britton v. Bishop, 11 Vt. 70 509, 1411
v. Chamberlain, 234 Ill. 246, aff'g 136 Ill. App. 290 1055
v. Des Moines, O. & S. R. Co., 59 Iowa 540 4120
v. Ferrin, 171 N. Y. 235 2974
v. Fort Worth, 78 Tex. 227 1590
v. Nuffin, 120 N. C. 87 2116
v. Phillips, 24 How. Pr. 111 1546
v. Street R. Co., 90 Mich. 159 4718, 4754
v. Supreme Council Royal Arcanum, 46 N. J. Eq. 102 1091
v. Turner, 6 N. H. 481 356, 542, 566, 2534, 2539, 2576
v. Updike, 3 N. J. Eq. 125 572
Brizsee v. Maybee, 21 Wend. 144 1136, 1456, 1680, 4312, 4318, 4338, 4352, 4354
Broad v. Thomas, 7 Bing. 99 2500, 2506
Broad St. Widening, In re, 225 Pa. 184 4112
Broadbrooks v. Tolles, 114 App. Div. (N. Y.) 646 922
Broadhurst v. Robinson, 10 The Argus L. R. 26 2573
Broadnax v. United E. & C. Co., 128 Fed. 649 2259
Broads v. Mead, 159 Cal. 765 33
Broadstreet v. Hall, 32 Ind. App. 122 4832
Broadway C. M. Co. v. Robinson, 150 Ky. 707 4794
v. Smith, 136 Ky. 725 3966, 4025, 4120, 4122
Broadway Renting Co. v. Wolpin, 59 N. Y. Misc. 199 3103
Broadway Sav. Bank v. Forbes, 79 Mo. 226, aff'g 9 Mo. App. 575 962
Broadwell v. Paradice, 81 Ill. 474 1680, 4349, 4352
Broadwood v. Southern Exp. Co., 148 Ala. 17 3334, 3350
Brobst v. Ruff, 100 Pa. 91 4648
v. Skillen, 16 Ohio St. 382 1607
Brock v. Bolton, 37 S. C. 40 1669
v. Gale, 14 Fla. 523 3380
v. Haley, 88 S. C. 373 4240
v. Jones, 16 Tex. 461 817, 820
v. Royal L. Co., 17 Manitoba 351 883
v. Stimson, 108 Mass. 520 4838
Brockenbrough v. Blythe, 3 Leigh 619 1025, 1026, 1027, 1965, 1967
Brockley v. Brockley, 122 Pa. 1 757
Brockman v. Ostdiek, 79 Neb. 843 627

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v. Hagebusch, 72 Ill. 562 712
Brockway v. Amer. Express Co., 168 Mass. 257 3420
v. Clark, 6 Ohio 45 877, 1000, 1002
v. McClun, 148 Ill. App. 465 1806
v. Petted, 79 Mich. 620 1613
v. Thomas, 36 Ark. 518 250, 3213
Broderick v. Broderick, 28 W. Va. 378 2473
Brodie v. Fost, 123 App. Div. (N. Y.) 749 2694, 2695
v. New England M. S. Co., 166 Ala. 170 2146, 2149, 2151
v. Ophir S. M. Co., 5 Sawyer 608 4442, 4451
v. Watkins, 33 Ark. 545 2477, 2497
Brofeld v. Schlanger (N. Y. Misc.) 104 N. Y. Supp. 369 861
Brogan v. Hanan, 55 App. Div. (N. Y.) 92 775
Brokaw v. Duffy, 165 N. Y. 391 1953, 1986
v. Hudson, 27 N. J. Eq. 135 639
v. New Jersey, etc., R. Co., 32 N. J. L. 328 1331
Brolaskey v. Loth, 5 Phila. 81 3104
Bromage v. Prosser, 4 B. & C. 247, 255 1288
Bromar v. Maxwell, 9 Humph. 621 3531
Bromberg v. Eugenotto C. Co., 162 Ala. 359 3191, 3192, 3196, 3210
Bromfield v. Jones, 4 B. & C. 380 354
Bromley v. School Dist., 47 Vt. 381 2556
v. Wallace, 4 Esp. 237 502, 4976
Bromley's Case, 1 Atk. 75 1572
Bronner B. Co. v. M. M. Canda Co., 18 N. Y. Misc. 681 1199
Bronseman v. Frank, 28 Pa. 475 1121
Bronson v. Bruce, 59 Mich. 467 4502, 4518, 4567, 4587, 4598
v. Canadian Pac. R. Co., 18 Ont. L. R. 337 1500
v. Coffin, 108 Mass. 175 2181, 2186, 2619
v. Fitzhugh, 1 Hill 185 773, 778, 783
v. Leibold, 87 Conn. 293 820, 1965
v. McCormick H. M. Co., 52 Neb. 342 2805
v. Rock Island, etc., R. Co., 40 How. Pr. 48 816
v. Rodes, 7 Wall. 229 600, 603, 606
v. Rugg, 39 Vt. 241 628, 638
Bronx G. E. Co. v. New York, 29 N. Y. Misc. 402 1199
Brook v. Bayless, 6 Okla. 568 1357
Brooke v. Clarke, 57 Tex. 105 1278, 4823
v. Enderby, 2 B. & B. 70 703, 717
v. Laurens M. Co., 78 S. C. 200 2221, 2237, 2256, 2369
v. Louisiana Ins. Co., 4 Mart. (N. S.) 640, 681 3031
v. Tradesmen's Nat. Bank, 69 Hun 202 278
v. Western U. Tel. Co., 119 Ga. 694 3610
Brooker v. Coffin, 5 Johns. 188 4502
v. McLean, 5 Ont. 209 3808
Brookfield v. Hughson, 44 N. J. L. 285 589
Brooklyn v. Brooklyn City R. Co., 47 N. Y. 475 299, 2891
v. Brooklyn City R. Co., 57 Barb. 497 307, 2885
v. Sequa, Tayl. (N. C.) 263 1522
Brooklyn Bank v. DeGrauw, 23 Wend. 342 809, 810, 816, 817
Brooklyn Church Soc. v. Brooklyn F. K. Soc., — App. Div. —, 152 N. Y. S. 41 32
Brooklyn E. R. Co., In re, 6 App. Div. (N. Y.) 53 4085
In re, 55 Hun 165 4082
Matter of, 6 App. Div. (N. Y.) 53 4084
Brooklyn Heights R. Co. v. Brooklyn City R. Co., 151 App. Div. (N. Y.) 465 754, 763, 1093, 1094
Brooklyn Hills I. Co. v. New York, etc., R. Co., 80 App. Div. (N. Y.) 508 226, 1961, 2605
Brooklyn L. Ins. Co. v. Week, 9 Ill. App. 358 3088
Brookman v. Metcalf, 5 Bosw. 429 676
Brooks v. Baker, 9 Daly 398 2747
v. Black, 68 Miss. 161 2127, 2128, 2134, 2143
v. Boston, 19 Pick. 174 4023
v. Carter, 34 Fed. 505 461
v. Chicago, etc., R. Co., 73 Iowa 179 273, 3775
v. Cotton, 48 N. H. 50 2483
v. Cunningham, 49 Misc. 108 3118
v. Davis, — Tex. Civ. App. —, 148 S. W. 1107 3193, 3230
v. Delaware, etc., R. Co., 80 N. J. L. 678 3934
v. Gibbs, 2 Jones 326 1606
v. Governor, 17 Ala. 206 1607, 1608
v. Hanford, 15 Abb. Pr. 342 590
v. Harrison, 91 N. Y. 83 4502, 4537, 4545
v. Holt, 65 Mo. App. 613 699
v. Hoyt, 6 Pick. 468 495, 1618
v. Hubbard, 3 Conn. 58 624, 2302, 2329, 2335
v. MacDonnell, 1 Y. & C. 500, 515 3028
v. Martin, 2 Wall. 70 20
v. Miller, 103 Ga. 712 1981
v. Mohl, 104 Minn. 404 2094, 2095, 2116, 2121, 2136
v. Moody, 25 Ark. 452 2151
v. Moody, 20 Pick. 474 556, 2152, 2156, 2157, 2159, 2874
v. New York, etc., R. Co., 30 Hun 47 1276
v. Northern Pac. R. Co., 58 Ore. 387 3365, 3537, 3538
v. Oriental Ins. Co., 7 Pick. 259 3032
v. Racich A. Mfg. Co., 137 App. Div. (N. Y.) 280 1728, 1729, 1732
v. Rochester R. Co., 156 N. Y. 244 4678, 4691
v. Rochester R. Co., 10 N. Y. Misc. 88 4714
v. Rogers, 101 Ala. 111 4212
v. St. John, 25 Hun 540 1611
v. Schwerin, 54 N. Y. 343 4759, 4761
v. Southern Pac. Co., 148 Fed. 986 5020
v. Stuart, 9 A. & E. 854 783
v. Tobin, 135 Mass. 69 1642
v. Todd, 79 Ga. 692 980
v. Western U. Tel. Co., 26 Utah 147 3549, 3565, 3604
v. White, 2 Metc. (Mass.) 283 76, 749, 752, 753, 755
v. Whitmore, 142 Mass. 399 2859
v. Wichita, 114 Fed. 297 832, 834, 866
v. Winkles, 139 Ga. 732 2094, 2097
Brooks O. Co. v. Weatherford, 91 Miss. 501 684
Brooks T. Mach. Co. v. Shields, 48 Tex. Civ. App. 531 531
v. Wells, 182 Mo. App. 50 2386
Brookshier v. McIlwrath, 112 Mo. App. 687 1784

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Broom v. Western U. Tel. Co., 71 S. C. 506 3556
Broome v. Speak, [1903] 1 Ch. 586 4392
v. United States, 15 How. 143 1586
Broquet v. Tripp, 36 Kan. 700 1512, 2447
Brosnan v. Sweetser, 127 Ind. 1 4733, 4739
Bross v. Cairo & V. R. Co., 9 Ill. App. 363 536
Brossard v. Morgan Co., 150 Wis. 1 1516, 4812
Brossman v. Drake Standard M. Works, 177 Ill. App. 323 1507, 4815
Brothers, The, 2 Biss. 104 4987
Brotherton v. Thompson, 11 Mo. 94 1709
Brotton v. Lunkley, 11 Wash. 581 2878, 2888
Brotzman's App., 133 Pa. 478 1078
Brough's Est., 71 Pa. 460 578
Broughel v. Southern New England Tel. Co., 72 Conn. 617 1501, 4870, 4906, 4948
Brought v. Cherokee Nation, 129 Fed. 192 1357, 3713
v. Duvall, 3 Call 61 2820
v. McGrew, 39 Fed. 672, 679 4529
v. Mitchell, 64 Ala. 210 1030, 1204
v. Saylor, 129 Ky. 180 2793, 2857
Brouncker v. Scott, 4 Taunt. 1 3303
Brounstein v. Sahlein, 65 Hun 365 4606
Brounty v. Daniels, 23 Nat. 162 1792
Brous v. Wabash R. Co., 160 Iowa 701 3893
Broussard v. Sabine, etc., R. Co., 80 Tex. 329 3896, 3897
Brouster v. Fox, 117 Mo. App. 711 435
Brower v. Lewis, 19 Barb. 574 2379
v. Life Ins. Co., 86 Fed. 748 1160, 1164
v. Merrill, 3 Pin. 46 3926
v. Western U. Tel. Co., 81 Kan. 109 152, 3594
Brown, Ex parte, 18 S. C. 87 1050
In re, 2 Story 502 677
In re, Ohio Ind. Comm. Bul., No. 11656, aff'd 92 Ohio St. 309 5189
Brown v. Adams, 35 Tex. 447 3118
v. Allen, 67 Ark. 386 4166
v. Allen, 57 Hun 219 2096
v. Allen, 73 Hun 291 2061, 2088
v. Allen, 88 Hun 401, aff'd 152 N. Y. 647 2134
v. Allen, 35 Iowa 306 1282, 3827, 4164, 4178, 4192, 4226, 4240
v. American Bonding Co. of Baltimore, 210 Fed. 844 2804
v. American F. Co., 31 Fed. 516 1163
v. Ames, 59 Minn. 476 1870
v. Arrott, 6 W. & S. 402 2905, 2906, 2907, 2910, 2937, 2958
v. Austin-W. Co., 111 Va. 209 2392
v. Ayer, 24 Ga. 288 2822
v. Baldwin, 121 Mo. 126 1728
v. Baltimore & O. R. Co., 6 D. C. App. Cas. 237 25
v. Bannister, 14 Hawaii 34 3662, 3663, 3666, 3676, 3686
v. Barkham, 1 P. Wms. 652 1246
v. Barnes, 39 Mich. 211 4526, 4534
v. Barrington, 36 Vt. 40 3233
v. Beatty, 35 Up. Can. Q. B. 328 65, 5003, 5006
v. Bellows, 4 Pick. 179 860, 918, 2221
v. Bigelow, 10 Allen 242 2388, 2406
v. Blaine, 41 Wash. 287 4711, 4735
Brown v. Blunt, 72 Me. 415 15, 4363
v. Board of Education, 29 Ill. App. 572 2546, 2561
v. Boorman, 11 Cl. & F. 1 356
v. Bowman, 119 Ga. 153 2589
v. Brabham, 3 Ohio 275 712
v. Bridges, 70 Tex. 661 4162, 4167
v. Brodhead, 3 Whart. 124 2157
v. Brooks, 3 Ind. 518 470
v. Brown, 124 Mo. 79 703, 2046
v. Buckingham, 11 Abb. Pr. 387 552
v. Burhans, 4 Hun 227 2370
v. Burley, 168 Ill. App. 114 3723
v. C. & O. R. Co., 135 Ky. 798 151, 152
v. Calumet River R. Co., 125 Ill. 600 4131
v. Cambridge, 3 Allen 474 426, 768, 773
v. Castles, 11 Cush. 348, 350 4376
v. Chadsey, 39 Barb. 253 4839, 4840, 4843
v. Chambers, 63 Tex. 131 2814
v. Chapman, 1 W. Bl. 427 4606
v. Chicago & A. R. Co., 80 Mo. 457 3905
v. Chicago, etc., R. Co., 64 Iowa 652 270, 4697, 4907
v. Chicago, etc., R. Co., 66 Neb. 106 3946
v. Chicago, etc., R. Co., 12 N. D. 61 1462, 1467
v. Chicago, etc., R. Co., 54 Wis. 342 54, 110, 133, 135, 136, 139, 183, 3449, 3450, 3452, 3457, 3461, 3463, 3471, 4678, 4684
v. Chicago, etc., R. Co., 102 Wis. 137 4851, 5118
v. City of Sigourney, 164 Iowa 184 4014
v. Clayton, 12 Ga. 564 2970, 2975
v. Corey, 43 Pa. 495 4133
v. Cory, 9 Kan. App. 702 998
v. Cowles, 72 Neb. 896 171, 295
v. Coxe, 75 Fed. 689 433
v. Crockett, 8 La. Ann. 30 4690, 4773
v. Cronise, 21 Cal. 386 675, 677
v. Crowley, 39 Ga. 376 556
v. Crown G. M. Co., 150 Cal. 376 699, 2460, 2469, 2547
v. Cummings, 7 Allen 507 115
v. Cunard S. Co., 147 Mass. 58 3422
v. Cunningham, 82 Iowa 512 1737, 3797
v. Curtis, 2 N. Y. 225 1111
v. Davidson, 42 Okla. 598 2393
v. Davies, 3 T. R. 80 1825
v. Dean, 123 Mass. 254 1486, 1490, 1491
v. Dickerson, 12 Pa. 372 1996, 2098, 2122
v. District of Columbia, 17 Ct. of Cls. 402 673
v. Doyle, 69 Minn. 543 1101, 1539, 2414
v. Dunckel, 46 Mich. 32 668
v. Dysinger, 1 Rawle 408 790, 792, 793, 801
v. East Carolina R. Co., 154 N. C. 300 235, 294, 2654
v. Edgington, 2 M. & G. 279 294, 2374, 2431, 2436
v. Electric L. Co., 138 N. C. 533 1348, 3826
v. Emerson, 18 Mo. 103 39
v. Erie R. Co., — N. J. L. —, 91 Atl. 1023 4919, 4927
v. Evans, 17 Fed. 912 1268, 1305, 1316, 4775, 4785
v. Feeter, 7 Wend. 301 631, 764
v. Ferguson, 2 Denio 196 820

[REFERENCES ARE TO PAGES]

Brown v. First Nat. Bank, 49 Colo. 393 1135, 4232
v. First Nat. Bank, 132 Fed. 450 560, 561, 2804
v. Floyd, 163 Ala. 317 3826
v. Foster, 1 App. Div. (N. Y.) 578 1495
v. Foster, 51 Pa. 165 50, 2598, 2626
v. Foster, 113 Mass. 136 2235
v. Franklin Mut. F. Ins. Co., 165 Mass. 565 3039
v. Galena M. & S. Co., 32 Kan. 528 1715
v. Gallaudet, 80 N. Y. 413 522
v. Galloway, Pet. C. C. 291 3699
v. Gardner, 4 Lea 157 970
v. Georgia, etc., R. Co., 119 Ga. 88 3442, 3444
v. Gilmore, 8 Me. 107 802, 804
v. Gise, 14 N. M. 282 1103
v. Gitchell, 11 Mass. 11 1558
v. Glascock, 1 Rob. (Va.) 461 1636
v. Globe P. Co., 213 Mo. 611 4508, 4512
v. Gooden, 16 Ind. 444 697
v. Gracy, D. & R. N. P. 41n 1879
v. Grady, 16 Wyo. 515 3694
v. Gray, 6 Jones 103 4372
v. Hadley, 43 Kan. 267 231, 2345
v. Hallett, 1 Caines 517 1556
v. Hancock, 13 Tex. 21 1800
v. Hannibal, etc., R. Co., 66 Mo. 588 3498
v. Hannibal, etc., R. Co., 99 Mo. 310 1373, 1378, 4660, 4664
v. Hardcastle, 63 Md. 484 958, 960
v. Hare, 3 H. & N. 484 2227
v. Haven, 37 Vt. 439 302, 310, 2745, 2790
v. Haynes, 52 Me. 578 4289, 4292
v. Hendrickson, 39 N. J. L. 239 580, 586, 588
v. Hiatts, 15 Wall. 177 1228
v. Hoburger, 52 Barb. 15 1460
v. Holton, 109 Ga. 431 4504
v. Honnis, 70 N. J. L. 260 1990
v. Hope, 17 Brit. Col. 220 2358, 2359, 2360
v. Horless, 22 Tex. 645 1540
v. Illius, 27 Conn. 84 3839
v. Independent Pub. Co., 48 Mont. 374 1366
v. Iowa Legion of Honor, 107 Iowa 439 693
v. Jackson, 1 Wash. C. C. 512 1904
v. Johnson, 45 Cal. 77 4326
v. Jones, 5 Nev. 374 305, 1722, 1727, 1744
v. Kansas City, etc., R. Co., 166 Mo. App. 255 126
v. Kennedy, 33 L. J. (Ch.) 71, 342 2489
v. Kimball, 12 Vt. 617 2524
v. King, 1 Bibb 462 422
v. Knapp, 79 N. Y. 136 1083
v. Knapp, 213 Mo. 655 4502, 4512, 4538, 4544
v. Kuecheloe, 3 Cold. 192 775
v. Lake, 29 Ohio St. 64 3823, 3825
v. Lally, 79 Minn. 38 684
v. Lattimore, 17 Cal. 93 1596, 2756
v. Laurens County, 38 S. C. 282 105
v. Laurie, 1 Low. Can. Rep. 343, 5 Low. Can. Rep. 65 2607
v. Leach, 107 Mass. 368 4381
v. Leath, 17 Tex. Civ. App. 262 3814, 4168, 4200
v. Leavitt, 31 N. Y. 113 1821
v. London, 9 C. B. (N. S.) 726 1560
v. McBride, 24 N. Y. Misc. 235 4628, 4646
Brown v. McCaul, 6 S. D. 16 2515
v. McCloud, 3 Head 280 3694
v. McCrie, 77 Kan. 230 3209
v. McGran, 14 Pet. 479, 10 L. ed. 550 2946, 2949
v. McLeish, 71 Iowa 381 1539
v. McRae, 17 Ont. 712 489, 3424
v. Manhattan R. Co., 105 App. Div. (N. Y.) 395 1384
v. Manter, 22 N. H. 468 1390, 3737
v. Marion Nat. Bank, 92 Ky. 607 1048
v. Marsh, 7 Vt. 320 773
v. Master, 104 Ala. 451 4604, 4606, 4611, 4615
v. Master, 111 Ala. 397 4620
v. Maulsby, 17 Ind. 10 971
v. Mauston, 1 Bul. Wis. Ind. Comm. No. 3 p. 97 5181
v. Mayor & Council of Wilmington, — Del. Super. Ct. —, 90 Atl. 44 4659
v. Mayor & Council of Wilmington, 4 Boyce (Del.) 492 4690, 4730, 4743
v. Mead, 68 Vt. 215 794
v. Memphis & C. R. Co., 5 Fed. 51, 7 Fed. 51 336, 3452, 3505, 3524
v. Merritt W. Organization, 83 Fed. 720 1250
v. Metz, 33 Ill. 339 2124
v. Miller, L. R. 7 Ex. 319 2275
v. Montgomery, 20 N. Y. 287 1869, 2383, 3685, 4278
v. Morrill, 55 N. Y. Misc. 224 4389, 4407, 4425
v. Morrill, 105 N. Y. Supp. 191 3204
v. Morris, 83 N. C. 221 524
v. Moseley, 11 Sm. & M. 354 603
v. Mostoller, — Iowa —, 149 N. W. 908 31, 34
v. Muller, L. R. 7 Ex. 319 317, 2231, 2232
v. Murdock, 140 Mass. 314 4211
v. Murphee, 31 Minn. 91 2376
v. Nagel, 21 Minn. 415 968
v. Nelms, 86 Ark. 368 3700, 3708, 3710, 3712
v. Nevitt, 27 Miss. 801 985
v. New Jersey, etc., R. Co., 76 N. J. L. 795 4133
v. Nickerson, 5 Gray 1 4534
v. Norcross, 59 N. J. Eq. 427 2046
v. North, 21 Mo. 528 1848
v. Northwestern R., 75 S. C. 20 3389, 3437
v. Odill, 104 Tenn. 250 3662, 3666, 3676, 3677
v. Olmsted, 50 Cal. 162 658, 698
v. Oregon-W. R. & N. Co., 63 Ore. 396 143, 4720
v. Orvis, 6 How. Pr. 376 4585
v. Osborne, 136 Ky. 456 735
v. Parker, 5 Blackf. 291 1655, 1660
v. Paxton, 19 Up. Can. Q. B. 426 1810
v. Penn, 1 McGloin 265 1595, 1627
v. Perkins, 1 Allen 89 435
v. Perkins, 1 Hare 564 762
v. Phillips, 3 Bush 656 539
v. Phipps, 6 Sm. & M. 51 1600
v. Phoenix Ins. Co., 4 Bin. 445 3010
v. Pierce, 97 Mass. 46 2395
v. Pierce County, 28 Wash. 345 3989
v. Pillow, 174 Fed. 967 4991
v. Pine Creek R. Co., 183 Pa. 38 769
v. Pittsburg, etc., R. Co., 29 Pa. Super. Ct. 131 2592
v. Pope, 27 Tex. Civ. App. 225 3791
v. Post, 6 Robert 111 2476
v. Postal Tel. Co., 111 N. C. 187 3551

[REFERENCES ARE TO PAGES]

Brown v. Power Co., 140 N. C. 333 3962, 3976, 4034, 4046
v. Providence & S. R. Co., 12 R. I. 238 1433, 4134
v. Providence, etc., R., 5 Gray 35 4023
v. Quincy Mut. F. Ins. Co., 105 Mass. 396 3029
v. Ralston, 4 Rand. 504 3286, 3294
v. Randall, 36 Conn. 56 4602
v. Rapid R. Co., 134 Mich. 591 3464
v. Rathburn, 10 Ore. 158 2805
v. Ray, 18 N. H. 102 2866
v. Republican Mountain S. Mines, 17 Colo. 421 2468, 2499
v. Roberts, 90 Minn. 314 1838
v. Robins, 4 Hurl. & N. 186 3916
v. Rogers, 76 S. C. 180 1074
v. Rogers, 80 S. C. 289 1051
v. Royal Ins. Co., 1 E. & E. 853 3065
v. St. Louis & S. R. Co., 127 Mo. App. 499 4769, 4773, 4929
v. St. Paul, etc., R. Co., 36 Minn. 236 2515
v. Samson, 8 New Zeal. L. R. 284 3117, 3155
v. Saul, 4 Esp. 267 790, 1884
v. Sax, 7 Cow. 95 362, 363, 3784, 4256
v. Sayles, 27 Vt. 227 2375, 2406, 2428
v. Scott, 91 Wis. 674 2471
v. Sharkey, 93 Iowa 157 2294
v. Shirk, 75 Ind. 266 735
v. Silsby, 10 N. H. 521 1221
v. Simons, 44 N. H. 475 572, 574, 790, 801
v. Smedley, 136 Mich. 65 1824
v. Smith, 1 N. H. 36 4362
v. Smith, 5 How. (Miss.) 387 2380, 2386, 2396
v. Smith, 12 Cush. 366 236, 376, 406, 4194
v. Smith, 83 Ill. 291 4634
v. Sneed, 77 Tex. 471 1596
v. South Joplin L. & Z. M. Co., 194 Mo. 681 4377, 4380
v. Southern Pac. R. Co., 7 Utah 288 4817
v. Spiegel, 156 Mich. 138 2793
v. Stanford, 22 Ark. 76 4347
v. Stapyleton, 4 Bing. 119 3035
v. Starke, 3 Dana 316 556
v. State, 23 Kan. 235 1648, 1649
v. State, 78 Ind. 239 1579
v. Steck, 2 Colo. 70 962
v. Sullivan, 71 Tex. 470 4658, 4664
v. Sunday Creek Co., 165 Fed. 504 417
v. Swineford, 44 Wis. 282 467, 1306, 1468, 4776
v. Syme, 16 Vict. L. R. 392 4549
v. Taylor, 115 Tenn. 1 2149, 2164, 2186
v. Thomas, 26 Miss. 335 4173
v. Thompson, 75 N. J. L. 832 1320
v. Title G. & S. Co., 232 Pa. 337 2757, 4018
v. Toell, 5 Rand. 543 979
v. Toronto General Hospital, 23 Ont. 599 3236, 3243, 3250
v. Trinidad Mfg. Co., 210 Mo. 260 2236, 2306
v. Turner, 7 T. R. 630 1825
v. Tuttle, 66 Barb. 169 533, 534
v. Tyler, 34 Tex. 168 1734
v. Union R. Co., 51 Mo. App. 192 1493
Brown v. Union S. & L. Ass'n, 28 Wash. 657 4285
v. United States, 152 Fed. 964 2754
v. Vannaman, 85 Wis. 451 4504, 4549
v. Vestal, 112 Ark. 608 2647, 2687
v. Virginia C. C. Co., 162 N. C. 83 3879, 3926
v. Vittur, 47 La. Ann. 607 4639
v. Wabash, etc., R. Co., 20 Mo. App. 222 101
v. Ware, 25 Me. 411 4174
v. Watson, 47 Me. 161 16, 3935
v. Weaver, 76 Miss. 7 1605
v. Weber, 38 N. Y. 187 2674
v. Webster City, 115 Iowa 511 3738, 3739, 3766
v. Weir, 95 App. Div. (N. Y.) 78 207, 318, 322, 3537
v. Welch, 26 Ind. 116 601
v. Weldon, 27 Mo. App. 251, 99 Mo. 564 1828, 2409, 2411
v. Werner, 40 Md. 15 213
v. Western U. Tel. Co., 6 Utah 219 3552, 3564, 3586
v. Western U. Tel. Co., 84 Tex. 54 3570
v. Western U. Tel. Co., 85 S. C. 495 3557
v. White, 202 Pa. 297 4736
v. Williams, 4 Wend. 360 780, 782
v. Windsor, 1 Cromp. & J. 29 3916
v. Woodliff, 89 Ga. 413 3882
v. Woods, 3 Cold. 182 2395, 2396, 2447, 4392, 4413
v. Worcester, 13 Gray 31 4065
v. Wyandotte County, 58 Kan. 672 1583
Brown B. Co., C. H. v. Baker, 99 Mo. App. 660 836
Brown Bag F. Mach. Co. v. Drohen, 175 Fed. 576 4452, 4460
Brown G. Co. v. Tuggle (Tex. Civ. App.), 141 S. W. 821 2230
Brown I. Co. v. Norwood (Tex. Civ. App.), 69 S. W. 253 893
Brown L. Co., In re, 181 Fed. 909 2509
v. Lehman, 134 Iowa 712 1483, 3164, 3170
Brown S. Co. v. Chattahoochee L. Co., 121 Ga. 809 3840, 3887
Brown's Est., 143 Cal. 450 1080
v. Stair, 25 Colo. App. 140 2925
Browne v. Lockhart, 10 Sim. 420, 424 786
v. Moore, 32 Mich. 254 1436, 1444, 2303
v. St. Paul P. Works, 62 Minn. 90 2219
v. Wolcott, 1 N. D. 415 2073
Brownell v. Chapman, 84 Iowa 504 2351, 2616, 2626, 2632, 2635
v. Davis, 15 Cal. 9 39, 1762
v. McEwen, 5 Denio 367 1482, 4967
v. Steere, 128 Ill. 209 1074
Brownfield v. Jones, 98 Ark. 495 2340, 2455
Browning v. El Paso L. Co. (Tex. Civ. App.), 140 S. W. 386 1106
v. Fies, 4 Ala. App. 580 80, 329, 333
v. Hamilton, 42 Ala. 484 2227
v. Hanford, 5 Hill 588 633
v. Jones, 52 Ill. App. 597 1311, 4974, 4976
v. McNear, 145 Cal. 272 2372
v. Morris, 2 Cow. 790 712
v. National Capital Bank, 13 App. Cas. (D. C.) 1 4373, 4384
v. Porter, 2 McCrary 581 1723
v. Powers (Mo.), 38 S. W. 943 4570

[REFERENCES ARE TO PAGES]

Browning v. Simons, 17 Ind. App. 45 176
v. Skillman, 24 N. J. L. 351 4173
v. Stillwell, 42 N. Y. Misc. 346 296, 2136, 2156, 2186, 2187
Browning, King & Co. v. Chamberlain, 210 N. Y. 270 796, 797, 825, 831
Brownlee v. Steel, Walk. (Miss.) 179 1085
Brownold v. Robdell, 130 App. Div. (N. Y.) 371 918
Brownson v. Wallace, 4 Blatchf. 465 1354
Broyhill v. Norton, 175 Mo. 190 3671, 3677
Broyles v. Prisock, 97 Ga. 643 1471, 4693
Broz v. Omaha Maternity & General Hospital Ass'n, 96 Neb. 648 1476, 1479, 4751, 4877
Brubaker v. Lebanon, 14 Pa. Dist. 585 3999
Bruce v. Beall, 99 Tenn. 303 1363, 1475. 4683, 4717
v. Cincinnati R. Co., 83 Ky. 174 4954
v. Coleman, 1 Handy 515 1690, 1704
v. Davenport, 36 Barb. 349 2902
v. Fiss, 26 N. Y. Misc. 472, 47 App. Div. (N. Y.) 273 2420
v. Hunter, 3 Camp. 467 1013
v. Jones, 1 H. & C. 769 3009
v. Rawlins, 3 Wills. 61 1397
v. Reed, 104 Pa. 408 4548, 4586
v. Soule, 69 Me. 566 4503
v. State, 11 Gill. & J. 382 1614
v. United States, 17 How. 437 1585, 1586
v. Welch, 52 Hun 524 3255
Bruck v. Feiner, 26 N. Y. Misc. 724 1711
Bruckshaw v. Chicago, etc., R. Co., — Iowa —, 155 N. W. 273 5067, 5088, 5093
Brudi v. Luhrman, 26 Ind. App. 221 4196
Bruen v. Marquand, 17 Johns. 58 770, 783
v. Ogden, 11 N. J. L. 370 4330
Brugh v. Shanks, 5 Leigh 598 1058
Brumble v. Brown, 71 N. C. 513 529
Brumby v. Smith, 3 Ala. 123 2608
Brundridge v. Whitecomb, 1 Chip. 180 2827
Brunell v. Cook, 13 Mont. 497 4315
Bruner's App., 57 Pa. 46 1121
Bruning v. New Orleans, etc., Co., 12 La. Ann. 541 16
Brunke v. Missouri & K. Tel. Co., 112 Mo. App. 623 4770, 4862
Brunn v. Kansas City, 216 Mo. 108 1046, 4151
v. Schuett, 59 Wis. 260 639, 642
Brunott v. McKee, 6 W. & S. 513 1601
Bruns v. Schreiber, 43 Minn. 468 2069, 2163
Brunsden v. Humphrey, 11 Q. B. Div. 712 403
v. Humphrey, 14 Q. B. Div. 141 372, 404
Brunson v. Lynde, 1 Root 354 4530
v. Martin, 17 Ark. 270 560
Brunston, The, 2 Hagg. Adm. 3 2723
Brunswick v. Harmer, 14 Q. B. 185 4515
v. Snow, 73 Me. 177 1038, 1617
Brunswick Co. v. Dart, 93 Ga. 747 2052
Brunswick G. Co. v. Spencer, 97 Ga. 764 1361, 3249
Brunswick L., etc., Co. v. Gale, 91 Ga. 813 1504
Brunswick & T. W. Dist. v. Maine W. Co., 99 Me. 371 4080
Brunswick & W. R. Co. v. Hardey, 112 Ga. 604 3919
v. Moore, 101 Pa. 684 3470
Brunswick, etc., R. Co. v. McLaren, 47 Ga. 546 1433, 4134
Brunswig v. White, 70 Tex. 504 4925
Brusch v. St. Paul City R. Co., 52 Minn. 512 1428
Brush E. L. & P. Co. v. Simonsohn, 107 Ga. 70 4665
Brush H. Mfg. Co. v. Abeles, 45 Pa. Super. Ct. 243 755
Brushaber v. Stegemann, 22 Mich. 266 1299, 1498, 4839
Bruske v. Neugent, 116 Wis. 488 4668
Bruton v. Gregory, 8 Ark. 177 1530
Bryan v. Abert, 3 D. C. App. Cas. 180 2502
v. Cowles, 152 N. C. 767 2469
v. Johnson, 39 Tex. 31 2204
v. McGuire, 3 Head 530 1279
v. Maume, 28 Cal. 238 826
v. Philpot, 3 Ired. 467 1829
v. Simpson, 92 Ga. 307 1779
v. United States, 1 Black 140 1582
v. Western U. Tel. Co., 133 N. C. 603 3557, 3622
v. Wharton Bank & Trust Co., — Tex. Civ. App. —, 174 S. W. 827 1806
Bryant v. American Tel. Co., 1 Daly 575 3379, 3553, 3585
v. Barton, 32 Neb. 613 291
v. Beebe & R. F. Co., 78 Neb. 155 55
v. Boothe, 30 Ala. 311 1995, 4418
v. Commonwealth Ins. Co., 13 Pick. 543 3010
v. Craig, 12 Ala. 354 1124
v. Crosby, 40 Me. 18 2388
v. Edson, 8 Vt. 325 1147
v. Everley, 22 Ky. L. Rep. 345 2007
v. Fairfield, 51 Me. 149 1545
v. Fissell, 84 N. J. L. 72 5186, 5187, 5188
v. Grady, 98 Me. 389 659, 662
v. Hambrick, 9 Ga. 133 1981
v. Isburgh, 13 Gray 607 2391
v. Merritt, 71 Kan. 272 8
v. Mosher, 96 Neb. 555 2056, 2085
v. Omaha, etc., R. & B. Co., 98 Iowa 483 4722
v. Proctor, 14 B. Mon. 451 748, 754
v. Rich, 106 Mass. 108 3467, 3512
v. Rich's Grill, 216 Mass. 344 773
v. Robinson, 97 Minn. 533 1458
v. Russell, 23 Pick. 508, 533 1222
v. Smith, 10 Cush. 169 643
v. Southwestern R. Co., 68 Ga. 805 3339
v. Stilwell, 24 Pa. 314 1414
v. Tidgewill, 133 Mass. 86 448
v. Ware, 30 Me. 295 360
v. Wilson, 71 Md. 440 2052
Bryson v. McCone, 121 Cal. 153 389, 2613
Bryton v. Marston, 33 Ill. App. 211 876, 881, 919
B. S. Green Co. v. Smith, 52 Ill. App. 158 2216
Bube v. Birmingham R., L. & P. Co., 140 Ala. 276 4772, 4781
Buccola v. Shreveport T. Co., 132 La. 106 4822
Buce v. Eldon, 122 Iowa 92 1471, 4747
Buchan v. Summer, 2 Barb. Ch. 165 3729
Buchanan v. Alwell, 8 Humph. 516 2212
v. Carpenter, 19 R. I. 337 4490
v. Clark, 10 Gratt. 164 2797
v. Cranford Co., 112 App. Div. (N. Y.) 278 4172
v. Drovers' Nat. Bank, 55 Fed. 223 1164

[REFERENCES ARE TO PAGES]

Buchanan v. Louisiana P. Exp. Co., 245 Mo. 337 858, 884
v. State, 106 Ind. 251 1643
v. Stout, 123 App. Div. (N. Y.) 648 343, 3821
v. West Jersey R. Co., 52 N. J. L. 265 4667
Buchegger v. Shultz, 13 Mich. 420 602, 1541
Buck v. Brady, 110 Md. 568 4665
v. Doyle, 4 Gill 478 644
v. Duvall, 9 Ga. App. 656 1990, 2042, 2043
v. Fisher, 4 Whart. 516 1067
v. Hermance, 1 Blatch. 398 4446, 4450
v. Hersey, 31 Me. 558 4532
v. Hutchins, 45 Minn. 270 2780
v. Kent, 3 Vt. 99 2897
v. Louisville & N. R. Co., 159 Ala. 305 3734, 3756
v. McKeesport, 223 Pa. 211 4721
v. Maddock, 167 Ill. 219 4905
v. Morrow, 2 Tex. Civ. App. 361 2876, 2886, 3206
v. Mutual B. & L. Ass'n, 49 Pa. Super. 128 739
v. People's St. R., etc., Co., 46 Mo. App. 555 4767, 4770
v. Pike, 27 Vt. 529 3155
v. Pond, 126 Wis. 382 2003
v. Remsen, 34 N. Y. 383 1680, 4284
v. Rhodes, 11 Iowa 348 1657, 1674
v. Rodgers, 39 Ind. 222 2614, 2635, 3236, 3245, 3253
v. Sanders, 1 Dana 187 2791
v. Wilson, 113 Pa. 423 385
v. Worcester, 48 Vt. 2 2465
Buckbee v. Third Ave. R. Co., 64 App. Div. (N. Y.) 360 4707
Buckels v. Cunningham, 6 Sm. & M. 358 1861, 2382
Buckhannan v. Gamble, Ga. Dec. 156 1530
Buckhannon, etc., R. Co. v. Great Scott, etc., Co., — W. Va. —, 83 S. E. 1031 3962, 3963, 3999, 4019, 4020, 4022, 4033, 4107, 4109, 4137
Buckholz v. New York, etc., R. Co., 148 N. Y. 640 3933
Buckhout v. New York, 82 App. Div. (N. Y.) 218 3947
v. Witwer, 157 Mich. 406 860
Bucki v. Atlantic L. Co., 57 C. C. A. 469, 121 Fed. 233 4644
v. McKinnon, 37 Fla. 391 2465
Bucki L. Co. v. Fidelity & D. Co., 109 Fed. 393 1689, 1694
Buckie v. Cone, 25 Fla. 1 449
Buckingham v. Harris, 10 Colo. 455 2500
v. Orr, 6 Colo. 587 962
v. Thompson (Tex. Civ. App.) 135 S. W. 652 4418
v. Thompson, — Tex. Civ. App. —, 147 S. W. 290 4389
Buckland v. Hall, 8 Ves. 92 3133
Buckle v. Knoop, L. R. 2 Ex. 125, 333 3289
Buckler v. Rogers, 6 Ky. L. Rep. 451 (Ky. Super. Ct.) 2861
Buckles v. Cunningham, 6 Sm. & M. 358 1826
v. Ellers, 72 Ind. 220 4959
v. Northern Bank of Kentucky, 63 Ill. 268 1520
Buckley, In re, 218 Mass. 354 5200
Buckley v. Artcher, 21 Barb. 585 4377
v. Bangor & A. R. Co., 113 Me. 164 3334
v. Buckley, 12 Nev. 423 47, 4311, 4328, 4331, 4342, 4347, 4356
Buckley v. Cunningham, 103 Ala. 449 3234
v. Dawson, 4 Ir. C. L. (N. S.) 211 284
v. Garrett, 47 Pa. 280 709
v. Holmes, 19 Ill. App. 530 2275
v. Kelly, 70 Conn. 411 1075
v. Knapp, 48 Mo. 152 1266, 1290, 1316, 4524, 4573
v. Van Diver, 70 Miss. 622 1705, 1707
Buckley's App., 48 Pa. 491 1935
Bucklin v. Beals, 38 Vt. 653 4302
Buckman v. Bergholz, 36 N. J. L. 531 2510
v. Davis, 28 Pa. 211 1244
v. Philadelphia & R. R. Co., 227 Pa. 277 4905
Buckmaster v. Grundy, 1 Scam. 310 1562
v. Grundy, 2 Ill. 310 1841, 1981
v. Grundy, 8 Ill. 626 1019, 3150
v. Smith, 22 Vt. 203 4289, 4292
Bucknam v. Goddard, 21 Pick. 70 2380
v. Great Northern R. Co., 76 Minn. 373 81
v. Greenleaf, 48 Me. 394 1483, 1486
v. Nash, 12 Me. 474 3918
Buckner v. Bogard (Ky. Super. Ct.), 8 Ky. L. Rep. 701 1778, 1795
v. Finley, 2 Pet. 587 807
v. State, 115 Ga. 238 4270
v. Terrell, 8 Ky. L. Rep. 701 (Ky. Super. Ct.) 1777
Buckry-Ellis v. Missouri Pac. R. Co., 158 Mo. App. 499 4699, 4717, 4801
Buckstaff v. Hicks, 94 Wis. 34 4508, 4523, 4525
Budd v. Crea, 6 N. J. L. 370 3681, 3686
v. Garrison, 45 Md. 420 1083
v. Multnomah St. R. Co., 15 Ore. 413 4245, 4283
v. United C. Co., 25 Ore. 314 148
v. Walker, 9 Barb. 493 3695
v. Zoller, 52 Mo. 238, 242 2502
Budd-Scott v. Daniell, [1902] 2 K. B. 351 3182
Buddin v. Fortunato, 16 Daly 195 3743
Buddington v. Shearer, 20 Pick. 477 443, 3938
Budget v. Binnington, 25 Q. B. Div. 320 2607
Budlong v. Cunningham, 11 Ill. App. 28 4392, 4394
Buel v. Chicago, etc., R. Co., 81 Neb. 430 1136
v. New York, etc., R. Co., 31 N. Y. 314 148
v. United R. Co., 248 Mo. 126 29
Buell v. Flower, 39 Conn. 462 509, 1411
v. Tate, 7 Blackf. 55 1845, 1956
Buelterman v. Meyer, 132 Mo. 474 2464
Buena Vista Co. v. McCandlish, 92 Va. 297 1499
Buenzle v. Newport Am. Ass'n, 29 R. I. 23 342
Buerk v. Imbaeuser, 14 Blatch. 19 4449, 4452, 4465, 4474, 4475
Buffalo, In re, 65 N. Y. Misc. 636 3964
v. Pratt, 131 N. Y. 293 3955, 4066
Buffalo B. W. Co. v. Phillips, 64 Wis. 338 2341
v. Phillips, 67 Wis. 129 2392
Buffalo Bayou Ship C. Co. v. Milby, 63 Tex. 492 125
Buffalo German Ins. Co. v. Title G. & T. Co., 51 N. Y. Misc. 267 2773, 2807
Buffalo Loan, T. & S. D. Co v. Medina G. & E. L. Co., 12 App. Div. (N. Y.) 199 1210

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Buffalo & H. T. Co. v. Buffalo, 58 N. Y. 639 1136
Buffalo, etc., R. Co. v. Brainard, 9 N. Y. 100 3946
v. Ferris, 26 Tex. 588 4119
Buffington v. Ulen, 7 Bush 231 2226
Buford v. Caldwell, 3 Mo. 477 4383
v. Gould, 35 Ala. 265 1101, 2405, 2415, 2421
v. Graden, 5 Ala. App. 421 1353, 2571
v. Hopewell, 140 Ky. 666 1312, 1323, 1499, 1506
v. McLuny, 1 N. & McC. 268 471
Bugden v. Bignold, 2 Y. & C. New Cas. 377 572
Buhl v. Fort St. U. D. Co., 98 Mich. 596 12
Buhrer v. Baldwin, 137 Mich. 263 1559
Buhrmaster v. Ainsworth, 90 Hun 563 3195
Buick M. C. Co. v. Reid Mfg. Co., 150 Mich. 118 2393
Building Ass'n v. Sutton, 35 Pa. 463 708
Building L. & W. Co. v. Fray, 96 Va. 559 2056, 2059, 2087
Building & L. Ass'n v. Griffin, 90 Tex. 480 1160, 1161
v. Logan, 66 Fed. 827 1160, 1164
Buist v. Guice, 96 Ala. 256 2275
Bulgaria, The. 83 Fed. 312 5003, 5007, 5010, 5011, 5012
Bulkeley v. Welch, 31 Conn. 339 539
Bulkley v. Dayton, 14 Johns. 387 770
v. Honold, 19 How. 390 2386
v. Smith, 1 Duer 643 1534
v. United States, 19 Wall. 37 293, 3269
Bull v. Allen, 19 Conn. 101 2820
v. Bank of Kasson, 123 U. S. 105 1891
v. Beiseker, 16 N. D. 290 2058
v. Bliss, 30 Vt. 127 2787
v. Bull, 43 Conn. 455 745, 814
v. Douglass, 4 Munf. 303 368
v. Gould, 34 Ind. 552 4782
v. Griswold, 19 Ill. 631 3791, 3804
v. Hepworth, 159 Mich. 662 757
v. Keenan, 100 Iowa 144 223
v. Ketchum, 2 Denio 188 1243, 1244, 1246
v. Rich, 92 Minn. 481 1093
v. Schuberth, 2 Md. 57 2545, 2547
v. Williard, 9 Barb. 641 2053
Bullard v. Bowers, 10 N. H. 500 3727, 3728
v. Briggs, 7 Pick. 533 2067
v. Eames, 219 Mass. 49 2256, 2263, 2269
v. Harkness, 83 Iowa 373 1728, 1735, 1744
v. Hascall, 25 Mich. 132 675
v. Leavell, 5 Call 531 509
v. New York, etc., R. Co., 178 Mass. 570 4146
v. Stone, 67 Cal. 477 2276
Bullen v. McGillicuddy, 2 Dana 90 761
Buller v. Harrison, 2 Cowp. 565 2993
Bullion's Est., 87 Neb. 700 1121
Bullis v. Chicago, 235 Ill. 472 2557
Bullitt v. Eastern Kentucky L. Co., 99 Ky. 324 2025, 2125
Bullock v. Adams, 20 N. J. Eq. 367, 374 2013
v. Baltimore & O. R. Co., 235 Pa. 417 3775
v. Boyd, 1 Hoff. Ch. 294 1187
v. Campbell, 9 Gill 182 2834
Bullock v. Charleston, etc., R. Co., 82 S. C. 375 3329, 3343, 3345
v. Cloyes, 4 Vt. 304 4520
v. Delaware, etc., R. Co., 61 N. J. L. 550 1281
v. Dommitt, 6 T. R. 650 3150
v. Ferguson, 30 Ala. 227 1225, 1721, 1730, 1734, 1741
v. Porter, 2 Boyce (Del.) 180 3773, 3780
v. Taylor, 39 Mich. 137 872, 1922
v. White Star S. Co., 30 Wash. 448 3450
Bulmier v. Erie R. Co., 34 N. J. L. 151 1330
Bulwinkle v. Cramer, 27 S. C. 376 767
Bummel v. Houston, 68 Tex. 10 2336
Bump v. Cooper, 19 Ore. 81 2411
v. Delaware, etc., R. Co., 157 App. Div. (N. Y.) 102 4652
v. Delaware, etc., R. Co., 145 App. Div. (N. Y.) 102 4806
Bumpass v. Well, 3 Ala. 109 1354
Bumpus v. Platner, 1 Johns. Ch. 213 555, 2211
Bunce v. Bunce, 65 Iowa 106 1653
Bunch v. Potts, 57 Ark. 257 41, 2275, 2359
v. Weil, 72 Ark. 343 2370, 2391
Bunck v. McAulay, 84 Wash. 473 4393
Bundy v. Maginess, 76 Cal. 532 1305
Bunel v. O'Day, 125 Fed. 303 759
Bungenstock v. Nishnabotna D. Dist., 163 Mo. 198 42, 3878
Bunham v. Upton, 174 Mass. 408 2503
Bunke v. New York Tel. Co., 110 App. Div. (N. Y.) 241, aff'd 188 N. Y. 600 3746
v. New York Tel. Co., 110 App. Div. (N. Y.) 241, 46 N. Y. Misc. 97 3747
Bunker v. Barron, 79 Me. 62 659, 661
v. Hanson, 99 Minn. 426 371
v. Hudson, 122 Wis. 43 3768
v. Langs, 76 Hun 543 1874
Bunn v. Hoyt, 3 Johns. 255 1486
v. Keach, 214 Ill. 259 2512
v. Kinney, 15 Ohio St. 40 988, 1000
Bunnell v. Greathead, 49 Barb. 106 502, 4976
Bunney v. Hopkinson, 1 L. T. (N. S.) 53 294
Bunny v. Hopkinson, 27 Beav. 565 2106
Bunscombe v. Scarborough, 6 Q. B. 13 1572
Bunstead v. Divident Mut. Ins. Co., 12 N. Y. 81 3021
Bunte v. Schumann, 46 N. Y. Misc. 593 791, 1452
Bunting's Est., 14 Pa. Dist. 7 1079
Bunyard v. Farman, 176 Mo. App. 89 2502
Bunyon v. Bordine, 14 N. J. L. 472 3935
Burbank v. Gould, 15 Me. 118 2068
v. Pillsbury, 48 N. H. 475 2147, 2186
Burburde v. St. Joseph, 130 Mo. App. 453 4126
Burby v. Roome, 7 Misc. (N. Y.) 167 2972
Burch v. Bernard, 107 Minn. 210 1315, 4508, 4524
v. De Rivera, 53 Hun 367 2753
v. Southern Pac. Co., 32 Nev. 75 4793, 4801
v. Southern Pac. Co., 145 Fed. 443 1493
v. State, 4 Gill & J. 444 1637
Burcham v. Griffeth, 31 Neb. 778 2226
Burchard v. Frazer, 23 Mich. 224 631, 668
Burchett v. Herald, 98 Ky. 530 1398

[REFERENCES ARE TO PAGES]

Burchfield v. Haffey, 34 Kan. 42 1038, 1570, 1575
Burchinell v. Butters, 7 Colo. App. 294 4169
Burckhalter v. Coward, 16 S. C. 435 4525, 4569
Burckhardt v. Burckhardt, 36 Ohio St. 261 2322, 2323
v. Burckhardt, 42 Ohio St. 474 173, 255, 2323
Burdall v. Johnson, 122 Mo. App. 119 257
Burdell v. Denig, 92 U. S. 761 4439, 4443, 4453, 4455
Burdet v. Hopegood, 1 P. Wms. 486 28
Burdett v. Estey, 19 Blatch. 1 4455, 4457, 4460, 4476
v. Lowe, 85 N. Y. 241 1786
v. Withers, 7 Ad. & E. 136 3152
Burdge v. Kelchner, 66 Kan. 642 371
Burdick v. Chicago, etc., R. Co., 81 Iowa 384 1138, 3774
v. Garrick, L. R. 5 Ch. 233 1127
v. Green, 15 Johns. 247 670
v. Seymour, 39 Iowa 452 4421
v. Valerius, 172 Ill. App. 267 1439, 1440
v. Weeden, 9 R. I. 139 1499
Buren v. Hubbell, 54 Mo. App. 617 2151, 2152, 2174, 2177
Burfeindt v. New York City R. Co. (App. Div.), 101 N. Y. Supp. 589 3528
Burford v. Memphis B. Co., 9 Heisk. 691 612
Burge v. Cedar Rapids, etc., R. Co., 32 Iowa 101 2018
v. Hinds, 46 Tex. Civ. App. 134 4319
Burgen v. Sharer, 14 B. Mon. 497 1728
Burger v. Northern Pac. R. Co., 22 Minn. 343 1457
v. Omaha, etc., St. R. Co., 139 Iowa 645 147
v. State Female Normal School, 114 Va. 491 4038, 4049, 4051
Burgess v. Abbott, 6 Hill 135 424
v. Alliance Ins. Co., 10 Allen 221 3048, 3056
v. Dable, 149 Mass. 256 1771
v. Denison P. Mfg. Co., 79 Me. 266 763
v. Felix, 42 Okla. 193 2410
v. Gun, 3 Har. & J. 225 3286
v. Langley, 5 M. & G. 722 1482
v. Love, L. R. 13 Eq. 450 2771
v. Patterson, 139 Ky. 547 449, 4502, 4548
v. Southbridge Sav. Bank, 2 Fed. 500 962
Burgett v. Bissell, 14 Barb. 638 2032
v. Burgett, 43 Ind. 78 4647
v. Paxton, 15 Ill. App. 379 1762
Burgher v. Burgher, 12 Ky. L. Rep. 95 (Ky. Super. Ct.) 1071
Burgie v. Hicks, 203 Fed. 340 384, 2276, 2289
Burgin v. Richmond & D. R. Co., 115 N. C. 673 138
Burgoon v. Johnson, 194 Pa. 61 838
Burhans v. Tibbitts, 7 How. Pr. 21 1491
Burho v. Minneapolis & St. L. Co., 121 Minn. 326 4652, 4669, 4806
Burhorn v. Lockwood, 71 App. Div. (N. Y.) 301 4244
Burk v. Arcata & M. R. R. Co., 125 Cal. 364 4852, 4870, 4944, 4945, 5118
v. Chrisman, 3 B. Mon. 50 572
v. Clements, 16 Ind. 132 556, 2115, 2116, 2157
v. Creamery P. Mfg. Co., 126 Iowa 730 99, 152
Burk v. Hill, 48 Ind. 52 2148
v. Howley, 179 Pa. 539 434
v. Serrill, 80 Pa. 413 1994
Burk's App., 75 Pa. 141 2047
Burke v. Baker, 111 App. Div. (N. Y.) 422 2490
v. Beveridge, 15 Minn. 205 2067, 2087
v. Carruthers, 31 Cal. 467 1050
v. Claughton, 12 D. C. App. Cas. 182 1016
v. Cork & M. R. Co., 13 Irish L. T. Rep. 171, 10 Cent. L. J. 48 (1879) 3643
v. Dunbar, 128 Mass. 499 2612
v. Dunn, 55 Ill. App. 25 884
v. Ellis, 105 Tenn. 702 4737
v. Graham, 106 App. Div. (N. Y.) 108 4325
v. Koch, 75 Cal. 356 1357
v. Louisville & N. R. Co., 7 Heisk. 456 4171
v. Melvin, 45 Conn. 243 460, 4783
v. Miller, 6 Blackf. 155 4530
v. Milwaukee, etc., R. Co., 83 Wis. 410 4383
v. Nichols, 1 Abb. Ct. of App. 260 2059
v. Pierce, 83 Fed. 95 3165
v. St. Louis S. R. Co., 120 Mo. App. 683 3527
v. Sanitary Dist. of Chicago, 152 Ill. 125 4050
v. Savage, 13 Allen 408 4173
v. Shannon (Ky.) 43 S. W. 223 2227
v. Smith, 69 Mich. 380 14
v. Smith, 111 Md. 624 1849
v. South Eastern R. Co., 5 C. P. Div. 1 3415
v. State, 71 Ala. 377 1279
v. Trabue, 137 Ky. 580 2094
Burke Hollow C. Co. v. Lawson, 151 Ky. 305 3788
Burkes v. Hubbard, 69 Ala. 379 4240
Burkett v. Griffith, 90 Cal. 532 4563, 4565, 4566
v. Insurance Co., 105 Tenn. 548 3067
Burkhardt v. Burkhardt, 36 Ohio St. 261 554
v. Press Pub. Co., 130 App. Div. (N. Y.) 22 4544
Burkhart v. Jennings, 2 W. Va. 242 4605
v. Sappington, 1 G. Greene 66 962, 968
Burkhiser v. Lyons, — Tex. Civ. App. —, 167 S. W. 244 471, 4572
Burkholder v. Farmers' Bank, 22 Ky. L. Rep. 2449 2061
Burkle v. Ells, 4 How. Pr. 288 3383
Burks v. Albert, 4 J. J. Marsh. 97 717, 722, 741
v. Hubbard, 69 Ala. 379 4218
v. Shain, 2 Bibb 341 3662
Burland v. Montreal, 33 Can. Sup. Ct. 373 3758
v. Nash, 2 F. & F. 687 738
Burlee D. D. Co. v. Besse, 130 Fed. 444 623
Burleigh v. Hines, 124 Iowa 199 4169, 4202
v. St. Louis T. Co., 124 Mo. App. 724 109
Burles v. Oregon Short Line R. Co., 49 Mont. 129 55, 1279
Burley v. Menefee, 129 Mo. App. 518 467, 4794
v. Old Colony R. Co., 219 Mass. 483 4135, 4136, 4137
Burley T. Soc. v. Gillaspy, 51 Ind. App. 583 863
Burlingame v. Burlingame, 7 Cow. 92 1958

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v. Central R., 23 Fed. 706 1485
Burlington, The, 73 Fed. 258 2716, 2732, 2734, 2735
Burlington Ins. Co. v. Johnson, 120 Ill. 622 2758
Burlington Mutual L. Ass'n v. Heider, 55 Iowa 424 979
Burlington & M. R. Co. v. Beebe, 14 Neb. 463 1431
v. Schluntz, 14 Neb. 421 1431
Burlington, etc., R. Co. v. Chicago L. Co., 15 Neb. 390 3281, 3309, 3310
v. Johnson, 38 Kan. 142 4087
v. Thompson, 31 Kan. 180 4953
Burmester v. Hodgson, 2 Camp. 488 3305, 3306
Burn v. Chicago, etc., R. Co., 153 Ill. App. 319 3464
v. Morris, 2 Cromp. & M. 579 480, 4201
Burn Line v. United States, etc., Co., 162 Fed. 298 3286
Burnan v. Rodocanachi, L. R. 7 App. Cas. 333 3006
Burnap v. Wight, 14 Ill. 301 162, 182, 1713
Burnby v. Bollett, 16 M. & W. 644 2377
Burnett v. Atlantic C. L. R. Co., 132 N. C. 261 149
v. Caldwell, 9 Wall. 290 2000
v. Great Northern R. Co., 76 Minn. 461 3799, 3802
v. Harwell, 3 Leigh 89 1636
v. Nicholson, 86 N. C. 99 391
v. Simpkins, 24 Ill. 264 502, 3681, 3686, 4529
v. Sledge, 129 N. C. 114 703, 725
v. Smith, 4 Gray 50 534, 566
v. Stark, 155 Iowa 588 1728
v. Wells, 12 Mod. 420 4532
Burnett C. Co. v. Art W. P. Co., 164 Ala. 547 536, 2679
Burney v. Pledger, 3 Rich. 191 4218, 4240
Burnham v. Allen, 1 Gray 496 1824
v. Best, 10 B. Mon. 227 3096, 3097, 3147
v. Collateral L. Co., 179 Mass. 268 4648
v. Detroit, etc., R. Co., 168 Mich. 55 3474, 3485
v. Lawson, 118 App. Div. (N. Y.) 389 4243
v. Marshall, 56 Vt. 365 4263
v. Meredith, 3 Neb. (Unof.) 287 289
v. Meredith (Neb.) 91 N. W. 553 2580
v. Roberts, 70 Ill. 19 2276
v. Upton, 174 Mass. 408 2511
v. Webster, 54 N. Y. Super. Ct. 30 4837
Burnhisel v. Firman, 22 Wall. 170 959, 1000, 1877
Burnley v. Shinn, 80 Wash. 240 2393
Burns, In re, 218 Mass. 8 5190, 5193, 5194, 5206
Burns v. Alabama & V. R. Co., 93 Miss. 816 3506, 3528
v. Anderson, 68 Ind. 202 959
v. Anderson, 68 Ind. 181 1194
v. Campbell, 71 Ala. 271 1329, 4164, 4165, 4167, 4168, 4173
v. Dockray, 156 Mass. 135 3685
v. Follansbee, 29 Ill. App. 41 1762
v. Furby, 4 New Zeal. L. R. (Sup. Ct.) 110 2684
v. George, 119 Ala. 504 1600, 1610
v. Grand Rapids R. Co., 113 Ind. 169 4852
Burns v. Horkan, 126 Ga. 161 432
v. Jones, 211 Mass. 475 4668
v. Limerick, 178 Mo. App. 145 2387
v. Mahannah, 39 Kan. 87 4400
v. National Mining, Tunnel & Land Co., 23 Colo. App. 545 674
v. Parish, 3 B. Mon. 8 2832, 2833, 2844
v. Pennsylvania R. Co., 219 Pa. 225 4871, 4874, 4878, 4909
v. Pennsylvania R. Co., 233 Pa. 304 48
v. Pennsylvania R. Co., 239 Pa. 207 48
v. Reynoldsville, 48 Pa. Super. Ct. 122 4032, 4107, 4124, 4152
v. School Dist., 61 Neb. 351 4054
v. Shoemaker, 172 Ill. App. 290 1442, 4239
v. Smith, 180 Pa. 606 659
v. True, 5 Tex. Civ. App. 74 786, 795
v. Vereen, 132 Ga. 349 2094
v. Yonkers, 83 Hun 211 104
Burnswig v. White, 70 Tex. 504 4923
Burnwell Coal Co. v. Setzer, — Ala. —, 67 So. 604 4867
Burpee v. Holmes, 132 Ga. 464 2380
v. Sparhawk, 97 Mass. 342 4392
Burr v. Beacon T. Co., 188 Mass. 131 2513
v. Boyer, 2 Neb. 265 2813, 2816
v. Brown, 5 W. Va. 241 2333
v. Burch, 5 Cranch C. C. 506 1199
v. Commonwealth, 212 Mass. 534 1221
v. Gilson, 3 M. & W. 390 2373
v. McCallum, 59 Neb. 326 4311
v. Redhead, 52 Neb. 617 2415, 2423
v. Sickles, 17 Ark. 428 623
v. Stenton, 43 N. Y. 462 3182
v. Todd, 41 Pa. 206 860, 899, 1959, 1989, 1996, 2008
v. Waterman, 2 Cow. 36n 1403
v. Wilcox, 22 N. Y. 551 1077
v. Williams, 23 Ark. 244 2218
v. Woodrow, 1 Bush 692 3715
Burr's D. T. Works v. Peninsular T. Mfg. Co., 142 Mich. 417 763, 4533
Burr's Ferry, etc., R. Co. v. Allen (Tex. Civ. App.), 149 S. W. 358 3890
Burr's Ferry, B. & C. Ry. Co. v. Allen, — Tex. Civ. App. —, 164 S. W. 878 1436, 4160, 4177
Burrage v. Boston, 198 Mass. 580 4150
v. Melson, 48 Miss. 237 4318
v. Milson, 18 Miss. 237 1269
Burrall v. Acker, 23 Wend. 606 1763
v. DeGroot, 5 Duer 379 1874
Burrell v. City of New York, 164 App. Div. (N. Y.) 245 4142
v. Fleming, 47 C. C. A. 598, 109 Fed. 489 4953
v. Greenville, 133 Mich. 235 107
v. New York, etc., S. Co., 14 Mich. 34 50, 245, 284, 375, 409, 1363, 1365, 2696, 2712, 3941
Burrill v. Cleeman, 17 Johns. 72 3299
v. Crossman, 69 Fed. 747, 752 3302
v. Daggett, 77 Me. 545 861, 923
v. Phillips, 1 Gall. 360 2956
v. Stevens, 73 Me. 395 4377
Burritt v. Belfy, 47 Conn. 322 388
Burrough v. Abel, 105 Fed. 366 1005, 1134
Burroughs v. Clancey, 53 Ill. 30 537, 547
v. Joint School Dist. No. 2, 155 Wis. 426 2663
v. Jones, 79 Miss. 214 1717
v. Lott, 19 Cal. 125 2864
v. Morse, 48 Mich. 520 2515, 2516
v. Selleck, 185 Ill. App. 446 532, 554, 559, 4391

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Burrow v. Terre Haute & L. R. Co., 107 Ind. 432 769
Burrows v. Bangs, 34 Mich. 304 656, 658, 664
v. Bank, 6 Humph. 440 2820
v. Cook, 17 Iowa 436 712, 740
v. Hannegan, 1 McLean 315 1151
v. London G. O. Co., 10 L. T. Rep. 298 1497
v. Lownsdale, 133 Fed. 250 1054, 1093, 5013
v. Marsh G. Co., L. R. 5 Ex. 67 67, 152
v. Stryker, 47 Iowa 477 1208
Burrus v. Gordon, 57 Miss. 93 752
v. Life Ins. Co., 124 N. C. 9 3084
v. Nevada-California-Oregon Ry., — Nev. —, 145 Pac. 926 3480, 3502, 3526
Burruss v. Hines, 94 Va. 413 223, 231, 1281
Burson v. Cox, 6 Baxter 360 1390
v. Fire Ass'n, 136 Pa. 267 3047, 3063
Bursow v. Doerr, 96 Neb. 219 4613
Burstein v. Sullivan, 134 App. Div. (N. Y.) 623 684
Burt v. Advertiser N. Co., 154 Mass. 238 4563, 4587, 4597
v. Bowles, 69 Ind. 1 4378
v. Burt, 41 Mich. 82 4352
v. Butterworth, 19 R. I. 127 717, 2749
v. Delano, 4 Cliff. 618 1038
v. Dewey, 31 Barb. 540 2395
v. Dewey, 40 N. Y. 283 2380, 2395, 2396
v. Dutcher, 34 N. Y. 493 4246
v. Garden City S. Co., 237 Ill. 473 553, 564
v. McBain, 29 Mich. 260 4511, 4589
v. Merchants' Ins. Co., 115 Mass. 1 3146, 4091
v. Smith, 181 N. Y. 1 4609, 4635, 4639
v. Wigglesworth, 117 Mass. 302 3146, 4033, 4091
Burtch v. Nickerson, 17 Johns. 217 4503, 4532
Burtis v. Thompson, 42 N. Y. 246 2231, 2255
Burton v. Anderson, 1 Tex. 93 1179, 1184, 1523, 1878, 1879, 1881
v. Brooks, 25 Ark. 215 1887
v. Dangerfield, 141 Ala. 285 1607, 4176
v. Decker, 54 Kan. 608 2755
v. Gee O. Co., 173 Ill. App. 548 542
v. Hansford, 10 W. Va. 470 2779
v. Henry, 90 Ala. 281 120, 224
v. Houston, 45 Tex. Civ. App. 363 4119
v. Hughes, 9 Moore 339 4173
v. Kansas City, 181 Mo. App. 427 4881
v. Knapp, 14 Iowa 196 1685
v. March, 6 Jones 409 4520, 4528, 4530, 4572
v. Miller, 227 Pa. 143 2283
v. Pinkerton, L. R. 2 Ex. 340 115, 2528
v. Platter, 53 Fed. 901 4326
v. Randall, 4 Kan. App. 593 4286
v. Reeds, 20 Ind. 87 2087, 2088, 2098
v. St. Paul, etc., R. Co., 33 Minn. 189 4606, 4636
v. Slaughter, 26 Gratt. 920 2838
v. Smith, 49 Ala. 293 1704
Burton v. Stewart, 3 Wend. 236 518, 533, 569, 1838
v. Tannehill, 6 Blackf. 470 4208
v. Todd, 1 Swanst. 255 2031
v. Wilmington, etc., R. Co., 82 N. C. 504 4875, 4906
v. Young, 5 Harr. (Del.) 233 2406
Burton L. Co. v. Houston, 45 Tex. Civ. App. 363 4108, 4124, 4141
Burtraw v. Clark, 103 Mich. 383, 107 Mich. 333 3766, 3767, 3770
Burvant v. Wolfe, 126 La. 787 1519, 4863
Burwash v. Ballou, 230 Ill. 34 2454
Burwell v. Jackson, 9 N. Y. 535 1953, 1989, 2052
Busbee v. Gagnon Co., 50 Mont. 203 41
Busby v. Caraac, 4 Wash. C. C. 296 1878
v. Treadwell, 24 Ark. 456 2212
Busch v. Brown (Tex. Civ. App.), 152 S. W. 683 305
v. Interborough R. T. Co., 187 N. Y. 388 3439
v. Jones, 16 (D. C.) App. Cas. 23, 43 4445, 4456
v. Robinson, 46 Ore. 539 4652, 4749
Buschman v. Codd, 52 Md. 202, 209 4408
Buse v. First State Bank, 105 Minn. 323 1823
Busell Trimmer Co. v. Coburn, 188 Mass. 254 307, 2555, 2562
Bush v. Abraham, 25 Ore. 336 626, 746, 747
v. Baldrey, 11 Allen 367 617, 631
v. Baltimore & C. C. Co., 88 Md. 665 2697
v. Bank, 111 Ga. 664 978
v. Brooks, 70 Mich. 446 2655
v. Canfield, 2 Conn. 485 291, 1891, 2299
v. Chapman, 2 Greene 549 2708
v. Cole, 28 N. Y. 261 354, 1989
v. Finucane, 8 Colo. 192 2671, 2682
v. Haeussler, 31 Mo. App. 47 2890
v. Hibbard, 24 Barb. 292 2329
v. Holmes, 53 Me. 417 368, 1985, 2275, 2309
v. Independent M. Co., 54 Wash. 212 58
v. Johnson County, 48 Neb. 1 1578, 1584, 1586, 1591
v. Jones, 2 Tenn. Cas. 224 2597
v. Kirkbride, 131 Ala. 405 1717, 1731
v. Marshall, 6 How. Pr. 284 2194
v. Prosser, 11 N. Y. 347 470, 471, 473, 506, 4580, 4583, 4585, 4587
v. Sprout, 43 Ark. 416 696
v. Western U. Tel. Co., 93 S. C. 176 3636
Bush's Est., In re, 89 Neb. 334 1121
Bushby v. Camac, 4 Wash. C. C. 296 1146, 1179
Bushnell v. Bushnell, 77 Wis. 435 2836, 2853, 2864
v. King B. Co., 140 Iowa 405 2340
v. Metz, 18 Ill. App. 84 4829
v. Wabash R. Co., 118 Mo. App. 618 3334
Bushong v. Alderson (Tex. Civ. App.), 143 S. W. 200 1322, 1537
v. Taylor, 84 Mo. 660 1020
Buson v. Elliot, 1 Del. Ch. 368 1078
Buss v. Allison W. G. Co., 146 Mo. App. 71 534, 2455
Bussard v. Hibler, 42 Ore. 500 1363, 2274

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v. Charleston & W. C. R. Co., 78 S. C. 352 4913
v. Excelsior Co., 1 McCrary 161 4439
Bussier v. Chew, 5 Phila. 70 2767
Bussman v. Ganster, 72 Pa. 285 3140, 3143, 3165
v. Western T. Co., 9 N. Y. Misc. 410 2439
Bussy v. Donaldson, 4 Dall. 206 47
Bustamente v. Stewart, 55 Cal. 115 43, 1728
Buster v. Holland, 27 W. Va. 510 710
Buston v. Pennsylvania R. Co., 16 Fed. 235 3317
Bustonaby v. Revardel, 71 N. Y. Misc. 207 899
Butch v. Welburn, 67 Mich. 387 2043
Butcher v. Churchill, 14 Ves. 567 2837
v. Norwood, 1 H. & J. 485 1252
v. Peterson, 26 W. Va. 447 2098, 2112
v. Porter, Carth 243 4348
v. Porter, Shower 400 4348
Butcher S. Works v. Atkinson, 68 Ill. 421 2465, 2517, 2548
Butchers' S. & M. Ass'n v. Commonwealth, 163 Mass. 386 4031
v. Commonwealth, 169 Mass. 103 4110, 4112, 4115
Butchers' & D.'s Bank v. Brown, 1 N. Y. Leg. Obs. 149 732
Butler v. Ashworth, 110 Cal. 614 425
v. Austin, 64 Cal. 3 1110
v. Baker, 5 Ohio St. 484 2309, 2328
v. Baker, 17 R. I. 582 2503, 2511
v. Bangor, 67 Me. 385 4794
v. Barnes, 61 Conn. 399 2111, 2136, 2143, 2146
v. Barret, 130 Fed. 944 4537, 4538, 4544, 4574, 4597
v. Butler, 9 W. Va. 674 2836
v. Butler, 10 R. I. 501 1017
v. Cheatham, 8 Bush 594 3716
v. Collins, 12 Cal. 457 4178, 4227
v. Cushing, 46 Hun 521 3241
v. Dorman, 68 Mo. 298 684
v. East St. Louis, 74 Ill. 649 4108
v. Eschleman, 18 Ill. 44 3681, 3682, 3686
v. Every Evening P. Co., 140 Fed. 934 4508, 4548
v. Gale, 27 Vt. 730 2181
v. Gazette Co., 119 App. Div. (N. Y.) 767 4510, 4544, 4598, 4599
v. Hoboken P. & P. Co., 73 N. J. L. 45 1492, 4537, 4538, 4552
v. Kent, 19 Johns. 223 158, 1364
v. Kent, 152 Ala. 594 2473, 2481
v. Kirby, 53 Wis. 188 1078
v. Ladue, 12 Mich. 173 2835
v. Manchester, etc., R. Co., 21 Q. B. Div. 207 3449
v. Manhattan R. Co., 143 N. Y. 417 209, 266, 4684, 4756, 4763
v. Mehrling, 15 Ill. 488 1421, 1664, 4314
v. Mercer, 14 Ind. 479 1305
v. Metropolitan St. R. Co., 117 Mo. App. 354 4737
v. Meyer, 17 Ind. 77 1147, 1878
v. Moore, 68 Ga. 780 238, 2444
v. Niles, 26 How. Pr. 61, 35 How. Pr. 329 588
v. Paine, 8 Minn. 324 1887
v. Rockwell, 17 Colo. 290 1048
Butler v. Sewer Com'rs, 39 N. J. L. 665 4147
v. State, 20 Ind. 169 1614
v. Stockdale, 19 Pa. Super. Ct. 98 4836
v. Stoullit, 8 Moore 472 1052
v. Tufts, 13 Me. 302 2380
v. Wallbaum S. & M. Co., 47 Ill. App. 153 841
v. Western U. Tel. Co., 77 S. C. 148 3637
v. Wigge, 1 Saund. 65 1558, 1561
v. Wildman, 3 B. & Ald. 402 3034
v. Winona M. Co., 28 Minn. 205 2459
v. Wright, 2 Wend. 369 372
Butler-H. Co. v. Virginia R. Co., 113 Va. 28 1032
Butler H. R. Co. v. Newark, 61 N. J. L. 32 3967, 4016
Butler-R. Co. v. Williams, 84 Minn. 447 162
Butman v. Howell, 144 Mass. 66 660
v. Hussey, 12 Me. 407 3846
Butner v. Bowser, 104 Ind. 255 583
v. Western U. Tel. Co., 2 Okla. 234 3609, 3642, 4686
v. Western U. Tel. Co., 77 S. C. 148 3655
Butt v. Gould, 34 Ind. 552 463
v. Riffe, 78 Ky. 352 2095, 2148, 2150
Butte County v. Boydston, 64 Cal. 110 4025
Butte E. R. Co. v. Jones, 90 C. C. A. 240, 164 Fed. 308 4902, 4903, 4904
v. Mathews, 34 Mont. 487 1538, 3986
Butterfield v. Byron, 153 Mass. 517 2611
v. Forrester, 11 East 60 161
v. Kirtley, 115 Iowa 207 3098, 3099
v. Stephens, 59 Iowa 596 2950
Butters v. Olds, 11 Iowa 1 1152, 1158, 1164, 1878
Butterworth v. Western Assur. Co., 132 Mass. 489 3020
Buttigieg v. Booker, 9 C. B. 689 763
Buttner v. New York, 110 App. Div. (N. Y.) 549 1500
Button v. Kinnetz, 88 Hun 35 1093, 3119, 3148
v. McCauley, 5 Ab. Pr. (N. S.) 29 3686
v. McCauley, 38 Barb. 413 3687
v. Russell, 55 Mich. 478 2576
Buttron v. Bridell, 228 Mo. 622 151, 1491, 1532
Butts v. Andrews, 136 Mass. 221 1953
v. Cleveland, etc., R. Co., 110 Fed. 329 162
v. Dean, 2 Metc. (Mass.) 76 660
v. Edwards, 2 Denio 164 4303
v. Long, 94 Mo. 687, 692 436
v. National Exch. Bank, 99 Mo. App. 168 4665
v. Phelps, 79 Mo. 302 2925
v. Ruby, 85 Mo. App. 405 2502
v. Whitney, 96 Ga. 445 626
v. Woods, 4 N. M. 343 1666
Buxton v. Ainsworth, 153 Mich. 315 4712
Buyers' Index Pub. Co. v. Scheidel W. X Ray C. Co., 152 Ill. App. 238 2664
Buzo v. San Juan L. & T. Co., 4 Porto Rico Fed. 520 4945
Byerlee v. Mendel, 39 Iowa 382 2539
Byerly v. Anamosa, 79 Iowa 204 105
Byers v. Bonsall, 3 Pittsb. 482 2271
v. Fowler, 14 Ark. 86 743
v. Horner, 47 Md. 23 493, 509
v. McClanahan, 6 Gill & J. 250 2856
v. Moore, 110 Ark. 504 3190
v. Southern Exp. Co., 165 N. C. 542 3382

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Byford v. Girton, 90 Iowa 661 4620
Byles v. Colier, 54 Mich. 1 2226
Byne v. Americus, 6 Ga. App. 48 299
v. Moore, 5 Taunt. 187 4608
Byram v. Aiken, 65 Minn. 87 4506
v. McGuire, 3 Head 530 4432
Byron, The, 5 Adm. Rec. 248, Fed. Cas. No. 2275 2737
Byrd v. Byrd, 4 McCord 141 2539, 2556
v. Campbell P. P. & Mfg. Co., 90 Ga. 542 2389
v. Gasquet, Hemp. C. C. 261 1059
v. Southern Exp. Co., 139 N. C. 273 4862, 4929
Byrd I. Co. v. Smyth (Tex. Civ. App.), 157 S. W. 260 3980, 3993, 4133
Byrd P. Co. v. Whitaker P. Co., 135 Ga. 865 763
Byrket v. Monohon, 7 Blackf. 83 4529, 4569
Byrkett v. Monohon, 7 Blackf. 83 473
Byrne v. Byrne, 3 S. & R. 54 640
v. Byrne, 47 Ill. 507 2478
v. Cambria & C. R. Co., 219 Pa. 217 1430
v. Funk, 38 Wash. 506 4508
v. Gardener, 33 La. Ann. 6 340
v. Grayson, 15 La. Ann. 457 728, 737
v. Independent School Dist., 139 Iowa 618 1356, 2555, 2563
v. Minneapolis, etc., R. Co., 38 Minn. 212 3801, 3861, 3893
v. Schiller, L. R. 6 Ex. 325 3301
v. Schwing, 6 B. Mon. 199 2955
v. Weeks, 7 Bosw. 372 3301
v. Weidenfeld, 113 App. Div. (N. Y.) 451 4207
v. Wilson, 15 Irish C. L. (N. S.) 322 160
Byrne M. Co. v. Robertson, 149 Ala. 273 212, 409, 2348
Byrnes, In re, 114 App. Div. (N. Y.) 532 1121
Byrnes v. Baldwin, 17 Misc. (N. Y.) 280 2519
v. Palmer, 113 Mich. 17 4324
v. Rich, 5 Gray 518 2066, 2069, 2070, 2102
Byrom v. Chapin, 113 Mass. 308 3838
Bystrom Bros. v. Jacobson, 162 Wis. 180 5190

C

C. A. Smith Timber Co. v. Auld, 134 C. C. A. 512, 218 Fed. 824 3792
C. A. Stickney Co. v. Sears, Roebuck & Co., 181 Ill. App. 486 1502
C. B. Sanford, The, 22 Fed. 863 532
C., C., C. & St. L. R. Co. v. McKelvey, 12 Ohio C. C. 426 3750, 4169, 4171
v. Reynolds, 55 Ohio 370 3476
C. F. Bielman, The, 108 Fed. 878 2722
C. H. Albers Commission Co. v. Milliken, 183 Mo. App. 662 1727
C. H. Brown B. Co. v. Baker, 99 Mo. App. 660 836
C. K. Hall Co. v. Lloyd, 14 Ohio C. C. 30 1036
C. M. Titus, The, 11 Fed. 442 2721
C. P. Minch, 61 Fed. 511 2716
C. P. Raymond, The, 28 Fed. 765 5004, 5007
C. P. Smith, The, 73 Fed. 859 2722
C. R. Hoyt, The, 136 Fed. 671 4986
C. W. Hunt Co. v. Boston El. R. Co., 217 Mass. 319 2575, 2598, 2648
C. W. Kettering Mercantile Co. v. Sheppard, — N. M. —, 142 Pac. 1128 171
C. & C. Brooks, The, 17 Fed. 548 2718
Cabell v. Arnold (Tex. Civ. App.), 22 S. W. 62 4838
v. Johnston, 14 Tex. Civ. App. 472 4284
v. Purycar, 27 Gratt. 902 1087
Cable v. Bowlus, 21 Ohio C. C. 53 4430, 4433
v. Dakin, 20 Wend. 172 4318, 4354
Cable Co. v. Macon, 153 N. C. 150 2404
Cables v. Bristol W. Co., 86 Conn. 223 1500
Cabot v. Christie, 42 Vt. 121 4383
Cabot Bank v. Morton, 4 Gray 156 2382
Cabrera v. American C. Bank, 214 U. S. 224, 53 L. ed. 974 2743
Cache River Drain. Dist. v. Chicago & E. I. R. Co., 264 Ill. 97 4076
Cade v. Brown, 1 Wash. 401 1989, 2006, 2010
Cadigan v. Crabtree, 179 Mass. 474 2504, 2506
v. Crabtree, 186 Mass. 7 2507
Cadle v. McIntosh, 51 Ind. App. 365 4509
v. Muscatine, etc., R. Co., 44 Iowa 11 3868
Cadman v. Lubbuck, 5 D. & Ry. 289 799
v. Markle, 76 Mich. 448 2465, 2474, 2568
Cadmus v. Fagan, 47 N. J. L. 549, rev'g 46 N. J. L. 441 2148, 2156, 2158
Cady v. Huntington, 1 N. H. 138 43
v. Scaniker, 1 Idaho 198 1805
v. Sheldon, 38 Barb. 103 2791
v. South Omaha Nat. Bank, 46 Neb. 756, 49 Neb. 125 716
Caerphilly C. Co., In re, 5 Ch. Div. 336 4254
Cæsar v. Rubinson, 71 App. Div. (N. Y.) 180 836, 865
v. Rubinson, 174 N. Y. 492 841, 858, 863, 868, 918
Caffe v. Bertrand, How. App. Cas. 224 4225
v. Newark A. Mfg. Co., 78 N. Y. Misc. 152 261
Caffery v. Thomas, 4 Pennew. (Del.) 437 4842
Caffrey v. Darby, 6 Ves. 488 2911, 2937, 2945
v. Dudgeon, 38 Ind. 512 1560
Cage v. Franklin, 8 Pa. Super. 89 104
v. Iler, 5 Sm. & M. 410 733
v. Phelps, 38 Ala. 383 532
v. Phillips, 38 Ala. 382 3260
Cagger v. Lansing, 64 N. Y. 417 3715
Cagney v. Wattles, 121 Mich. 469 1627
Cahaba C. Co. v. Hanby, 7 Ala. 282 759
Cahall v. Citizens' Mut. B. Ass'n, 74 Ala. 539 1794
Cahen v. Platt, 40 N. Y. Super. 483 2271
v. Platt, 69 N. Y. 348 2276, 2297, 2301
Cahill v. Eastman, 18 Minn. 324 3840
v. London, etc., R. Co., 10 C. B. (N. S.) 154, 13 C. B. (N. S.) 818 3534
v. Murphy, 94 Cal. 29 4523, 4537
v. Norwood Park, 149 Ill. 156 4042, 4049
v. Patterson, 30 Vt. 592 2524
v. Pintony, 4 Munf. 371 1360
Cahn v. Western U. Tel. Co., 46 Fed. 40 3558
v. Western U. Tel. Co., 48 Fed. 810 3569
Cahoon v. Hoggan, 31 Utah 74 4643

[REFERENCES ARE TO PAGES]

Cain v. Bates, 35 Mo. 427 2814
v. Cody (Cal.), 29 Pac. 778 4321
v. Fisher, 57 W. Va. 492 2095, 2121
v. Osler, 168 Iowa 59 4550
v. Southern R. Co., 199 Fed. 211 1505, 4861, 4900
v. Shutt, 105 Md. 304 4513
v. Vogt, 138 Iowa 631 717, 718, 722
v. Vollmer, 19 Idaho 163 119, 269
v. Western U. Tel. Co., 89 Kan. 797 3568, 3570, 3591, 3598
Cain L. Co. v. Standard D. K. Co., 108 Ala. 346 1363
Cairnes v. Knight, 17 Ohio St. 69 876
v. O'Bleness, 40 Wis. 470 1601
v. Pelton, 103 Md. 40 4505, 4508, 4544
Cairns v. Chester City, 34 Pa. Super. Ct. 43 3887, 3890
Cairo v. Zane, 149 Ill. 122, 143 1210
Cairo, etc., R. Co. v. Holbrook, 72 Ill. 419 1404
v. Stevens, 73 Ind. 278 8
Calbeck v. Ford, 140 Mich. 48 889
Calcatera v. Iovaldi, 123 Mo. App. 347 4858, 4866, 4923, 4929
Calcote v. Elkin, 3 Tenn. Cas. 319 2093
Calcraft v. Harborough, 4 C. & P. 499 502, 4976
v. Roebuck, 1 Ves. 221 1026, 1027
Calcutta Co. v. De Mattos, 32 L. J. (Q. B.) 322 2225
Calder v. Bull, 3 Dall. 386 1189
v. Dobell, L. R. 6 C. P. 486 682
v. Smalley, 66 Iowa 219 4823
v. Southern R. Co., 89 S. C. 287 1316, 1328, 1343, 3480, 3541
Calderin v. Heraldo Espanol, 4 Porto Rico Fed. 376 4503, 4510, 4524, 4530, 4535, 4545, 4587, 4592
Calderon v. Atlas S. Co., 64 Fed. 874 3414, 3425
v. Atlas S. Co., 170 U. S. 272, 42 L. ed. 1033 3336
Caldwell v. Atlantic C. L. R. Co., 75 S. C. 74 3440
v. Bank, 20 Ind. 294 4095
v. Brown, 53 Pa. 453 4931
v. Bruggerman, 4 Minn. 270 4328
v. Canton, 81 Conn. 288 4182
v. Central Park, etc., R. Co., 27 N. Y. Supp. 397 1379
v. Cowan, 9 Yerg. 262 4208
v. Craig, 22 Gratt. 340 605, 800
v. Dickson, 17 Mo. 575 2524
v. Dutton, 20 Tex. Civ. App. 369 624
v. Evans, 5 Bush 380 687
v. Fenwick, 2 Dana 333 4336
v. Gale, 11 Mich. 77 3842
v. Hall, 49 Ark. 508 663, 709
v. Henry, 76 Mo. 254 4392
v. Hurley, 41 Wash. 296 2853
v. Insurance Co., 140 N. C. 100 4389
v. Julian, 2 Mills 294 429
v. Kimbrough, 91 Miss. 877 786
v. Murphy, 1 Duer 233 3487
v. Murphy, 11 N. Y. 416 3489, 3495
v. Myers, 2 S. D. 506 2688
v. New Jersey S. Co., 47 N. Y. 282 1276, 3467, 3501, 3503, 3514
v. New York & H. R. Co., 111 App. Div. (N. Y.) 164 4083, 4084
v. Northern Pac. R. Co., 56 Wash. 223 1302, 3481, 3498, 3528
v. Northern Pac. R. Co., 62 Wash. 420 1501
v. Pennington, 3 Gratt. 91 537, 547
v. Richards, 2 Bibb 331 1059
v. Ryan, 210 Mo. 17 583
Caldwell v. Sawyer, 30 Ala. 283 532. 2456
v. Schmulbach, 175 Fed. 429 887, 930, 2654, 2656, 2676
v. Shepherd, 6 T. B. Mon. 389 2490
v. Southern Exp. Co., 1 Flip. 85 3331
v. Vicksburg, etc., R. Co., 41 La. Ann. 624 1519
v. Wentworth, 14 N. H. 431 705, 711, 1852
v. West, 21 N. J. L. 411 1664, 1672
v. White, 4 T. B. Mon. 561 2021, 2032
Caldwell F. F. Co. v. Peck-W. H. & V. Co., 27 Ohio C. C. 665 2274
v. Peck-W. H. & V. Co., 6 Ohio C. C. (N. S.) 629 2277, 2284
Caldwell L. & L. Co. v. Hayes, 157 N. C. 333 1393
Caledonia, The, 157 U. S. 124 3345, 3353
Caledonian Ins. Co. v. Cooke, 101 Ky. 412 3008
Caledonian R. Co. v. Colt, 3 L. T. (N. S.) 252 3408
v. Walker's Trustees, 7 App. Cas. 259 4020
Caley v. Mills, 79 Kan. 418 2255
v. Hannan, 87 Ala. 277 1685
Calhoun v. Gray, 150 Mo. App. 591 2872
Calhoun County v. Art Metal C. Co., 152 Ala. 607 4218
California C. Co. v. Pacific S. M. Works, 144 Fed. 886 531, 553, 2343, 2346
v. Pacific S. M. Works, 164 Fed. 978 527
California C. F. Ass'n v. Ainsworth, 134 Cal. 461 4285
v. Marshall, 61 Ga. 275 1208
California Canneries Co. v. Canton, Ins. Office, 25 Cal. App. 303 3015
California D. Co. v. Yuma Valley, etc., Co., 9 Ariz. 366 1442, 1455
California D. D. Co. v. Armstrong, 17 Fed. 216 3834, 3835
California N. & Exp. Co. v. State I. & Ins. Co., 70 Cal. 586 3010
California N. & I. Co., In re, 110 Fed. 670 4858, 4870, 4944, 4945, 4991
California P. B. & L. Co. v. Wasatch O. Co., 39 Utah 325 2274, 2282, 2355
California Pac. R. Co. v. Armstrong, 46 Cal. 85 4106
California Reclamation Co. v. New Zealand Ins. Co., 23 Cal. App. 611 3005
California S. N. Co. v. Wright, 6 Cal. 258 420, 887
California Southern R. v. Southern Pac. R. Co., 67 Cal. 59 4027, 4052
California & P. R. Co. v. Armstrong, 46 Cal. 85 4053
Calisher D. G. Co. v. Block (Tex. Civ. App.), 147 S. W. 683 4608
Calkin v. Postal Tel. Co., 11 Pa. Dist. 305 4099
Calkins v. Bertrand, 8 Fed. 755 4465
v. State, 13 Wis. 389 758
v. Sumner, 13 Wis. 193 11
Call v. Allen, 1 Allen 137 494
v. Foster, 52 Me. 257 1810
v. Hagar, 69 Me. 521 306
v. Middlesex, 2 Gray 232 399
v. Ruffin, 1 Call (Va.) 333 1642
v. Scott, 4 Call 402 817, 820, 870, 998
Calla v. Patterson, 18 B. Mon. 201 1636
Callaghan v. Hall, 1 S. & R. 241 1121
v. Meyers, 128 U. S. 617 4479, 4480, 4481

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Callahan v. Bank, 69 S. C. 374 275
v. Boazman, 21 Ala. 246 728
v. Chickasha C. O. Co., 17 Okla. 544 234, 2625, 2627
v. Goldman, 216 Mass. 238 2094
v. Ingram, 122 Mo. 355 4508, 4543, 4544, 4586
v. Keiso, 170 Mo. App. 338 4623, 4633, 4636, 4640
v. Shotwell, 60 Mo. 398 2529
Callanan Road Imp. Co. v. Oneonta, 117 App. Div. (N. Y.) 332 930, 931
Callander v. Oelrichs, 5 Bing. N. C. 58 2914, 2915
Callaway v. Mellett, 15 Ind. App. 366 3501
v. Quattlebum, 19 Ga. 277 2390
v. Spurgeon, 63 Ill. App. 571 4939
Callen v. Collins, 56 Tex. Civ. App. 620 3789
v. Collins (Tex. Civ. App.), 154 S. W. 673 1135
Callender v. Flint, 187 Mass. 104 2759
Callender I. & W. Co. v. Badger, 30 Ill. App. 314 2411
Callfas v. World Pub. Co., 93 Neb. 108 4540
Callis v. Merrieweather, 98 Md. 361 4981
Callisher v. Bischoffsheim, L. R. 5 Q. B. 449 757
Callison v. Brake, 63 C. C. A. 354, 129 Fed. 196 4863, 4948, 4950
v. Lemons, 2 Port. 145 1532
Callow v. Lawrence, 3 M. & S. 95 1816
Calloway v. Laydon, 47 Iowa 456 4675, 4777
v. Middleton, 2 A. K. Marsh. 372 470, 4576
v. Price, 32 Gratt. 1 2815
v. Snapp, 78 Ky. 561 2821
Calman v. Kreipke, 40 Okla. 516 2980
Calor O. & G. Co. v. Franzell, 128 Ky. 715 7, 3962, 3995, 4048
Calton v. Bragg, 15 East 223 962, 1034
Calumet E. St. R. Co. v. Jennings, 83 Ill. App. 616 4827
Calumet I. & S. Co. v. Martin, 115 Ill. 358, 374 1358
Calumet River R. Co. v. Brown, 136 Ill. 322 4053
v. Moore, 124 Ill. 329 4033, 4131
Calumet & C. C. & D. Co. v. Morawetz, 195 Ill. 398 3952
Calusa & H. R. Co. v. Glenn, 25 Cal. App. 634 3975
Calvary Cathedral, Chapter of, v. United States, 29 Ct. of Cls. 269 694
Calvert v. Carter, 18 Md. 73 728
v. Springfield E. L. & P. Co., 231 Ill. 290 1476
Calvert Bank v. Katz, 102 Md. 56 716, 1107
Calvit v. McFadden, 13 Tex. 324 2311
Caly Centre v. Jevons, 2 Kan. App. 568 107
Camanche, The, 8 Wall. 448, 19 L. ed. 397 2717, 2719
Camarillo v. Fenlon, 49 Cal. 205 3693
Cambria I. Co. v. Keynes, 56 Ohio St. 501 2750
Cambria S. S. Co. v. Pittsburgh S. S. Co., 212 Fed. 674 5014
Cambridge v. Anderton, 2 B. & C. 691 3010
v. Foster, 195 Mass. 411 1558, 1604
v. Hanscom, 186 Mass. 54 299, 301
Camden v. Allen, 26 N. J. L. 398 1064
v. Doremus, 3 How. 515 2788
v. Greenwald, 65 N. J. L. 458 1559, 1583
v. Ward, 67 N. J. L. 558 1569
Camden C. O. Co. v. Schlens, 59 Md. 31, 45 2427
Camden I. R. Co. v. Smiley, 27 Ky. L. Rep. 75 3953
Camden & A. R. Co. v. Williams, 61 N. J. L. 646 1477
Camden & S. R. Co. v. Stetson, 177 U. S. 172 1465
Camden, etc., R. Co. v. Baldauf, 16 Pa. 67 3335, 3534
Cameron v. Boyle, 2 G. Greene 154 1555
v. Bryan, 89 Iowa 214 1288, 4818
v. Burke, 61 Wash. 203 2061, 2113
v. Chicago, etc., R. Co., 51 Minn. 153 4051
v. Citizen's T. Co., 216 Pa. 191 146
v. Hart, 57 Mo. App. 142 1509
v. Kanrich, 201 Mass. 451 425
v. Nash, 41 App. Div. (N. Y.) 532 3100
v. New England Tel. & T. Co., 182 Mass. 310 79, 147, 4689
v. Rich, 4 Strobh. 168 3386
v. Smith, 2 B. & Ald. 305 962
v. Union Trunk Line, 10 Wash. 507 4748
v. Western U. Tel. Co., 90 S. C. 503 3654
v. White, 74 Wis. 425 284, 2262, 2697, 2706
Cameron M. & E. Co. v. Anderson, 34 Tex. Civ. App. 105 4745
v. Anderson, 34 Tex. Civ. App. 229 337
v. Anderson, 98 Tex. 156 4712
Cameron Steam Pump Works, A. S., v. Lubbock L. & I. Co., — Tex. Civ. App. —, 167 S. W. 256 312, 476
Camidge v. Allenby, 6 B. & C. 373 647, 648, 651, 2938
Cammann, In re, 143 App. Div. (N. Y.) 223 4154
Camp v. Atlanta & C. A. L. R. Co., 100 S. C. 294 5136
v. Bates, 11 Conn. 487 1203, 1209
v. Bostwick, 20 Ohio St. 337 2852, 2868, 2870
v. Camp, 59 Vt. 667 3833
v. First Nat. Bank, 44 Fla. 497 1241, 1243
v. Hamlin, 55 Ga. 259 230, 368, 2238, 2242, 2275
v. Martin, 23 Conn. 86 4503
v. Morgan, 21 Ill. 255 376
v. Neufelder, 49 Wash. 426 2654
v. Pollock, 45 Neb. 771 832
v. Pulver, 5 Denio 48 2220
v. Randle, 81 Ala. 240 1878, 1879, 1919
v. Simon, 34 Ala. 126 802
v. Smith, 136 N. Y. 187 723
v. Wabash R. Co., 94 Mo. App. 272 47
v. Watt, 14 Ala. 614 1599
v. Western Union Tel. Co., 1 Metc. (Ky.) 164 3546
Camparetti v. Union R. Co., 95 App. Div. (N. Y.) 66 4718, 4833
Campbell v. American F. Ins. Co., 73 Wis. 100 2914, 3026
v. Arnold, 1 Johns. 511 3734
v. Baker, 46 Pa. 243 2893
v. Baxter, 41 Neb. 729 2513
v. Behn, 3 Philip. Isl. 590 2679
v. Bentley, 159 App. Div. (N. Y.) 522 2097
v. Booth, 8 Md. 107 748, 764
v. Brown, 2 Woods 349 3699, 3710
v. Brown, 100 Tenn. 245 1818
v. Butler, 14 Johns. 349 2768, 2781

[REFERENCES ARE TO PAGES]

Campbell v. Butts, 3 N. Y. 174 4515, 4517
v. Campbell, 13 N. J. Eq. 415 3728
v. Campbell, 54 Wis. 90 4502, 4528, 4573
v. Campbell, 65 Barb. 639 2516
v. Chamberlain, 10 Iowa 337 1690, 1694, 4194
v. City of Chillicothe, 175 Mo. App. 436 1359, 1373, 4705
v. Clark, 63 Ark. 450 1643, 1646
v. Commonwealth, 8 S. & R. 414 1598
v. Coquard, 93 Mo. 474 1075
v. Cowdrey, 31 How. Pr. 172 1083
v. Elkins, 58 W. Va. 308 1142
v. Harmon, 96 Me. 87 1290
v. Harris, 4 Tex. Civ. App. 636 4763
v. Hatchett, 55 Ala. 548 376, 384
v. Head, 13 Ill. 122 4349
v. Hillman, 15 B. Mon. 508 4392
v. Howerton (Tex. Civ. App.), 87 S. W. 370 2700
v. Iowa Cent. R. Co., 124 Iowa 248 1536, 4180
v. James, 5 Fed. 807 4451
v. Johnson, 4 Dana 182 2061
v. Jones, 4 Wend. 306 2846
v. Jones, 6 T. R. 570 1843
v. Jones, 79 Ala. 475 1874
v. Kimball, 87 Neb. 309 1030
v. Lewis, 2 B. & Ald. 392 1528
v. Los Angeles T. Co., 137 Cal. 565 4676
v. Mayor, etc., 105 Fed. 631 4476
v. Meiser, 4 Johns. Ch. 334 1021
v. Meiser, 6 Johns. Ch. 21 1021
v. Metcalf, 1 Mont. 378 306, 1722, 1729, 1744
v. Metropolitan St. R. Co., 82 Ga. 320 3952
v. Miller, 38 Ga. 304 612
v. Miltenberger, 26 La. Ann. 72 315, 476
v. Mion, 6 Ga. App. 134 2696, 2701
v. Morse, 1 Harp. 468 141
v. Nichols, 33 N. J. L. 81 1878, 1881
v. O'Connor, 55 Neb. 638 688
v. Paddington, [1911] 1 K. B. 869 3935
v. Park, 128 Iowa 181 4224
v. People, 154 Ill. 595, 52 Ill. App. 338 1591
v. Philadelphia, 108 Pa. 300 4095
v. Portland S. Co., 63 Me. 552 2995
v. Railway T. Co., 95 Minn. 375 161
v. Seaboard A. L. R. Co., 83 S. C. 448 3460, 3508
v. Seaman, 63 N. Y. 568 3846
v. Shields, 6 Leigh 517 870, 998
v. Shields, 11 How. Pr. 565 548, 3122, 3260
v. Skinner, 30 Mich. 32 758
v. Southwestern Tel. & T. Co., 108 Ark. 569 42
v. Stillwater, 32 Minn. 308 105
v. Thompson, 1 Stark. 490 3301
v. United R. Co., 243 Mo. 141 153, 4654, 4822
v. United States, 8 Ct. of Cls. 240 1439
v. Wheelihan-W. Co., 45 Wash. 675 4816
v. White, 5 Ir. C. L. (N. S.) 312 4556
v. Wilcox, 10 Wall. 421 1801
v. Woods, 122 Mo. App. 719 2214, 2250
v. Woodworth, 20 N. Y. 499 1453, 4228
v. Woodworth, 26 Barb. 538 4169
v. Woolen, 5 Blackf. 80 1399
v. Worman, 58 Minn. 561 1918, 1920
v. Wright, 118 N. Y. 594 2965
Campbell Co. v. Angus, 91 Va. 438 2950
Campbell P. Co. v. Holcomb, 67 Kan. 48 2459
Campbell P. P. & M. Co. v. Jones, 79 Ala. 475 949
Campbell's Est., 7 Pa. 100 642
Campell v. Hodgson, Gow 74 1866
Campfield v. Sauer, 189 Fed. 576 1414, 2299, 2346, 2356
Campion v. Crawshay, 6 Taunt. 356 1397, 1398
v. Marston, 99 Me. 410 2372
Canada, The, 92 Fed. 196 2735
Canada, The, Lush. 584 (1860) 4994
Canada v. Canada, 6 Cush. 18 2662
Canada Cement Co. v. Pazuk, 22 Quebec K. B. 432, 12 D. L. R. 303 5195
Canadian, The, 1 Brown Adm. 11 222, 3455, 4730
Canadian C. Co. v. Fagan, 12 Brit. Col. 23 1500, 4160
Canadian F. Co. v. McShane, 80 Neb. 551 757
Canadian G. P. & L. v. Orr, 23 Ont. L. R. 616 2374
Canadian Pac. R. Co. v. Lachance, 42 Can. Sup. Ct. 205 1493, 4857
v. Robinson, 14 Can. Sup. Ct. 105 4857
Canadian & A. M. & T. Co. v. Fitzpatrick, 71 Miss. 347 1719, 1723
Canady v. Knok, 43 Wash. 567 887
Canal v. Fisher, 10 Rettie (Scotch) 824 3315
Canal Bank v. Bank, 1 Hill 287 1869, 2383
Canal Co. v. Gordon, 6 Wall. 561 2693
Canal Com'rs v. Kempshall, 26 Wend. 404 1042
Canandaigua, etc., R. Co. v. Payne, 16 Barb. 273 1419, 1425
Canastota & M. P. R. Co. v. Parkill, 50 Barb. 601 824
Canda v. Michigan M. I. Co., 152 Fed. 178 4449, 4454, 4465
v. Wick, 49 N. Y. Super. 497 487
Cande v. Western U. Tel. Co., 34 Wis. 479 172
Candee v. Skinner, 40 Conn. 464 1117
v. Webster, 9 Ohio St. 452 1225
v. Western U. Tel. Co., 34 Wis. 471 3549, 3553, 3559, 3560, 3604
Candler v. Washoe Lake R., etc., Co., 28 Nev. 151 175, 285, 3801, 3806
Candor's App., 5 W. & S. 513 2474
Candrian v. Miller, 98 Wis. 164 4572, 4575
Cane Belt R. Co. v. Hughes, 31 Tex. Civ. App. 565 3963
v. Ridgeway, 38 Tex. Civ. App. 108 3881
Canfield v. Chicago, etc., R. Co., 59 Mo. App. 354 1266, 1343, 4774
v. Chicago, etc., R. Co., 142 Iowa 658 1479, 1511, 4823, 4835
v. Eleventh School Dist., 19 Conn. 529 1197
v. Gun Plains, 175 Mich. 379 4195
v. Jackson, 112 Mich. 120 1381
v. McLaughlin, 10 Martin 48 1710, 1711
v. Westcott, 5 Cow. 270 1935
Cangreme v. Alberta C. M. Co., 5 Alberta L. R. 173, 7 B. W. C. C. 1020, 22 W. L. R. 68, 2 W. W. R. 1058 5174
Cann v. Rector, etc., 111 Mo. App. 164 2547
Cannel v. Buckle, 2 P. Wms. 243 1552
v. Collins, 2 Burr. 820 1552

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Canning v. Fibush, 77 Cal. 196 3102
v. Williamstown, 1 Cush. 451 339, 345, 3472, 3474, 3484, 3647, 4662, 4687
Cannon v. Apperson, 14 Lea 553 1079, 1121
v. Bates, 115 Va. 711 2504, 2506
v. Beggs, 1 McCord 370 1105
v. Brooklyn City R. Co., 13 N. Y. Misc. 400 4760
v. Cooper, 39 Miss. 784 1635
v. Cox, 98 S. C. 185 4629
v. Folsom, 2 Iowa 101 2311
v. Handley, 72 Cal. 133 815
v. Hileman, 229 Pa. 414 702
v. Hudson, 5 Del. Ch. 112 574
v. Hunt, 113 Ga. 501 2626, 2632
v. Western U. Tel. Co., 100 N. C. 300 3560
v. Wildman, 22 Conn. 472, 491 2654
Cannon C. Co. v. Taggart, 1 Colo. App. 60 2581, 2928
Canon v. Sharon & W. St. R. Co., 216 Pa. 408 1330
Canon City E. L. & P. Co. v. Medart P. P. Co., 11 Colo. App. 300 2386, 2404, 2409, 2454
Canovan v. Neeld, 189 Pa. 208 2284
Canteen H. & F. Ass'n v. Schwartz, 128 Ill. App. 224 3849, 3853
Canter v. American Ins. Co., 3 Pet. 307 10
Canthen v. Breyer (Tex. Civ. App.), 131 S. W. 853 42
Cantling v. Hannibal, etc., R. Co., 54 Mo. 385 1460
Canton v. Smith, 65 Me. 203 4273
Canton Co-op. Bank v. American Cent. Ins. Co., 319 Mass. 132 3061
Canton-H. P. Co. v. Llera, 205 Fed. 209 491
Canton Inst. for Savings v. Murphy, 156 Mass. 305 2755
Canton L. Co. v. Liller, 107 Md. 146 376, 2274, 2407, 2415
v. Liller, 112 Md. 258 2358
Canton Union-C. Co. v. Parlin, 215 Ill. 244 759
Cantralt v. Fawcett, 2 Ill. App. 571 536
Cape Girardeau, etc., R. Co. v. Blechle, 234 Mo. 471 3980, 4108, 4130
v. St. Louis & G. R. Co., 222 Mo. 461 3693
v. Wingerter, 124 Mo. App. 426 47, 187, 1987
Cape May R. E. Co. v. Henderson, 42 Pa. Super. 1, 231 Pa. 82 926, 927
Capehart v. Granite Mills, 97 Ala. 353 3314
Capel v. Butler, 2 Sim. & S. 457 2813
v. Lyons, 3 N. Y. Misc. 73 3815
v. Thornton, 3 C. & P. 352 684
Capella, The [1892] Prob. 70 2736
Capen v. Crowell, 66 Me. 282 960, 968
v. De Steiger G. Co., 105 Ill. 185 2275, 2280, 2295
Capers v. Western U. Tel. Co., 71 S. C. 29 3559, 3629
Capital City B. & P. Co. v. Des Moines, 136 Iowa 243 2592, 2654
Capital City Mut. F. Ins. Co. v. Detwiler, 23 Ill. App. 656 763
Capital L. Co. v. Learned, 36 Ore. 544 1663, 1666
Capital Nat. Bank v. Robinson, 41 Wash. 454 634
v. Wilkerson, 36 Ind. App. 467 1035
Capital Trust Co. v. Great Northern R. Co., 127 Minn. 144 5108
Caplen v. Cox, 42 Tex. Civ. App. 297 502, 4389
Capp v. Topham, 6 East 392 2970
Capper v. Forster, 3 Bing. N. C. 938 3278, 3299
v. Manufacturers' P. Co., 86 Kan. 355 2280
Capps v. Vasey, 23 Okla. 554 4278
Capron v. Adams, 28 Md. 529 616
Caproon v. Mitchell, 77 Neb. 562 2395
Carberry v. Acme T. Co., 203 Fed. 780 4794
Carbon Hill C. Co. v. Cunningham, 153 Ala. 573 2458, 2524
Carbon S. Co. v. Ennis, 114 Fed. 260 3269, 3306
Carbondale I. Co. v. Burdick, 58 Kan. 517 230
v. Burdick, 67 Kan. 329 355, 4609, 4643
Card v. Columbia, 191 Pa. 254 107
v. Ellsworth, 65 Me. 547 162
v. Hope, 2 B. & C. 661 1849
Cardell v. Bridge, 9 Allen 355 356, 538, 2667, 2676
Cardin v. Jones, 23 Ga. 175 677
Cardinell v. O'Dowd, 43 Cal. 586 703, 711
Cardival v. Smith, 109 Mass. 158 4608
Cardon v. McConnell, 120 N. C. 461 4566
Cardozo v. Bloomingdale, 79 N. Y. Misc. 605 4196
v. Hardy, 2 Moore 220 1555
Cardwell v. Hicks, 37 Barb. 458 1819
Carew v. Boston, E. F. Co., 3 Cliff. 356 4452, 4474
v. Denney, 8 Pick. 363 2768
v. Otis, 1 Johns. 418 2993
Carey v. Askew, 2 Bro. Ch. 58 1083
v. Berkshire R. Co., 1 Cush. 475 4846
v. Bilby, 129 Fed. 203 781
v. Choat, 6 Up. Can. Q. B. (O. S.) 467 1411
v. Day, 36 Conn. 152 508, 1404
v. Dyer, 97 Wis. 554 1453
v. Guillow, 105 Mass. 18 533, 553, 559
v. Gunnison (Iowa), 17 N. W. 881, 885 2322
v. Rochereau, 16 Fed. 87 2994
v. Sheets, 60 Ind. 17 4842
v. Taylor, 28 Ohio C. C. 667 1965
v. Wolff, 72 N. J. L. 510 434, 1340, 4158
Carey L. Co. v. Magazine & R. Co., 70 N. Y. Misc. 541 1448
Carey-L. L. Co. v. Hunt, 54 Ill. App. 314 736
Carey's Est., 15 Pa. Dist. 527 1035
Cargill v. Thompson, 57 Minn. 534 3210, 3230
Cargo ex Ulysses, 13 Prob. Div. 205 2723
Cargo from Wreck of Bark Edwards, 12 Fed. 508 2735
Carhart v. State, 115 App. Div. (N. Y.) 1 438, 442
v. Wainman, 114 Ga. 632 11
Carkin v. Savory, 14 Gray 528 2758
Carl v. Ayers, 53 N. Y. 14 4634, 4643
v. Granger C. Co., 69 Iowa 519 39, 42, 3114
v. Sheboygan, etc., R. Co., 46 Wis. 625 401, 402, 3759, 3876, 3881
Carlberg v. Spiegels House Furnishing Co., 178 Ill. App. 424 1343, 3826
Carle v. Nelson, 145 Wis. 593 1445, 2237, 2241, 2301
Carleton v. Fletcher, 109 Me. 576 305, 1279, 1322
v. Lombard, 19 App. Div. (N. Y.) 297, aff'd 162 N. Y. 628 2417

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v. Woods, 28 N. H. 290 1850
Carlewis v. Laurie, 12 Q. B. 640 1390
Carley v. Parton, 75 Tex. 98 428
v. Vance, 17 Mass. 389 825, 1229
v. Wilkins, 6 Barb. 557 2387
Carli v. Stillwater, etc., R. Co., 16 Minn. 260 4097
v. Union Depot, etc., Co., 32 Minn. 101 3753
Carlile v. Bentley, 81 Neb. 715 1374, 4719, 4721, 4743, 4778
Carlin v. Chappel, 101 Pa. 348 3913
v. Deahl, 172 Ill. App. 197 4934
v. Kennedy, 97 Minn. 141 4816
v. New York, 132 App. Div. (N. Y.) 90 2687
v. Ritter, 68 Md. 478 3255
Carlisle v. Brisbane, 113 Pa. 544 108
v. Callahan, 78 Ga. 320 1514, 3818, 4185
v. Green (Tex. Civ. App.), 132 S. W. 1140 889
v. Orde, 7 C. P. 456 2168
v. Silver Creek, 85 Miss. 380 1604
Carll v. Butman, 7 Me. 102 3727
v. Goldberg, 59 N. Y. Misc. 172 287
Carlon v. City Sav. Bank, 85 Neb. 659 4747
v. Dixon, 14 Ore. 293 1570, 1669, 1670, 2876
Carlson v. Benton, 66 Neb. 486 1475
v. Oregon S. L., etc., R. Co., 21 Ore. 450 4906, 4947, 4950
v. Stone-O.-W. Co., 40 Mont. 434 193, 261
Carlson S. Co. v. Schmidt, 21 Wyo. 498 4164
v. Schmidt (Wyo.), 133 Pac. 1053 1338
Carlton v. Bailey, 27 N. H. 230 1850
v. Carter, — Tex. Civ. App. —, 140 S. W. 827 4271, 4298
v. St. Louis & S. R. Co., 128 Mo. App. 451 338, 4790
v. Whitcher, 5 N. H. 196 1850
Carlyon v. Lannon, 3 Nev. 156 1356, 4211
Carmack v. Commonwealth, 5 Bin. 184 1600
v. Drum, 27 Wash. 382 3263
Carman v. Bean, 88 Pa. 319 3699
v. Montana Cent. R. Co., 32 Mont. 137 1417
v. Pultz, 21 N. Y. 547 791, 819, 1952
v. Trude, 25 How. Pr. 440 2402
Carmen v. Noble, 9 Pa. 366 2893
Carmichael v. Bell Tel. Co., 157 N. C. 21 330, 332, 3588, 3589, 3610, 3619, 3625
v. Southern Bell Tel. & T. Co. 162 N. C. 333 56, 1316, 1318, 3622
Carmody v. St. Louis T. Co., 122 Mo. App. 338 340, 1261, 1304, 1311, 1332, 3465, 3473, 3481
Carmona v. Fajardo D. Co., 5 Porto Rico Fed. 209 4871, 4876
Carnahan v. Chesapeake & O. R. Co., 145 Ky. 676 3537
v. Hughes, 108 Ind. 225 2229
v. Moore, 70 Wash. 623 4394
v. Paris, 158 Ill. App. 150 3968
Carnegie v. Federal Bank, 5 Ont. 418 2954
v. Holt, 99 Mich. 606 172
v. Morrison, 2 Metc. (Mass.) 381 1163
Carnego v. Crescent Coal Co., 164 Iowa 552 4923, 4924, 4940
Carner v. Chicago, etc., R. Co., 43 Minn. 375 3736, 3774
v. Peters, 9 Pa. App. 26 1937, 1944
Carnes v. Finigan, 198 Mass. 128 2504
v. Heimrod, 45 Neb. 364 1733
Carney v. Concord St. R. Co., 72 N. H. 364 4946
v. Marquette Third Vein C. Co., 175 Ill. App. 139 4812
v. Matthewson, 86 Ark. 25 997
v. Vogel, 52 Wash. 571 2274, 2289
Carnig v. Carr, 167 Mass. 544 2546
Carnnegie v. Hulbert, 70 Fed. 209 1559
Carnwright v. Gray, 127 N. Y. 92 1824
Carolina Cent. R. Co. v. McCaskill, 98 N. C. 526 3710
Carolina P. C. Co. v. Alabama C. Co., 162 Ala. 380 546, 561, 564
v. Anderson, 186 Fed. 145 3391
v. Columbia I. Co., 3 Ga. App. 483 207, 408, 2253
Carolina, etc., R. Co. v. Armfield, 167 N. C. 464 3961, 3972, 4018, 4107, 4131
Carondelet v. Desnoyer, 27 Mo. 36 781
Carons v. Singleton, 23 Ky. L. Rep. 1626 4782
Carothers v. McIlhenny, 63 Tex. 138 1685
Carp v. Queen Ins. Co., 203 Mo. 295 434, 1423, 4601, 4607, 4613, 4615, 4629
Carpenter v. American B. & L. Ass'n, 54 Minn. 403 4298, 4301, 4302
v. Atherton, 28 How. Pr. 303 605
v. Barker, 44 Vt. 441 1321
v. Bowen, 42 Miss. 28 2867
v. Buffalo Gen. Elec. Co., 213 N. Y. 101, aff'g 155 App. Div. 655 5101
v. Buffalo, etc., R. Co., 38 Hun 116 4896, 4937
v. Carpenter, 66 Hun 177 388, 416, 2554
v. Carpenter, 88 Ark. 169 2097
v. Chicago & A. R. Co., 119 Mo. App. 204 1536
v. Chicago, etc., R. Co., 7 S. D. 584 746
v. Doody, 1 Hilt. 465 1607
v. Dresser, 72 Me. 377 4199, 4298
v. Eastern T. Co., 71 N. Y. 574 489
v. Easton R. Co., 26 N. J. L. 168 4146
v. First Nat. Bank, 53 Tex. Civ. App. 23 1723
v. First Nat. Bank, 119 Ill. 352 2343, 2344
v. Goin, 19 N. H. 479 708, 725
v. Going, 20 Ala. 587 482, 4307
v. Hamilton, 185 Mo. 603 1267, 4508, 4537, 4544
v. Hyman, 67 W. Va. 4 59, 1311
v. Ibbetson, 1 Cal. App. 272 2596, 2598
v. Jennings, 77 Ill. 250 4119
v. King, 9 Met. 511 2805
v. Lancaster, 212 Pa. 581 3840, 3853, 3875, 3877
v. Landaff, 42 N. H. 218 4114, 4115
v. Le Count, 22 Hun 106 2570
v. Lingenfelter, 42 Neb. 728 4260, 4262, 4263, 4344
v. Lockhart, 1 Ind. 434 912, 918
v. McClure, 39 Vt. 9 1838
v. McDavitt, 53 Mo. App. 393 4677
v. Manhattan L. Ins. Co., 93 N. Y. 552 552
v. Minter, 72 Tex. 370 2836, 2862
v. New York, 44 App. Div. (N. Y.) 230 4112
v. New York, 51 App. Div. (N. Y.) 584 4112, 4156
v. New York, etc., R. Co., 124 N. Y. 53 3531, 3539

[REFERENCES ARE TO PAGES]

Carpenter v. Pennsylvania R. Co., 13 App. Div. (N. Y.) 328 1416, 4838
v. Phillips, 2 Houst. 524 1827, 1835
v. Providence, etc., Ins. Co., 16 Pet. 496 3023, 3059
v. Robinson, 1 Holmes 67 1461, 2305
v. Sheldon, 5 Sandf. 77 4643
v. Sherfy, 71 Ill. 427 1541
v. Sibley, 153 Cal. 215 4640
v. Stevens, 12 Wend. 589 4338, 4341
v. Stevenson, 6 Bush 259 1695
v. Warner, 38 Ohio St. 416 1611, 1612, 1617
v. Welch, 40 Vt. 251 1203
v. Wright, 52 Kan. 221 4374, 4382
Carpentier v. Atherton, 25 Cal. 564 601
v. Gardiner, 29 Cal. 160 1508
Carples v. New York & H. R. R. Co., 16 App. Div. (N. Y.) 158 4706
Carr v. Anderson, 24 Miss. 188 1541
v. Barnes, 138 Mo. App. 264 2797
v. Bennett, 3 Dema. 433, 457 1083
v. Dooley, 119 Mass. 294 2147, 2148
v. Edwards, 3 Stark. 132 1034
v. Hamilton, 129 U. S. 252 2830
v. Hills A. L. M. Co., 12 Daly 332 2975
v. Houston G. & W. Co., 105 Ga. 268 1679, 1709
v. Howard, 8 Blackf. 191 2820
v. Moore, 41 N. H. 131 4392, 4410
v. National S. Bank, 107 Mass. 45 682
v. Pennsylvania R. Co. (Misc.) 92 N. Y. Supp. 799 3279
v. Providence, etc., Ins. Co., 38 Hun 86 3010
v. Roberts, 5 B. & Ad. 78 283, 2168, 2189, 2892
v. Smith, 129 N. C. 232 2861, 2865
v. State, 127 Ind. 204 1040
v. Stephens, 9 B. & C. 759 453
v. Toledo T. Co., 19 Ohio C. C. 281 3447, 3451, 3503
v. Tucker, 42 Tex. 330 524
Carrabine v. Cox, 136 Mo. App. 370 1953, 2199
Carraway v. Moore, 75 Ark. 146 3713
Carre v. Massil, 113 La. 608 1357
Carrel v. Early, 4 Bibb 270 4336, 4339
Carrell v. McDonnell, 139 Mo. App. 450 2462
Carricarti v. Blanco, 121 N. Y. 230 1102
Carrick v. Joachim, 126 La. 5 405
Carrico v. Stevenson (Tex. Civ. App.), 135 S. W. 260 226, 252, 2696, 2701
v. West Virginia, etc., R. Co., 39 W. Va. 86 1468
Carrie v. Cloverdale B. & C. Co., 90 Cal. 84 4287
Carrier v. Boston, etc., R. Co., 34 N. H. 498 1422
v. Poulas, 87 Miss. 595 1687
Carrington v. Basshor, 119 Md. 378 1115
v. Crocker, 37 N. Y. 336 422, 749, 772
v. Graves, 121 Md. 567 2503
v. Omaha L. Ass'n, 59 Neb. 116 4363
v. Taylor, 11 East 571 161
Carrodus v. Sharp, 20 Beav. 56 1969
Carrol v. White, 33 Barb. 615 4503
Carroll, The, 167 Fed. 112 2727
Carroll v. Bowie, 7 Gill 34 2812
v. Burgin, 159 Ala. 406 1675
v. Caine, 27 Wash. 402 1364, 2585
v. Central R. Co., 134 Fed. 684 4603
v. Cohen, — Del. —, 91 Atl. 1001 2545, 2547, 2556
v. First State Bank (Tex. Civ. App.), 148 S. W. 818 4628
Carroll v. Girard F. Ins. Co., 72 Cal. 297 3017
v. Holmes, 24 Ill. App. 453 656, 670
v. Little, 73 Wis. 52 1074
v. Manierre, 149 Wis. 409 3735
v. New York E. R. Co., 14 App. Div. (N. Y.) 278, aff'd 162 N. Y. 603 4081
v. Nodine, 41 Ore. 412 2383, 2384
v. Pathkiller, 3 Port. 279 4314
v. Pettit, 67 Hun 418 2507
v. Rice, Walk. Ch. 373 2029, 2047
v. Siebenthaler, 37 Cal. 193 694
v. Staten Island R. Co., 58 N. Y. 126 3467
v. Sweet, 128 N. Y. 19 664, 672
v. Texarkana G. & E. Co., 102 Ark. 137 1499
v. Weaver, 65 Conn. 76 627
v. Welch, 26 Tex. 147 356, 2525, 2539, 2609, 2659, 2682
v. Weld, 13 Ill. 682 2779
Carroll County v. Cuthbertson, 136 Iowa 458 1560
Carroll County Sav. Bank v. Strother, 28 S. C. 504 1924, 2825
Carroll-P. B. & T. Co. v. Columbus Mach. Co., 55 Fed. 451 204, 231, 2253, 2287, 2418, 2423, 2452
Carroll Springs D. Co. v. Schnepfe, 111 Md. 420 4, 3849, 3922, 3923
Carroll St., In re, 137 App. Div. (N. Y.) 39 4096
Carron v. Clark, 14 Mont. 301 1353, 1368
v. Wood, 10 Mont. 500 3897
Carsey v. Farmer, 117 Ky. 826 253, 276
Carslake v. Mapledoram, 2 T. R. 473 4503
Carson v. Applegarth, 6 Nev. 187 4328
v. Arvantes, 10 Colo. App. 382 883, 921, 3121, 3123, 3150
v. Baillie, 19 Pa. 375 2386
v. Bunting, 154 N. C. 530 317
v. Coleman, 11 N. J. Eq. 106 3946
v. Cook County L. Co., 37 Okla. 12 703, 705
v. Edgworth, 43 Mich. 241 4634
v. Ft. Smith L. & T. Co., 108 Ark. 452 55
v. Germania Ins. Co., 62 Iowa 433 1244
v. Godley, 26 Pa. 111 3182
v. Golden, 36 Kan. 705 4334
v. Hanawalt, 50 Ind. App. 409 4284
v. Hill, 1 McMull. (S. C.) 76 728
v. Jennings, 1 Wash. C. C. 129 324
v. Kelley, 57 Tex. 379 2204
v. Marine Ins. Co., 2 Wash. C. C. 468 3022, 3023, 3024
v. Neatheny, 9 Colo. 212 1014
v. Norfolk & C. R. Co., 128 N. C. 95 3755
v. Pearl, 4 J. J. Marsh. 92 1541
v. Prater, 6 Cold. 565 4174
v. Quinn, 127 Mo. App. 525 2994
v. Singleton, 23 Ky. L. Rep. 1626 461
v. Slattery, 123 La. 825 3681
v. Smith, 133 Mo. 606 1181, 1267, 1273, 1311, 4233
v. Southern R., 68 S. C. 55 1343
v. Springfield, 53 Mo. App. 289 3852
Carson's App., 113 Pa. 438 3070
Carsten v. Northern Pac. R. Co., 44 Minn. 454 134, 3439, 3455, 3476
Carstens v. McReavy, 1 Wash. 359 2502
Carstens P. Co. v. Southern Pac. Co., 58 Wash. 239 3333
Carswell v. Habberzettle, 99 Tex. 1 2148, 2159
v. Western U. Tel. Co., 154 N. C. 112 3624

[REFERENCES ARE TO PAGES]

Cartan v. Tackaberry, 139 Iowa 586 531, 748
Cartanos v. Ritter, 3 Duer 370 4767
Carter, In re, 221 Mass. 105 5200
Carter v. Bailey, 64 Me. 458 4478
v. Baker, 1 Sawyer 527 4442, 4448, 4449, 4474, 4475
v. Bankers' L. Ins. Co., 83 Neb. 810 3039, 3071
v. Bedortha, 124 Mich. 548 3738
v. Black, 4 Dev. & Batt. 425 2856
v. Black, 46 Mo. 384 2388
v. Brunswick & W. R. Co., 115 Ga. 853 25
v. Burr, 39 Barb. 59 3125
v. Cairo, etc., R. Co., 145 Ill. App. 653 2600
v. Cairo, etc., R. Co., 240 Ill. 152 286, 1444
v. Carter, 1 Bailey 217 1949, 1956, 2201
v. Carter, 4 Day 30 1570
v. Carter, 5 Bing. 406 503
v. Carter, 76 Iowa 474 1875
v. Carter, 129 Mo. App. 467 815
v. Chicago, etc., R. Co., 136 Mo. App. 719 763
v. Collar, 1 Phila. 339 3099
v. Compton, 79 Ind. 37 585
v. Corley, 23 Ala. 612 877
v. Current River R. Co., 156 Mo. 635 4
v. Davis, 8 Fla. 183 591
v. Denman, 23 N. J. L. 260 2058, 2094, 2181, 2188
v. Denman, 23 N. J. L. 273 2146, 2147
v. Duggan, 144 Mass. 32 1625
v. Du Pre, 18 S. C. 179 4218, 4240
v. Edwards, 88 Va. 205 (1891) 2320
v. Fidelity & D. Co., 134 Ala. 369 2855, 2862
v. Fischer (N. Y. Misc.), 121 Supp. 614 317, 2415
v. Fulgham, 134 Ala. 238 4173
v. Glass, 44 Mich. 154 4384
v. Illinois Cent. R. Co., 17 Ky. L. Rep. 1352 1311, 1312
v. Jones, 5 Ired. Eq. 196 636
v. Kaufman, 67 S. C. 456 888
v. King, 11 Rich. 125 1109, 1875
v. Lacy, 3 Ind. App. 54 3192
v. Lewis, 29 Ill. 500 1241
v. McDaniel, 94 Ky. 564 3716
v. McGehee, Phill. (N. C.) 431 2768
v. McNeeley, 1 Ired. 448 2221
v. Manhattan L. Ins. Co., 11 Hawaii 69 3084
v. Maryland & P. R. Co., 112 Md. 599 1430, 3736, 3749
v. Moses, 39 Ill. 539 977
v. Neal, 24 Ga. 346 572
v. New Orleans Ry. & Light Co., 135 La. 151 3477
v. North Carolina R. Co., 139 N. C. 499 4879, 4905, 4907
v. Oster, 134 Mo. App. 146 167, 287
v. Parker, 28 Me. 509 3717, 3718
v. Peak, 138 Mass. 439 2158
v. Penn, 4 Ala. 140 2331
v. Phoenix Ins. Co., 2 Wash. C. C. 51 3036
v. Pitcher, 87 Hun 580 3734, 3780
v. Producers' O. Co., 200 Pa. 579 1074
v. Roberts, 85 Neb. 480 2274
v. St. Paul, etc., R. Co., 22 Minn. 342 4033
v. Sioux City S. Co., 160 Iowa 78 4947
Carter v. Southern Ry., 75 S. C. 355 318, 3459
v. Spencer, 4 Ind. 78 1403
v. Strom, 41 Minn. 522 918
v. Thorn, 18 B. Mon. 613 1038, 1568, 1570, 1574
v. Thurston, 58 N. H. 104 1431
v. Towne, 98 Mass. 567 99
v. Wabash R. Co., 128 Mo. App. 57 3742, 3799, 3805
v. Wallace, 2 Tex. 206 37
v. West Jersey & S. R. Co., 76 N. J. L. 602 4860, 4900
v. Western U. Tel. Co., 141 N. C. 374 3547
Carthage Stone Co. v. Travelers' Ins. Co., 186 Mo. App. 318 312, 318, 476
Carthage T. Co. v. Andrews, 102 Ind. 138 1421, 1424, 1472, 4692, 4815
Cartin v. Hammond, 10 Mont. 1 1989, 2000
Cartmell v. Allard, 7 Bush. 482 2945
Cartmill v. Brown, 1 A. K. Marsh. 576 943
Cartwright v. Canode (Tex. Civ. App.), 138 S. W. 792 3821
v. Cooke, 3 B. & Ad. 701 629, 753
v. Culver, 74 Mo. 179 2211
v. Elliott, 45 Ill. App. 458 4633
v. Gardner, 5 Cush. 273 839
v. Greene, 47 Barb. 9 1155, 2957
v. McCook, 33 Tex. 612 2311, 2329
v. Roff, 1 Tex. 78 1397
Cartwright Tel. Co., 128 Ky. 395 3548
Caruthers v. Hall, 10 Mich. 40 572
v. Humphrey, 12 Mich. 270 826
v. Tillman, 1 Hayw. 501 414
Carver v. Adams, 40 Vt. 552 1358
v. Brady, 104 N. C. 219 978
v. Graves, 47 Tex. Civ. App. 481 2241
v. Jackson, 82 Miss. 583 1511
v. Mayfield L. Co., 29 Tex. Civ. App. 434 1056
v. Mayfield L. Co., 68 S. W. 711 (Tex. Ct. of App.) 1926
v. Taylor, 35 Neb. 429 1983, 1989
Carver's App., 89 Pa. 276 1249
Carvill v. Jacks, 43 Ark. 439 4363, 4389, 4387, 4418
Cary v. Allen, 39 Wis. 481 4506
v. Bancroft, 14 Pick. 315 629, 802
v. Courtenay, 103 Mass. 316 615
v. Gruman, 4 Hill 625 2390, 2405, 2410, 2424, 2443, 4369, 4410
v. Whiting, 118 Mass. 363 3139
Cary Brick Co. v. Tilton, 125 C. C. A. 499, 208 Fed. 497 4630
Casale v. Calderone, 49 N. Y. Misc. 555 4556
Casassa v. City of Seattle, 75 Wash. 367 41
Casavan v. Sage, 201 Mass. 547 4636, 4648
Cascarella v. National G. Co., 151 Mich. 15 434, 436, 4646
Case v. Babbitt, 16 Gray 278 1625, 4357
v. Boughton, 11 Wend. 106 632
v. Case, 45 Neb. 493 4541
v. Case, 137 App. Div. (N. Y.) 393 2589, 2595
v. Duffy (Misc.), 86 N. Y. Supp. 778 4221
v. Erwin, 18 Mich. 434 2147
v. Fish, 58 Wis. 56 739, 1202
v. Gerrish, 15 Pick. 49 756, 1826
v. Hall, 2 Ind. Ty. 8 3702
v. Hall, 24 Wend. 102 169, 2380, 2396, 2397, 4425
v. Hart, 11 Ohio 364 4285

[REFERENCES ARE TO PAGES]

Case v. Hartford F. Ins. Co., 13 Ill. 676 3040, 3048
v. Hotchkiss, 3 Keyes 334, 3 Abb. Pr. (N. S.) 381, 1 Abb. Ct. of App. 324 1102, 1103, 2475, 2489
v. Hulsebush, 122 Ala. 212 1594
v. Marks, 20 Conn. 248 470, 4524, 4573, 4575
v. Phillips, 182 Ill. 187 680
v. Plato, 54 Iowa 64 1542
v. Rully, 3 Wash. C. C. 298 3036
v. St. Louis R. Co., 75 Mo. 668 486
v. Simonds, 7 N. Y. Supp. 253 2244
v. Smith, 107 Mich. 416 4960
v. Wolcott, 33 Ind. 5 2008, 2028, 2046
Case Mfg. Co. v. Soxman, 138 U. S. 431 666, 673
Case Plow Works, J. I., v. Niles & S. Co., 90 Wis. 590 2374, 2376
Case T. Co. v. Souders, 48 Ind. App. 503 847, 859
Case T. M. Co. v. Davis, 131 La. 87 2392
v. Fronk, 105 Minn. 39 840, 858, 868
v. Puls, 158 Ill. App. 1 2456
Casebeer v. Mowry, 55 Pa. 419 3846
Casey v. Ballou B. Co., 98 Iowa 107 4269, 4271, 4274
v. Chaytor, 5 Tex. Civ. App. 385 4212, 4215
v. Chicago City R. Co., 237 Ill. 140 1472
v. Galli, 94 U. S. 673 1076
v. Gill, 154 Mo. 181 3676, 3681
v. Hanrick, 69 Tex. 44 525
v. Harris, 2 Litt. 172 631
v. Hulgan, 118 Ind. 590 4507, 4514
v. Lucas, 2 Bush 55 2212
v. St. Louis T. Co., 116 Mo. App. 235 4859
v. St. Louis, etc., R. Co., 129 Mo. App. 362 3799
Cash v. Kennion, 11 Ves. 314 616, 1146, 1878, 1902
v. Meisenheimer, 53 Wash. 576 2013
v. New York Cent., etc., R. Co., 56 App. Div. 473 144
Cash Register Co. v. Townsend, 137 N. C. 652 4375
Cashion v. Western U. Tel. Co., 123 N. C. 267 3621, 3636, 3637, 3638
Casidy, Succession of, 40 La. Ann. 827 2099
Casner v. Johnson, 66 Kan. 404 691
Cason v. Western U. Tel. Co., 77 S. C. 157 323, 3570
Caspar v. Stone, 2 McGloin 149 3232
Casper v. Geck, 185 Ill. App. 155 4799
v. Klippen, 61 Minn. 353 4183, 4194
Cass v. Adams, 3 Ohio 223 633
v. Higenbotam, 100 N. Y. 248 811, 813, 820
Cassaboglou v. Gibb, 11 Q. B. Div. 797, 9 Q. B. Div. 220 2921
Cassacia v. Phoenix Ins. Co., 28 Cal. 628 1242
Cassady v. Old Colony St. R. Co., 184 Mass. 156 88
v. Trustees of Schools, 105 Ill. 560 1132
Cassani v. Dunn, 44 App. Div. (N. Y.) 248 2888, 2889
Casselberry v. Forquer, 27 Ill. 170 376, 379
Cassell v. Hays, 51 Ill. 261 1499
Cassell's Mill v. Strater G. Co., 166 Ala. 274 170, 187, 2273, 2340
Casserly v. Witherbee, 119 N. Y. 522 786
Cassidy v. Brooklyn Daily Eagle, 138 N. Y. 239 4516
Cassidy v. Elk Grove L. & C. Co., 58 Ill. App. 39 4212
v. Hunt, 75 Fed. 1012 4448
v. LeFevre, 45 N. Y. 562 234, 284, 2626
v. Saline County Bank, 7 Ind. Terr. 543 1704
Cassin v. Marshall, 18 Cal. 689 4178
Cassity v. New Orleans Ins. Ass'n, 65 Miss. 49 3050
Casson v. Field, 52 N. Y. Super. 196 2950
Cassville R. M. Co. v. Aetna Ins. Co., 105 Mo. App. 146 794
Casted v. Walker, 40 Ark. 117 960
Castelli v. Jereissati, 80 N. J. L. 295 748
Castello v. Landwehr, 28 Wis. 522 4874
Castenholz v. Heller, 82 Wis. 30 1451
Castigan v. Mohawk, etc., R. Co., 2 Denio 609 2522
Castino v. Ritzman, 156 Cal. 587 1391
Castle v. Candee, 16 Conn. 223 2779
v. Peirce, 2 Root 294 2076
Castleberry v. Atlanta, 74 Ga. 164 4116
Castleman v. Holmes, 4 J. J. Marsh. 1 666
Castleton v. Minor, 8 Vt. 209 309
Castner v. Darby, 128 Mich. 241 4227
v. Slater, 59 Me. 212 2743
Caston v. Quimby, 178 Mass. 153 2511
Castor v. Dufur, 133 Iowa 535 40, 2065
Casualty Co. of America v. Beattie, 75 Wash. 166 1092
Caswell v. Coan, 1 Taunt. 566 2400
v. J. S. McCall & Sons, — Tex. Civ. App. —, 163 S. W. 1001 31
v. Wendell, 4 Mass. 108 2060, 2110, 3188
Catalina, The, 105 Fed. 633 2717, 2727
Catanzarodi di Giorgo Co. v. Stock, 116 Md. 201 1115
Catawissa R. Co. v. Armstrong, 52 Pa. 282 4858, 4874, 4906
Cate v. Cate, 50 N. H. 114 359
v. Hutchinson, 58 Neb. 232 1446
v. Schaum, 51 Md. 299 3823
Cates v. McKinney, 48 Ind. 562 3664
v. Sparkman, 73 Tex. 619 183
v. Western U. Tel. Co., 151 N. C. 497 3622
Catharine, The, v. Dickinson, 17 How. 170 4986, 5009
Cathcart v. Bowman, 5 Pa. 319 2098, 2148, 2149, 2175, 2185
Cathey v. St. Louis, etc., R. Co., 149 Mo. App. 134 1279, 3506
Catholic Knights v. Franke, 137 Ill. 118 1089
Catlett v. Brodie, 9 Wheat. 553 1767
Catlin v. Birchard, 13 Mich. 110 1854
v. Latson, 4 Abb. Pr. 248 1530
v. Lyman, 16 Vt. 44 1199, 1202, 1206
v. Munn, 37 Hun (N. Y.) 23 647
v. Northern C. & I. Co., 225 Pa. 262 4043
v. Smith, 24 Vt. 85 2956
v. Tobias, 26 N. Y. 217 2230
v. Ware, 9 Mass. 217 3718
Catlin C. Co. v. Lloyd, 109 Ill. App. 122 395
Caton v. Rideout, 1 Macn. & G. 599 1070
v. Shaw, 2 H. & G. 13 871, 998, 1000
Catron, In re, Estate of, 82 Mo. App. 416 1081
Catron v. Lafayette County, 125 Mo. 67 1058
Catskill Bank v. Messenger, 9 Cow. 37 773, 781
Catterall v. Hindle, L. R. 1 C. P. 186 2944
Catterlin v. Voney, 177 Fed. 527 832
Catterson v. Ireland, 60 Wash. 208 804

[REFERENCES ARE TO PAGES]

Catzen v. Belcher, 64 W. Va. 314 4640, 4647, 4648
Cau v. Texas & P. R. Co., 194 U. S. 427 3333
Cauble v. Central Vermont Ry. Co., 216 Fed. 712 4711
Caudle v. Rice, 78 Ga. 81 591
Cauldwell, In re, 156 App. Div. (N. Y.) 661 4157
Caulfield v. Whitworth, 18 L. T. (N. S.) 527 4568
Caulkins v. Gaslight Co., 85 Tenn. 683 4221
v. Harris, 9 Johns. 324 1028, 2076
Causey v. Seaboard Air Line R. Co., 166 N. C. 5 766
Cauthen v. Barnesville Bank, 68 Ga. 287 1807
v. Lancaster Cotton Oil Mills, 96 S. C. 342 3856
Cavanagh & Canada Atlantic R. Co., In re, 14 Ont. L. R. 523 4008, 4156
Cavanagh & Canada Atlantic R. Co. v. Block, 192 Mass. 63 3904
v. Durgin, 156 Mass. 466 3769, 3771
Cavanaugh v. Austin, 42 Vt. 576 470, 4513, 4569
v. Marble, 80 Conn. 389 704
v. Stevens, 24 S. D. 349 2404, 2422
Cave v. Seaboard A. L. R., 94 S. C. 282 3504
Caven v. Troy, 15 App. Div. (N. Y.) 163 326
Cavender v. Guild, 4 Cal. 250 1055, 1182
v. Waddingham, 2 Mo. App. 551 2508
Caverly v. Nichols, 4 Johns. 189 1556
Caves v. Bartek, 85 Neb. 511 311, 3243
Caviness v. Fidelity & D. Co., 140 N. C. 58 2798
Cavins v. Trice, 55 Tex. Civ. App. 533 4214
Cawkwell v. Russell, 26 L. J. (Ex.) 35 3840
Cawley v. Jean, 218 Mass. 263 3162
Cawood Patent, 94 U. S. 695 4456, 4459
Cawston v. Sturgis, 29 Ore. 331 4381, 4383, 4397, 4407
Cawthon v. Lusk, 97 Ala. 674 2275
Cawthorn v. Trickett, 15 C. B. (N. S.) 802 3303
Cawthorpe v. Clark, 173 Mich. 267 1826
Cayenne, The, 2 Abb. (U. S.) 42 2735
Caykendall, Ex parte, 6 Cow. 53 1484
Cayle's Case, 8 Coke 32 3530
Cayuga, The, 59 Fed. 483 5014
Cayuga, The, 2 Ben. 125, 7 Blatch. 385, 14 Wall. 270 5003, 5005
Cayuga Nat. Bank v. Dunklin, 29 Mo. App. 442 2780
Caze v. Baltimore Ins. Co., 7 Cranch 358 3294
Cecconi v. Rodden, 147 Mass. 164 2111
Cecil v. Hicks, 29 Gratt. 1 962
Cedar Rapids, etc., R. Co. v. Raymond, 37 Minn. 204 3978, 3986, 4003
v. Ryan, 37 Minn. 38 4033
Cedartown v. Brooks, 2 Ga. App. 583 1461, 1467, 1471
Cederberg v. Robinson, 100 Cal. 93 1417, 2697, 2700, 2703
Ceffarelli v. Landino, 82 Conn. 126 6, 2464
Ceigler v. Hopper-M. Co., 90 App. Div. (N. Y.) 379 4740, 4772
Celles v. Casey, 48 Mont. 568 480
Celluloid Co. v. Haines, 176 Mass. 415 2749
Celluloid Mfg. Co. v. Celluloid Mfg. Co., 40 Fed. 476 4456
Centaur C. Co. v. Hill, 7 Ont. L. R. 110 2359, 2364, 2406, 2455
Center v. Davis, 39 Ga. 210 3248
v. Elgin City B. Co., 185 Ill. 534 2125
v. Spring, 2 Iowa 393 4635
Central Altagracia v. Wilson, 5 Porto Rico Fed. 36 41
Central Appalachian Co. v. Buchanan, 73 Fed. 1006 3116
Central B. Co. v. Lowell, 15 Gray 111 4065
Central B. P. Co. v. Mt. Clemens, 143 Mich. 259 930
Central Bank & T. Co. v. State, 139 Ga. 54 1196, 1197
Central Branch Union Pac. R. Co. v. Andrews, 26 Kan. 702 400
v. Andrews, 30 Kan. 590 4097
v. Andrews, 41 Kan. 370 3878
v. Twine, 23 Kan. 585 3982
Central C. Co. v. Pinkert, 122 Ky. 720 3858, 3859, 3866, 3875, 3877
Central C. & C. Co. v. Hartman, 111 Fed. 96 233
v. Henry S. Co., 69 Ark. 302 4257
v. Penny, 173 Fed. 340 4259, 4263
Central C. & S. Co. v. Welborn, 153 Mo. App. 647 4165
Central F. Co. v. Bennett, 144 Ala. 574 4926, 4939
Central Georgia B. Co. v. Carolina P. Co., 136 Ga. 693 384, 2280
v. Mays, 137 Ga. 120 3963, 4027, 4034
Central Georgia Power Co. v. Cornwell, 141 Ga. 643 4007, 4034, 4136
v. Fincher, 141 Ga. 191 1377, 1392, 3943
v. Harris, 141 Ga. 196 3943
v. Parker, 141 Ga. 198 3905
v. Pope, 141 Ga. 186 3838, 3849, 3887, 3900, 3907, 3918, 3934
v. Stone, 142 Ga. 662 3965
v. Stubbs, 141 Ga. 172 1391, 3943
Central I. Co. v. Miles, 56 Neb. 272 2787
Central Kentucky T. Co. v. Chapman, 130 Ky. 342 1373
Central L. Co. v. Arkansas Valley L. Co., 86 Kan. 131 317, 2274
Central M. Co. v. Graves, 74 Kan. 718 2214
v. Thaler, 133 Mo. App. 86 569, 2474
Central Nat. Bank v. Cooper, 85 Mo. App. 383 1164
v. Copp, 184 Mass. 328 646
v. Gallagher, 163 Pa. 456 4201
Central O. Co. v. Southern Ref. Co., 154 Cal. 165 2239, 2274
Central of Georgia Ry. Co. v. Courson, 10 Ala. App. 581 3533
v. Wallace, 141 Ga. 51 345, 3478
Central P. R. Co. v. Kuhn, 86 Ky. 578 4656, 4662, 4690, 4730
Central Pac. R. Co. v. Pearson, 35 Cal. 247 3998, 4021, 4046, 4133, 4134, 4135
Central R. Co. v. Alexander, 144 Ala. 257 4908, 4947
v. Ashley, 159 Ala. 145 3449
v. Augusta B. Co., 122 Ga. 646 1389
v. Barnett, 151 Ala. 407 1430, 1433
v. Bayonne, 51 N. J. L. 428 4057
v. Bond, 111 Ga. 13 4875
v. Bryant, 73 Ga. 722 3412
v. Butler M. & G. Co., 8 Ga. App. 1 3401, 3418
v. Champion, 169 Ala. 622 3904
v. Chicago P. Co., 122 Ga. 11 1367, 3418, 4230, 4269, 4270
v. Chicago V. Co., 169 Ala. 287 3430
v. City Mills Co., 128 Ga. 841 3333
v. Crosby, 74 Ga. 737 1477, 1521
v. De Bray, 71 Ga. 406 4817

[REFERENCES ARE TO PAGES]

Central R. Co. v. Dorsey, 116 Ga. 719 113, 3458, 3481
v. Dutton, 7 Ga. App. 755 3447
v. English, 73 Ga. 366 3924
v. Glascock, 117 Ga. 938 3416
v. Hall, 124 Ga. 322 57, 3401, 3418
v. Henson, 121 Ga. 462 4917
v. Jones, 7 Ga. App. 165 3413
v. Kelley, 7 Ga. App. 464 3765
v. Knight, 3 Ala. App. 436 333, 3542
v. McNab, 150 Ala. 332 4701, 4730, 4733
v. Minor, 2 Ga. App. 804 1476, 4872
v. Montmollen, 145 Ala. 468 480, 3332
v. Morgan, 161 Ala. 483 3449, 3451, 3527
v. Mote, 131 Ga. 166 1523, 4697, 4794
v. Newman, 138 Ga. 145 4879
v. Owen, 121 Ga. 220 152
v. Perkerson, 112 Ga. 923 1514, 4908
v. Price, 106 Ga. 176 3458
v. Ray, 129 Ga. 349 4913
v. Roach, 70 Ga. 434 1495
v. Rouse, 77 Ga. 393 4915
v. Sears, 66 Ga. 499 1140
v. Senn, 73 Ga. 705 1431, 3488
v. Serfass, 153 Ill. 379 4657, 4664
v. Smith, 76 Ga. 209 3528
v. Stancel, 118 Ga. 142 1429
v. Steverson, 3 Ala. App. 313 323, 1515, 3905, 3912
v. Swint, 73 Ga. 651 4952, 4956
v. Thompson, 76 Ga. 770 4872, 4875, 4906, 4913
v. Turner, 143 Ala. 142 2479
v. White, 135 Ga. 524 3459
v. White, 175 Ala. 60 4795, 4797, 4798, 4814
v. Windham, 126 Ala. 552 3840, 3855, 3911
v. Wood, 118 Ga. 172 3527
Central R. Co. of New Jersey v. Kellett, 86 N. J. L. 84 5212
Central R. & B. Co. v. Lanier, 83 Ga. 587 1379, 4664, 4817
v. Murray, 93 Ga. 256 3767, 3776, 3806
v. Roach, 64 Ga. 635 4913
v. Roberts, 91 Ga. 513 3440, 3473, 3527
v. Strickland, 90 Ga. 562 3455, 3456, 3528
v. Warren, 84 Ga. 329 4186
Central T. Co. v. Arctic I. Mach. Mfg. Co., 77 Md. 202, 238 2392, 2405, 2626, 2636
v. Burton, 74 Wis. 329 1159
v. Clark, 92 Fed. 293 172, 180, 194
v. Condon, 67 Fed. 84 1057
v. Folsom, 167 N. Y. 285 690
v. Louisville T. Co., 100 Fed. 545 2873
v. Manhattan T. Co., 144 App. Div. (N. Y.) 560 4228
v. Savannah & W. R. Co., 69 Fed. 682 200, 3342, 3345, 3375
v. Wabash, etc., R. Co., 57 Fed. 441 3842
Central Union Tel. Co. v. Sokola, 34 Ind. App. 429 56, 143
Central Vermont R. Co. v. Franchere, 35 Can. Sup. Ct. 68 1502
Central, etc., R. Co. v. Cornwell, 141 Ga. 643 3961
v. Luther, 32 Tex. Civ. App. 309 7450
v. White, 238 U. S. 507, aff'g 87 Vt. 330, 5035, 5083, 5113, 5130, 5133, 5137, 5139
Centralia v. Ayres, 133 Ill. App. 290 4737
v. Wright, 156 Ill. 561 3853, 3860
Centralia & C. R. Co. v. Brake, 125 Ill. 393 3977, 3979, 4027
v. Rixman, 121 Ill. 214 4027
Centurion, The, 2 Ware 490 2720
Cerero v. American S. Co., 59 N. Y. Misc. 548 842
Cernahan v. Chrisler, 107 Wis. 645 4200, 4264, 4296, 4297, 4299, 4301
Cerny v. Paxton, 78 Neb. 134 4399
v. Paxton, 83 Neb. 88 1452
Cerveny v. Chicago Daily News Co., 139 Ill. 345 4506
Cetofonte v. Camden C. Co., 78 N. J. L. 662 4856
Chace v. Hinman, 8 Wend. 452 2191, 2873
Chacey v. Fargo, 5 N. D. 173 104, 4732, 4738
Chadbourn v. Watts, 10 Mass. 121 992
Chadbourne v. Springfield St. R. Co., 199 Mass. 574 109
Chaddock v. Briggs, 13 Mass. 248 4503, 4534
v. Vanness, 35 N. J. L. 517 2781
Chadron v. Glover, 43 Neb. 732 417
Chadsey v. Green, 24 Conn. 562 2388
Chadwick v. Butler, 28 Mich. 349 4244
v. Lamb, 29 Barb. 518 430, 4287
v. Oregon-Washington R. & N. Co., 74 Ore. 19 5073, 5074, 5086
v. Trower, 6 Bing. N. C. 1 1527
v. Woodward, 12 Daly 399 3247
Chaffe v. Landers, 46 Ark. 364 998
Chaffee v. Jones, 19 Pick. 260 2779, 2859, 2864
v. Memphis, etc., R. Co., 64 Mo. 193 2779
v. Sherman, 26 Vt. 237 430
Chaffee's App., 56 Mich. 244 3962
Chaffin v. Campbell, 4 Sneed 184 2857
v. Manufacturing Co., 136 N. C. 364, 135 N. C. 95 35
Chaboon v. Hollenback, 16 S. & R. 425 795
Chairman v. Moore, 2 Murph. 22 1636
Chaityn v. Stock (Misc.), 120 N. Y. Supp. 89 2596
Chalice v. Witte, 81 Mo. App. 84 176, 194, 212, 2354
Chalie v. Duke of York, 6 Esp. 45 1033, 1034
Challenge C. P. Co. v. Diel, 92 Hun 165 2743
Challis v. Lake, 71 N. H. 90 56
v. McCrum, 22 Kan. 157 1870
Challoner v. Boyington, 83 Wis. 399 655, 656, 663
Chalmers v. Jones, 23 S. C. 463 611
v. Shackell, 6 C. & P. 475 473, 4583
v. Turnipseed, 21 S. C. 126 662
Chalmers Motor Co. v. Maibaum, 186 Ill. App. 147 4424
Chaloux v. International P. Co., 75 N. H. 281 4931
Chalstran v. Board of Education, 244 Ill. 470 2694
v. Board of Education, 150 Ill. App. 506 2687
Chalupa v. Tri-State L. Co., 92 Neb. 477 267, 357
Chamberlain v. Applegate, 2 Hun 510 1791
v. Bagley, 11 N. H. 234 854, 876
v. Beller, 18 N. Y. 115 295, 2876, 2888
v. Boyd, 11 O. B. Div. 407 4552
v. Brady, 49 N. Y. Super. 484 2000
v. Chandler, 3 Mason 242 1330, 1347, 3467
v. Collinson, 45 Iowa 429 3788
v. Eddy, 154 Mich. 593 1110

[REFERENCES ARE TO PAGES]

Chamberlain v. Farr, 23 Vt. 265 2251
v. Godfrey, 36 Vt. 380 295, 296
v. Godfrey, 50 Ala. 530 3124
v. Greenfield, 3 Wils. 292 1390, 3825
v. Hibbard, 26 Ore. 428 2597, 2606
v. Lake Shore, etc., R. Co., 111 Mich. 614 3441
v. Lake Shore, etc., R. Co., 122 Mich. 477 3441
v. Maitland, 5 B. Mon. 448 1059
v. Morgan, 68 Pa. 168 312, 2561
v. Parker, 45 N. Y. 569 35, 39, 2585, 3158
v. Preble, 11 Allen 373 2131
v. Shaw, 18 Pick. 278 4161, 4176, 4291
v. Smith, 1 Mo. 718 1019
v. Townsend, 72 Ore. 207 539
v. Western T. Co., 45 Barb. 218 3529
v. Worrell, 38 La. Ann. 347 4211
Chamberlin v. Booth, 135 Ga. 719 930
v. Day, 3 Cow. 353 586
v. Morgan, 68 Pa. 168 2551, 2558
v. Murphy, 41 Vt. 110 491
v. Sawyer, 33 Vt. 80 2688
v. Scott, 33 Vt. 80 291, 2687, 2690
v. Vance, 51 Cal. 75 469, 1541, 4513, 4517, 4577
Chamberlyn v. Delarive, 2 Wilson 353 677
Chambers v. Boyd, 116 App. Div. (N. Y.) 208 1095, 2470
v. Brown, 69 Iowa 213 1444
v. Carroll, 199 Pa. 371 162
v. Chambers, 87 Ky. 144 1079
v. Chattanooga Union R. Co., 130 Tenn. 459 4089
v. Chicago City R. Co., 175 Ill. App. 362 4745
v. Cline, 60 W. Va. 588 1559
v. Emery, 36 Utah 380 4311
v. Everding & Farrell, 71 Ore. 521 49
v. Hodges, 3 Tex. 517 1806
v. Hunt, 18 N. J. L. 339 421, 431
v. Jaynes, 4 Pa. 39 2659, 2665
v. King, 8 Mo. 517 2666
v. Mattingly, 57 Tex. Civ. App. 129 3240
v. Porter, 5 Cold. 273 4782
v. Reinhold, 33 Pa. Super. 266 2113, 2119
v. Robinson, 2 Str. 691 4614
v. Ross, 25 N. J. L. 293 3097, 3099
v. Short, 79 Mo. 204 684
v. South Chester, 140 Pa. 510 3975, 4029
v. Waters, 7 Cal. 390 1660, 1673
Chambersburg Ins. Co. v. Smith, 11 Pa. 120 676, 677
Chambersburg & B. T. Road, In re, 20 Pa. Super. Ct. 173 4049, 4071, 4141
Chamblee v. McKenzie, 31 Ark. 155 2226
Chamblin v. Blair, 58 Ill. 385 601
Chambliss v. Robertson, 23 Miss. 302 953, 1180, 1878
Chamboret v. Cagney, 2 Sweeny 378, 41 How. Pr. 125 549
Chamier v. Hill, 15 South Aust. L. R. 84 4748, 4753
Chamness v. Chamness, 53 Ind. 301 2305
Champant v. Ranelagh. Prec. Ch. 128 1147
Champion v. Griffith, 13 Ohio 228 2779
v. Joslyn, 44 N. Y. 653 802
v. Vincent, 20 Tex. 811 1269, 3831
Champion I. Mfg. & C. S. Co. v. Pennsylvania I. W. Co., 68 Ohio 229 2627, 2635
Champlain C. Co. v. O'Brien, 117 Fed. 271 931
Champlain S. & S. Co. v. State, 66 N. Y. Misc. 434 354, 3969
Champlin v. Baltimore & O. S. R. Co., 140 Ill. App. 94 1455
v. Dotson, 13 Sm. & M. 553 2211
v. Rowley, 18 Wend. 187, 13 Wend. 258 2229, 2231
v. Stoddard, 34 Hun 109 4498
Champney v. Coope, 34 Barb. 539 637
Champneys v. Lyle, 1 Bin. 327 1035
Champomier v. Washington, 2 La. Ann. 1013 1764
Chancellor v. Schott, 23 Pa. 68 712
v. Wiggins, 4 B. Mon. 201 2380
Chandler v. Allison, 10 Mich. 460 3231
v. Andrews, 192 Fed. 543 1458, 4408
v. Baker, 191 Mass. 579 2462, 2481
v. Brainard, 14 Pick. 285 2869
v. Bush, 84 Ala. 102 1431
v. Calvert, 87 Mo. App. 368 1891
v. Childs, 42 Mich. 128 533
v. Commerce F. Ins. Co., 88 Pa. 223 3021
v. Edson, 9 Johns. 362 362, 363
v. Grieves, 2 H. Bl. 606 2533
v. Herrick, 19 Johns. 129 782
v. Higgins, 109 Ill. 602 2799
v. Higgins, 156 Ala. 511 1444
v. Hill, 2 Hen. & Mun. 124 422
v. Illinois Cent. R. Co., 171 Ill. App. 240 1373, 4686
v. Jamaica Pond A. Co., 122 Mass. 305 4136
v. Jamaica Pond A. Co., 125 Mass. 544 4094
v. John Hancock Mut. Life Ins. Co., 180 Mo. App. 394 3090
v. Monmouth Bank, 13 N. J. L. 255 2468
v. Morey, 195 Ill. 596 4095, 4147
v. Newton, 13 Ky. L. Rep. 927 4782
v. People's Sav. Bank, 61 Cal. 410 1013
v. Rutherford, 101 Fed. 774 1604
v. Smith, 70 Ill. App. 658 54, 4183
v. Westfall, 30 Tex. 475 2779
Chandler G. & M. Co. v. Shea, 213 Mass. 398 2276
Chandler L. Co. v. Radke 136 Wis. 495 2793
Chaney v. Coleman, 77 Tex. 100 4418
v. Cooke, 5 T. B. Mon. 248 1017
Change of Grade of Norwood St., 12 Pa. Dist. 309 4098
Chansky v. William Const. Co. (Misc.) 144 N. Y. Supp. 687 3186
Chanter v. Hopkins, 4 M. & W. 399 2373, 2379
Chany v. Hotchkiss, 79 Conn. 104 2274
Chapel v. Bull, 17 Mass. 213 2060, 2115, 2157, 2159, 2181, 2187
Chapeze v. Young, 87 Ky. 476 2855
Chapin v. C. & E. I. R. Co., 18 Ill. App. 47 773
v. Dobson, 78 N. Y. 75 3233
v. Leapley, 35 Ind. App. 511 639
v. Murphy, 5 Minn. 474 943, 958
Chaplain v. Briscoe, 5 Sm. & M. 198 2197
Chaplin v. Hicks, [1911] 2 K. B. 786 269
Chapline v. Scott, 4 Har. & McHen. 91 1214
Chapman v. Atlantic Ave. R. Co., 14 N. Y. Misc. 384 4826
v. Bible, 171 Mich. 663 4391
v. Burt, 77 Ill. 615 1014
v. Carrothers (Wyo.), 129 Pac. 434 1414

[REFERENCES ARE TO PAGES]

Chapman v. Chicago, etc., R. Co., 26 Wis. 295 369, 1136, 1141, 3389, 3400, 4171
v. Cochran, 30 Wis. 295 2238
v. Coffin, 14 Gray 454 661, 1486, 1490
v. Collins, 12 Cush. 163 637
v. Commonwealth, 25 Gratt. 721 1588
v. Dease, 34 Mich. 375 2222, 2230
v. Durant, 10 Mass. 47 659
v. Eddy, 13 Vt. 205 1951
v. Emerick, 5 Cal. 239 1392
v. Ferry, 12 Fed. 693 4479
v. Fowler, 132 App. Div. (N. Y.) 250 2318
v. Haw, 1 Taunt. 341 591
v. Hicks, 2 Dowl. P. C. 641 821
v. Holms, 10 N. J. L. 24 2056
v. Ingram, 30 Wis. 290 2236, 2249
v. Kansas City, etc., R. Co., 146 Mo. 481 2697
v. Kerr, 80 Mo. 158 1136, 4327, 4334, 4351, 4352
v. Kirby, 49 Ill. 211 267, 2306, 3209, 3222
v. Larin, 4 Can. Sup. Ct. 349 2244
v. Lee, 64 Ala. 483 675
v. McCrea, 63 Ind. 360 2929
v. Murch, 19 Johns. 290 2387
v. Oshkosh, etc., R. Co., 33 Wis. 629 4119, 4125
v. Pickersgill, 2 Wils. 145 4606
v. Propp, 125 Minn. 447 862, 867
v. Robertson, 6 Paige 627 1163, 1878, 1881
v. Rochester, 110 N. Y. 273 3905
v. Rockford Ins. Co., 89 Wis. 572 3017, 3044
v. Rothwell, Ellis, Bl. & E. 168 1394
v. Salfisberg, 104 Ill. App. 445 1490
v. Shaw, 5 Me. 59 2847
v. Smith, 16 How. 114 1607
v. Speller, 14 Q. B. 621 2382
v. Staunton, 246 Ill. 394 3948
v. Steinmetz 1 Dall. 261 1904
v. Thames Mfg. Co., 13 Conn. 269 35
v. Thornburgh, 17 Cal. 87 1622, 4564
v. Western U. Tel. Co., 88 Ga. 763 345, 3481, 3642, 3650
v. Western U. Tel. Co., 90 Ky. 265 352, 3597, 3621, 3639, 3641
Chapman D. Co. v. Security Mut. L. Ins. Co., 149 Fed. 89, 145 Fed. 434 887
Chappel v. Comfort, 10 C. B. (N. S.) 802 3303
v. Theus, 3 Tenn. Cas. 457 1079
Chappell v. Ellis, 123 N. C. 259 4150, 4191
v. Foster, 87 Kan. 203 3745
v. Puget Sound R. Co., 27 Wash. 63 3788
v. Western Ry. of Alabama, 8 Ga. App. 787 502, 3381, 3496, 3497
Chapter of Calvary Cathedral v. United States, 29 Ct. of Cls. 269 694
Charbonnell v. Seabury, 23 R. I. 543 4389
Charland v. Home for Aged Women, 204 Mass. 563 2156
Charles, The, 1 Newb. 329 2721
Charles Avery, The, 1 Bond 119 2724
Charles Henry and Cargo, The, 1 Bene. 8 2735
Charles, The, v. Lister, 174 Fed. 288 4993
Charles v. Altin, 15 C. B. 46 456, 2911, 3178
v. Carter, 96 Tenn. 607 2271
v. Haskins, 11 Iowa 329 1601
v. Jacobs, 9 S. C. 295 1639
Charles v. Witt, 88 Kan. 484 1122, 1361, 1569, 1645
Charles City P. & M. Co. v. Jones, 71 Iowa 234 560, 1698, 1701
Charles F. Co. v. Bond, 26 Fed. 18 918
Charles H. Klinck, The, 172 Fed. 1019 4990
Charleson v. Russell, 144 Iowa 38 4505
Charless v. Rankin, 22 Mo. 566 3913, 3916
Charleston Ice Mfg. Co. v. Joyce, 63 Fed. 916 2656, 2664
Charleston Ins. Co. v. Neve, 2 McMull. 237 3019
Charleston L. Co. v. Friedman, 64 W. Va. 151 833, 888, 2683
Charleston S. Co. v. Bason, 1 Harp. 262 141
Charleston & S. R. Co. v. Varnadore, 94 Ga. 639 3521, 3527
Charleston & W. C. R. Co. v. Nixon Grocery Co., 142 Ga. 343 3386
v. Sylvester, — Ga. App. —, 86 S. E. 275 5073, 5078
v. Thompson, 234 U. S. 576 3342
Charlevois v. Gogebic, etc., R. Co., 91 Mich. 59 1395
Charlotte, The, 124 Fed. 989 4905, 4990
Charlotte, etc., R. Co. v. Jesup, 44 How. Pr. 447 2428
v. Wooten, 87 Ga. 203 3385
Charlton v. Lay, 5 Humph. 496 2380
v. Markland, 36 Wash. 40 4613, 4639
Charman v. Hibbler, 31 App. Div. (N. Y.) 477 1433, 2149
v. Tatum, 54 App. Div. (N. Y.) 61 2132, 2141, 2142, 2184
Charnley v. Shawano W. P., etc., Co., 109 Wis. 563 3854
Charrington v. Laing, 3 M. & P. 587 836
Charter v. Stevens, 3 Denio 33 632
Chartier v. Marshall, 56 N. H. 478 1989, 2008
Chartres v. Cairnes, 4 Mart. (N. S.) 1 1145
Chase v. Alaska F. & L. Co., 2 Alaska 82 2568
v. Allen, 13 Gray 42 857, 890, 892, 918, 925
v. Alliance Ins. Co., 9 Allen 311 3302
v. Baker Co. v. National Trust & Credit Co., 215 Fed. 633 977
v. Barnes, 82 Kan. 28 2113
v. Bassett, 15 Abb. Pr. (N. S.) 293 1521
v. Bennett, 59 N. H. 394 300, 309
v. Brown, 32 Mich. 225 691
v. Clearfield L. Co., 209 Pa. 422 3776, 3794
v. Cochran, 102 Me. 431 434, 3737, 3826
v. Dearborn, 23 Wis. 143 1793
v. Dow, 47 N. H. 405 1181
v. Drew, 47 N. H. 405 1878
v. Evoy, 58 Cal. 348 524
v. Heaney, 70 Ill. 268 1609, 2645
v. Hinman, 8 Wend. 452 2893
v. Hoosac T. & W. R. Co., 85 Vt. 60 48, 3774, 3794
v. Jemmett, 8 Utah 231 4054
v. Manhardt, 1 Bland 333 1221
v. Monroe, 30 N. H. 427 1200, 1624
v. New York Cent. R. Co., 24 Barb. 273 324, 3761, 3897, 3898, 3922
v. New York I. W. Co., 57 Ill. App. 205 3255
v. Portland, 86 Me. 367 3957
v. Ries, 10 Cal. 517 1801
v. Rusk, 90 Mo. App. 25 4380, 4383

[REFERENCES ARE TO PAGES]

Chase v. Silverstone, 62 Me. 175 7
v. Smith, 35 Wash. 631 2689, 2696
v. Union S. Co., 11 Daly 107 1118
v. Welsh, 45 Mich. 345 789, 796
v. Western U. Tel. Co., 44 Fed. 554 3642
v. Whitmore, 68 Cal. 545 1924
v. Whitten, 51 Minn. 485 999
v. Whitten, 62 Minn. 498 999
v. Woodbury, 6 Cush. 143 572
v. Woodward, 61 N. H. 79 580
v. Worcester, 108 Mass. 60 4030
Chase County Nat. Bank v. Thompson, 54 Kan. 307 4314, 4328
Chasemore v. Richards, 7 H. of L. Cas. 349 7
Chastain v. Johnson, 2 Bailey 574 664, 669
Chatfield v. Bunnell, 69 Conn. 511 4650
v. Sintz-Wallin Co., 182 Mich. 689 4403
v. Wilson, 27 Vt. 670 3846
Chatham v. Jones, 69 Tex. 744 2358
v. McCrea, 12 Up. Can. C. P. 352 2752
Chatham F. Co. v. Moffatt, 147 Mass. 403 4384
Chatham Nat. Bank v. Pratt, 135 N. Y. 423 2788
Chatsworth v. Rowe, 66 Ill. App. 55 4797
Chattahoochee, The, 21 C. C. A. 162, 74 Fed. 899 4986, 4989
Chattahoochee B. Co. v. Goings, 135 Ga. 529 434
v. Sullivan, 86 Ga. 50 2671
Chattahoochee Valley R. Co. v. Bass, 9 Ga. App. 83 3946, 3963, 3983, 4121
Chattanooga v. Dowling, 101 Tenn. 342 3850, 3876
Chattanooga C. & F. Co. v. Lefebre, 113 La. 487 321, 2367
Chattanooga R. T. Co. v. Walton, 105 Tenn. 415 61
Chattanooga R. & F. Co. v. Vickrey (Tex. Civ. App.), 158 S. W. 1159 2241
Chattanooga S. R. Co. v. Thompson, 133 Ga. 127 3311, 3330
Chattanooga State Bank v. Citizens' State Bank, 39 Okla. 255 4312
Chattanooga, etc., R. Co. v. Evans, 66 Fed. 809 1659
v. Lyon, 89 Ga. 16 3521
Chatterton v. Cave, L. R. 3 App. Cas. 483, 492 4482
v. Crothers, 9 Ont. 683 848
v. Fox, 5 Duer 64 210, 537, 548, 3122, 3185, 3189, 3202, 3253, 3258
Chaude v. Shepard, 122 N. Y. 397 883, 920
Chaudiere M. & F. Co. v. Canada Atlantic R. Co., 33 Can. Sup. Ct. 11 3852
Chauncey v. Yeaton, 1 N. H. 151 1134, 1135, 4232
Chauvin v. Valiton, 8 Mont. 451 4314
Cheairs v. Coats, 77 Miss. 846 3124
Cheatham v. Yarbrough, 90 Tenn. 77 2501
Checkley v. Illinois Cent. R. Co., 257 Ill. 491 40
Cheddick v. Marsh, 21 N. J. L. 463 860, 861, 918
Cheek v. Waldrum, 25 Ala. 152 1030, 1032
Cheeks v. Virginia-Pocahontas Coal Co., 74 W. Va. 553 47
Cheeney v. Lafayette, etc., R. Co., 68 Ill. 570 2468
v. Nebraska & C. S. Co., 41 Fed. 740 (Colo.) 3791
Cheerful, The, 11 Prob. Div. 3 2724
Cheeseborough v. Hunter, 1 Hill (S. C.) 400 1020
Cheetham v. Ward, 1 B. & P. 630 643
Cheever v. Ellis, 134 Mich. 645 1120
Cheeves v. Anders, 87 Tex. 287 3075
Chellis v. Chapman, 125 N. Y. 214 1311, 3669, 3670, 3673, 3676, 3679, 3680
v. Woods, 11 Vt. 466 628
Chelmsford Co. v. Demarest, 7 Gray 1 1582, 1596, 2755
Cheltenham S. & G. Co. v. Gates I. Works, 23 Ill. App. 635, aff'd 124 Ill. 623 663, 667, 698
Chemical Nat. Bank v. Armstrong, 59 Fed. 372 1005, 1036
v. Bailey, 12 Blatch. 480 1035, 1113
v. Kellogg, 183 N. Y. 92 677
Cheminant v. Thornton, 2 C. & P. 50 807, 811
Chenango B. Co. v. Lewis, 63 Barb. 111 3911
Chenault v. Thomas, 119 Ky. 130 2058, 2065, 2069
Cheney v. Bilby, 74 Fed. 52 806, 817, 819, 1219, 1220, 1236
v. City Nat. Bank, 77 Ill. 562 2153
v. Dunlap, 27 Neb. 401 979
v. Gleason, 125 Mass. 166 4410
v. Higginbotham, 10 Ark. 273 1824
v. Libby, 134 U. S. 68 686, 687, 1027, 1220
v. Ricks, 187 Ill. 171 1241
v. Straube, 35 Neb. 521 2095, 2097, 2117
v. Straube, 43 Neb. 879 2095
v. Tory H. Ass'n, 65 N. Y. 282 523
Cheng Fun v. Campbell, 44 Nova Scotia 51 4837
Chenoweth v. National B. Ass'n, 59 W. Va. 653 979
Cherbuliez v. Parsons, 59 N. Y. Misc. 613 147
Cherokee P. Co. v. Hilson, 95 Tenn. 1 4827
Cherpeski v. Great Northern Ry. Co., 128 Minn. 360 5065, 5136
Cherry v. Canal & W. Co., 140 N. C. 422 3834
v. Chicago & A. R. Co., 191 Mo. 489 3465
v. Christian County, 146 Ky. 330 491, 1449, 3769
v. Kansas City, etc., R. Co., 61 Mo. App. 303 3475
v. Louisiana & A. R. Co., 121 La. 471 4863, 4930
v. McCall, 23 Ga. 193 1305
v. Mann, Cooke 269 1561
v. St. Louis, etc., R. Co., 163 Mo. App. 53 4744
v. Sprague, 187 Mass. 113 1904
v. Sutton, 30 Ga. 875 537, 545
v. Thompson, L. R. 7 Q. B. 573 312
Cherry Valley I. Works v. Florence I. R. Co., 64 Fed. 569 2231, 2232, 2237, 2242, 2251
Chesapeake Bank v. Swain, 29 Md. 483 606
Chesapeake I. Works v. Hochschild, 119 Md. 303 489
Chesapeake S. S. Co. v. Merchants' Nat. Bank, 102 Md. 589 295, 3425
Chesapeake T. Co. v. Walker, 158 Fed. 850 2792

[REFERENCES ARE TO PAGES]

Chesapeake & O. C. Co. v. Grove, 11 Gill & J. 398 399, 4014
v. Knapp, 9 Pet. 541 2458, 2695
Chesapeake & P. Tel. Co. v. Mackenzie, 74 Md. 36 3765
v. State, 124 Md. 527 4871, 4893
Chesapeake, etc., R. Co. v. Bank, 153 Ky. 625 4948
v. Banks, 142 Ky. 746 4853
v. Blankenship, 158 Ky. 270 381, 400, 3961, 3963, 3972, 3994, 4021, 4025
v. Carnahan, 241 U. S. 241 5088, 5092, 5131
v. Chambers, 95 Va. 503 4095
v. Conley, 136 Ky. 601 1267, 1310
v. Crank, 128 Ky. 329 1378, 4832
v. Davis, 119 Ky. 641 444, 4701
v. De Atley, 241 U. S. 310, rev'g 159 Ky. 687 5072, 5077, 5078, 5135, 5139
v. Dixon, 179 U. S. 131 4852
v. Dwyer's Adm'x, 157 Ky. 590 4948
v. Francisco, 149 Ky. 307 57, 3487, 3526
v. Gainey, 241 U. S. 494, rev'g 162 Ky. 427 5131
v. Ghee, 110 Va. 527 4860, 4863, 4917
v. Greaver, 110 Va. 350 3840
v. Gross, 19 Ky. L. Rep. 1926 3878, 3889, 3982, 3986
v. Hall, 136 Ky. 379 3413, 3414, 3427
v. Hawkins (W. Va.) 98 C. C. A. 443, 174 Fed. 597 4941
v. Higgins, 85 Tenn. 620 1501
v. Hoffman, 109 Va. 44 4662, 4690, 4718
v. Kelly, 241 U. S. 485, rev'g 160 Ky. 296, 161 Ky. 655 5088, 5105, 5106, 5131
v. Kornhoff, 167 Ky. 353 5040, 5041
v. Lang, 100 Ky. 221 4949
v. Lavin, 136 Ky. 205 482, 4296
v. Magowan, 147 Ky. 422 3413
v. May, 157 Ky. 708 3969
v. Meyers, 150 Ky. 841 1503
v. Moats, 20 Ky. L. Rep. 1757 400
v. Osborne, 97 Ky. 112 3521
v. Paris, 11 Va. 41 113
v. Patton, 9 W. Va. 648 1482
v. Perkins, 127 Ky. 110 3215
v. Pew, 109 Va. 288 3416
v. Robbins, 154 Ky. 387 3871
v. Roberts, 32 Ky. L. Rep. 651 1384
v. Robinett, 151 Ky. 778 78, 4687
v. Shaw, 168 Ky. 537 5040
v. Shiflett's Adm'x, — Va. —, 86 S. E. 860 5078
v. Stein, 142 Ky. 515 3849, 3856, 3875, 3877, 3881, 3886
v. Stock, 104 Va. 97 3390, 3400
v. Webb, 8 Ky. L. Rep. 44 (Ky. Super. Ct.) 3397
v. Wiley, 134 Ky. 461 1471, 1473, 4742
v. Wills, 111 Va. 32 113
Chesbrough v. Woodworth, 195 Fed. 875 4411
Chesebro v. Powers, 78 Mich. 472 436, 4567
Cheshire B. Co. v. Thrall, 72 Vt. 9 2749
v. Wilson, 86 Conn. 551 1372
Chesley v. Chesley, 10 N. H. 327 3667
v. King, 74 Me. 177 14
v. Thompson, 137 Mass. 136 4537
Chesmore v. Barker, 101 Iowa 576 3242, 4194
Chester, City of, 9 Prob. Div. 182 2728
Chester v. Bank, 16 N. Y. 336 2804
v. Broderick, 131 N. Y. 542 1786, 1787
v. Dickerson, 52 Barb. 349 101
v. Dickerson, 54 N. Y. 1 449
v. Jumel, 125 N. Y. 237, 254 1011
v. Powell, 52 L. T. Rep. 722 3140
v. Wheelwright, 15 Conn. 562 726, 728, 742
Chesterfield Mfg. Co. v. Dehon, 5 Pick. 7 2973
Chestertown Bank v. Walker, 163 Fed. 510 1920
Chestnut v. Sales, 49 Mont. 318 373
v. Tyson, 105 Ala. 149 3189
Chestnut St. T. & S. F. Co. v. Hart, 217 Pa. 506 722
Chestwood v. Mayo, 5 Munf. 16 4582
Chetwood v. California Nat. Bank, 113 Cal. 414 424
Chevalier v. Brush, Anthon's Law Stud. 186 4600
Cheveley v. Morris, 2 W. Bl. 1300 1357
Chew v. Bank, 14 Md. 299 1134
v. Lucas, 15 Ind. App. 595 3192
Chezum v. Parker, 19 Wash. 645 4303
Chicago v. Allcock, 86 Ill. 384 1107, 3809
v. Anglum, 104 Ill. App. 188 3964
v. Babcock, 143 Ill. 358 755, 774, 781, 782
v. Barbian, 80 Ill. 482 1063, 4147
v. Blaine, 126 Ill. App. 102 1806
v. Burcky, 158 Ill. 103 12, 4102, 4109
v. Colman, 33 Ill. App. 557 4829
v. Conway, 138 Ill. App. 300 1046
v. Davis, 110 Ill. App. 427 4662
v. Duffy, 117 Ill. App. 261 274, 371
v. Elzeman, 71 Ill. 131 4725
v. Garrity, 7 Ill. App. 474 3146, 4086
v. Gillett, 91 Ill. App. 287 4826
v. Greer, 9 Wall. 726 409, 2262, 2700
v. Hawgood & A. T. Co., 110 Ill. App. 34 3303
v. Hesing, 83 Ill. 204 4911
v. Honey, 10 Ill. App. 535 4734
v. Hoy, 75 Ill. 530 162
v. Huenerbein, 85 Ill. 594 3800, 3881, 3897
v. Hunt, 227 Ill. 130 2514
v. Hurford, 238 Ill. 552 1045
v. Jackson, 196 Ill. 496 3954, 4022
v. Jackson, 88 Ill. App. 130 4022
v. Jones, 66 Ill. 349 1499, 4725, 4730
v. Keefe, 114 Ill. 222 4934
v. Kelly, 69 Ill. 475 1350, 1499, 4831
v. Knobel, 232 Ill. 112 479
v. Langlass, 52 Ill. 259 1350, 4831
v. Langlass, 66 Ill. 361 1499, 4657, 4725, 4730
v. McCartney, 216 Ill. 377 4111
v. McGovern, 226 Ill. 403 1046
v. McKechney, 205 Ill. 372 2654
v. McLean, 133 Ill. 148 1379
v. McNally, 227 Ill. 14 1425, 1464, 1473
v. McShane, 102 Ill. App. 239 3954
v. Major, 18 Ill. 349 4862, 4889
v. Martin, 49 Ill. 241 1309
v. Murdock, 212 Ill. 9 3767
v. Northwestern Mut. L. Ins. Co., 120 Ill. App. 497 1021, 1046
v. Northwestern Mut. L. Ins. Co., 218 Ill. 40 1046
v. O'Brennan, 65 Ill. 160 1375, 3495, 4730
v. Palmer, 93 Ill. 125 1062, 4154
v. People, 116 Ill. App. 564 1046
v. People, 215 Ill. 235 1015
v. Pulcyn, 129 Ill. App. 179 3984, 3989

[REFERENCES ARE TO PAGES]

Chicago v. Robbins, 2 Blackf. 418 299, 302
v. Rust, 117 Ill. App. 427 3887
v. Saldman, 129 Ill. App. 282 1484, 1806
v. Scholten, 75 Ill. 468 1395, 4858, 4870, 4874, 4894, 4906, 4931, 4944
v. Sexton, 115 Ill. 230, 241 2670, 2691
v. Smith, 48 Ill. 107 1493, 4794
v. Spoor, 190 Ill. 340 3951, 4020, 4126
v. Taylor, 125 U. S. 161 3951
v. Tebbets, 104 U. S. 120 1015
v. Tilley, 103 U. S. 146, 26 L. ed. 371 2687
v. Troy L. Mach. Co., 162 Fed. 678 152, 3737
v. Union B. Ass'n, 102 Ill. 379, 393 16
v. Union T. Co., 138 Ill. App. 245 1046
v. Wood, 24 Ill. App. 40 4734
Chicago A. Ass'n v. Eddy E. Mfg. Co., 77 Ill. App. 204 2685
Chicago Anderson P. B. Co. v. Rembarz, 51 Ill. App. 543 4811
Chicago B. Co. v. McLester, 165 Ill. App. 114 1014
Chicago B. Soc. v. Crowell, 65 Ill. 453 3179, 4279
Chicago, B. & G. R. Co. v. Burns, 61 Neb. 793 658
Chicago B. & I. Co. v. La Mantia, 112 Ill. App. 43 4944
v. Olson, 80 Minn. 523 837
Chicago C. Co. v. McNamara, 136 Mo. App. 460 2757
Chicago, City of, v. Didier, 227 Ill. 571, aff'g 131 Ill. App. 406 1428
Chicago City R. Co. v. Anderson, 182 Ill. 298, 80 Ill. App. 71 1375, 4672, 4825
v. Carroll, 206 Ill. 318 4721, 4747
v. Cooney, 95 Ill. App. 471 153
v. Cooney, 196 Ill. 466 4681, 4684
v. Flynn, 131 Ill. App. 502 4694
v. Gemmill, 209 Ill. 638 1502
v. Henry, 62 Ill. 142 208
v. Henry, 218 Ill. 92 4730
v. Howison, 86 Ill. App. 215 1752
v. Leach, 80 Ill. App. 354 4826
v. Mauger, 105 Ill. App. 579 4672
v. Reddick, 139 Ill. App. 160 4935
v. Saxby, 213 Ill. 274 327
v. Schaefer, 121 Ill. App. 334 4672, 4700
v. Smith, 226 Ill. 178 1475, 4652
v. Taylor, 68 Ill. App. 613 4791, 4826
v. Taylor, 170 Ill. 49 339, 1378, 4663, 4671, 4791
v. Van Vleck, 143 Ill. 480 1425
v. Wall, 93 Ill. App. 411, 416 4735
v. Wilcox, 33 Ill. App. 450 4671
Chicago Consol. T. Co. v. Mahoney, 230 Ill. 562 1262, 1309, 1311, 3501
v. Schritter, 222 Ill. 364 4661, 4692
Chicago Edison Co. v. Moren, 86 Ill. App. 152 4882
Chicago Embossed Moulding Co. v. Hoffman, 184 Ill. App. 617 3101
Chicago F. & B. Co. v. Major, 30 Ill. App. 276 3928
v. Sanche, 35 Ill. App. 174 3928
Chicago F. & M. Ins. Co. v. Keiron, 27 Ill. 501 1891
Chicago Federation v. American Musicians' Union, 234 Ill. 504 1806
Chicago H. W. Co. v. United States, 106 Fed. 385 844, 861, 863, 884, 894
Chicago Ins. Co. v. Graham & Morton Transp. Co., 108 Fed. 271 3030
Chicago L. N. Co. v. Browne, 103 Ill. 317 3128
Chicago L. & C. Co. v. Garner, 132 Iowa 282 2650
Chicago T. School v. Davies, 64 Ill. App. 503 2647
Chicago T. T. R. Co. v. Bomberger, 130 Fed. 884 1804
v. Bugbee, 184 Ill. 353 3981
v. Chicago, 217 Ill. 343 4063
Chicago T. & R. Co. v. O'Marr, 25 Mont. 242 1503
Chicago T. & T. Co. v. Chicago, 110 Ill. App. 395, 209 Ill. 172 114, 1713, 1734, 1735
v. Core, 223 Ill. 58 474, 4158, 4165
v. McGlew, 90 Ill. App. 58 728, 741
Chicago Union T. Co. v. Brethauer, 223 Ill. 521 4693, 4706
v. Brethauer, 125 Ill. App. 204 4693
v. Chugren, 209 Ill. 429 4742
v. Lauth, 216 Ill. 176 1280, 1505
v. Miller, 212 Ill. 49 4833
Chicago V. Co. v. Jones, 143 Ky. 21 4812
Chicago-V. C. Co. v. Wilson, 67 Ill. App. 443 3883, 3936
Chicago & S. H. S. S. Co. v. Lynch, 119 C. C. A. 408, 201 Fed. 70 4799
Chicago & S. T. Co. v. Flaherty, 222 Ill. 67 2491, 2492, 4148
Chicago, etc., Ins. Co. v. Stanford, 28 Ill. 168 876
Chicago, etc., R. Co. v. Abels, 60 Miss. 1017 20, 3412
v. Aldrich, 134 Ill. 9 3977, 3978
v. Alexander, 47 Wash. 131 4019, 4040, 4134
v. Atterbury, 156 Ill. 281 3977
v. Austin, 69 Ill. 426 4901
v. Averill, 224 Ill. 516 780, 781
v. Avery, 10 Ill. App. 210 4827
v. Ayers, 106 Ill. 511 3951
v. Bailey, 9 Kan. App. 207 4744
v. Baker, 73 Ill. 316 3872, 3878
v. Barnes, 10 Ind. App. 460 3893
v. Barnes, 50 Tex. Civ. App. 46 87, 4660
v. Barrett, 16 Ill. App. 17 4795
v. Barrett, 190 Fed. 118 4221
v. Bartlett, 20 Ill. App. 96 2757
v. Batsel, 100 Ark. 526 1506, 1512, 4778
v. Bayfield, 37 Mich. 205 4861, 4887
v. Beaver, 199 Ill. 34 4935
v. Bell, 44 Neb. 44 25
v. Bell, — Tex. Civ. App. —, 168 S. W. 396 3387, 3388, 4170
v. Binkopski, 72 Ill. App. 22 1505, 4677
v. Blake, 116 Ill. 163 3964, 4033
v. Board, 182 Fed. 291 4061
v. Bond, 240 U. S. 449, rev'g — Okla. —, 148 Pac. 103 5045, 5047, 5048
v. Bowman, 122 Ill. 595 3964, 3977, 3978, 3980, 3983, 4002
v. Boyce, 73 Ill. 510 3531
v. Boyles, 11 Tex. Civ. App. 522 138
v. Brandon, 77 Kan. 612 1502
v. Branyan, 10 Ind. App. 570 4935, 4941
v. Brinkman, 47 Ill. App. 287 4145
v. Brisbane, 24 Ill. App. 463 3449, 3459
v. Broe, 16 Okla. 25 3345, 3437
v. Brown, 70 Neb. 696 754
v. Brown, 157 Ind. 544 3774
v. Buel, 56 Neb. 205 4154
v. Calumet Stock Farm, 194 Ill. 9 3403

[REFERENCES ARE TO PAGES]

Chicago, etc., R. Co. v. Calvert, 41 Tex. Civ. App. 236 3375, 3397
v. Carey, 90 Ill. 514 3878, 3889, 3893, 3921
v. Carroll, — Tex. Civ. App. —, 151 S. W. 1116 3519
v. Catholic Bishop, 119 Ill. 525 4036, 4055
v. Caulfield, 11 C. C. A. 552, 63 Fed. 396 4666, 4672
v. Cedar Rapids, etc., R. Co., 86 Iowa 500 4075
v. Chappel, 124 Mich. 72 4064
v. Chicago, 140 Ill. 309 4059, 4060, 4062, 4064
v. Chicago, 143 Ill. 641 4147
v. Chicago, 149 Ill. 457 4060
v. Chicago, 166 U. S. 226 4060
v. Cicero, 154 Ill. 656 4062
v. Cicero, 157 Ill. 48 4060
v. Clark, 92 Fed. 968 748
v. Clark, — Tex. Civ. App. —, 166 S. W. 129 4177, 4188
v. Cleaver, 48 Tex. Civ. App. 294 4719
v. Clemenger, 77 Ill. App. 186 1503, 1505
v. Cleminger, 178 Ill. 536 4732
v. Cogswell, 44 Ill. App. 388 4146
v. Conklin, 32 Kan. 55 3535
v. Conley, 6 Ind. App. 9 3482
v. Cram, 228 U. S. 70 4
v. Curtis, 51 Neb. 442 25
v. Davis, 54 Ill. App. 130 3401
v. Davis, 74 Ill. App. 595 3780
v. Davis, 159 Ill. 53 3339
v. Davis, 26 Okla. 434 8, 3875
v. Davison, 49 Kan. 589 4042
v. De Clow, 61 C. C. A. 34, 124 Fed. 142 4745, 4746, 5089
v. de Freilas, 134 Ill. App. 228 3935
v. Devine, 239 U. S. 52, aff'g 266 Ill. 248, aff'g 185 Ill. App. 488 5104, 5141
v. Dickson, 63 Ill. 151 1337, 1344
v. Dinius, 170 Ind. 222 161
v. Diver, 213 Ill. 26 3976, 3987
v. Dockery, 195 Fed. 221 918
v. Doyle, 60 Miss. 977 4954
v. Drainage Dist., 142 Iowa 607 4030
v. Dresel, 110 Ill. 89 4125
v. Driscoll, 207 Ill. 9 4884,
v. Dunlap, 71 Kan. 67 3339
v. Dunn, 52 Ill. 260 417, 4762
v. Duran, 38 Okla. 719 3332
v. Eaton, 136 Ill. 9 3951, 3965, 3970, 3979, 4014, 4016
v. Ellis, 52 Kan. 41 4093
v. Emmert, 53 Neb. 237 3877, 3892
v. Englewood C. R. Co., 115 Ill. 375 4073
v. Erickson, 91 Ill. 613 3353
v. Eubanks, 130 Mo. 270 4154
v. Fahey, 52 Ill. 81 3529
v. Fisher, 38 Ill. App. 33 4794
v. Flagg, 43 Ill. 365 3474, 3481
v. Floyd, — Ark. —, 171 S. W. 913 3526
v. Forrester (Tex. Civ. App.), 137 S. W. 162 1506
v. Fowler, 138 Ill. App. 352 4935
v. Francis, 70 Ill. 238 3964
v. Frazier, 66 Kan. 422 1511, 3527
v. Fretz, 173 Ind. 519 4832, 4833
v. Gardiner, 51 Neb. 70 3335
v. Garvy, 58 Ill. 83 1499
v. Gitchell, 95 Ill. App. 1 4169, 4178
v. Goodwin, 111 Ill. 273 4052
v. Gray, 237 U. S. 399, aff'g 153 Wis. 637 5141
Chicago, etc., R. Co. v. Greiney, 137 Ill. 628 3970, 3981, 3993
v. Griffin, 68 Ill. 499 3499
v. Griffith, 44 Neb. 690 4140
v. Groner, 43 Tex. Civ. App. 264 146, 4892
v. Groner, 51 Tex. Civ. App. 65 4914
v. Groves, 20 Okla. 101 8
v. Gunderson, 174 Ill. 495 4870
v. Gunn, 112 Ark. 401 4883, 4893, 4894
v. Hale, 83 Ill. 360 3370, 3408
v. Hale, 108 C. C. A. 490, 186 Fed. 626, rev'g 99 C. C. A. 379, 176 Fed. 71 4720, 4723
v. Hambel, 2 Neb. (Unof.) 607 4877, 4887
v. Hamler, 215 Ill. 525 3342
v. Hare, 36 Ind. App. 422 3333
v. Harmon, 12 Ill. App. 54 1392, 3415
v. Harrington, 77 Ill. App. 499, 503 4732
v. Harrington, 241 U. S. 177, aff'g — Mo. App. —, 180 S. W. 443 5041, 5043, 5047, 5062
v. Harwood, 80 Ill. 88 4862
v. Hazels, 26 Neb. 364 3951, 3955
v. Healy, 76 Neb. 783 21
v. Heil, 83 C. C. A. 400, 154 Fed. 626 1498, 4786
v. Hildebrand, 136 Ill. 467 3970, 4019
v. Hines, 45 Ill. 299 4666
v. Hoag, 90 Ill. 339 208, 3856, 3939, 3941
v. Hock, 118 Ill. 587 4010
v. Holdridge, 118 Ind. 281 3474, 3520
v. Holland, 18 Ill. App. 418 4807
v. Holland, 122 Ill. 461 4656, 4690, 4730, 4735, 4748
v. Hoover, 147 Ky. 33 3856, 3875, 3878, 3881
v. Hopkins, 90 Ill. 316 3975
v. Hough, 61 Mich. 507 4057
v. Howell, 65 Ill. App. 373 1429
v. Howison, 86 Ill. 215 4194
v. Hoyt, 149 U. S. 1 2307
v. Hughes, 87 Ill. 94 1495, 3528, 4827
v. Hunerberg, 16 Ill. App. 387 97
v. Hunter, 128 Ind. 213 3977
v. Hurst, 41 Kan. 740 4087
v. Huston, 196 Ill. 480 4939
v. Igo, 130 Ill. App. 373 3387
v. Iowa, 233 U. S. 334 5052
v. Jackson, 40 Tex. Civ. App. 273 158
v. Jacobs, 110 Ill. 414 3957, 4040
v. Jenkins, 103 Ill. 588, 599 3309, 3310
v. Johnson, 25 Okla. 760 1445, 3799, 3801
v. Joliet, etc., R. Co., 105 Ill. 388 236, 3987
v. Kane, 70 Ill. App. 676 4811
v. Kelly, 182 Ill. 267, aff'g 80 Ill. App. 675 4874
v. Kelly, 221 Ill. 498 3976, 4138
v. Kemper, 256 Mo. 279 3963, 3972, 3973, 3999, 4107
v. Kendall, 167 Fed. 62 1466
v. Kendall, 108 C. C. A. 251, 186 Fed. 139 3748, 3751, 3773
v. Kern, 9 Ind. App. 505 390, 3780
v. King, 104 Ark. 215 3323, 3324
v. Klauber, 9 Ill. App. 613 1375
v. Kline, 220 Ill. 334 3986, 4137
v. Knuffke, 36 Kan. 367 4030
v. Krayenbuhl, 70 Neb. 766 1468, 1504, 1506, 1511, 4801
v. Krempel, 103 Ill. App. 1 4652, 4762

[REFERENCES ARE TO PAGES]

Chicago, etc., R. Co. v. Krempel, 116 Ill. App. 253 47, 4757, 4761
v. Lagerkrans, 65 Neb. 566 4884
v. Langston, 19 Tex. Civ. App. 568 1463
v. Larsen, 19 Colo. 71 1426
v. Latta, 226 U. S. 519, 57 L. ed. 328 3338
v. Leah, 152 Ill. 249 3951
v. Lewis, 48 Ill. App. 274 1430
v. Lindeman, 75 C. C. A. 18, 143 Fed. 946 4745, 4746, 5089
v. Loeb, 118 Ill. 203 400, 3759, 3860, 3875, 4095, 4145
v. Loftis, — Tex. Civ. App. —, 168 S. W. 403 4929, 4931
v. Logue, 58 Ill. App. 142 4895
v. Long, 26 Tex. Civ. App. 601 4698
v. Louderback, 125 Ill. App. 323 4934
v. Luddington, 10 Ind. App. 636 68
v. McAra, 52 Ill. 296 1499
v. McAuley, 121 Ill. 160 4145
v. McBee, — Okla. —, 145 Pac. 331 4124
v. McCutchen, 80 Ark. 235 3849, 3854
v. McEwan, 35 Ind. App. 251 886, 1030
v. McGrew, 104 Mo. 282 3946, 3956, 3963, 3976, 3979, 3987, 3998, 4003, 4009, 4014, 4024, 4025, 4032, 4056, 4110
v. McKelvey, 12 Ohio C. C. 436 1435
v. McKittrick, 78 Ill. 619 4831
v. Maher, 91 Ill. 312 391, 400, 3861
v. Martin, 31 Ind. App. 308 149
v. Martin, 59 Kan. 437 21
v. Mason, 23 S. D. 564 3964, 4033, 4035
v. Mason, 26 Ind. App. 395 3979
v. Mawman, 206 Ill. 182 3978
v. Meech, 163 Ill. 305, 314 1375, 4693, 4706, 4707
v. Melville, 66 Ill. 329 3946
v. Metcalf, 44 Neb. 848 4189
v. Metropolitan West Side E. R. Co., 152 Ill. 519 33, 4086
v. Miller, 22 C. C. A. 264 24
v. Miller, 106 Mo. 458 4004
v. Miller, 226 U. S. 513, 57 L. ed. 323 3338
v. Miller, 233 Ill. 508 3947
v. Milwaukee, 97 Wis. 418 4061
v. Mines, 221 Ill. 448 4102, 4135
v. Minneapolis, 115 Minn. 460 4057, 4061
v. Mitchell, 56 Ind. App. 354 151, 475
v. Mitchell, — Ind. App. —, 110 N. E. 78 5043
v. Mochell, 96 Ill. App. 178 55
v. Moes, 89 Ark. 187 78
v. Moggridge, 116 Tenn. 445 4103
v. Moore, 63 Ill. App. 163 3977, 3984, 4014
v. Moore, 117 Ill. App. 147 1804
v. Moranda, 93 Ill. 302 4874, 4906
v. Morris, 26 Ill. 400 4858, 4862, 4889
v. Morrison, 195 Ill. 271 4060, 4062
v. Mosher, 76 Kan. 599 1432, 3774
v. Moss, 89 Ark. 187 163, 345, 3443, 3481
v. Myers, 57 Ind. App. 458 3862
v. Myers, 86 Ill. App. 401 1474
v. Naperville, 166 Ill. 87 4060, 4062
v. Newburn, 27 Okla. 9 3513
v. Newhouse, M. & L. Co., 90 Ark. 452 3345, 3370
v. Newsome, 83 C. C. A. 422, 154 Fed. 665 4745, 4746
Chicago, etc., R. Co. v. Nichols, 57 Ill. 464 391, 421
v. Nix, 137 Ill. 141 3977, 3981, 3984
v. Nolin, 221 Ill. 367 3976, 3979
v. O'Connor, 42 Neb. 90 3980, 3981, 4003, 4145
v. O'Neill, 58 Neb. 239 3755, 3760
v. Oyster, 58 Neb. 1 1394
v. Palmer, 44 Kan. 110 3976
v. Parks, 18 Ill. 460 1347, 3285
v. Patterson, 26 Ind. App. 295 3977
v. Payne, 192 Ill. 239 3878, 3951
v. Payzant, 87 Ill. 125 1495, 3528
v. Peacock, 48 Ill. 253 1495
v. Pearson, 82 Ill. App. 605 4882
v. Pemberton, — Tex. Civ. App. —, 170 S. W. 108 1463, 1467
v. Ponn, 191 Fed. 682 1498, 4908
v. Pontiac, 169 Ill. 155 4059, 4060
v. Porterfield, 19 Tex. Civ. App. 225 4859
v. Posten, 59 Kan. 449 3488, 4693, 4694
v. Pounds, 11 Lea 127 26
v. Price, 138 U. S. 185, 34 L. ed. 916 2685
v. Ptacek, 171 Ill. 9 4895
v. Pullman Southern Car Co., 139 U. S. 79 489
v. Radford, 36 Okla. 657 4835, 4839, 4841
v. Randolph, 65 Ill. App. 208 4784
v. Rausch, 245 Ill. 477 4142
v. Reid, 38 Okla. 214 3343, 3364
v. Reisch, 247 Ill. 350 4049, 4137
v. Risley, 55 Tex. Civ. App. 66 1441
v. Robbins, 159 Ill. 598 3760
v. Rogers, — Tex. Civ. App. —, 129 S. W. 1155 3388, 3433
v. Root, 106 Ill. App. 164 4941
v. Roth, — Ind. App. —, 107 N. E. 689 334
v. Rouse, 178 Ill. 132 4952
v. Schaffer, 26 Ill. App. 280 400, 401, 408, 1432, 3860, 3872, 3893
v. Schaffer, 124 Ill. 112 401, 408
v. Scheinkoenig, 62 Kan. 57 4693
v. Schultz, 55 Ill. 421 1136
v. Scott, 225 Ill. 352 4137
v. Scott, 232 Ill. 419 4139
v. Scurr, 59 Miss. 456 1282, 1309, 1344
v. Shafer, 49 Neb. 25 3978
v. Shannon, 43 Ill. 338 1394, 4862, 4870, 4941, 4944, 5098
v. Sizer, 1 Neb. (Unof.) 32 4913
v. Slaughter, 84 Ark. 423 3333
v. Smith, 6 Ind. App. 262 3761
v. Smith, 107 Ark. 512 4798
v. Smith, 111 Ill. 363 3955, 3964
v. Sourney, 97 Ill. App. 570 4803
v. Spence, 213 Ill. 220 1475, 4711, 4722
v. Spilker, 134 Ind. 380 1428
v. Spirk, 51 Neb. 167 134, 135, 138, 3452, 3463
v. Springfield, etc., R. Co., 67 Ill. 142 4027, 4030, 4074, 4145
v. Springfield, etc., R. Co., 96 Ill. 274 4030, 4074
v. Staley, 221 Ill. 405 3976, 3979, 4039
v. Stanbro, 87 Ill. 195 3364
v. Steckman, 125 Ill. App. 299 4778
v. Steel, 47 Neb. 741 4075
v. Steele, — Ind. —, 108 N. E. 4 5063
v. Stein, 75 Ill. 41 4014
v. Stibbs, 17 Okla. 97 4720
v. Stroud, 129 Ill. App. 348 319
v. Sturey, 55 Neb. 137 3964

[REFERENCES ARE TO PAGES]

Chicago, etc., R. Co. v. Swan (Tex. Civ. App.), 130 S. W. 855 1511, 4661
v. Swett, 45 Ill. 197 4894, 4944
v. Thayer, 65 Wash. 402 3981
v. Todd, 74 Neb. 712 1452, 3432
v. Tracey, 109 Ill. App. 563 4659, 4668
v. Trippett, 50 Tex. Civ. App. 279 1480, 4887
v. Ullrich, 213 Ill. 170 474, 4745
v. United States, 220 U. S. 559 5071
v. Van Buskirk, 58 Neb. 252 1394
v. Van Cleave, 52 Kan. 665 4016
v. Vaughn, 206 Ill. 234 4052
v. Vester, 47 Ind. App. 141 4936
v. Vosburg, 45 Ill. 311 2650
v. Wagner, 239 U. S. 452, aff'g 265 Ill. 245 5116, 5117, 5139
v. Ward, 16 Ill. 522 316, 1404
v. Ward, 128 Ill. 349 3996, 4010
v. Warner, 22 Ill. App. 62 4810
v. Warner, 108 Ill. 538 1379, 4660, 4717
v. Watkins, 43 Kan. 50 1536, 3741, 3831
v. Wehrman, 25 Okla. 147 1511
v. West Chicago St. R. Co., 156 Ill. 255 4062, 4075
v. Whiting, etc., R. Co., 139 Ind. 297 4075
v. Whitney, 143 Iowa 506 1720, 1724, 1726, 1728
v. Whitten, 90 Ark. 462 1280, 1287, 3482, 3530
v. Wiebe, 25 Neb. 542 3964
v. Willard, 111 Ill. App. 225 56, 68, 4168
v. Williams, 55 Ill. 185 1269
v. Williams, 131 Ind. 30 68
v. Willits, 45 Kan. 110 3761, 3764
v. Wisconsin, etc., R. Co., 76 Iowa 615 670
v. Wolcott, 141 Ind. 267 3281, 3311, 3318
v. Wolf, 137 Ill. 360 4009, 4112
v. Woodward, 164 Ind. 360 3403
v. Woolridge, 174 Ill. 330, rev'g 72 Ill. App. 551 4899, 5098
v. Word (Tex. Civ. App.) 158 S. W. 561 56, 112, 313, 366, 3805, 3818
v. Wright, 239 U. S. 548, aff'g 96 Neb. 87 5025, 5040, 5066, 5141
v. Wymore, 40 Neb. 645 21
v. Yawger, 24 Ind. App. 460 2697
v. Young, 58 Neb. 678 1394, 4859
Chickasaw R. Co. v. Crigger, 83 Ark. 364 868
Chickering v. Lord, 67 N. H. 555 4
Chicopee Bank v. Chapin, 8 Metc. (Mass.) 40 1817
Chicora F. Co. v. Dunan, 91 Md. 144 823
Chief, The, 147 Fed. 875 2726
Chieppo v. Chieppo, 88 Conn. 233 2981, 2982
Child v. Boston & F. I. Works, 19 Fed. 258 396, 4449
v. Eureka P. Works, 44 N. H. 354 2831, 2874
v. Homer, 13 Pick. 503 465, 4593, 4594
v. New York Times Co., 110 Fed. 527 4481
v. Pierce, 37 Mich. 155 2329, 2331
v. Stenning, 11 Ch. Div. 82 3195
Childers v. San Jose Mercury P. & P. Co., 105 Cal. 284 4507, 4510, 4537, 4544
Childers v. San Jose Pub. Co., 105 Cal. 284, 291 1291
Childress v. Stuart, Peck 276 1889
v. Yourie, Meigs 561 62
Childs v. Crithfield, 66 Mo. App. 422 2509
v. Krey, 199 Mass. 352 1031, 1102
v. New Haven & N. Co., 133 Mass. 253 4108, 4116
v. New York, etc., R. Co., 77 Hun 539 3459
v. O'Leary, 174 Mass. 111 3767
v. Pellett, 102 Mich. 558, 566 665
v. Ptomey, 17 Mont. 502 2513
Chiles v. Alton, etc., T. Co., 158 Ill. App. 508 3968, 3988
v. Drake, 2 Metc. (Ky.) 146 1274, 1284, 1285, 1305
v. School Dist., 111 Mo. App. 52 1808
Chilholm v. Arrington, 43 Ala. 610 606
Chilliner v. Chilliner, 2 Ves. Sr. 528 839, 1552
Chils v. Gronlund, 41 Fed. 505 1503
Chilsons v. Downer, 27 Vt. 536 2876
Chilton v. Butler, 1 E. D. Smith 150 2506
v. Chapman, 13 Mo. 470 2865
v. Missouri L. & M. Co., 144 Mo. App. 315 1535
v. St. Joseph, 143 Mo. 192 4744
v. Union Pac. R. Co., 8 Utah 47 4864, 4882, 4901
v. Whiffin, 3 Wils. 13 1867
Chinery v. Viall, 5 H. & N. 288 541, 2276, 4203, 4295
Chinese Prince, The, 61 Fed. 697 2729
Chinn v. Bretches, 42 Kan. 316 803
v. Hamilton, Hemp. C. C. 438 1197, 1238, 1241, 1242
v. Wagoner, 26 Mo. App. 678 2190, 2191
Chipley v. Atkinson, 23 Fla. 206 4553
Chipman v. Bates, 5 Vt. 143 795
v. Briggs, 5 Cal. 76 2048
v. Emeric, 5 Cal. 239 1535
v. Fowle, 130 Mass. 352 582
v. Hibberd, 6 Cal. 162 3774
v. Morrill, 20 Cal. 130 2860
v. Palmer, 9 Hun 517 3938
v. Todd, 60 Me. 282 2814
v. Union Pac. R. Co., 12 Utah 68 4804
Chippendale, Ex parte, 4 De G., M. & G. 36 1072
Chippewa L. Co. v. Phoenix Ins. Co., 80 Mich. 116 3017, 3057
Chippewa L. & B. Co. v. Howard, 18 Pa. Super. 423 2374
Chippewa, etc., R. Co. v. Chicago, etc., R. Co., 75 Wis. 224 2494
Chirac v. Reinecker, 11 Wheat. 280 3693
Chisholm v. Capital L. Ins. Co., 52 Mo. 213 3071
v. Preferred Bankers' L. Assur. Co., 112 Mich. 50 2558, 2561, 2564
v. Williams, 128 Ill. 115 665, 668
Chisholm & M. Mfg. Co. v. United States, 111 Tenn. 202 189, 228, 2339, 2343, 2428
Chism v. Schipper, 51 N. J. L. 1 2684
v. Woods, Hardin 531 2381
Chismon v. Carney, 33 Ark. 316 4839
Chisom v. School Directors, 19 Ohio 289 1529
Chittick v. Philadelphia R. T. Co., 224 Pa. 13 78
Chitty v. Naish, 2 Dowl. P. C. 477 722
v. St. Louis, etc., R. Co., 148 Mo. 64 1515

[REFERENCES ARE TO PAGES]

Chitty v. St. Louis, etc., R. Co., 166 Mo. 435 1503, 1515, 1518, 4804
Choate v. Arrington, 116 Mass. 552 1638, 1647
v. Crowninshield, 3 Cliff. 184 3385
v. Hoogstraat, 105 Fed. 713 696
v. Thorndike, 138 Mass. 371 1639
Choctaw, etc., R. Co. v. Alexander, 7 Okla. 579 3815
v. Burgess, 21 Okla. 653 1498, 4747
v. Cantwell, 78 Ark. 331 3502
v. Deparade, 12 Okla. 367 1445
v. Doughty, 77 Ark. 1 4882, 4905, 4908
v. Drew, 37 Okla. 396 3841, 3853, 3877
v. Halloway, 114 Fed. 458 153
v. Holloway, 191 U. S. 334 143
v. Hill, 110 Tenn. 396 3475, 3502
v. Jacobs, 15 Okla. 493 3328
v. Rolfe, 76 Ark. 220 140, 189, 293, 3369
Choice v. Moseley, 1 Bailey 136 838, 2336
v. State, 31 Ga. 424 1461
Cholodnicka v. Glonicezek, 150 App. Div. (N. Y.) 206 479
Chomley v. Watson, Vict. L. R. (1907) 502 4504
Choteau v. Jones, 11 Ill. 300 2831
Chouquette v. Southern E. R. Co., 152 Mo. 257 1494
Chouteau v. Rowse, 56 Mo. 65 671
v. St. Louis, 8 Mo. App. 48 3878
Christ Church Hospital v. Fuechsel, 54 Pa. 71 594, 606
Christenson v. American Exp. Co., 15 Minn. 270 20
v. Floriston P. & P. Co., 29 Nev. 552 1272, 1511, 4858, 4865, 4940, 4953
Christian, Ex parte, 23 Ark. 641 1591, 1592
Christian v. Ashley County, 24 Ark. 142 1591, 1592, 1608
v. Bryant, 102 Ga. 561 697
v. Columbus & R. R. Co., 90 Ga. 124 4909
v. Highlands, 32 Ind. App. 104 2831
v. Scott, 1 Stew. 490 1957
Christian County v. Merrigan, 191 Ill. 484 2484
v. Overholt, 18 Ill. 223 2693
Christianson v. Chicago, etc., R. Co., 67 Minn. 94 111, 112
v. Linford, 3 Robert. 215 26
Christie v. Crawford, 152 Mich. 400 2406
v. Pennsylvania I. W. Co., 128 La. 208 2627
v. Scott, 77 Kan. 257 739
Christman v. Commonwealth, 17 S. & R. 381 1599
v. Postal Tel. Co., 159 N. C. 195 3655
Christopher v. Austin, 11 N. Y. 216 3122, 3123
Christophers v. White, 10 Beav. 523 2471
Christophulus C. Co. v. Phillips, 4 Ga. App. 819 34, 1366, 2613
Christy v. Ashlock, 93 Ill. App. 651 4311
v. Douglass, Wright 485 2489
v. Ogle, 33 Ill. 295 533, 556, 2144, 2186, 2187
v. Reynolds, 16 S. & R. 258 2206
v. Row, 1 Haunt. 300 3294
Chrysler v. Canaday, 90 N. Y. 272 4375
Chubb v. Gsell, 34 Pa. 114 4527, 4529
Chumasero v. Gilbert, 24 Ill. 293, 26 Ill. 39 1147, 1184, 1879
Churan v. Sebesta, 131 Ill. App. 330 329, 3663, 3666
Church v. Baker, 18 Colo. App. 369 1728, 1729
v. Bridgman, 6 Mo. 190 471, 4599
v. Kidd, 6 Hun 475 1097
v. Malloy, 9 Hun 148 1160
v. Sterling, 16 Conn. 388 2903
v. Wilkerson-T. Co., 58 Wash. 262 226, 228, 243, 1430, 2513
Church of Holy Communion v. Paterson E. R. Co., 66 N. J. L. 218 395
Churcher v. Stringer, 2 B. & Ad. 777 1033
Churchill v. Beethe, 48 Neb. 87 3980, 4145
v. Bowman, 39 Vt. 518 749, 761
v. Burlington W. Co., 94 Iowa 89 3847, 3907
v. Holt, 127 Mass. 165, 131 Mass. 67 2430, 2858
v. Hunt, 3 Denio 321 2192, 2873, 2875, 2894
v. Lewis, 17 Abb. New Cas. 226 4983, 4984
v. Moore, 15 Kan. 255 2873, 2875, 2892
v. Siggers, 3 El. & Bl. 937 4605, 4606, 4609, 4625
v. Warren, 2 N. H. 298 633
v. Watson, 5 Day 140 164, 4193
v. Welsh, 47 Wis. 39 4301, 4302
v. Yeatman-Gray Grocer Co., 111 Ark. 529 664
Churchman v. Kansas City, 44 Mo. App. 665 4184
Cicero v. Green, 211 Ill. 241 739
v. Grisko, 144 Ill. App. 564 1104
v. Grisko, 240 Ill. 220 1587
v. Hall, 240 Ill. 160 1031, 1578, 2741
Cicero, etc., R. Co. v. Boyd, 95 Ill. App. 510 4941
v. Brown, 89 Ill. App. 318, aff'd 193 Ill. 274 4748
v. Priest, 190 Ill. 592 1424, 1472
Cigler v. Keinath, 265 Ill. 144, rev'g 185 Ill. App. 353 2742
Cilley v. Colby, 61 N. H. 63 2821
v. Hawkins, 48 Ill. 308 250, 784, 816, 1229, 3189, 3198, 4194
Cimarron L. Co. v. Barton, 51 Kan. 554 876
Cimiotti U. Co. v. American F. R. Co., 158 Fed. 171 1718, 1737
Cincinnati v. Evans, 5 Ohio St. 594 4194
v. McLaughlin, 12 Ohio C. C. (N. S.) 220 3890
v. Whetstone, 47 Ohio St. 196 1064, 4150
v. Wright, 2 Ohio N. P. (N. S.) 53 3890
Cincinnati B. S. Co. v. Steinmetz, 35 Ind. App. 228 2414, 2415
Cincinnati C. B. R. Co. v. Burski, 4 Ohio C. C. (N. S.) 98 6, 13
Cincinnati C. Co. v. White Line T. Co., 1 Cin. Super. Ct. 300 3371
Cincinnati Daily Tribune Co. v. Bruck, 61 Ohio St. 489 520, 4608, 4610
v. Upson, 40 Ohio St. 17 4608
Cincinnati G. T. Co. v. Cartee, 149 Ky. 89 3976, 3978
v. Wilson, 70 W. Va. 157 3956, 4133
Cincinnati, H. & D. Ry. Co. v. McCullom — Ind. —, 109 N. E. 206 488
Cincinnati N. T. Co. v. Rosnagle, 84 Ohio 310 168, 3483
Cincinnati, R. & M. R. v. Miller, 36 Ind. App. 26 3994
Cincinnati S. R. Co. v. Hudson, 83 Ky. 480 2588

[REFERENCES ARE TO PAGES]

Cincinnati T. Co. v. George, 13 Ohio C. C. (N. S.) 209 4797
v. Kettler, 11 Ohio C. C. (N. S.) 516 4907
v. McKee, 27 Ohio C. C. 630, 6 Ohio C. C. (N. S.) 426 4664, 4665
v. Stephens, 75 Ohio St. 171, rev'g 7 Ohio C. C. (N. S.) 454 4927
Cincinnati & C. T. Co. v. American B. Co., 202 Fed. 184 2637
Cincinnati & F. Ins. Co. v. May, 20 Ohio 223 3000
Cinc nnati, etc., G. I. Co. v. Western S. L. Co., 152 U. S. 200 261
Cincinnati, etc., R. Co. v. Ackerman, 148 Ky. 435 1277
v. Acrea, 42 Ind. App. 127 111, 112, 135, 152
v. Altemeier, 60 Ohio St. 10 4859, 4920, 4939
v. Baker, 130 Ill. App. 414 229, 1941, 1962
v. Bennette, 134 Ky. 19 1384
v. Bonham, 130 Tenn. 435 5069, 5131, 5132, 5142
v. Brandenburg, 142 Ky. 814 1430, 3449
v. Carson, 145 Ky. 81 3473
v. Carthage, 36 Ohio St. 631 2590
v. Chester, 57 Ind. 297 3518
v. Cole, 29 Ohio St. 126 3499
v. Cooper, 120 Ind. 469 1288
v. Crabtree, 30 Ky. L. Rep. 1000 475, 509
v. Davis, 127 Fed. 933 478
v. Eaton, 94 Ind. 474 134, 135, 3456, 3461, 3471
v. Falconer, 30 Ky. L. Rep. 152 3751, 3767
v. Giboney, 124 Ky. 806 1377
v. Gillespie, 130 Ky. 213 3881, 3922
v. Hansford, 125 Ky. 37 3319, 3390, 3396
v. Harris, 115 Tenn. 501 3468, 3486
v. Hildreth, 77 Ind. 504 770
v. Hundley, 29 Ky. L. Rep. 1123 3392
v. Klute, 8 Ohio C. C. (N. S.) 409 1279, 1343
v. Klute, 29 Ohio C. C. 702 1330
v. Leonard, 35 Ind. App. 268 4665
v. Logan, 29 Ky. L. Rep. 1123 3429
v. Longworth, 30 Ohio St. 108 4120
v. Lovell, 141 Ky. 249 4947, 4948, 4949, 4950
v. Lutes, 112 Ind. 276 2697, 2705
v. McElroy, 146 Ky. 668 1532, 1534, 4705
v. McMullen, 117 Ind. 439 4954
v. Marcus, 38 Ill. 219 3412
v. Nolan, 161 Ky. 205 5034
v. Pearce, 28 Ind. 502 2098
v. Raine, 130 Ky. 454 3443, 3451, 3459
v. Rankin, 154 Ky. 549 3395
v. Richardson, 145 Ky. 516 1506
v. Rosnagle, 84 Ohio St. 310 3476
v. Spears, 152 Ky. 200 147, 4659
v. Taylor, 27 Ohio C. C. 757 4890
v. Troxell, 143 Ky. 765 4700, 4772
v. Troy, 68 Ohio St. 510 4057
v. Tucker, 168 Ky. 144 5065, 5124, 5126, 5133, 5140
v. Ward, 120 Ill. App. 212 319, 3893, 3921
v. Worthington, 30 Ind. App. 663 3527
v. Zinn, 18 Ohio St. 417 4020
Citizens' Bank v. Arkansas C. & W. Co., 80 Ark. 601 1061
v. Carson, 32 Mo. 191 457, 655, 716
Citizens' Bank v. Fredrickson, 83 Neb. 755 1824
v. Jeansonne, 120 La. 393 2065, 2143, 4293
v. Ketchmar, 91 Miss. 608 664
v. Lay, 80 Va. 436 637
v. Nantucket S. Co., 2 Story 35 3279
v. Shaw, 132 Ga. 771 4269, 4275
v. Spencer, 126 Iowa 101 2466
Citizens' Bank of Senath v. Douglass, 178 Mo. App. 664 2793
Citizens' C. & S. Bank v. Platt, 135 Mich. 267 658
Citizens' Elec. L. & P. Co. v. Gonzales W. P. Co. (Tex. Civ. App.), 76 S. W. 577 2588
Citizens' G. & O. M. Co. v. Whipple, 32 Ind. App. 203 488
Citizens' L., H. & P. Co. v. Lee, 182 Ala. 561 4867, 4905
Citizens' Mut. F. Ins. Co. v. Conowingo B. Co., 113 Md. 430 3040
Citizens' N. G. Co. v. Chenango N. G. Co., 138 Pa. 22 2341
Citizens' Nat. Bank v. Brown, 45 Ohio St. 39 1891
v. Donnell, 172 Mo. 384 721, 731, 959
v. Donnell, 195 Mo. 564 994
v. Elliott, 55 Iowa 104 2468
v. Forman, 23 Ky. L. Rep. 613 712
v. Importers' & T.'s Bank, 119 N. Y. 195 275
v. Oldham, 136 Mass. 515 4351
Citizens' Nat. Life Ins. Co. v. Rutherford, 157 Ky. 820 3086
Citizens' R. Co. v. Branham (Tex. Civ. App.), 137 S. W. 403 4674
v. Griffin, 49 Tex. Civ. App. 569 149, 4795
v. Washington, 24 Tex. Civ. App. 422 4920
Citizens' R. T. Co. v. Dew, 100 Tenn. 317 1460
Citizens' R. & L. Co. v. Atwood, — Tex. Civ. App. —, 138 S. W. 1101 436
v. Case (Tex. Civ. App.), 138 S. W. 621 1538
Citizens' Sav. Bank v. Vaughan, 115 Mich. 156 1036
v. Wood, 134 Iowa 232 705, 715
Citizens' Sav. Bank & T. Co. v. Fitchburg Mut. F. Ins. Co., 86 Vt. 267 1440, 1443, 3041, 3042
Citizens' State Bank v. Morse, 60 Kan. 526 1655, 1679
v. Pettit, 85 Mo. App. 499 2896
Citizens' State Bank of Chautauqua v. Shawnee Fire Ins. Co., 91 Kan. 18 2918
Citizens' St. R. Co. v. Burke, 98 Tenn. 650 1366
v. Clark, 33 Ind. App. 190 3470
v. Robbins, 144 Ind. 671 4217, 4233, 4245, 4282
v. Steen, 42 Ark. 321 1344
v. Twiname, 121 Ind. 375 4761
v. Willoeby, 134 Ind. 563 1267, 1273, 1468
Citizens' T. & G. Co. v. Ohio Valley T. Co., 138 Ky. 421 318, 1722, 1726, 1728, 1735, 1738, 1748, 1749
Cito, The, 7 Prob. Div. 5 3287
City v. Lamson, 9 Wall. 477 1210
City Bank v. Cutter, 3 Pick. 414 785, 789, 1230, 1814
v. Smith, 3 G. & J. 265 837
v. Young, 43 N. Y. 457 2816
City Council v. Montgomery Waterworks, 79 Ala. 233 525
City D. Bank v. Green, 130 Iowa 384 1826

[REFERENCES ARE TO PAGES]

City D. Bank v. Green, 138 Iowa 156 1835, 1838
v. Henry, 139 Ala. 161 1329
v. McLean, L. R. 9 C. P. 692 738
City Nat. Bank v. Jeffries, 73 Ala. 183 340, 483, 1338, 1685, 1699, 1701, 1702
v. Jordan, 139 Iowa 499 1824
City of Alexandria, The, 40 Fed. 697 4995
City of Atlanta, The, 56 Fed. 252 2721
City of Atlanta v. Williams, 15 Ga. App. 654 4139
City of Aurora v. Firemen's Fund Ins. Co., 180 Mo. App. 263 3011
City of Baltimore v. Kahl, 124 Md. 299 3961, 4141
v. Megary, 122 Md. 20 4142
City of Birmingham v. Kennedy, 9 Ala. App. 541 4107
City of Boston, The, 182 Fed. 174 1143
City of Boulder v. Stewardson, 26 Colo. App. 290 1373, 1377
City of Chester, The, 9 Prob. Div. 182 2728
City of Chester, The, 34 Fed. 429 5009
City of Chester v. Didier, 227 Ill. 571, aff'g 131 Ill. App. 406 1428
City of Clarendon v. Betts, — Tex. Civ. App. —, 174 S. W. 958 3877
City of Covington v. Westbay, 156 Ky. 839 773
City of Dallas v. Moore, 32 Tex. Civ. App. 230 4779
City of Dublin v. Ogburn, 142 Ga. 840 50, 53
City of Ft. Worth v. Charbonneau, — Tex. Civ. App. —, 166 S. W. 387 3997, 4034
City of Henderson v. Herron, 152 Ky. 341 3854, 3880
v. Robinson, 152 Ky. 245 3854, 3880, 3937
City of Huntsville v. Pulley, 187 Ala. 367 1434
City of Indianapolis v. Stokes, 182 Ind. 31 4795
City of Ironton, Ohio v. Harrison Const. Co., 212 Fed. 353 2700
City of Key West v. Baldwin, 69 Fla. 136 4661, 4690, 4730, 4751
City of Lexington v. Chenault, 151 Ky. 774 3963, 4030, 4131, 4138
City of Lincoln, The, 15 Prob. Div. 15 4992
City of Louisville v. Hehemann, 161 Ky. 523 3905
v. Henderson, 11 Ky. L. Rep. 796 1031
v. Lausberg, 161 Ky. 361 3954
v. Nicholls, 158 Ky. 516 774
v. Sauter, 149 Ky. 721 3877, 3880, 3883
City of Meriden, In re, 88 Conn. 427 3961, 3963, 4001
City of New York, In re, 190 N. Y. 350 4119
In re, 198 N. Y. 84 4139
City of Norwalk, The, 55 Fed. 98 4989
City of Norwich, The, 4 Bene. 271 3412
City of Norwich, The, 118 U. S. 468 5010
City of Ottumwa v. Nicholson, 161 Iowa 473 391
City of Panama, The, 101 U. S. 453 5092
City of Paragould v. Milner, 114 Ark. 334 4107
City of Peking, The, 15 App. Cas. 438 5006
City of Pittsburgh, In re, 243 Pa. 392 4022
City of Puebla, The, 153 Fed. 925 2716
City of Rawlins v. Murphy, 19 Wyo. 238 1094
City of Shreveport v. United States F. & G. Co., 131 La. 933 1806
City of Summit v. Morris County Traction Co., 85 N. J. L. 193 917
City of Texarkana v. Lawson, — Tex. Civ. App. —, 168 S. W. 867 3982
City of Topeka v. Federal Union Surety Co., 213 Fed. 958 2758
City R. E. Co. v. MacFarland, 67 N. Y. Misc. 286 952
City Sav. Bank v. Bidwell, 29 Barb. 325 1166
v. Stevens, 59 N. Y. Super. Ct. 549 620
City T. Co. v. Robinson, 12 Ky. L. Rep. 555 1346, 4087
City Trust, etc., Co. v. American B. Co., 174 N. Y. 486 2833
City, etc., R. Co. v. Basshor, 82 Md. 397 2647
v. Comery, 61 Ark. 381 433
v. Shropshire, 101 Ga. 33 4782
v. Smith, 121 Ga. 663 4711, 4724
Clabaugh v. Southern W. G. Ass'n, 181 Fed. 706 755
Claderin v. Heraldo Espanol, 4 Porto Rico Fed. 376 4531
Claffin v. Case, 53 Kan. 560 2096
Claflin v. Beaver, 55 Fed. 576 361
v. Boston & L. R. Co., 7 Allen 341 2227
v. Continental J. Works, 85 Ga. 27 360
v. Hawes, 8 Mass. 261 820, 822
v. Holmes, 202 Mass. 157 1082
Clagett v. Easterday, 42 Md. 617 1981, 2010, 2012, 2052
v. Hall, 9 Gill & J. 91 2067
Claggett v. Richards, 45 N. H. 360 1660
Clague v. Tri-State L. Co., 84 Neb. 499 286, 2589
Claiborne v. Tanner, 18 Tex. 68 1525
Clair v. Battle Creek Journal Co., 168 Mich. 467 4512, 4519, 4537, 4549
Clammer v. State, 9 Gill 279 1555
Clancey v. Robertson, 2 Mill 404 2555
Clancy v. Kenworthy, 74 Iowa 740 1604
v. Overman, 1 Dev. & Bat. 402 2308
Clandeboye, The, 70 Fed. 631 2718, 2737
Clanton v. Burges, 2 Dev. Eq. 13 2212
Clany v. Grand Trunk R. Co., 29 Ont. 18 3459
Clap v. Draper, 4 Mass. 266 429
Clapham v. Crabtree, 72 Me. 473 1680
Clapp v. Boston, 133 Mass. 367 4021, 4093
v. De La Perrelle, 17 Vict. L. R. 413 4962
v. Herdman, 25 Ill. App. 509 2091
v. Hudson River R. Co., 19 Barb. 461 1495, 3528
v. Hughes, 1 Phila. 382 2506
v. Noble, 84 Ill. 62 3099, 3101
v. Rice, 13 Gray 403 2779
v. Rice, 15 Gray 557 2823
v. Thomas, 7 Allen 188 4169
v. Tirrell, 20 Pick. 247 2068
v. Vatcher, 9 Cal. App. 462 1128, 4422
v. Walter, 2 Tex. 130 4314
Clara, The, 23 Wall. 1 18
Clare v. Maynard, 6 Ad. & El. 519 183, 2426
v. Maynard, 7 C. & P. 741 217, 304, 2426, 4392
v. Northwestern Pac. R. Co., 21 Cal. App. 214 3452, 3457, 3461, 3465

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Claremont Bank v. Wood, 12 Vt. 252 423
Clarence, The, 3 W. Rob. 283 5003
Clarendon, City of, v. Betts, — Tex. Civ. App. —, 174 S. W. 958 3877
Claridge v. South Staffordshire T. Co., [1892] 1 Q. B. 422 430, 4174, 4175
Clarion, The, 1 Brown's Adm. 74 2717
Clarion Bank v. Jones, 21 Wall. 325 2305, 4225, 4235
Clarion T. & B. Co. v. Clarion County, 172 Pa. 243 4045, 4071
Clarita, The, 23 Wall. 1, 23 L. ed. 146 18, 2716, 2721
Clark v. Abbott, 53 Minn. 88 753
v. American Exp. Co., 130 Iowa 254 1393, 3343, 3345, 4221
v. Babcock, 23 Mich. 164 3233
v. Bailey, 22 Ky. L. Rep. 1668 2352
v. Baird, 5 Seld. 183 3685
v. Baird, 9 N. Y. 183 1419, 1423, 1431, 1443, 4392
v. Baird, 17 N. Y. 183 1420
v. Baker, 5 Metc. (Mass.) 452 384
v. Bales, 15 Ark. 452 1532
v. Bank, 17 Pa. 322 2910
v. Barlow, 4 Johns. 183 1067, 3147
v. Barnard, 108 U. S. 436 860, 864, 866, 874
v. Barnwell, 12 How. 272 3386
v. Barrett, 19 Mo. App. 39 2821
v. Bates, 1 Dak. 40 4201, 4275
v. Bayer, 32 Ohio St. 300 4771
v. Bayes, 1 Dak. 42 4231
v. Boardman, 42 Vt. 667 1388
v. Bonner, 217 Mass. 201 2503
v. Bovreau, 14 Cal 634 3694
v. Britton, 76 N. H. 64 887
v. Brott, 71 Mo. 475 482
v. Brown, 18 Wend. 229 4749
v. Brown, 116 Mass. 504 1509, 4573, 4574
v. Burdett, 2 Hall 197 707, 2749
v. Burr, 14 Ohio 118 2098, 2134
v. Bush, 3 Cow. 151 452, 780, 781, 1038, 1561, 1568
v. Busse, 82 Ill. 515 2612
v. Butt, 26 Ind. 236 3183
v. Carter, 2 Cow. 84 419
v. Cedar Rapids, 129 Iowa 358 4751
v. Chambers, 3 Q. B. Div. 327 64
v. Chicago, 174 Ill. 145 4790
v. Chicago Great Western R. Co., 170 Iowa 452 5064
v. Child, 136 Mass. 344 1055, 1182
v. Clark, 25 Barb. 76 4485
v. Clark, 46 Conn. 586 1105
v. Clark, 132 Ind. 25 1522
v. Clement, 75 Vt. 417 4209, 4285
v. Cleveland, 6 Hill 344 4602
v. Clune, 172 Mich. 323 297
v. Conroe, 38 Vt. 469 2058
v. Conroe's Est., 38 Vt. 469 2095, 2189
v. Cort, Cr. & Ph. 154 1816
v. Dales, 20 Barb. 42 1101
v. Dalton, 69 Ill. 521 1101
v. Davidson, 53 Wis. 317 2007
v. Deshon, 12 Cush. 589 699
v. Dinsmore, 5 N. H. 136 770
v. Dreyer, 9 Colo. App. 453 1672
v. Dutton, 69 Ill. 521 1094
v. Ellithorpe, 7 Kan. App. 337 1433
v. Ellsworth, 104 Iowa 442 2478, 2485, 2486
v. Equitable L. Assur. Soc., 76 Miss. 22 635
v. Estate of Conroe, 38 Vt. 469 2095, 2189
Clark v. Fairchild, 22 Wend. 576 2673
v. Farmers' Nat. Bank, 124 Ky. 563 1112
v. Fensky, 3 Kan. 389 2474
v. Field, 42 Mich. 342 1393
v. First Nat. Bank, 57 Mo. App. 277 2781
v. Fisher, 54 Kan. 403 2146, 2149, 2186, 2187
v. Fitch, 2 Wend. 459 4958, 4962, 4967
v. Foster, 8 Vt. 98 2983
v. Foxcroft, 7 Me. 348 2835
v. Franklin, 2 Leigh 1 2607, 2609, 2611, 2687
v. Gay, 112 Ga. 777 3767
v. Gilbert, 26 N. Y. 279 2529, 2532
v. Gilbert, 32 Barb. 576, 26 N. Y. 279 2524
v. Goodwin, 1 Blackf. 73 1555
v. Green, 37 New Bruns. 525 4168
v. Hallock, 16 Wend. 607 481
v. Hampstead, 19 N. H. 365 4149
v. Hannibal, etc., R. Co., 36 Mo. 202 1530
v. Hershy, 52 Ark. 473 1005
v. Hodges, 65 Vt. 273 3680
v. Holdridge, 12 App. Div. (N. Y.) 613 3788
v. Holmes, 7 H. & N. 937 2611
v. Holway, 101 Me. 391 1824
v. Hubbard, 44 Pa. Super. 37 2512
v. Iowa Cent. R. Co., 162 Iowa 630 1492, 1500, 4876, 4878, 4880, 4947, 4950
v. Iowa City, 20 Wall. 583 1210
v. Jones, 15 Lea 351 2977
v. Jones, 93 Tenn. 638 1922
v. Kansas City, etc., R. Co., 153 Mo. App. 689 418
v. Kay, 26 Ga. 403 1000
v. Keith, 9 Ohio 72 4362
v. Kellogg, 96 Mich. 171 2787
v. Koerner (Ky.), 61 S. W. 30 2630, 2635
v. Lamoreaux, 70 Wis. 508 4360
v. Lanier, 104 Ga. 184 3875
v. Lindsay, 7 Pa. Super. Ct. 43 3241
v. London G. O. Co., [1906] 2 K. B. 648 4857
v. Macdermott, 82 Conn. 572 1037
v. McNulty, 3 S. & R. 364 2094
v. Mallory, 185 Ill. 227, 83 Ill. App. 488 773, 2823
v. Marsiglia, 1 Denio 317 1937, 2702
v. Martin, 120 Mass. 543 4314, 4315
v. Mayor, 1 Keyes 9 809, 811
v. Mayor, 3 Barb. 288 2709
v. Mayor, 4 Barb. 338 2696
v. Mayor, 4 N. Y. 338 252, 1938, 2688
v. Meigs, 10 Bosw. 337 26
v. Merriam, 25 Conn. 576 2779
v. Mershon, 2 N. J. L. 70 721
v. Miller, 4 Wend. 628 419, 2906, 3433
v. Miller, 54 N. Y. 528 496, 498, 1627
v. Monroe, 14 Mass. 351 3728
v. Monroe Co., 127 Mich. 300 361
v. Moody, 17 Mass. 145 287, 2905, 2910, 2945, 2958
v. Moore, 3 Mich. 55 178, 202, 2230
v. Morris, 88 Kan. 752 4421
v. Mullenix, 11 Ind. 532 816, 820
v. Mundall, 1 Salk. 124 656
v. Munford, 62 Tex. 531 2095, 2143
v. Munsell, 6 Metc. (Mass.) 373 4577
v. Murphy, 164 Mass. 490 684

[REFERENCES ARE TO PAGES]

Clark v. National B. & C. Co., 67 Fed. 222 377
v. Neufville, 46 Ga. 261 2405, 2409, 2416
v. Nevada L. & M. Co., 6 Nev. 202 392
v. New England Ins. Co., 6 Cush. 342 3019, 3021
v. Newsam, 1 Ex. 131 1327, 1532
v. New York, etc., R. Co., 33 R. I. 83 1497, 1500
v. New York, etc., R. Co., 35 R. I. 479 1500
v. New York, etc., R. Co., 40 N. Y. Misc. 691 3542
v. Nichols, 79 Kan. 612 962
v. Nicholson, 6 C. & P. 712 4235
v. Nordholt, 121 Cal. 26 4607
v. North American Co., 203 Pa. 346 4501, 4510, 4544
v. Norton, 6 Minn. 412 1660, 1673
v. Osborn, 41 Ohio St. 28 2821
v. Pacific Mut. Life Ins. Co., 185 Ill. App. 580 3079
v. Parish, 1 Bibb 547 422
v. Parr, 14 Ohio 118 1028, 2060
v. Patapsco G. Co., 144 N. C. 64 3936
v. Pearce, 80 Tex. 146 4606
v. Peckham, 10 R. I. 35 16, 3933
v. Pennsylvania R. Co., 145 Pa. 438 3846, 3921
v. Perry, 30 Me. 151 2153
v. Phelps, 6 Metc. (Mass.) 296 992
v. Philadelphia, 171 Pa. 30 403
v. Pinney, 6 Cow. 297 1542
v. Pinney, 7 Cow. 596 2311
v. Pinney, 7 Cow. 681 2275, 2297, 2311, 4239, 4246
v. Pope, 70 Ill. 128 2612
v. Porter, 90 Mo. App. 143 1923
v. Reese, 26 Tex. Civ. App. 619 3673, 3687
v. Reese, 35 Cal. 89 3671
v. Ricker, 14 N. H. 44 1850
v. Russel, 3 Watts 213 782
v. Russell, 110 Mass. 133 225, 327, 2670, 2676
v. St. Clari, etc., I. Co., 24 Mich. 508 3749, 3751, 3822
v. St. Louis etc., R. Co., 64 Mo. 440 3386
v. San Francisco, etc., R. Co., 142 Cal. 614 1357, 1360, 1393
v. Sawyer, 121 Mass. 224 2767
v. Searight, 135 Pa. 173 1147
v. Sewell, 2 Atk. 99 1081
v. Seyton, 6 Ves. 411 1568
v. Sickler, 64 N. Y. 231 828, 2789, 2808, 2814
v. Smallwood, 156 Fed. 409 1017
v. Smith, 9 Conn. 379 39
v. Smith, 10 Conn. 1, 6 1622, 1623
v. Smith, 14 Johns. 326 2666
v. Smith, 88 Ill. 298 684
v. Snelling, 1 Ired. 382 1828
v. State, 7 Blackf. 570 1556
v. State, 12 Ohio 483 1461
v. State, 142 N. Y. 101 2461
v. Stevenson, 2 W. Bl. 803 1482
v. Sullivan, 2 N. D. 103 2830
v. Swift, 3 Met. 390 43, 2056, 2058, 2152, 2175
v. Tanner, 100 Ky. 275 1923
v. Taylor & Co., George, [1914] W. C. & Ins. Rep. 448 [1914] 2 Sc. L. T. 145 5211
v. Terry, 25 Conn. 395 2517, 2518
v. Tilton, 74 N. H. 330 4838, 4839
v. Traction Co., 138 N. C. 77 3488
Clark v. Tulare Lake D. Co., 14 Cal. App. 414 4925, 4941
v. United F. & M. Ins. Co., 2 Mass. 365 3038
v. United F. & M. Ins. Co., 7 Mass. 345 3026
v. United Ins. Co., 7 Mass. 365 3006
v. Van Northwick, 1 Pick. 343 2955
v. Van Vleck, 135 Iowa 184 1476, 1483
v. Wabash R. Co., 132 Iowa 11 3758
v. Waterman, 7 Vt. 76 2464
v. Watson, 18 C. B. 277 2221
v. Weis, 87 Ill. 438 815
v. Wells, 5 Gray 69 625, 630
v. West, 137 App. Div. (N. Y.) 23 376, 2689
v. Wheeling S. Works, 53 Fed. 494 2231
v. Whitaker, 19 Conn. 330 485, 4211
v. Wildridge, 5 Ind. 176 522
v. Wilkinson, 59 Wis. 543 1038, 1570, 1647
v. Wilson, 103 Mass. 219 488, 3023
v. Woods, 2 Ex. 395, 406 4366
v. Woods, 17 L. J. (Mag. Cas.) 189 4836
v. Worden, 10 Neb. 87 1072
v. Yocum, 116 Cal. 515 1995, 1997
v. Zeigler, 79 Ala. 346, 85 Ala. 154 2185
Clark L. Co. v. St. Coner, 97 Ark. 358 4747, 4753
Clark Mfg. Co. v. Western U. Tel. Co., 152 N. C. 157 40, 187, 3559, 3569
Clark Mile-End S. C. Co. v. Shaffery, 58 N. J. L. 229 4700
Clark T. Co. v. Clark Co., 56 N. J. Eq. 789 4491
Clark's Cove G. Co. v. Appling, 33 W. Va. 470 531
Clark's Est., 39 Pa. Super. 445 1120
Clarke v. Abingdon, 17 Ves. 106 1563, 1573
v. American D. & I. Co., 35 Fed. 478 4618, 4836, 4837
v. Army & N. Co-op. Soc., [1903] 1 K. B. 155 169
v. Bogardus, 12 Wend. 67 639, 640
v. Chesapeake & O. R. Co., 63 W. Va. 423 3323, 3340, 3403, 4222, 4296
v. Day, 2 Leigh 172 1051
v. Gates, 67 Mo. 139 671
v. Hardgrove, 7 Gratt. 399 2112, 2211
v. Holford, 2 C. & K. 540 4162, 4230, 4260
v. Janesville, 1 Biss. 98 1209
v. Lamb, 6 Pick. 512, 8 Pick. 830 1491, 1528
v. London St. R. Co., 12 Ont. L. R. 279 1511
v. Lyon County, 7 Nev. 75 821
v. Midland Great Western R. Co., [1895] 2 Irish 294 398
v. New York Cent. & H. River R. Co., 157 App. Div. (N. Y.) 194 3413
v. Pearce, 80 Tex. 146 4626
v. Postan, 6 C. & P. 423 4608
v. Priest, 21 App. Div. (N. Y.) 314 2175
v. Schmidt, 210 N. Y. 211 2403
v. Scott, 45 Cal. 86 703, 710
v. Seaton, 18 B. Mon. 226 1537
v. Sexton, 6 Ves. 411 1563, 1565
v. Taylor, 69 Ark. 612, 617 1155
v. The Dodge Healey, 4 Wash. C. C. 651 2724
v. Watt, 83 Misc. (N. Y.) 404 2983

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v. Westcott, 2 App. Div. (N. Y.) 503 4732
v. Western U. Tel. Co., 112 Ga. 633 1417
Clarkson v. Carter, 3 Cow. 84 419
v. De Peyster, Hopk. Ch. 424 1126
Clarridge v. South Staffordshire T. Co., [1892] 1 Q. B. 422 3396
Clary v. Rolland, 24 Cal. 147 1683
Clase v. Clearfield L. Co., 209 Pa. 422 3795
Clason v. Baldwin, 129 N. Y. 183 1964, 3715
v. Baldwin, 152 N. Y. 204 1361
v. Kehoe, 87 Hun 368 1790, 1794
v. Nassau F. Co., 20 N. Y. Misc. 315 223, 313
Claude v. Shepard, 122 N. Y. 397 848
Claudius v. Commissioner of Railways, 5 West Aust. L. R. 97 3532, 3537
Claughton v. Black, 24 Miss. 185 1539
Clausen v. Puvogel, 114 App. Div. (N. Y.) 455 1076
Claussen v. Cumberland Tel. & T. Co., 126 La. 1087 143
Clawson v. Munson, 55 Ill. 394 1917
Claxton v. Pool, 182 Mo. App. 13 4978, 4979
Clay v. Board, 85 Mo. App. 237 32
v. Central R. & B. Co., 84 Ga. 345 4915, 4917
v. Chicago, etc., R. Co., 104 Minn. 1 1467, 4764, 4819
v. Clay, 3 Metc. (Ky.) 548 1129
v. Drake, Minor 164 947
v. Hart, 7 Dana 1 1121, 1638
v. Huston, 1 Bibb 461 2329, 2331
v. Severance, 54 Vt. 300 2840
Clay Center v. Williamson, 79 Kan. 485 1714, 1734, 1740, 1742
Clay County v. Chickasaw County, 64 Miss. 534 1041
Clay County L. & C. Co. v. Angelina County, 23 Tex. Civ. App. 220 2048
Claycomb v. Munger, 51 Ill. 373 2117, 2120, 2123, 2124, 2129
Clayes v. Hooker, 6 Thomp. & C. 448, 4 Hun 231 1161
v. White, 83 Ill. 540 384
Claypool v. Sturgess, 10 Ohio St. 440 1000
v. Wilgmore, 34 Ind. App. 35 157
Clayton v. Blake, 4 Ired. 497 2667, 2682
v. Clark, 74 Miss. 499 752
v. Franco-T. L. Co., 15 Tex. Civ. App. 365 2874
v. Henderson, 20 Ky. L. Rep. 87 125
v. Henderson, 103 Ky. 228 437
v. O'Connor, 35 Ga. 193 1134, 4401, 4407
Clayton's Case, 1 Meriv. 585 736
Clear v. Fox, 26 Fed. 90 1495
Clear Creek Co. v. Nash, 27 Colo. App. 551 2568
Cleary v. City R. Co., 76 Cal. 240 350, 4864
v. Folger, 84 Cal. 316 2018
v. Sohier, 120 Mass. 210 2608
Cleave v. King, 3 New Zeal. L. R. 277 2415, 2417
Cleaves v. Lord, 3 Gray 66 416
Cleburne St. Ry. Co. v. Barnes, — Tex. Civ. App. —, 168 S. W. 991 4827
Clegg v. Cramer, 32 Hun 162 525
v. Dearden, 12 Q. B. 576 396, 411, 413
v. New York N. Union, 72 Hun 395 1094
Cleghorn v. New York, etc., R. Co., 56 N. Y. 44 1333, 3506, 3514
Cleland v. Anderson, 66 Neb. 252 424
v. Carlile, 186 Pa. 110 1481
Clem v. Holmes, 33 Gratt. 722 4969
Clemens v. Connecticut Mut. L. Ins. Co., 184 Mo. 46 3947
v. Gem Fibre P. Co., 153 Mich. 495 4711
Clement v. British America Assur. Co., 141 Mass. 298 3052, 3063
v. Brown, 57 Minn. 314 3674
v. Cash, 21 N. Y. 253 844, 857, 860, 889, 918
v. Courtright, 9 Pa. Super. 45 2880
v. Duffy, 54 Iowa 632 1665, 3788
v. Louisville & N. R. Co., 153 Fed. 979 3322
v. McConnell, 14 Ill. 154 1107
v. Major, 8 Colo. App. 86 4635, 4636
v. Rommeck, 149 Mich. 595 2372
v. Skinner, 72 Vt. 159 3669
v. Spear, 56 Vt. 401 4233
v. Western U. Tel. Co., 137 Mass. 463 3554
Clement & H. Mfg. Co. v. Meserole, 107 Mass. 362 368, 2237, 2256
Clements v. Beatty, 87 Ala. 238 2006
v. Burlington, etc., R. Co., 74 Iowa 442 4238
v. Eisely, 63 Neb. 651 4297
v. Glass, 23 Ga. 395 4314
v. Hawkes Mfg. Co., 107 Mass. 362 2357
v. London, etc., R. Co., [1894] 2 Q. B. 482 25
v. Maloney, 55 Mo. 352 4523, 4544
v. Philadelphia Co., 184 Pa. 28 4017
v. Railroad Co., 132 Pa. 445 876, 894
v. Schuylkill, etc., R. Co., 132 Pa. 445 847
v. Stapleton, 136 Iowa 137 2501
v. State, 77 N. C. 142 266
Clemmitt v. New York L. Ins. Co., 76 Va. 355 3085, 3086
Clemons v. Grays Harbor, etc., R. Co., 63 Wash. 38 842
v. Seba, 131 Mo. App. 378 3662, 3687
Clemson v. Davidson, 5 Bin. 392, 401 3286
Clendaniel v. Tuckerman, 17 Barb. 184 3066, 3287, 3302, 3304
Clendening v. Hawk, 8 N. D. 419 4283, 4286
Clendinen v. Black, 2 Bailey 488 1839, 2489, 2529
Clendinning v. Lindner, 9 N. Y. Misc. 682 3111
Clenighan v. McFarland, 11 N. Y. Supp. 719 3233
v. McFarland, 16 Daly 402 3247
Cleone, The, 6 Fed. 517 2721
Cleopatra M. Co. v. Dickinson, 28 Wash. 211 3114
Clerk v. Withers, 2 Ld. Raym. 1072, 1 Salk. 323, 6 Mod. 290 633
Clerque v. McKay, 6 Ont. L. R. 51 1990
Cleu v. McPherson, 1 Bosw. 480 2371, 2376
Cleveland v. Bangor, 87 Me. 264 426
v. Bryant, 16 S. C. 634 3108, 3110
v. Burnham, 64 Wis. 347 1077
v. Burrill, 25 Barb. 532 1025, 1026, 1029
v. Citizens' G. L. Co., 20 N. J. Eq. 201 3839
v. City Council, 102 Ga. 233 4064
v. Emerson, 51 Ind. App. 339 4835, 4839, 4841

[REFERENCES ARE TO PAGES]

Cleveland v. Grand Trunk R. Co., 42 Vt. 449 427
v. Lamm, 73 Ill. App. 592 3310
v. Rowe, 99 Minn. 444 2280, 2301
Cleveland-C. Springs Co. v. Goldsboro B. Co., 148 N. C. 533 2259
Cleveland C. & C. Co. v. American C. I. P. Co., 168 Ala. 250 863
Cleveland Leader P. Co. v. Nethersole, 84 Ohio 118 4552
Cleveland P. & S. Works v. Consumers C. Co., 5 Ohio C. C. (N. S.) 258 2415
v. Consumers C. Co., 75 Ohio 53 2345, 2347, 2386
Cleveland R. M. v. Rhodes, 121 U. S. 255 2232
Cleveland School Dist. v. Great Northern R. Co., 20 N. D. 124 3774
Cleveland & S. T. Co. v. Ward, 6 Ohio C. C. (N. S.) 385 4719
Cleveland, etc., R. Co. v. Ball, 5 Ohio St. 568 1431, 3980, 4116
v. Beckett, 11 Ind. App. 547 1503
v. Blind, 182 Ind. 398 3333, 5034
v. Born, 49 Ind. App. 62 3741, 3742, 3815, 4174
v. Conner, 74 Ohio 225 3464, 3499
v. Christie, 178 Ind. 691 3877
v. Closser, 126 Ind. 348 3280
v. Dixon, 51 Ind. App. 658 4613, 4628, 4639
v. Druien, 118 Ky. 237 3420
v. Drumm, 32 Ind. App. 547 4944, 4945
v. Dukeman, 130 Ill. App. 105 4894, 4903
v. Ebert, 19 Ohio C. C. 725 3480, 4686
v. Gorsuch, 28 Ohio C. C. 468 1441, 1448, 1449, 3986
v. Hadley, 170 Ind. 204 4711, 4720, 4808
v. Heath, 22 Ind. App. 47 1429
v. Hilligoss, 171 Ind. 417 423, 424, 766, 772, 774
v. Holden, 73 Ill. App. 582 3310
v. Huddleston, 151 Ind. 540 1470
v. Jenkins, 174 Ill. 398 4833
v. Kelley, 5 Ohio St. 180 2309, 2338
v. King, 23 Ind. App. 573 3852, 3862, 3875, 3904
v. Kinsley, 27 Ind. App. 135 3446
v. Lynn, 177 Ind. 311 4793
v. Miles, 162 Ind. 646 4929
v. Miller, 165 Ind. 381 1484, 4655, 4665
v. Mitchell, 84 Ill. App. 206 3189, 3199
v. Moore, 170 Ind. 328 2654, 2656, 2686, 2689, 2792, 2831
v. Newell, 104 Ind. 264 4748
v. Oesterling (Ind. App.), 100 N. E. 856 4815
v. Ohio Postal Tel. C. Co., 68 Ohio 306 4066, 4069
v. Osborn, 66 Ohio St. 45 13
v. Patterson, 37 Ind. App. 617 143
v. Pattison, 67 Ill. App. 351 3852, 3872, 3883
v. Patton, 104 Ill. App. 550 3387
v. Patton, 203 Ill. 376 1442, 3434, 3747
v. Perkins, 17 Mich. 296 1436, 1437, 3337
v. Potts, 33 Ind. App. 564 3340
v. Quillen, 22 Ind. App. 496 3450, 3519, 3528
v. Ruby, 173 Ind. 181 3387, 3394
Cleveland, etc., R. Co. v. Scott, 39 Ind. App. 420 2539, 2540, 2682
v. Smith, 177 Ind. 524 3976, 4003, 4015, 4025, 4038, 4103, 4125, 4134
v. Speer, 56 Pa. 325 14, 3948
v. Starks, 174 Ind. 345 1395, 4870, 4900, 4905
v. Stephens, Ill. App. 586 3780
v. Stewart, 24 Ind. App. 374 92
v. Sutherland, 19 Ohio St. 151 4714, 4905
v. Tauer, 176 Ind. 621 99, 125
v. True, 53 Ind. App. 156 1484
v. Van Laningham, 52 Ind. App. 156 4860
v. Van Natta, 44 Ind. App. 608 1458
v. Ward, 27 Ohio C. C. 761 4778
v. Wood, 189 Ill. 352, 90 Ill. App. 551 3209, 3215, 3216
Clevenger v. Dunaway, 84 Ill. 367 1269, 1276, 3207
Cleves v. Willoughby, 7 Hill 83 3127, 3138
Cleworth v. Pickford, 7 M. & W. 314 458
Clews v. Jamieson, 182 U. S. 461 1453
Click v. Green, 77 Va. 827 2068, 2098
Clifford v. Cochrane, 10 Ill. App. 570 4503, 4562
v. Dam, 44 N. Y. Super. Ct. 391 4693
v. Press P. Co., 78 App. Div. (N. Y.) 79 4546
v. Richardson, 18 Vt. 620 1429, 2599, 2624, 2626
v. Watts, L. R. 5 C. P. 577 1561, 3116
Clift v. Moses, 75 Hun 517 1215
Clifton v. Bank, 75 Miss. 929 1924
v. Charles, 53 Tex. Civ. App. 448 1986, 1997
v. Hooper, 6 Q. B. 468 32, 43, 1620, 1628, 1630
v. Newsom, 1 Jones 108 2239
Climax T. Co. v. American T. Co., 234 Ill. 179 2454
Cline v. Mock, 150 Mo. App. 431 2374, 2439
v. Rudesill, 126 N. C. 523 825
Clingan v. Cleveland, C., C. & St. L. Ry. Co., 184 Ill. App. 202 3338
Clinkenbeard v. St. Joseph, 122 Mo. 641 3953
Clinque, In re, 109 Fed. 455 2753
Clinton v. Laning, 61 Mich. 355 4772, 4774
v. Lyons, [1912] 3 K. B. 198 113
v. Mercer, 3 Murph. 119 39
v. Myers, 46 N. Y. 511 38
Clinton B. & L. Works v. First Nat. Bank, 103 Wis. 117 1223
Clinton St. (Misc.), In re, 123 N. Y. Supp. 198 3976, 4033
Clinton W. C. Co. v. Gardner, 99 Ill. 151 3099
Clio G. Co. v. Western U. Tel. Co., 82 S. C. 405 3559
Clippens O. Co. v. Edinburgh & D. W. Trustees, [1907] App. Cas. 291 1735
Cliquot's Champagne, 3 Wall. 114 1436, 2303, 2304, 2305
Clisby v. Mastin, 150 Ala. 132 1579, 2741
Clisdell v. Kingston & P. R. Co., 18 Ont. L. R. 169 4210
Clissold v. Machell, 25 Up. Can. Q. B. 80, 26 Up. Can. Q. B. 422 424, 1269, 1532

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Cloney v. Richardson, 34 Mo. 370 717
Clopper v. Union Bank, 7 Har. & J. 92 780, 782
Clopton v. Elkin, 49 Miss. 95 1827, 1830, 1849
v. Spratt, 52 Miss. 251 2816
Clore v. Robinson, 100 Ky. 402 2241, 2243
Close v. Ann Arbor R. Co., 169 Mich. 392 1432, 3752
v. Browne, 230 Ill. 228 2508
v. Crossland, 47 Minn. 500 2380, 2392, 2395, 2396
v. Fields, 2 Tex. 232 941, 1010
v. Riddle, 40 Ore. 592 976
v. Stuart, 4 Wend. 95 1546
v. Stuyvesant, 132 Ill. 607 1953
v. Van Husen, 19 Barb. 505 640
v. Zell, 141 Pa. 390 1935
Closing of Attorney Street, In re, 162 App. Div. (N. Y.) 469 3958
Closson v. Staples, 42 Vt. 209 223, 4606, 4608, 4609, 4623
Clothren v. Scanlan, 34 Ga. 555 807
Cloud v. Clinkinbeard, 8 B. Mon. 398 639, 640
v. Scarborough, 3 Ga. App. 7 2910
v. Smith, 1 Tex. 102 1010
Clough v. Baker, 48 N. H. 254 1836, 1843
v. Patrick, 37 Vt. 421 1826, 1828
v. Stillwell M. Co., 112 Mo. App. 177 2462, 2528, 2540
v. Tenney, 5 Me. 446 4957
v. Unity, 18 N. H. 75 1062, 4146, 4150
Clover v. Greenwich Ins. Co., 101 N. Y. 277 3056
Clow v. Borst, 6 Johns. 37 679, 754
v. Brogden, 2 M. & Gr. 39 3161
v. Derby C. Co., 98 Pa. 432 2805
v. Gilbert, 54 Ill. App. 134 1655
v. Yount, 93 Ill. App. 112 4320, 4339, 4353
Clowdis v. Fresno F. & I. Co., 118 Cal. 315 64
Clowes v. Dickenson, 5 Johns. Ch. 235, 9 Cow. 403 571, 573
v. Hawley, 12 Johns. 483 4281
v. Joplin M. Co., 4 Dill. 469 3788, 4260
Cloy v. Western U. Tel., 78 S. C. 109 3619, 3633
Cloyd v. Steiger, 139 Ill. 41 538
Cluggage v. Swan, 4 Bin. 150 1482
Clukey v. Seattle E. Co., 27 Wash. 70 4679
Clum v. Smith, 5 Hill 560 1484
Clune v. Ristine, 94 Fed. 745 489, 4885
Clunnes v. Pessey, 1 Camp. 8 1415
Clute v. North Yakima & V. R. Co., 62 Wash. 531 12
v. Robison, 2 Johns. 595 1952
v. Wiggins, 14 Johns. 175 161
Clyde C. Co. v. Pittsburg, etc., R. Co., 226 Pa. 391 197, 200, 3323
Clyde M. & E. Co. v. Buoy, 71 Kan. 293 1093, 1247
Clyde S. S. Co., In re, 134 Fed. 95 4848
Clydebank E. & S. Co. v. Yzquierdo y Castaneda, [1905] App. Cas. 6 832, 834, 858, 863, 868, 932
Clyne v. Helmes, 61 N. J. L. 358 3127
Coad v. Home C. Co., 32 Neb. 761 1163, 1166
Coagan v. Parker, 2 Rich. 255 3143
Coal Co. v. Ice Co., 134 N. C. 574 317, 2230, 2280
Coal Creek Co. v. Tennessee C., etc., Co. 106 Tenn. 651 885, 909, 3116
Coal Creek M. & M. Co. v. Moses, 15 Lea 300 3788
Coal, etc., R. Co. v. Reherd, 204 Fed. 859 931, 2684
v. Young, 126 Ill. App. 651 1266, 1332, 4668, 4775
Coalgate v. Bross, 25 Okla. 244 437
v. Isherwood, 7 Ind. T. 130 4718
Coan Brownstown, 126 Mich. 626 1138
Coast Central Milling Co. v. Russell Lumber Co., 88 Conn. 109 1364, 2415
Coast W. Co. v. Phoenix Ins. Co., 7 Fed. 236 3035
v. Phoenix Ins. Co., 13 Fed. 127 2734, 2735
Coates v. Allegheny S. Co., 234 Pa. 199 2560
v. Cheever, 1 Cow. 460 3727, 3728
v. Chicago, etc., R. Co., 239 Ill. 154 3337
v. Coates, 1 Duer 664 1719
v. Locust Point Co., 102 Md. 291 2501
v. Nyack, 127 App. Div. (N. Y.) 153 1094, 2702
Coats v. Chicago, etc., R. Co., 144 Ill. App. 81 3401
v. Holbrook, 2 Sandf. Ch. 599 4485, 4486
Coatsworth v. Lehigh Valley R. Co., 73 N. Y. Misc. 645 3959, 4124
Cobb v. Boston, 109 Mass. 309 4022
v. Boston, 109 Mass. 438 4104
v. Boston, 112 Mass. 181 4134
v. Elizabeth City, 75 N. C. 1 521
v. Great Western R., [1894] App. Cas. 419 185
v. Haynes, 8 B. Mon. 137 2859, 2864
v. I. C. R. Co., 38 Iowa 601 193, 384, 3316
v. Klosterman, 58 Ore. 211 2074, 2120
v. Little, 2 Me. 261 2768
v. People, 84 Ill. 511 1259, 2744
v. St. Louis & H. R. Co., 149 Mo. 609 4813
v. Simon, 119 Wis. 597 1340, 4840
v. Smith, 38 Wis. 21 391, 3853, 3939
v. Standish, 14 Me. 198 161
v. Stratton's Estate, 56 Colo. 278 941, 1087
v. Titus, 10 N. Y. 698 2783
v. Western U. Tel. Co., 85 S. C. 430 3617
v. Whitsett, 51 Mo. App. 146 2295
v. Wrightsville & T. R. Co., 129 Ga. 377 3759, 3760
Cobb C. Co. v. Crocker-W. Co., 125 Ill. App. 241 2340
Cobbey v. Knapp, 28 Neb. 158 1019
Cobe v. Guyer, 237 Ill. 568 991, 992
Coble v. Potter, 155 App. Div. (N. Y.) 716 2406
Coburn v. Ames, 52 Cal. 385 3935
v. California P. C. Co., 144 Cal. 81 2251
v. Goodall, 72 Cal. 498 1093
v. Haley, 57 Me. 346 1847
v. Litchfield, 132 Mass. 449 2158
v. Odell, 30 N. H. 540 1850
v. Ware, 30 Me. 202 1838, 1848
v. Watson, 48 Neb. 257 4302, 4306
Cochran v. Baker, 34 Ore. 555 2979, 2982
v. Boston, 211 Mass. 171 1141
v. Cochran, 93 Minn. 284 2480
v. Cochran, 127 App. Div. (N. Y.) 319 4980, 4982
v. Flint, 57 N. H. 514 361

[REFERENCES ARE TO PAGES]

Cochran v. Gould, 106 Mass. 29 2147
v. Miller, 13 Iowa 128 1269, 1284
v. Missouri, etc., R. Co., 94 Mo. App. 469 4053
v. Mitchem, 143 Ga. 35 4796
v. Orr, 94 Ind. 433 779, 2814, 2821
v. People's R. Co., 113 Mo. 359 858
v. State, 7 Humph. 544 1483
v. Street, 1 Wash. (Va.) 79 1483
v. Walker, 82 Ky. 220 2870
v. Yoho, 34 Wash. 238 2706
Cochrane v. Commonwealth, 175 Mass. 299 4033
v. Greene, 9 C. B. (N. S.) 448 1816
v. National E. Co., 20 N. D. 169 1436
v. Tuttle, 75 Ill. 361 1321, 1499
v. Winburne, 13 Tex. 143 4331
Cockayne v. Hodgkisson, 5 C. & P. 543 4522
Cockburn v. Alexander, 6 C. B. 791 3278
v. Ashland L. Co., 54 Wis. 619 2289, 2341, 4225
v. Edwards, 16 Ch. Div. 393 2968
Cocke v. Big Muddy C. & I. Co. (Tex. Civ. App.), 155 S. W. 1019 2276
v. Conigmaker, 1 A. K. Marsh. 254 1179
v. Hoffman, 5 Lea 105 2870
v. Western U. Tel. Co., 84 Miss. 380 3619
Cocking v. Frazer, 4 Doug. 295 3014
Cockle v. Flack, 93 U. S. 344 1164, 1165
Cockley v. Brucker, 54 Ohio St. 214 371, 376, 2542
Cockrane v. Quackenbush, 29 Minn. 376 4606
Cockrell v. Ellison, — Tex. Civ. App. —, 137 S. W. 150 3250, 4391
v. Proctor, 65 Mo. 41 2073, 2076, 2083
Cockrill v. Armstrong, 31 Ark. 580 3728
v. Kirkpatrick, 9 Mo. 688 1887
v. Mizer, 11 Ky. L. Rep. 637 1056
Cockshott v. Bennett, 2 T. R. 765 756
Codding v. Munson, 52 Neb. 580 2979
Coddington v. Hoblit, 49 Ill. App. 66 1963
v. Paleologo, L. R. 2 Ex. 193 2232
Codey v. Raynaud, 1 Colo. 272 2525
Codman v. Freeman, 3 Cush. 306 4173
Codrington v. Lloyd, 8 Ad. & E. 449 4841
Codwise v. Taylor, 4 Sneed 346 1540
Cody v. American E. Co., 131 Ill. App. 240 2259
v. Gremmler, 121 Mo. App. 359 1318
v. New York, etc., R. Co., 151 Mass. 462 149
Coe v. Clay, 5 Bing. 440 3183
v. Foree, 20 Tex. Civ. App. 550 1578
v. Lindley, 32 Iowa 437 2047
v. Peacock, 14 Ohio St. 56 1621
v. Peacock, 14 Ohio St. 187 37, 495
v. Rankin, 5 McLean 354 2873, 2892
v. Smith, 4 Ind. 79 542, 2496, 2532, 2539
Coen v. Birchard, 124 Iowa 394 840, 863
Coffee v. Eastland, Cooke 159 422
v. Meiggs, 9 Cal. 363 1416
Coffeen v. Brunton, 4 McLean 516 4486
Coffey v. National Bank, 46 Mo. 140 4213
v. Sutton, 175 Ill. App. 331 1417, 4735
Coffeyville M. & G. Co. v. Carter, 65 Kan. 565 4882, 4906
Coffin v. Brig Akbar, 5 Fed. 456 2722
v. Brown, 94 Md. 190 4568
v. Field, 7 Cush. 355 4196
Coffin v. Gephart, 18 Iowa 257 4311
v. Lawson, 7 Houst. 327 3735
v. McLean, 80 N. Y. 560 2828, 2830
v. Newburyport M. Ins. Co., 9 Mass. 436 3026
v. Spencer, 2 Hawaii 23 1269, 4779
v. State, 144 Ind. 578 41, 2298, 2318, 2341
v. Storer, 5 Mass. 251 3297, 3298
v. Taylor, 16 Ore. 375 4314, 4317
v. The John Shaw, 1 Cliff. 230 2720
v. The Osceola, 34 Fed. 921 5005
v. Varila, 8 Tex. Civ. App. 417 4795, 4836, 4840
Coffing v. Dodge, 167 Mass. 231 2963
Coffman v. Huck, 19 Mo. 435 2027
v. Saline Val. R. Co., 183 Mo. App. 622 313
v. Scoville, 86 Ill. 300 2198
v. Spokane Chronicle P. Co., 65 Wash. 1 4549, 4591
Cofield v. Jenkins M. Co., 89 S. C. 419 2573
Cogan v. Cook, 22 Minn. 137 786
v. Ebden, 1 Burr 383 1482
Cogdell v. Western U. Tel. Co., 135 N. C. 431 3547
v. Yett, 1 Cold. 230 50
Coggeshall v. Coggeshall, 2 Strobh. 51 388
v. Ruggles, 62 Ill. 401 2837, 2838
Coggs v. Bernard, 2 Ld. Raym. 909 827
Coghill v. Boyd, 79 Va. 1 1128
Coghlan v. Quartararo, 15 Cal. App. 662 1095
v. South Carolina R. Co., 142 U. S. 101 1150, 1155, 1164
Coghlen v. South Carolina R. Co., 32 Fed. 316 820
Coghlin v. La Fonderie, 34 Can. Sup. Ct. 153 1258
v. Hayden, 5 Ore. 22 2779, 2780
v. Lyon, 3 J. J. Marsh, 38 1029, 2024, 2134
v. New York, etc., R. Co., 103 N. Y. 10 3831
Cogwill v. Robberson, 75 Mo. App. 412 1815
Cohea v. State, 34 Miss. 179 1501, 1539
Cohen v. Ames, 205 Mass. 186 2501
v. Bellenot, 2 Va. Dec. 639 3886
v. Bellenot (Va.), 32 S. E. 455 3849, 3908, 3944
v. Cohen, 26 Tex. Civ. App. 315 3563
v. Commissioners, 7 Sm. & M. 437 2814
v. Dry Dock, etc., R. Co., 69 N. Y. 170 3511
v. Dupont, 1 Sandf. 260 3125
v. Fisher, 135 App. Div. (N. Y.) 238 1364
v. Fox, 26 Colo. App. 55 1287
v. Marchant, 1 Disney 113 1612
v. Minzesheimer (N. Y. Misc.) 118 Supp. 385 10
v. New York Mut. L. Ins. Co., 50 N. Y. 610 3091
v. Numsen, 104 Md. 676 1935
v. Platt, 69 N. Y. 348 1439
v. Rittimann (Tex. Civ. App.), 139 S. W. 59 143, 144, 3846, 3904, 3924
v. St. Louis, etc., R. Co., 34 Kan. 158 3960, 4040, 4052, 4053, 4131, 4149
v. State, 34 Miss. 179 1664
Cohn v. Ansonia Realty Co., 162 App. Div. (N. Y.) 791 4667
v. Hill, 9 N. Y. Misc. 326 3150
v. May, 210 Pa. 615 147

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v. Neeves, 40 Wis. 393 3930
v. Norton, 57 Conn. 480 175, 178, 183, 2621, 3189, 3197
v. Saidel, 71 N. H. 558 4614, 4634
Coil v. Wallace, 24 N. J. L. 291 3663, 3673
Coine v. Chicago & N. R. Co., 123 Iowa 458 3446, 3476
Cointement v. Cropper, 41 La. Ann. 303 4615, 4624, 4645
Coit v. Houston, 3 Johns. Cas. 243 762, 825
v. Planer, 7 Robert. 413 3103
v. Schwartz, 29 Kan. 344 2273, 2275
v. Stewart, 50 N. Y. 17 538
v. Western U. Tel. Co., 130 Cal. 657 3550, 3551, 3554
Cok v. Danaher L. Co., 61 Wash. 118 4691
Coker v. Brevard, 90 Miss. 64 860
Colasurdo v. Central R. R. of New Jersey, 180 Fed. 832 5049
Colbath v. Bangor & A. R. Co., 105 Me. 379 3423, 3425
Colbert v. Journal Pub. Co., 19 N. M. 156 1267, 1305, 4509, 4547
v. Rhode Island Co. (R. I.) 67 Atl. 446 1479
Colburn v. Marble, 196 Mass. 376 337, 3681, 3682, 3686
v. Morrill, 117 Mass. 262 3122, 3124
v. Neal, 4 Dana 121 1499
v. Northern Pac. R. Co., 13 Mont. 476 2053, 2056
v. Pomeroy, 44 N. H. 19 295, 311
v. Simms, 2 Hare 554 4479
v. Woodworth, 31 Barb. 381 2539, 2550, 2556
Colburn's Est., In re, 153 Mich. 206 2472
Colby v. Bailey, 5 Hawaii 152 862
v. Copp, 35 N. H. 434 724
v. Kimball, 99 Iowa 321 4290, 4301
v. McGee, 48 Ill. App. 294 4544
v. Meservey, 85 Iowa 555 1721, 1729, 1735, 1744
v. Reed, 99 U. S. 560 482, 784, 820
Colchord Mach. Co. v. Loy-W. F. & Mach. Co., 131 Mo. App. 540 2372
Colcock v. Goode, 3 McCord 302 2385
v. Goode, 3 McCord 513 2381
Colcord v. Sylvester, 66 Ill. 540 1759
Colcough v. Nashville, etc., R. Co., 2 Head 171 4027, 4086, 4145
Coldren v. Miller, 1 Blackf. 296 2318, 2329
Cole v. Albers, 1 Gill 423 2067
v. Andrews, 176 N. Y. 374 1088
v. Atlanta & W. P. R. Co., 102 Ga. 474 3468
v. Bickelhaupt, 64 App. Div. (N. Y.) 6 3836
v. Blake, Peake 179 809
v. Blue Ridge R., 75 S. C. 156 1267, 1386
v. Buckle, 18 Up. Can. C. P. 286 3155, 3243
v. Butler, 43 Me. 401 1077
v. Champlain T. Co., 26 Vt. 87 816, 2371
v. Cheovenda, 4 Colo. 17 2275
v. Colburn, 61 N. H. 499 536, 549
v. Curtis, 16 Minn. 182 1321, 4635
v. Dalziel, 13 Ill. App. 23 4288
v. Ellwood P. Co., 216 Pa. 283 3997, 3998, 4037
v. Evans, Son Lescher & Webb. Ltd., 4 B. W. C. C. 138 5196
Cole v. German S. & L. Soc., 124 Fed. 113 157
v. Goodwin, 19 Wend. 251 3414
v. Gray, 70 Kan. 705 345, 1322
v. High, 173 Pa. 590 4420
v. Hills, 44 N. H. 227 980
v. Hoeburg, 36 Kan. 263 1356
v. Holliday, 4 Mo. App. 94 3687
v. Illinois Cent. R. Co., 120 Ky. 686 404
v. Justice, 8 Ala. 793 2196, 2825, 2827
v. Knight, 3 Mod. 277 772
v. Laird, 121 Iowa 146 2434
v. Laws, 104 N. C. 651 1485
v. McKey, 66 Wis. 500 3234
v. Millspaugh, 111 Minn. 159 4503
v. O'Brien, 34 Neb. 68 2979
v. Patterson, 25 Wend. 456 3132, 3133
v. Petty, 2 N. J. L. 60 1541
v. Ross, 9 B. Mon. 393 2337, 4210
v. Sackett, 1 Hill 516 657, 753
v. St. Louis, 132 Mo. 633 4108, 4114
v. St. Louis T. Co., 183 Mo. 81 4711
v. Seattle, etc., R. Co., 42 Wash. 462 4653, 4690, 4747
v. Shrubsall & Wakeley Bros., Ltd., [1912] W. C. Rep. 226, 5 B. W. C. C. 337 5176
v. Sprowl, 35 Me. 161 414, 3850, 3935
v. Stearns, 20 N. Y. Misc. 502 50, 322
v. Stearns, 23 App. Div. (N. Y.) 446 290
v. Swanston, 1 Cal. 50 1363, 1366, 2230, 2298, 2340, 2347
v. Thompson, 134 Iowa 685 3097, 3806
v. Trull, 9 Pick. 325 708, 724, 726, 1012
v. Tucker, 6 Tex. 266 1305
v. Zucarello, 104 Tenn. 64 2238
Cole's Estate, In re, 85 Misc. (N. Y.) 630 936, 1110
Colegrove v. New York, etc., R. Co., 20 N. Y. 492 433, 444
Coleman v. Allen, 79 Ga. 637 1316
v. Ballard, 13 La. Ann. 512 2111
v. Bennett, 111 Tenn. 705 153, 432, 3854, 3861, 3877, 3878
v. Bresnahan, 54 Hun 619 2175
v. Bunce, 37 Tex. 171 3258
v. Clark, 80 Mo. App. 339 303, 2054, 2066
v. Cole, 158 Mo. 253 980
v. First Nat. Bank, 53 N. Y. 388 682
v. Henrich, 2 Mackey 189 4648
v. Himmelberger-H. L. & L. Co., 105 Mo. App. 254 4865, 4923, 4929
v. Hudson, 2 Sneed 465 378
v. Jenkins, 78 Ga. 605 626, 687
v. Lewis, 183 Mass. 485 679
v. Lucksinger, 224 Mo. 1 2057, 2065, 2069, 2072, 2097, 2100
v. Luetcke, — Tex. Civ. App. —, 164 S. W. 1117 2097
v. Meade, 13 Bush 358 2503
v. New York, etc., R. Co., 106 Mass. 160 1347, 4676
v. Pepper, 159 Ala. 310 1266, 1310, 1311, 3827
v. Perry, 28 Mont. 1 111
v. Price, 54 Tex. Civ. App. 39 3840, 3863
v. Railroad, 138 N. C. 351 3443, 3456
v. Riggs, 61 Iowa 543 2842
v. Seymour, 1 Ves. Sr. 210 1083
v. Simpson, 2 Dana 166 2462, 2464

[REFERENCES ARE TO PAGES]

Coleman v. Southwick, 9 Johns. 44 1495, 4795
v. United States, 81 Fed. 824 2484
v. White, 43 Ind. 429 4976
v. Whittle, 79 S. C. 212 2174
Coleman's App., 62 Pa. 252 365, 3788, 4261
Colerain v. Bell, 9 Metc. (Mass.) 499 1588
Coles v. Ballard, 78 Va. 139 2821
v. Bell, 1 Camp. 478 817, 818
v. Coles, 15 Johns. 319 3728
v. Kelsey, 13 Tex. 75 1058, 1060
v. Soulsby, 21 Cal. 47 699
v. Standard L. Co., 150 N. C. 183 193, 274, 278, 2245
v. Thompson, 7 Tex. Civ. App. 666 389
v. Withers, 33 Gratt. 186 666, 726
Coles County v. Goebring, 209 Ill. 142 1042
v. Haynes, 134 Ill. App. 320 741
Coley v. North Carolina R. Co., 128 N. C. 534 4728
v. Statesville, 121 N. C. 301 4906
Colgate v. Western E. Mfg. Co., 28 Fed. 146 4441
Colgrove v. Tallman, 67 N. Y. 95 2819
Coliseum I. Co. v. King County, 72 Wash. 687 4231
Colladay v. Baird, 4 Phila. 139 4484
Collamer v. Page, 35 Vt. 387 1663, 4349
Collard v. Donaldson, 17 Ohio 264 643
v. Smith, 13 N. J. Eq. 43 977
v. Southeastern R. Co., 7 H. & N. 79 50, 217, 2359, 2366, 2367, 3349, 3357, 3363, 4678
Collen v. Wright, 7 El. & B. 301 223, 298, 303, 2984
v. Wright, 8 El. & B. 647 309, 2981, 2982
Collerd v. Tully, 77 N. J. Eq. 439 718, 739
Collett v. Jones, 7 B. Mon. 586 583
Collette v. Rebori, 107 Mo. App. 711 1329
Colley v. Streeton, 2 B. & C. 273 3162
Collidge v. Neat, 129 Mass. 146 3670
Collier v. Betterton, 87 Tex. 440 858, 885, 893, 926
v. Cowger, 52 Ark. 322 1028, 2133, 2156
v. Early, 54 Ind. 559 158
v. Erwin, 3 Mont. 142 525, 552
v. Gamble, 10 Mo. 472 2054, 2075, 2078
v. Gray, Overton 110 1108
v. Myers, 14 Tex. Civ. App. 312 1669
v. Postum C. Co., 150 App. Div. (N. Y.) 169 430, 4513
v. Powell, 23 Ala. 579 1599
v. Pulliam, 13 Lea 114 2907, 2938, 2942
v. Rutledge, 136 N. Y. 621 2470
v. State, 10 Ind. 58 1621
v. White, 67 Miss. 133 790, 798
Collingbourne v. Mantell, 5 M. & W. 292 762
Collingwood v. Irwin, 3 Watts 306 297, 2399
Collinridge v. Royal Exch. Assur. Corp., 3 Q. B. Div. 173 3043, 3063
Collins v. Adams, 53 Vt. 433 623, 637
v. Albany, etc., R. Co., 12 Barb. 492 1493, 1512, 3527, 3528
v. Babbitt, 67 N. J. Eq. 165 1071
v. Baumgardner, 52 Pa. 461 328, 2367, 2603
v. Bellefonte Cent. R. Co., 171 Pa. 243 4326, 4358
v. Blantern, 2 Wils. 347 1852
Collins v. Boyd, 14 Ala. 505 2831
v. Carey, 2 Beav. 128 2471
v. Carlisle, 13 Ill. 254 1853
v. Cave, 4 H. & N. 225 210
v. Clark, 30 Tex. Civ. App. 341 3812
v. Cochran, 121 Ga. 785 303
v. Collins, 8 App. Div. (N. Y.) 502 3105
v. Council Bluffs, 32 Iowa 324 412, 3495, 4787
v. Council Bluffs, 35 Iowa 432 1510
v. Delaporte, 115 Mass. 159 230, 2258, 2260
v. Dodge, 37 Minn. 503 1375
v. East Tennessee, etc., R. Co., 9 Heisk. 841 350
v. Fillingham, 129 Mo. App. 340 3251
v. Gleason C. Co., 140 Iowa 114 1538, 3762, 3809
v. Godwin, 65 Fla. 283 4774
v. Hayte, 50 Ill. 353 4605
v. Hough, 26 Mo. 149 4349
v. Huffman, 48 Wash. 184 1728
v. Illinois Cent. R. Co., 161 Ill. App. 95 3780
v. Janesville, 99 Wis. 464 4676, 4744
v. Janesville, 107 Wis. 436 4827
v. Karatopsky, 36 Ark. 316, 329 3124, 3247
v. Lavelle, 19 R. I. 45 207, 213, 234, 2305
v. Lowry, 78 Wis. 329 4264, 4267, 4299, 4307
v. Luban, 127 N. Y. Supp. 461 2340, 2345, 2348
v. McClurg, 1 Colo. App. 348 2902, 2903
v. Mack, 31 Ark. 684 3677
v. Maude, 144 Cal. 289 699
v. Middle L. Com'rs, L. R. 4 C. P. 279 161
v. Mitchell, 3 Fla. 4 1710
v. Morrison, 91 Wis. 324 3258, 3263
v. Pennsylvania R. Co., 163 N. Y. App. Div. 452 5093, 5103
v. Price, 5 Bing. 132 2461
v. Rainey, 42 Ark. 531 2903
v. Robinson, 33 Ala. 91 827
v. St. John, 38 New Bruns. 86 4890
v. Sinclair, 51 Ill. 328 1734, 1747
v. Smith, 16 Vt. 9 507
v. Smith, 158 Fed. 872 4273
v. State, 3 Ind. App. 542 1610
v. Stephens, 58 Ala. 543 175
v. Stephenson, 8 Gray 438 4577
v. Tigner, 5 Pen. (Del.) 345 2403
v. Todd, 17 Mo. 539 465
v. United States, 34 Ct. of Cls. 294 2684, 2688, 2691, 2701
v. Waterbury Co., 144 App. Div. (N. Y.) 670 147
v. West Jersey Exp. Co., 72 N. J. L. 231 143
Collins I. Co. v. Burkam, 10 Mich. 283 992, 993, 1830, 1878
Collis v. Emmett, 1 H. Bl. 313 2781
v. Press P. Co., 68 App. Div. (N. Y.) 38 4586
Collyer v. Higgins, 1 Duvall 6 1614
v. Moulton, 9 R. I. 90 2696, 2702
Colman v. Crump, 70 N. Y. 578 4487
v. Post, 10 Mich. 422 1853, 1854
Colombia, The, 197 Fed. 661 834, 3307
Colon v. McGraw, 66 Mich. 194 3125
Colonel Ledyard, The, 1 Sprague 530 3387
Colonial I. & A. Co. v. Cobain, 14 Vict. L. R. 740 1989
Colonization Soc. v. Reed, 25 Tex. Sup. 343 1538

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Colorado, The, Brown 411 4994
Colorado C. Co. v. McFarland (Tex. Civ. App.), 94 S. W. 400 239
v. Sims, 42 Tex. Civ. App. 442 3893, 3923
Colorado Cent. C. M. Co. v. Turck, 70 Fed. 294 4260, 4263
Colorado Con. L. & W. Co. v. Hartman, 5 Colo. App. 150 3799, 3802
Colorado F. & L. S. Co. v. York, 38 Colo. 239 1444
Colorado Midland R. Co. v. O'Brien, 16 Colo. 219 4807
Colorado Mortgage & Investment Co. v. Giacomini, 55 Colo. 540 3234
Colorado Springs E. Co. v. Soper, 38 Colo. 126 1502, 4794
Colorado Springs L. Co. v. Godding, 2 Colo. App. 1 2241
Colorado, etc., R. Co. v. Allen, 48 Colo. 4 1472, 4661
v. Brown, 15 Colo. 193 3958, 4033, 4101
v. Jenkins, 25 Colo. App. 348 1498, 1511, 1517
v. Marr, 26 Colo. App. 48 1379
v. Nichols, 41 Colo. 272 136, 3452, 4684, 4703, 4722
v. Petit, 37 Colo. 326 4656, 4793
v. Snider, 38 Colo. 351 1458
Colrick v. Swinburne, 105 N. Y. 503 1354, 1356, 4241
Colt v. Owens, 90 N. Y. 368 2314, 2948, 2966, 4244
Colter v. Morgan, 12 B. Mon. 278 295, 297
Colton v. Butterfield, 14 N. D. 465 2031
v. Dunham, 2 Paige 267 606
v. Good, 11 Up. Can. Q. B. 153 2597, 2635, 2670
v. Kennedy, 74 N. Y. Misc. 217 2319
v. Onderdonk, 69 Cal. 155 3738, 3749
Coltman v. Morrison & Mason Ltd., [1914] W. C. & Ins. Rep. 43, 7 B. W. C. C. 194 5202
Columbia, The, 48 C. C. A. 596, 109 Fed. 660 5006
Columbia v. Amos, 5 Ind. 184 2318
Columbia A. Co. v. Pine Beach I. Co., 109 Va. 325 1719, 1741, 1750
Columbia County v. Massie, 31 Ore. 292 1590
Columbia Delaware B. Co. v. Geisse, 38 N. J. L. 39 1439
v. Geisse, 35 N. J. L. 558 3947
Columbia Digger Co. v. Rector, 215 Fed. 618 696, 703, 712, 730, 2793
Columbia E. S. Co. v. Kemmet, 67 N. J. L. 18 2749
Columbia Nat. Bank v. Bletz, 2 Penny. (Pa.) 169 1038
v. MacKnight, 29 App. D. C. 580 275, 276
Columbia Sav. Bank v. Winn, 132 Mo. 80 1070
Columbia, etc., R. Co. v. Hawthorne, 3 Wash. T. 353 4709
v. Histogenetic, M. C., 14 Wash. 475 3699, 3715
v. Hutchinson, 56 Wash. 323 4050
v. Sauter, 223 Fed. 604 5043, 5064
Columbian Conservatory v. Dickenson, 158 N. C. 207 1815
Columbian Ins. Co. v. Ashby, 13 Pet. 331 3033, 3036, 3037
v. Lawrence, 10 Pet. 507 3018
Columbus, The, Abb. Adm. 97 3435
Columbus, The, 3 W. Rob. 164 4994
Columbus v. Ogletree, 102 Ga. 293 1480, 1484
v. Rohr, 10 Ohio C. C. (N. S.) 320 3938
Columbus Co. v. Clowes, [1903] 1 K. B. 244 2, 2575, 2579
Columbus Gas, etc., Co. v. Freeland, 12 Ohio St. 392 3846, 3848
Columbus R. Co. v. Woolfolk, 128 Ga. 631 1343, 1459, 1460
Columbus S. P. Co. v. Ganser, 58 Mich. 385 2749
Columbus, S. & H. R. Co.'s Appeals, In re, 109 Fed. 177 1155
Columbus, etc., R. Co. v. Bridges, 86 Ala. 448 4814
v. Burke, 54 Ohio St. 98 1716, 1717
v. Flounoy, 75 Ga. 745 3376
Colusa County v. Hudson, 85 Cal. 633 4026, 4047
Colusa, etc., R. Co. v. Glenn, 25 Cal. App. 634 3961, 3963, 4133
Colusa Parrot M. & S. Co. v. Monahan, 162 Fed. 276 149, 1476, 4728
Colville v. Besly, 2 Denio 139 2847
v. St. Paul, etc., R. Co., 19 Minn. 283 3964, 3977, 3992, 4033
Colvin v. Carter, 4 Ohio 354 700
v. Corwin, 15 Wend. 557 372, 382
v. Jones, 3 Dana 576 2367, 3329
v. McCormick Cotton Oil Co., 66 S. C. 61 2368
v. Newell, 8 Ky. L. Rep. 959 1967
v. United States Mut. Accident Ass'n, 66 Hun 543 622
Colwell v. Foulks, 36 How. Pr. 316 896
v. Lawrence, 38 Barb. 643 896
v. Lawrence, 38 N. Y. 71 856, 863
v. Manhattan R. Co., 57 Hun 452 4737
Colwill v. Reeves, 2 Camp. 575 361
Coman v. Alles, 198 Mass. 99 3858
Combs v. Bates, 150 Ky. 188 1054
v. Combs, 130 Ky. 827 2147
v. Lake, 91 Ark. 128 1443, 3107, 3699
v. Scott, 76 Wis. 662 1959, 1987, 1996, 2008, 2047
v. Tarlton, 2 Dana 464 (1834) 1986, 2020, 2022, 2032
Comegys v. Davidson, 154 Pa. 534 1956, 2116
v. State Bank, 6 Ind. 357 2863, 2869
Comer v. Advertiser Co., 172 Ala. 613 4591
v. Foley, 98 Ga. 678 3528
v. Knowles, 17 Kan. 440 4835, 4842, 4843
v. Ritter L. Co., 50 W. Va. 688 4717, 4700
v. Shehee, 129 Ala. 588 1087
v. Taylor, 82 Mo. 341 4965, 4967, 4971
Comerford v. Melvina, The, 43 Fed. 77 5009, 5010
v. Morrison, 145 Ill. App. 615 3798
Comingor v. Louisville T. Co., 128 Ky. 697 4227
Comings v. Little, 24 Pick. 266 2156
Commerce C. O. Co. v. Camp (Tex. Civ. App.), 129 S. W. 852 4925
Commerce Exch. Nat. Bank v. Blye, 123 N. Y. 132 372, 407, 4339
Commercial Bank v. Cunningham, 24 Pick. 270 732
v. First State Bank & T. Co., (Tex. Civ. App.), 153 S. W. 1175 4285
v. Hughes, 17 Wend. 94 671
v. Jones, 18 Tex. 811 4211

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v. Red River Valley Nat. Bank, 8 N. D. 382 2931, 2939
v. Reed, 11 Ohio 498 1914
v. Union Bank, 11 N. Y. 203 631
v. Western Reserve Bank, 11 Ohio 444 572
Commercial Bank of Boonville v. Varnum, 176 Mo. App. 78 636, 701
Commercial Bank of South Australia, In re, 36 Ch. Div. 522 1883, 1905
Commercial Club v. Hilliker, 20 Ind. App. 239 1395, 4862, 4933
Commercial I. Co. v. National Bank, 36 Wash. 287 40, 2190
Commercial Ins. Co. v. Union Ins. Co., 19 How. 318 2999
Commercial Nat. Bank v. Henninger, 105 Pa. 496 2809
v. Latham, 29 Okla. 88 277
v. Portland, 24 Ore. 188 1044
Commercial News Co. v. Beard, 116 Ill. App. 501 469
Commercial R. & C. Co. v. Dorsey, 114 Md. 172 2372
Commercial Tel. C. Co. v. Prevost, 133 La. 47 3976
Commercial Union Assur. Co. v. Meyer, 9 Tex. Civ. App. 7 3012, 3014
Commercial & F.'s Nat. Bank v. McCormick, 97 Md. 703 748, 778, 782
Commercial & R. Bank v. Atherton, 1 Sm. & M. 641 1839
Comminge v. Stevenson, 76 Tex. 642 1372, 3860, 3882
Commission Co. v. Carroll, 104 Tenn. 489 1164, 1182
Commissioner v. Chelsea Sav. Bank, 161 Mich. 691 2744, 2804, 2806
Commissioner of Public Works, In re, 135 App. Div. (N. Y.) 561 4119, 4127
Commissioner of Public Works v. Hills, [1906] App. Cas. 368 558, 858, 863
Commissioners, In re, 83 Misc. (N. Y.) 186 3960
Commissioners v. Chicago, etc., R. Co., 91 Mich. 291 4057, 4058
v. Executors of Robinson, 1 Bailey 151 2826
v. Greenwood, 1 Desaus. 450 1583
v. Harkleroads, 62 Miss. 807 3980, 3993, 4019, 4025
v. Hogan, 39 Kan. 606 3980
v. Johnson, 66 Miss. 248 3146, 4088
v. Johnston, 71 N. C. 398 4114
v. Labore, 37 Kan. 480 3999
v. McCormick, 4 Mont. 115, 133 597
v. Michigan Cent. R. Co., 90 Mich. 385 4057
v. Moesta, 91 Mich. 149 4007
v. O'Sullivan, 17 Kan. 58 4119
v. Thompson, 4 McCord 241 2048
Commissioners of Parks v. Chicago, etc., R. Co., 91 Mich. 291 4063, 4074
Commissioners of Parks, etc., v. Michigan Cent. R. Co., 90 Mich. 385 4074
Commissioners of Saline County v. Anderson, 20 Kan. 298 694
Commissioners of State Reservation at Niagara, In re, 37 Hun 537 4078
Commissioners of Washington Park, In re, 56 N. Y. 148 4147
Commissioners' Court v. Street, 116 Ala. 28 4026
Commonwealth v. Allen, 30 Pa. 49 1607
v. American B. & T. Co., 205 Pa. 372 1592
v. American Bonding Co., 245 Pa. 535 1647
v. Barker, 126 Ky. 200 527
v. Beaumarchais, 3 Call 107 608
v. Boston, etc., R., 3 Cush. 25 1062, 4004, 4028, 4072, 4152
v. Bradley, 1 Litt. 48 1607
v. Carrington, 116 Mass. 37 1486
v. City Trust, S. D. & S. Co., 224 Pa. 223 2744
v. Colberg, 119 Mass. 350 4783
v. Cole, 7 B. Mon. 250 1602, 1604
v. Comly, 3 Pa. 372 1578
v. Cook, 6 Serg. & R. 577 1307
v. Coombs, 2 Mass. 492 3957
v. Crevor, 3 Bin. 121 1134
v. Cummins, 155 Pa. 30 748
v. Damon, 136 Mass. 441, 448 4517
v. Dorus, 108 Mass. 488 1486
v. Drew, 4 Mass. 391 1483
v. Drewry, 15 Gratt. 1 1597, 1614
v. Fairfax, 4 Hen. & M. 208 1583
v. Fidelity & D. Co., 224 Pa. 95 2747
v. Froelich, 56 Pa. Super. Ct. 604 2797
v. Ginn, 23 Ky. L. Rep. 521 886
v. Godshaw, 92 Ky. 435 1133, 1578
v. Gould, 48 Pa. Super. 528 1559, 3708, 3712
v. Green, 17 Mass. 515 1174
v. Harmer, 6 Phila. 90 1607
v. Haupt, 10 Allen 38 613
v. Hide & L. Ins. Co., 112 Mass. 136 3026, 3041
v. Hinson, 143 Ky. 428 1582
v. Holmes, 25 Gratt. 771 1597
v. Jimison, 205 Pa. 367 1592
v. Kellogg, 6 Phila. 90 1595
v. Kidder, 107 Mass. 188 3841
v. Knettle, 182 Pa. 176 1585
v. Lamb, 1 W. & S. 261 1558
v. Ledford, 129 Ky. 190 1560
v. Lee, 120 Ky. 433 1612
v. Loyd, 12 Phila. 221 1653
v. Magnolia Villa L. & I. Co., 163 Pa. 99 1689, 1690
v. Massachusetts Mut. Ins. Co., 119 Mass. 45 1090
v. Middlesex, 9 Mass. 388 3957
v. Miller, 5 Mon. 205 754
v. Montgomery, 31 Pa. 519 1599
v. Norfolk, 5 Mass. 435 3956
v. Overby, 80 Ky. 208 1560
v. Philadelphia City & County, 157 Pa. 555 1065
v. Porter, 21 Pa. 385 1132
v. Power, 7 Metc. (Mass.) 596 1347
v. Press Co., 156 Pa. 516 1134
v. Reitzel, 9 W. & S. 109 1584, 1586
v. Sayres, 1 Miles 235 1607
v. Smith, 19 Pa. Dist. 973 1056
v. Stockton, 5 Mon. 192 1601
v. Straub, 35 Pa. 137 1598
v. Sturtevant, 117 Mass. 122 1422
v. Swope, 45 Pa. 535 1600
v. Tate, 89 Ky. 587 1591, 1592
v. Terry, 11 Pa. Super. 547 2498
v. Todd, 9 Bush 708 747, 3257, 3261
v. Toms, 45 Pa. 408 1590
v. Vanderslice, 8 S. & R. 452 2808
v. Wathen, 126 Ky. 573 716
v. Williams, 4 Litt. 335 1601
v. Wolbert, 6 Bin. 292 1559
v. Wood, 142 Mass. 459 4376
Commonwealth Ins. Co. v. Sennett, 37 Pa. 205 836, 2065, 3022, 3023, 3024, 3051

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Compania Mexicana De Cemen Portland v. Waite, 196 Fed. 227 885
Compania Naviera Vasconzada v. Churchill, [1906] 1 K. B. 237 3363
Comparet v. Burr, 5 Blackf. 419 26
v. Johnson, 6 Blackf. 59 515
Compound L. Co. v. Murphy, 169 Ill. 343 743
Compressed A. M. Co. v. West San Pablo L. & W. Co., 9 Cal. App. 361 4317
Comptoir D'Escompte v. Dresbach, 78 Cal. 15 663, 666, 667
Compton v. Ahrens & O. Mfg. Co. (Tex. Civ. App.), 151 S. W. 884 714, 722
v. Allen, Style 162 3150
v. Elliott, 48 N. Y. Super. Ct. 211 765
v. Martin, 5 Rich. 14 4285
Comstock v. Connecticut R. & L. Co., 77 Conn. 65 4720, 4723
v. Georgetown, 137 Mich. 541 1376, 1384, 1472
v. Grand Rapids, 40 Mich. 397 694
v. Hier, 73 N. Y. 269 4272, 4277
v. Hutchinson, 10 Barb. 211 2405, 2410
v. Lager, 78 Mo. App. 390 815
v. New York, etc., R. Co., 48 Hun 225 3889
v. Smith, 20 Mich. 338 615
v. Smith, 23 Me. 202 659
v. Son, 154 Mass. 389 2098
v. Taggart, 156 Mich. 47 2407
Conally v. Saunders, — Tex. Civ. App. —, 142 S. W. 975 4394
Conan v. Ely, 91 Minn. 127 3994
Conant v. Evans, 202 Mass. 34 2462
v. Griffin, 48 Ill. 412 4858
v. Jones, 120 Ga. 568 1451
v. Leslie, 85 Me. 257 4516, 4519
v. Seneca County Bank, 1 Ohio St. 298 712
Conard v. Pacific Ins. Co., 6 Pet. 262 4169
Concord A. H. Co. v. O'Brien, 228 Ill. 360 1031, 2676, 2684
Concord G. Co. v. French, 12 Daly 228 625
Concord Mut. Ins. Co. v. Woodbury, 45 Me. 452 3061
Concord R. Co. v. Greely, 23 N. H. 237 1063, 3995, 4136, 4153
Concordia C. Ass'n v. Minnesota & N. R. Co., 121 Ill. 199 4135
Condee v. Skinner, 40 Conn. 463 1221
Condemnation of Land, In re, 19 R. I. 382 4046, 4105
Condemnation of Property on Race St., 9 Pa. Dist. 615 4045
Condict v. Grand Trunk R. Co., 54 N. Y. 500 142, 3332
Condon v. Callahan, 115 Tenn. 285 1075
v. Des Moines Mut. Hail Ass'n, 120 Iowa 80 3053
v. Exton-Hall Brokerage & Vessel Agency, 80 Misc. (N. Y.) 369 2916
v. Kemper, 47 Kan. 126 848, 858
v. Pearce, 43 Md. 83 1869
v. South Side Co., 14 Gratt. 302 2684
Condron v. Carr, 156 App. Div. (N. Y.) 658 4840
Conduitt v. Ryan, 3 Ind. App. 1 728, 736, 737
Cone v. Central R. Co., 62 N. J. L. 99 1281, 3473
v. Lewis, 64 Tex. 331 546, 4306
v. Southern R., 85 S. C. 524 1367
Conemaugh, The, 189 U. S. 363 4986
Conery v. Coons, 33 La. Ann. 372 1734
v. Noyes, 17 La. Ann. 201 2667
Coney v. Laird, 153 Mo. 408 717
Coney Island Co. v. Dennan, 149 Fed. 687 5074
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Confederation L. Ass'n v. Labatt, 27 Ont. App. 321 2395, 2397
Confrey v. Stark, 73 Ill. 187 4777
Conger v. Armstrong, 3 Johns. Cas. 5 1825
v. Babbet, 67 Iowa 13 2825
v. Fincher, 28 Ill. 347 2581
v. Hudson River R. Co., 6 Duer 375 3329
v. Weaver, 6 Cal. 548 13
v. Weaver, 20 N. Y. 140 39, 284, 355, 1986, 2027
Congham v. King, Cro. Car. 222 3167
Congregation v. Peres, 2 Cold. 620 2526, 2545, 2556
Congregational Soc. v. Hubble, 62 Ill. 161 2682
v. Walker, 18 Vt. 600 3699
Congress, The, 1 Biss. 42 3033
Congress S. Co. v. High Rock S. Co., 45 N. Y. 291 4485
Conheim v. Chicago G. W. T. Co., 104 Minn. 312 3538
Conhocto, etc., Co. v. Buffalo, etc., R. Co., 52 Barb. 390 3842
Conkey v. Hopkins, 17 Johns. 113 2873, 2893, 2894
Conklin v. Central New York Tel. & T. Co., 130 App. Div. (N. Y.) 308 4945
v. Consolidated R. Co., 196 Mass. 302 405, 4619, 4713
v. Hancock, 67 Ohio St. 455 2061
Conkling v. King, 10 N. Y. 440, aff'g 10 Barb. 372 655, 748, 753, 754
v. Krakauer, 70 Tex. 735 2502
v. Standard O. Co., 138 Iowa 596 2374
v. Underhill, 4 Ill. 388 985
v. Weatherwax, 181 N. Y. 258 695
Conlan v. Sullivan, 110 Cal. 624 2029
Conley v. Arnold, 93 Ga. 823 33
v. Maine Cent. R. Co., 95 Me. 149 4913
v. Palmer, 2 N. Y. 182 1574
v. United Drug Co., 218 Mass. 238 4667
Conlon v. Cassidy, 17 R. I. 518 4959
v. McGraw, 66 Mich. 194 389, 3127, 3192, 3205
v. Metropolitan St. R. Co., 34 N. Y. Misc. 394 3476
Conn v. Bernheimer, 67 Miss. 498 373
v. Rice, 122 C. C. A. 417, 204 Fed. 181 3745, 3793
v. Wilson, 2 Overt. 233 3663
Connally v. Saunders (Tex. Civ. App.), 142 S. W. 975 148, 286
Connemara, The, 108 U. S. 352 2716, 2721, 2723, 2725
Connecticut General L. Ins. Co. v. Chase, 72 Vt. 176 2796
Connecticut L. Ins. Co. v. Houser, 89 Ind. 258 3088

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v. State Treasurer, 31 Mich. 6 628
Connecticut Mut. L. Ins. Co. v. Bowler, 1 Holmes 263 2755
v. New York, etc., R. Co., 25 Conn. 262 116, 4846, 4848, 4937
v. Schaefer, 94 U. S. 461 3070, 3071
v. Schurmeier, 125 Minn. 368 1639, 2741
v. Scott, 81 Ky. 540 2753
v. Stinson, 86 Ill. App. 668 807, 1061
v. Westerhoff, 58 Neb. 379 971. 975, 1060
Connecticut River L. Co. v. Brown, 68 Vt. 239 814
Connecticut River P. Co. v. Dickinson, 75 N. H. 353 1443
Connecticut, etc., Ins. Co. v. New York, etc., R. Co., 25 Conn. 265 127
Connecticut, etc., R. Co. v. Clapp, 1 Cush. 559 4155
Connell v. Boulton, 25 Up. Can. Q. B. 444 2157, 2165, 2168
v. Harron, 7 Cal. App. 745 2286
v. McClean, 6 Harr. & J. 297 2276
v. Prescott, 20 Ont. App. 49 149
v. Putnam, 58 N. H. 534 4768
v. Stalker, 20 Misc. (N. Y.) 423 2563
v. Western U. Tel. Co., 116 Mo. 34 3642, 3645
Connell Bros. Co. v. H. Diederichsen & Co., 213 Fed. 737 2359, 2368
Connellee v. Latham (Tex. Civ. App.), 140 S. W. 368 1806
Connelly v. Illinois Cent. R. Co., 120 Mo. App. 652 1522
v. Priest, 72 Mo. App. 673 883, 892
v. Western U. Tel. Co., 100 Va. 51 3642, 3644
v. Western U. Tel. Co., 100 Va. 618 3626
v. White, 122 Iowa 391 4609, 4628, 4641
Conner v. Baxter, 124 Iowa 219 1990, 2009
v. Bean, 43 N. H. 202 2873, 2875, 2892
v. Clark, 12 Cal. 168 1853, 1857, 1867
v. Eddy, 25 Mo. 72 2396
v. Henderson, 15 Mass. 319 2391
v. Missouri Pac. R. Co., 181 Mo. 397 418
v. Myers, 7 Blackf. 337 978
v. Nevada, 188 Mo. 148 4680
v. New York, 2 Sandf. 370 693
v. Pioneer Fireproof C. Co., 29 Fed. 629 1363, 1374
v. Reeves, 103 N. Y. 527 2893, 2898, 2899
v. Sewell, 90 Tex. 275 3827
v. Winton, 7 Ind. 523 550
Conner's Adm'x v. Paul, 12 Bush (Ky.) 144 5120
Conners v. Holland, 113 Mass. 50 949, 1874
v. Walsh, 131 N. Y. 590 1261
Connersville v. Snider, 31 Ind. App. 218 1376
Connersville W. Co. v. McFarland C. Co., 166 Ind. 123 49, 207, 209, 230, 233, 234, 2274, 2346, 2351, 2355
Connery v. Manning, 163 Mass. 44 4647
Conness v. Indiana, etc., R. Co., 193 Ill. 464 3979, 4021, 4129
Conniff v. San Francisco, 67 Cal. 45 3948
Connoble v. Clark, 38 Mo. App. 476 240
Connolly v. Boston, 117 Mass. 64 18
v. Coon, 23 Ont. App. 37 413
v. Cottle, Breese 364 422
v. Dammann, 232 Ill. 175 1827
v. Dolan, 22 R. I. 60 2852, 2854
v. Sullivan, 173 Mass. 1 2688, 2689
Connop v. Levy, 11 Q. B. 769 453, 781
Connor v. Dempsey, 49 N. Y. 665 2405
v. Donnell, 55 Tex. 167 1166
v. Hillier, 11 Rich. 193 4282
v. Levinson, 115 Mich. 297 4395
v. Mayor, 5 N. Y. 285 693
v. Missouri Pac. R. Co., 181 Mo. 397 1454
v. Munsees, (Misc.) 145 N. Y. Supp. 891 2512
v. Paul, 12 Bush 380 4850
v. Potts, [1897] 1 Irish 534 2047
v. State, 152 N. Y. 49 3887
v. Wabash R. Co., 149 Mo. App. 675 108
Connors v. Burlington, etc., R. Co., 71 Iowa 490 4851
v. Chingren, 111 Iowa 451 4408
Connoss v. Meir, 2 E. D. Smith 314 1356
Conover v. Harrisburg & S. C. Co., 161 Ill. App. 74 4858
v. Hill, **76 Ill. 342** 2854
v. Pacific Exp. Co., 40 Mo. App. 31 3335
v. Wright, 9 Pa. Dist. 688 2037
Conover's Case, 35 N. J. Eq. 108 1651
Conqueror, The, 166 U. S. 110 1447, 1448, 5001, 5009
Conqueror Z. & L. Co. v. Ætna L. Ins. Co., 152 Mo. App. 332 2872, 2878
Conquest v. Ebbetts, [1896] App. Cas. 490 3155, 3163, 3168
Conrad v. Clarke, 106 Minn. 430 1824
v. Effinger, 87 Va. 59 1987, 2097, 2113, 2141
v. Ehrman, 61 Ill. App. 128 1710
v. Ellington, 104 Wis. 367 1362, 1428
v. Gibbon, 29 Iowa 120 1000
v. New York Cent., etc., R. Co., 137 App. Div. (N. Y.) 372 4872
v. Pacific Ins. Co., 6 Pet. 262 4164, 4198
v. Saginaw M. Co., 54 Mich. 249 3256
v. Trustees of Grand Grove, 64 Wis. 258 792, 794, 2060, 2074, 2098
v. Uhrig B. Co., 8 Mo. App. 277 4484
v. Western U. Tel. Co., 162 Pa. 204 3555
Conradt v. Lepper, 13 Wyo. 473 1904
Conried Met. O. Co. v. Brin, 66 N. Y. Misc. 282 832, 845, 886
Conroe v. Conroe, 47 Pa. 198 4574
Conroy v. Flint, 5 Cal. 327 1675
v. Warren, 3 Johns. Cas. 259 671, 1825
Consaul v. Cummings, 24 App. D. C. 36 1072
v. Sheldon, 35 Neb. 247, 252 2629
Consequa v. Fanning, 3 Johns. Ch. 587 616, 940, 1008, 1199, 1878, 1899
v. Willings, Pet. C. C. 229 1155, 1878
Consett, The, 5 Prob. Div. 229 5004
Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382 5148, 5177
Consolidated C. Co. v. Block & H. S. Co., 53 Ill. App. 565 2284
v. Findlay, 128 Iowa 696 1968
v. Haenni, 146 Ill. 614 1262, 1311, 4730
v. Jones, 232 Ill. 326 2306
v. Peers, 150 Ill. 344 869, 909
v. Scheiber, 65 Ill. App. 304 4732

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v. Shepherd, 112 Ill. App. 458 488
v. Stein, 122 Ill. App. 310 4934
Consolidated E. L. & P. Co. v. Koepp, 64 Kan. 735 52, 129
Consolidated G. Co. v. Allman, 59 Fla. 230 1499
v. Getty, 96 Md. 683 58, 67, 3767
v. Smith, 109 Md. 186 4882
Consolidated H. M. L. Mach. Co. v. Bradley, 171 Mass. 127, 134 2430
Consolidated I. Co. v. Pennsylvania R. Co., 224 Pa. 487 4092
Consolidated I. Mach. Co. v. Keifer, 134 Ill. 481 442
v. Trenton Hygeian I. Co., 57 Fed. 898 1480
Consolidated Lower Boulder R. & D. Co. v. Alaux, 24 Colo. App. 377 1443
Consolidated Oil Well P. Co. v. Eaton, 12 Fed. 865 4450
Consolidated R. E. & F. Ins. Co. v. Cashow, 41 Md. 59 3092, 3093
Consolidated S. Co. v. Morgan, 160 Ind. 241 4876, 4884
v. Staggs, 164 Ind. 331 4871
Consolidated T. Co. v. Hone, 60 N. J. L. 444 4914
v. Jordan, 36 Ind. App. 156 3983, 4133
v. Lambertson, 59 N. J. L. 297 4667
v. Lambertson, 60 N. J. L. 457 4663
Consolidated T. L. Co. v. Bronson, 2 Ind. App. 1 1670, 1676
Consolidated, etc., R. Co. v. Taylor, 48 Tex. Civ. App. 605 4718
Constable v. Colden, 2 Johns. 480 1107, 1111
Constant v. Lehman, 52 Kan. 227 4395, 4407
Constantine v. Rowland, 147 Iowa 142 1350, 2875, 2876, 2877, 2880
Constitution Pub. Co. v. Way, 94 Ga. 120 4590
Consumers' P. I. Co. v. Jenkins, 58 Ill. App. 519 2351, 2631, 2636
Conta v. Corgiat, 74 Wash. 28 4381
Contee v. Findley, 1 H. & J. 331 1252
Continental C. Co. v. Cole, 146 Ky. 821 4866
Continental Divide M. I. Co. v. Bliley, 23 Colo. 160 4239
Continental G. Co. v. DeBord, 34 Okla. 66 4222, 4287
Continental Ins. Co. v. Chase (Tex. Civ. App.), 33 S. W. 603 3020
v. Clark, 126 Iowa 274 2901, 2905, 2918
v. Hargrove, 131 Ky. 837 635
v. Miller, 4 Ind. App. 553 794, 803
Continental O. & C. Co. v. Gilliam (Tex. Civ. App.), 151 S. W. 890 4793
v. Thompson (Tex. Civ. App.), 136 S. W. 1178 3905
v. Wristen & Johnson, — Tex. Civ. App. —, 168 S. W. 395 1435, 4181
Continental State Bank v. Trabue (Tex. Civ. App.), 150 S. W. 209 967
Continuous Glass Press Co. v. Schmertz Wire Glass Co., 219 Fed. 199 4455
Converse v. Blumrich, 14 Mich. 109 758
v. Burrows, 2 Minn. 229 2406, 2423
v. Damariscotta Bank, 15 Me. 431 1358
v. Foster, 32 Vt. 828 988
v. United States, 21 How. 463 2460
Converse B. Co. v. Geneva County, 168 Ala. 432 2596
Conway v. Case, 22 Ill. 127 804
v. Chicago, 237 Ill. 128 1045
v. Conway, 130 Ky. 218 2472
v. Mitchell, 97 Wis. 290 569, 2697, 2701
v. Nicol, 34 Iowa 533 4977
Conwell v. Pumphrey, 9 Ind. 135 1886
v. Voorhees, 13 Ohio 523 2995
Conwisher v. Johnson, 127 Ill. App. 602 4544
Conyers v. Magrath, 4 McCord 218 1108, 1134
Cooch v. Gerry, 3 Har. 280 3702
Cook v. American, etc., G. Co., 70 N. J. L. 65 4930, 4940
v. Anderson, 85 Ala. 99 3124, 3138
v. Andrews, 36 Ohio St. 174 3114
v. Ansonia, 66 Conn. 413 3890
v. Barkley, 2 N. J. L. 169 471, 4576, 4577, 4599
v. Bartlett, 115 App. Div. (N. Y.) 829 4646
v. Bartlett, 179 Mass. 576 4958, 4964
v. Bates, 88 Me. 455 2467
v. Boone Suburban E. R. Co., 122 Iowa 437 4125
v. Brandies, 3 (Metc.) (Ky.) 555 2242
v. Brockway, 21 Barb. 331 1420
v. Castner, 9 Cush. 266 533, 560, 565
v. Ceas, 143 Cal. 221 1642
v. Chapman, 41 N. J. Eq. 152 1720, 1721, 1722, 1725, 1740
v. Charlestown, 98 Mass. 80 162
v. Chehalis River L. Co., 48 Wash. 619 4722
v. Clark, 4 E. D. Smith 213 1814, 1873, 2783
v. Clark's Committee, 21 Ky. L. Rep. 316 1109
v. Clary, 48 Mo. App. 166 4314, 4321
v. Clay St. Hill R. Co., 60 Cal. 604 4939
v. Cleveland, etc., R. Co., 143 Ill. App. 109 1504, 4898
v. Cockrill, 1 Stew. 475 1822
v. Columbian O. A. & R. Co., 144 Cal. 670 2701
v. Commissioners, 6 McLean 612 252
v. Cook, 100 Mass. 194 15, 4553
v. Curtis, 68 Mich. 611 2098, 2102, 2105, 2127, 2131
v. Danaher L. Co., 61 Wash. 118 1468
v. Doggett, 2 Allen 439 2005
v. Ellis, 6 Hill 466 467, 1303, 1305, 4776
v. Farinholt, 3 Ala. 384 1067
v. Fidelity & D. Co., 167 Fed. 95 40
v. Finch, 19 Minn. 407 918
v. Fiske, 12 Gray 491 2506
v. Fowler, L. R. 7 H. of L. Cas. 27 956, 961, 969, 1033
v. Globe P. Co., 227 Mo. 471 1506, 4502, 4508, 4510, 4535, 4538, 4581, 4590
v. Gordon, 68 Ore. 557 2510
v. Greenough, 14 Mont. 352 1721
v. Gross, 60 App. Div. (N. Y.) 446 4322
v. Hamilton, 67 Iowa 394 4312, 4314, 4329
v. Hartle, 8 C. & P. 568 480, 4201
v. Hastings, 150 Mich. 289 435
v. Hopper, 23 Mich. 511 435
v. Hull, 3 Pick. 269 35
v. Husted, 12 Johns. 188 642
v. Illinois T. & S. Bank, 68 Ill. App. 478 1210

[REFERENCES ARE TO PAGES]

Cook v. Jackson, 20 Tex. 209 2204
v. Jennings, 7 T. R. 381 3294
v. Kelley, 9 Bosw. 358 795
v. King, 7 Ill. App. 549 1800
v. Larkin, 19 La. Ann. 507 1818
v. Litchfield, 5 Sandf. 330 1148
v. Litchfield, 9 N. Y. 279 1905
v. Loomis, 26 Conn. 483 480, 4201, 4211, 4291, 4296, 4302
v. Lusk, 186 Mo. App. 288 3502, 3518
v. McCabe, 53 Wis. 250 2608, 2611
v. McCabe, 143 N. C. 429 2609
v. Marsh, 44 Ill. 178 1778
v. Medbury, 150 Mass. 499 3097
v. Minneapolis, etc., R. Co., 98 Wis. 624 145
v. Moffat, 5 How. 295 1148, 1878
v. Mohawk, 207 N. Y. 311 80, 3906
v. Neely, 143 Mo. App. 632 1267, 1320
v. Packard Motor Car Co. of New York, 88 Conn. 590 65, 329
v. Patterson, 103 N. C. 127 978
v. Proskey, 138 Fed. 273 4636, 4646, 4648
v. Redman, 45 Mo. App. 397 389, 396, 407, 3737
v. Sanders, 15 Rich. 63 482
v. Smith, 67 Kan. 53 40
v. Soule, 56 N. Y. 420 315, 476, 537, 564, 3162, 3236, 3243, 3249, 3257, 3258
v. South Park Com'rs, 61 Ill. 115 1049, 1062, 4097, 4152
v. Southern Columbian C. Co., 75 Miss. 121 4366
v. Southern R. Co., 153 Ala. 118 3502
v. State, 14 Ind. 154 1588
v. Terry, 19 Cal. App. 765 1727
v. Tousey, 3 Wend. 444 1556
v. Webb, 21 Minn. 428 3694
v. Welch, 9 Allen 350 2506
v. Western & A. R. Co., 72 Ga. 48 22
v. Williams, 148 Ky. 679 2416
v. Wright, 1 B. & S. 559 757
Cook County v. Harms, 108 Ill. 151 2685
v. Sexton, 16 Ill. App. 93 2689, 2691, 2709
Cook Mfg. Co. v. Randall, 62 Iowa 244 2299
Cook & R. Co. v. Sanitary Dist. of Chicago, 177 Ill. 599 4019, 4021
Cooke v. Big Muddy C. & I. Co. (Tex. Civ. App.), 155 S. W. 1019 2344
v. Burke, 148 Ill. App. 155 1794
v. Chancy, 14 Ala. 65 674
v. Crawford, 1 Tex. 9 1184, 1881
v. Davis, 53 N. Y. 318 605, 606
v. England, 27 Md. 14 413, 3155
v. Gulf Refining Co., 135 La. 609 2667
v. McAdoo, 85 N. J. L. 692 762
v. Meeker, 36 N. Y. 15 1081, 1083
v. Meeker, 42 Barb. 533 1083
v. Munstone, 1 P. & B. N. R. 351 2230
v. Preble, 80 Ill. 381 537, 554
v. Smith, 7 Hill 186 589
v. Wildes, 5 El. & B. 328 4522
v. Wise, 3 He. & M. 463 1068, 3149
Cooke Co. v. Hill, 175 Ill. App. 532 2260
Cookin v. Hoyt, 3 N. H. 392 1636
Cookman v. Nill, 81 Mo. App. 297 4188
Cookville C. & L. Co. v. Evans (Tex. Civ. App.), 135 S. W. 750 1491, 1522
Cool v. King, 7 Ill. App. 549 1766
Cooley v. Betts, 24 Wend. 203 2960
v. Kansas City, etc., R. Co., 149 Mo. 487 1444, 3780
Cooley v. Kansas E. R. Co., 170 Mo. App. 42 1364
v. Kinney, 119 Mich. 377 747
v. Pennsylvania R. Co., 40 N. Y. Misc. 239 3445, 3455
v. Philadelphia, 12 How. 299 5023
v. Rankin, 11 Mo. 647 2212
v. Rose, 3 Mass. 221 1199
v. Weeks, 10 Yerg. 141 790, 801, 827
Coolidge v. Brigham, 1 Metc. (Mass.) 547 1869, 2381, 2384
v. Brigham, 5 Metc. (Mass.) 68 301, 2399
v. Choate, 11 Metc. (Mass.) 79 4169, 4178
v. Neat, 129 Mass. 146 3675, 3685, 3687
v. New York, 99 App. Div. (N. Y.) 175 4940
v. Poor, 15 Mass. 427 1154, 1899
Coombe v. Sansom, 1 D. & R. 201 4281
Coombs v. Beede, 89 Me. 187 2475
v. King, 107 Me. 376 4673
v. Newton, 4 Blackf. 120 2874
v. Parker, 17 Ohio 289 2815
Coon v. Knapp, 8 N. Y. 402 761, 766, 767
v. McCormack, 69 Iowa 539 1764
v. Moffett, 3 N. J. L. 436 4961, 4963, 4964
v. Moffett, 3 N. J. L. 583 4957
v. St. Paul Park Realty Co., 101 Minn. 391 2501
Coonan v. Cape Girardeau, 149 Mo. App. 609 862, 867, 888
Cooney v. Chase, 81 Mich. 203 4619, 4629, 4645, 4648
v. Pullman P. C. Co., 121 Ala. 368 3539, 3540, 3541
v. Southern E. R. Co., 80 Mo. App. 226 4706
v. United States W. Co., 101 Ill. App. 468 656
Coonley v. Coonley, Hill & Denio 312 677
v. Wood, 36 Hun 559 756
Coons v. McKees Rocks Borough, 243 Pa. 340 1443, 1502, 3962, 4091, 4107, 4131
v. Nall, 4 Litt. 264 3725
v. People, 76 Ill. 383 1586
Coontz v. Missouri Pac. R. Co., 115 Mo. 669 1374
Cooper v. Armour, 42 Fed. 215 4602, 4610
v. Barber, 24 Wend. 105 468, 4584
v. Bigalow, 1 Cow. 206 580, 582, 586
v. Bigly, 13 Mich. 463 571, 574
v. Bissell, 15 Johns. 318 1527
v. Board of Review, 207 Ill. 472 4279
v. Caledonian R. Co., 9 Scotch L. T. Rep. 273 90
v. Cashman, 190 Mass. 75 122
v. Chitty, 1 Burr. 31 4207
v. Cooper, 256 Ill. 160 1122, 4242
v. Flemming, 114 Tenn. 40 4644
v. Hall, 5 Ohio 320 3838, 3847, 3848
v. Hames, 93 Ala. 280 1730
v. Harvey, 77 Kan. 854 2484
v. Hill, 3 Bush 219 1687
v. Hopkins, 70 N. H. 271 168, 340, 4689
v. Kankakee E. L. Co., 164 Ill. App. 581 3770
v. Kipp, 52 App. Div. (N. Y.) 250 4361
v. Knight (Tex. Civ. App.), 147 S. W. 349 4172
v. Lake Shore, etc., R. Co., 66 Mich. 261 1478, 4931

[REFERENCES ARE TO PAGES]

Cooper v. Livingston, 19 Fla. 684 1357, 1360
v. Manhattan R. Co., 85 Hun 217 4080
v. Mullins, 30 Ga. 146 3647
v. National F. Co., 132 Ga. 529 183, 2339, 2409
v. Newman, 45 N. H. 339 4201, 4292
v. Page, 24 Mc. 73 2768, 2784
v. Parker, 15 C. B. 825 753, 754
v. Payne, 103 App. Div. (N. Y.) 118 2376
v. Phipps, 24 Ore. 357 4529
v. Powell, Anthon 49 670, 675
v. Randall, 59 Ill. 321 3860
v. Ratliff (Ky.), 116 S. W. 748 4334, 4358
v. Rutland, 99 S. C. 83 2025
v. St. Paul City R. Co., 54 Minn. 379 1474
v. Schlesinger, 11 U. S. 148 4414
v. Scyoc, 104 Mo. App. 414 15, 434, 1267, 4621, 4631
v. Seaverns, 81 Kan. 267 4505
v. Shore E. Co., 63 N. J. L. 558 4852, 4854, 4869
v. Shuttleworth, 25 L. J. (Ex.) 14 2221
v. Sillers, 30 App. D. C. 567 389, 395
v. Singleton, 19 Tex. 260 1952, 2076, 2204
v. Southern R. Co., 165 N. C. 578 1267, 1331, 4617, 4628
v. Stronge, 111 Minn. 177 2551, 2555, 2563
v. Sun P. & P. Ass'n, 57 Fed. 566 4549
v. Tappan, 4 Wis. 362 978
v. Ulmann, Walk. Ch. 251 733
v. Waldegrave, 2 Beav. 272, 282 1150, 1878
v. Wolf, 15 Ohio St. 523 39, 495
v. Wright, 23 N. J. L. 200 936
v. Yazoo, etc., R. Co., 82 Miss. 634 760
v. Young, 22 Ga. 269 173, 3371
Cooper's App., 149 Pa. 239 2798
Coopers v. Wolf, 15 N. H. 523 1621
Coore v. Callaway, 1 Esp. 115 817, 818
Coorman v. Brooklyn Height R. Co., 127 App. Div. (N. Y.) 315 3473
Coorsen v. Ziehl, 103 Wis. 381 2650
Coos Bay R. Co. v. Nosler, 30 Ore. 547 195
Coosaw M. Co. v. Carolina M. Co., 75 Fed. 860 1734, 1735, 1751
Coots v. Farnsworth, 61 Mich. 497 2822
Coover's App., 74 Pa. 143 1082
Cope v. Bangor & P. T. Co., 39 Pa. Super. Ct. 134 2696, 2703
v. Cope, 15 Sim. 118 1889
v. Kidney, 115 Pa. 228 1492
v. Smith, 8 S. & R. 110 2820
v. Wheeler, 41 N. Y. 303 1159, 1162, 1165, 1879
v. Williams, 4 Ala. 362 1957
Copeland v. Copeland, 30 Me. 446 2115
v. Cunningham, 63 Ala. 394 224
v. Fowler, 151 N. C. 353 2229
v. Goldsmith, 100 Wis. 436 3144
v. Gorman, 19 Tex. 253 2076
v. Hamilton, 9 Manitoba 143 2456
v. McAdory, 100 Ala. 553 2101, 2149, 2151, 2162, 2182
v. Mercantile Ins. Co., 6 Pick. 198 2903
v. Wabash R. Co., 175 Mo. 650 4682
v. Young, 21 S. C. 275 525, 550
Copella, The, L. R., 1 Adm. & Ecc. 356 2721
Copis v. Middleton, 1 Turn. & Russ. 224 644
Copland v. Toulmin, 7 Cl. & F. 349 737
Coplay I. Co. v. Pope, 108 N. Y. 232 2391
Coppedge v. Goetz B. Co., 67 Kan. 851 6, 18
v. Powell, Anthon 49 2940
Copper Co. v. Copper M. Co., 33 Vt. 92 291, 2310
Copper River & N. W. R. Co. v. Heney, 211 Fed. 459 5037
Coppin v. Braithwaite, 8 Jur. 875 331
Coppock v. Burkhart, 4 Blackf. 220 1841
Coppola v. Kraushaar, 102 App. Div. (N. Y.) 306 178, 1353
Coquard v. Prendergast, 47 Mo. App. 243 1077
v. Weinstein, 16 Mont. 312, 317 2913
Coquillard v. Bearss, 21 Ind. 479 2494
Corbet v. Johnson, 10 Ont. App. 564 234
Corbett v. Anderson, 85 Wis. 218 2693, 2697
v. Boston, etc., R. Co., 219 Mass. 351 5129, 5130
v. Brown, 5 C. & P. 363 4365
v. Clark, 45 Wis. 406 670
v. Gilbert, 24 Ga. 454 4372
v. Lucas, 4 McCord 323 765, 766
v. Sayers, 29 Tex. Civ. App. 68 2336
v. Spring Garden Ins. Co., 155 N. Y. 389 3013
v. Wrenn, 25 Ore. 305 2149, 2156, 2157, 2159
Corbin v. Taussig, 137 Fed. 151 261, 265
Corbin O. & G. Co. v. Mull, 123 Ky. 763 2598
Corbit v. Bank, 2 Harr. 235 595, 648, 656
Corbitt v. Berryhill, 29 Iowa 157 1953
Corbley v. Wilson, 71 Ill. 209 473
Corby v. Brokmeyer, 84 Mo. App. 649 2780
Corcoran v. Corcoran, 2 Ir. C. L. (N. S.) 272 4556
v. Doll, 32 Cal. 82 962, 1060, 1242
v. Harran, 55 Wis. 120 466, 1497, 1509, 1512, 4783, 4795
v. Judson, 24 N. Y. 106 305, 1719
v. Keily, 61 N. Y. Misc. 323 122
v. Postal Telegraph-Cable Co., 80 Wash. 570 1302, 3620
v. Renehan, 24 App. D. C. 411 1130
v. Sumption, 79 Minn. 108 257
Cordell v. Western U. Tel. Co., 149 N. C. 402 56, 3548, 3659
Corder v. Martin, 17 Mo. 41 1727
v. O'Neill, 176 Mo. 401 1241
v. O'Neill, 207 Mo. 632 2512
Cordes v. Bailey, 39 Ind. App. 83 2497
v. Cushman, 79 Kan. 702 2025
v. Miller, 39 Mich. 581 2308
Cordiner v. Los Angeles T. Co., 5 Cal. App. 400 435, 4743
Cordner v. Hall, 84 Conn. 117 1374, 4750
Cordrey v. Washington S. Co., 65 Wash. 381 1511
Corey v. Eastman, 166 Mass. 279 2575
v. Havener, 182 Mass. 250 424, 432
v. Penney, 165 Ala. 234 1437, 1439
Corkings v. Meier, 112 Ill. App. 655 1327
Corley v. Board of Levee Com'rs, 95 Miss. 617 143, 1500
v. McKeag, 57 Mo. App. 415 1046, 1058
Corlis v. Cumming, 6 Cow. 181 2972
Corliss v. Keown, 207 Mass. 149 436
Corman v. Sanderson, 72 Wash. 627 3195, 3196
Cormier v. Bourque, 32 New Bruns. 283 116
v. Brock, 212 Mass. 292 2650
Corn Exch. Bank v. American D. & T. Co., 163 N. Y. 332 4415

[REFERENCES ARE TO PAGES]

Corn Exch. Bank v. Nassau Bank, 91 N. Y. 74 1016
v. Peabody, 111 App. Div. (N. Y.) 553 4210
Corn Exch. Nat. Bank v. Blye, 56 Hun 403 4314
v. National Bank, 78 Pa. 233 647
Cornelius v. Cornelius, 233 Mo. 1 4980
v. Kessel, 58 Wis. 237 553
v. Kinnard, 157 Ky. 50 2149
v. Lytle, 246 Pa. 205 171, 251, 3211
v. Washington S. L., 52 Wash. 272 1115
Cornell v. Barnes, 7 Hill 35 1558
v. Cook, 7 Cow. 310 372, 633
v. Dean, 105 Mass. 435 1445, 2303
v. Eagan, 13 Daly 505 2755
v. Green, 10 S. & R. 14 825, 1229, 1232
v. Jackson, 3 Cush. 506 2061, 2083, 2087, 2088, 2091, 3125
v. Le Roy, 9 Wend. 163 3019
v. Masten, 35 Barb. 157 773
v. Payne, 115 Ill. 63 4623
v. Prescott, 5 Barb. 16 573
v. Taylor, 137 App. Div. (N. Y.) 496 757
v. Vanartsdalen, 4 Pa. 364 2665
Cornell-A. S. Co. v. Boston & P. R. Co., 202 Mass. 585 3964, 3981, 3985, 3995, 3997
v. Boston & P. R. Co., 209 Mass. 298 4032, 4086, 4087
Cornell S. Co. v. Eighteen Hundred Eighty-three Bags of Sugar, 108 Fed. 277 2731
v. Fallon, 102 C. C. A. 345, 179 Fed. 293 4848
Cornely v. Marckwald, 131 U. S. 159 4440, 4447
Cornes v. Lemson, 16 Conn. 246 2517
Cornford v. Carlton Bank, [1899] 1 Q. B. 392, [1900] 1 Q. B. 22 4607
Corning v. Corning, 6 N. Y. 97 461, 465, 467, 1360, 4782
v. Dollmeyer, 123 Ill. App. 188 4573
Cornish v. Cleife, 3 H. & C. 446 3151, 3153
Cornish v. Farm Buildings F. Ins. Co., 74 N. Y. 296 1422
v. North Jersey St. R. Co., 73 N. J. L. 273 488
v. Stratton, 8 B. Mon. 586 2024, 2028, 2032
v. Woolverton, 32 Mont. 456 688
Cornman's Est., 197 Pa. 125 1071
Cornwall v. Gould, 4 Pick. 444 658, 1528, 2843, 2874
v. Haight, 8 Barb. 327 2231
v. Moore, 132 Fed. 868 1414, 2255, 3269
Corona C. & I. Co. v. White, 158 Ala. 627 64, 111
Corona K. Co. v. Lichtman, 84 N. J. L. 363 4222, 4232
Correll v. Gedar Rapids, 110 Iowa 333 3937
Corridan v. Wilkinson, 20 Ont. App. 184 4569
Corrigan v. Chicago, 144 Ill. 537 3145, 3146, 4086, 4088, 4091
v. Foster, 51 Ohio St. 225 1651
Cors v. Tompkins, 51 Ill. App. 315 1725, 1730
Corse v. Minnesota G. Co., 94 Minn. 331 1116, 1134
Corser v. Hale, 149 Pa. 274 2237
Corsicana v. Tobin, 23 Tex. Civ. App. 492 299, 300
Corson v. Lewis, 77 Neb. 446, 449 2533
Cort v. Ambergate, etc., R. Co., 17 Q. B. 127 2256, 2260, 2265
Cortelyou v. Cortelyou, 2 N. J. L. 318 1358
v. Houghton, 27 App. D. C. 188 1734
v. Lansing, 2 Cai. Cas. 200 4273
Corwin v. Benham, 2 Ohio St. 36 2382
Corwin v. Walton, 18 Mo. 71 467, 1305
Cory v. Boylston F. & M. Ins. Co., 107 Mass. 140 3030
v. Burr, L. R. 8 App. Cas. 393, 9 Q. B. Div. 463, 8 Q. B. Div. 313 2999
v. Leonard, 56 N. Y. 494 1200
v. Owners of Turkish Steamship Mecca, [1897] App. Cas. 286 720
v. Thames I. Works Co., L. R. 3 Q. B. 181 193, 196, 204, 2398
Coryell v. Colbaugh, 1 N. J. L. 77 1310, 3673
v. Dubois, 226 Pa. 103 932, 2654
Cosby v. Owensboro R. Co., 10 Bush 294 3985
Cosgriff v. Miller, 10 Wyo. 190 267, 389, 1261, 1268, 1279, 1306, 1316, 3817, 3827, 3828, 3829
Cosgrove v. Burton, 104 Mo. App. 698 2494
v. Hay, 54 Pa. Super. Ct. 175 4939
v. Ogden, 49 N. Y. 255 1330, 1335
Cossitt v. St. Louis & S. R. Co., 224 Mo. 97 149
Costello v. Bridges, 81 Wash. 192 1595, 1763
v. Burke, 63 Iowa 361 4093
v. St. Louis T. Co., 119 Mo. App. 391 4653
v. Taylor, 217 N. Y. 179 5185
Costelo v. Cave, 2 Hill (S. C.) 528 658, 663
Coster v. Monroe Mfg. Co., 2 N. J. Eq. 467 556, 2211
Costich v. Rochester, 68 App. Div. (N. Y.) 623 1350
Costigan v. Kraus, 158 Ky. 818 1637, 1640, 2742
v. Mohawk, etc., R. Co., 2 Denio 609 312, 2556, 2561, 2563
v. Pennsylvania R. Co., 54 N. J. L. 233 3913
Cotant v. Boone S. R. Co., 125 Iowa 46 4743
Cotheal v. Talmage, 9 N. Y. 551 856, 860, 862, 869, 884, 886, 890, 901, 912
Cothran v. Collins, 29 How. Pr. 113 686
v. Ellis, 107 Ill. 413 2965, 4239
v. Hanover Nat. Bank, 40 N. Y. Super. Ct. 401 4278
v. Scanlan, 34 Ga. 555 809
v. Western U. Tel. Co., 83 Ga. 25 3569
v. Witham, 123 Ga. 190 208
Cotnam v. Wisdom, 83 Ark. 601 2463, 2466, 2478
Cotrill v. Cramer, 59 Wis. 231 1495
Cottage City, The, 136 Fed. 496 2726
Cottam v. Oregon City, 98 Fed. 570 4844
Cotter v. Cotter, 82 Conn. 331 2472
Cotting v. Commonwealth, 205 Mass. 523 2095, 2149
Cotton v. Beatty, — Tex. Civ. App. —, 162 S. W. 1007 721, 731
v. Boston E. R. Co., 191 Mass. 103 4081, 4082, 4084
v. Godwin, 7 M. & W. 147 1234
v. James, 1 B. & Ad. 128 4641
v. Rand, 93 Tex. 7 2526
v. Reavill, 2 Bibb 99 1059
v. Reed, Sneed 24 2329

[REFERENCES ARE TO PAGES]

Cotton v. Reed, 25 N. Y. Misc. 380 2378
v. United States, 38 Ct. of Cls. 536 2701
v. Wallace, 3 Dall. 302 1804
v. Ward, 3 Mon. 304 2088
v. Willmar, etc., R. Co., 99 Minn. 366 109
v. Wood, 8 C. B. (N. S.) 568 161
Cotton Press Co. v. Bradley, 52 Tex. 587, 601 350
Cottrell v. Fountain, 80 N. J. L. 1 1266
v. Michigan United Traction Co., 184 Mich. 221 3336
v. Russell, 21 Mo. App. 1 4190
Cottrill v. Krum, 100 Mo. 397 4381
Cotulla v. Kerr, 74 Tex. 89 4504, 4513
Cotzhausen v. Simon, 47 Wis. 103 4383
Couburn v. Muskegon B. Co., 72 Mich. 134 1093
Couch v. Chesapeake & O. R. Co., 45 W. Va. 51 1271, 4865
v. Eastham, 29 W. Va. 784 1080
v. Kansas City S. R. Co., 252 Mo. 34 3804
v. Mills, 21 Wend. 424 781, 782
v. Mining Journal Co., 130 Mich. 294 4539
v. Newtown Council B. Ass'n, 109 App. Div. (N. Y.) 856 888, 929
v. Steel, 3 El. & B. 402 66, 101
Couchman v. Lisle, 15 Ky. L. Rep. 543 (Ky. Super. Ct.) 1560
Coughlin v. McElroy, 74 Conn. 397 694
Coughran v. Bigelow, 164 U. S. 301 2792
Cougle v. Densmore, 57 Ill. App. 591 3109
Couglin v. McElroy, 74 Conn. 397 1030
Coulson v. Panhandle Nat. Bank, 54 Fed. 855 4296, 4299
Coultas v. Victorian Ry. Com'rs, 12 Vict. L. R. 895 77
Coulter v. Norton, 100 Mich. 389 3125, 3182, 3190
v. Pine Township, 164 Pa. 543 489, 4885
v. Richmond, 59 N. Y. 478 2778
v. Thompson L. Co., 142 Fed. 706 2299
Coulthurst v. Sweet, L. C. 1 C. P. 649 3298
Council v. Hixon, 11 Ga. App. 818 1032, 2495
v. St. Louis, etc., R. Co., 123 Mo. App. 432 1458, 3426
Countryman v. Fonda, etc., R. Co., 166 N. Y. 201 4893, 4894, 4902, 4911
County Board of Education v. Bateman, 102 N. C. 52 1590
County Com'rs v. Hamilton, 60 Md. 340 4767, 4768, 4772
Coupe v. Royer, 155 U. S. 565, 582 4438, 4444, 4445, 4452
Couper v. O'Neill, 53 Misc. (N. Y.) 319 2506
Coupland v. Housatonic R. Co., 61 Conn. 531 3333
Courcier v. Graham, 2 Ohio 341 2048
v. Ritter, 4 Wash. C. C. 549 2946
Courier-Journal Co. v. Millen, 20 Ky. L. Rep. 1811 2700
v. Sallee, 104 Ky. 335 4543
Coursey v. Covington, 5 Harr. & J. 45 1358
Court v. Vanbibber, 3 Har. & McHen. 140 1227
Courteen v. Kanawha Dispatch, 110 Wis. 610 3333
Courtenay v. Earle, 10 C. B. 73, 83 356
v. Williams, 3 Hare 539 639
Courteney v. Standard B. Co., 16 Cal. App. 600 1094, 2218
Courter v. Lydecker, 71 N. J. L. 511 2501
v. Simpson Const. Co., 264 Ill. 488 5152
Courtney v. Blackwell, 150 Mo. 245 1322
v. Boswell, 65 Mo. 96 2411
v. Clinton, 18 Ind. App. 620 501
v. Kneib, 131 Mo. App. 204 1322
Courtois v. Carpenter, 1 Wash. C. C. 376 1145
Courvoisier v. Raymond, 23 Colo. 113, 118 1316
Cousins, Estate of, 111 Cal. 441 1120, 1128
Cousins v. Illinois Cent. R. Co., 126 Minn. 172, rev'd 241 U. S. 641 (mem. dec.) 5047, 5136
v. Lake Shore & M. S. R. Co., 96 Mich. 386 4730
v. Merrill, 16 Up. Can. C. P. 114 4566
v. Paxton, 122 Iowa 465 295, 2872
Couturie v. Roensch (Tex. Civ. App.), 134 S. W. 413 2556, 2972, 2974
Covell v. Carpenter, 24 R. I. 1 467
v. Hill, 6 N. Y. 374 4293
Covenant Mut. Ben. Ass'n v. Joffman, 110 Ill. 603 3076
Coventry v. Barton, 17 Johns. 142 2977, 2978
Coverdill v. Seymour, 96 Tex. 1 4611
Coverse v. Burrows, 2 Minn. 191 3375
Covert v. Brooklyn, 13 App. Div. (N. Y.) 188 3850
v. Gray, 34 How. Pr. 450 411
v. Sargent, 42 Fed. 298 4451
Covey v. Campbell, 52 Ind. 157 1446, 2305
v. Schiesswohl, 50 Colo. 68 2885
Covill v. St. Paul, etc., R. Co., 19 Minn. 283 4138
Covington v. Berry, 120 Ky. 582 491, 3890, 3928
v. Roberson, 111 La. 326 4508
v. Roberts, 2 B. & P. N. R. 378 3034
v. St. Francis County, 77 Ark. 258 2478
v. Taffee, 24 Ky. L. Rep. 373 3991
v. Visse, 158 Ky. 134 4809
Covington, City of, v. Westbay, 156 Ky. 839 773
Covington St. R. Co. v. Packer, 9 Bush 455 4862
Covington, etc., R. Co. v. Kleimeier, 105 Ky. 609 3985, 3986
v. Piel, 87 Ky. 267 3946, 3966
Covode v. Principaal, 110 Mich. 672 2626, 2629
Cow Run Co. v. Lehmer, 41 Ohio St. 384 553
Cowan v. Campbell, 131 Ala. 211 1919
v. Curran, 216 Ill. 598 419
v. De Hart (N. Y. Misc.) 84 N. Y. Supp. 576 2242
v. Donaldson, 95 Tenn. 327 1252
v. Kane, 211 Ill. 572 1953, 2147, 2181
v. Muller, 176 Mo. 192 3694
v. Roberts, 134 N. C. 415 2768
v. Southern R. Co., 118 Ala. 554 3755, 4053
v. Western U. Tel. Co., 122 Iowa 379 56, 3610, 3622, 3641
Coward v. East Tennessee, etc., R. Co., 16 Lea 225 3533
Cowart v. Connally (Tex. Civ. App.), 108 S. W. 973 858
v. Dees, 7 Ga. App. 601 4304

[REFERENCES ARE TO PAGES]

Cowden v. Lockridge, 60 Miss. 385 4321
v. Wright, 24 Wend. 429 348, 3515, 3517, 4772
Cowden's Est., 1 Pa. 267, 274 571, 574
Cowdery v. Greenlee, 126 Ga. 786 1941, 1946
v. Woburn, 136 Mass. 409 3998
Cowdren v. Gardner, 1 J. J. Marsh. 589 1529
Cowdrey v. Carpenter, 1 Robert. 429 834
v. Coit, 3 Robert. 210, 44 N. Y. 383 2116
Cowell v. The Brothers Bee, 1 Newb. 136 2718, 2724
Cowen v. Sunderland, 145 Mass. 363 3234
v. Winters, 96 Fed. 929 1266, 1338, 3447, 3476, 3505
Coweta Falls Mfg. Co. v. Rogers, 19 Ga. 417 173, 284, 2625, 2628, 2659, 2667, 2713
Cowger v. Gordon, 4 Blackf. 110 1847
Cowgill v. City of St. Joseph, 180 Mo. App. 327 4738
Cowherd v. St. Louis, etc., R. Co., 151 Mo. App. 1 3345
Cowine G. Co. v. Merchants' D. T. Co., 130 Iowa 327 3345
Cowing v. Cowing, 33 L. J. (N. S.) Prob. 149 4975
v. Rumsey, 8 Blatch. 36 4443, 4445, 4446, 4447
Cowles v. United States F. & G. Co., 32 Wash. 120 2757
v. Woodruff, 8 Conn. 35 995
Cowley v. Davidson, 10 Minn. 392 1353
v. Davidson, 13 Minn. 92 2367, 3318, 3328, 3349, 3400
v. Dunlop, 7 T. R. 581 2937
Cownie G. Co. v. Merchants' D. T. Co., 130 Iowa 327 3385
Cowper v. Bakewell, 13 Beav. 421 1027
Cowper Essex v. Local Board for Acton, 14 App. Cas. 153 4003
Cowperthwaite v. Jones, 2 Dal. 55 1481
v. Sheffield, 1 Sandf. 416, 3 N. Y. 243 732
Cowqua v. Landebrun, 1 Wash. C. C. 521 1146, 1878
Cox v. Adams, 1 Nott & McC. 284 2565
v. Alexander, 30 Ore. 438 1922
v. Armstrong, 14 Ky. L. Rep. 350 4423
v. Birmingham R. L. & P. Co., 163 Ala. 170 1494, 4867
v. Borstadt, 49 Colo. 83 2978
v. Burbridge, 13 C. B. (N. S.) 430 122
v. Burdett, 23 Pa. Super. Ct. 246 4312, 4318, 4350, 4351
v. Central Vermont R. Co., 170 Mass. 129 3415
v. Cline, 139 Iowa 128 1826
v. Cox, 53 Ill. App. 84 1131
v. Cronan, 82 Conn. 175 1222
v. Cutter, 28 N. J. Eq. 13 668
v. Edwards, 120 Minn. 512 3680, 3682
v. Fenwick, 4 Bibb 558 3167
v. Glue, 5 C. B. 533 3735
v. Hannibal, etc., R. Co., 174 Mo. 588 8
v. Hartranft, 154 Pa. 457 1673
v. Henry, 32 Pa. 18 1989, 2008, 2012, 2098, 2133, 2134
v. High Point, etc., R. Co., 149 N. C. 86 1491
v. Hunt, 1 Blackf. 146 1798
v. Jagger, 2 Cow. 638 3716
v. Joseph, 5 T. R. 307 2874
v. Kansas City, 86 Kan. 298 4935
Cox v. L. & N. R. Co., 137 Ky. 388 4860, 4905, 4908
v. Livingston, 2 W. & S. 103 2484
v. Long, 69 N. C. 7 2370
v. McLaughlin, 54 Cal. 605 2687, 2688, 2693
v. McLaughlin, 76 Cal. 67 1093, 1095, 1104, 1105, 2547
v. Marlatt, 36 N. J. L. 389 1047, 1053, 1189, 1195
v. Mason City, etc., R. Co., 77 Iowa 20 4125
v. National Bank, 100 U. S. 704 1905
v. Odell, 1 Cal. App. 682 8, 3887
v. Parry, 1 T. R. 464 822
v. Pennsylvania R. Co. (Pa.), 85 Atl. 863 1506, 1536, 3284
v. Pennsylvania R. Co., 240 Pa. 27 1517, 1536, 3320
v. Philadelphia, etc., R. Co., 215 Pa. 506 4005, 4034, 4040
v. Prentice, 3 M. & S. 344 2224, 2993
v. Reed, 27 Ill. 434 659
v. Reynolds, 7 Ind. 257 533
v. St. Louis, etc., R. Co., 123 Mo. App. 356 3736
v. Sargent, 10 Colo. App. 1 1663
v. Smith, 1 Nev. 161 1202
v. Smith, 93 Ark. 371 887, 2014
v. Strickland, 101 Ga. 482 4529, 4577, 4582, 4591
v. Strickland, 120 Ga. 104 436
v. Strode, 2 Bibb 273 2024, 2060, 2065, 2098, 2137, 2143
v. Sullivan, 7 Ga. 144 2942
v. Taylor, 10 B. Mon. 17 4606, 4610
v. United S. Co. (Misc.) 128 N. Y. Supp. 622 2522
v. United States, 6 Pet. 172, 202 1153
v. Vanderkleed, 21 Ind. 164 3474
v. Way, 3 Blackf. 143 1404
v. Western Pac. R. Co., 44 Cal. 18 2658
v. Western Pac. R. Co., 47 Cal. 87 2688
v. Wheeler, 7 Paige 248 572
Coxe v. England, 65 Pa. 212 1437, 3788
v. Skeen, 3 Ired. 443 2539
v. State Bank, 8 N. J. L. 472 589
v. Whitney, 9 Mo. 531 465
Coxe Bros. & Co. v. Anoka Water Works, Elec. Light & Power Co., 91 Minn. 50 1539, 2274, 2281
Coy v. Indianapolis G. Co., 146 Ind. 655 55, 67, 134, 135
v. Title G. & T. Co., 198 Fed. 275 3184
Coya, The, 108 Fed. 413 2729
Coykendall v. Constable, 48 Hun 360 2820
Coyle v. Baum, 3 Okla. 695 128, 1435, 2370, 2374, 2415, 2433
v. Snellenburg, 30 Pa. Super. Ct. 246 4614
Coyle Consol. Companies, W. H., v. Swift & Co., 42 Okla. 613 2274
Coyne v. Grand Rapids & I. Ry. Co., 185 Ill. App. 431 3339
Cozad v. Elam, 115 Mo. App. 136 2465, 2516, 2517
Cozens v. Stevenson, 5 Serg. & R. 421 3183
Cozzens v. Higgins, 1 Abb. App. Dec. 451 1474
Crabb v. Mickle, 5 Ind. 145 1664
Crabbe v. Mammoth Channel Gold Min. Co., 168 Cal. 500 4900
Crabbs v. Koontz, 69 Md. 59 1429, 1655, 1657, 1676
v. Nashville Bank, 6 Yerg. 332 1360

[REFERENCES ARE TO PAGES]

Crabtree v. Hagenbaugh, 25 Ill. 233 375, 392, 2658
v. Kile, 21 Ill. 180 2411
v. Messersmith, 19 Iowa 179 2255
v. Missouri Pac. R. Co., 86 Neb. 33 4870, 4927, 4935
v. Old Dominion B. & L. Ass'n, 95 Va. 670 995
v. Randall, 133 Mass. 552 1075
Craddock v. Goodwin, 54 Tex. 58 4299
v. Stewart, 6 Ala. 77 2382
v. Williams, 54 Tex. 578 546
Crafer v. Hooper, 194 Mass. 68 4509
Craft v. Northern Pac. R. Co., 25 Ore. 275 4946
Crafts v. Mott, 4 N. Y. 603 2860
v. Sweeney, 18 R. I. 730 772
Craghill v. Page, 2 Hen. & Munf. 446 1354
Cragin v. Fowler, 34 Vt. 326 1826, 1835, 1853
v. Lovell, 88 N. Y. 258 521
v. New York Cent. R. Co., 51 N. Y. 61 3336
Craig v. Ankeney, 4 Gill 225 2859
v. Brown, 5 Blackf. 44 4503
v. Butler, 9 Mich. 21 985, 992
v. Butler, 83 Hun 286 3145
v. Chambers, 17 Ohio St. 254 39
v. Chicago, St. P., M. & O. R. Co., 97 Neb. 586 4877, 4890
v. Cook, 28 Minn. 232 1516, 3827
v. Craig, 5 Rawle 91 297, 2834
v. Derrett, 1 J. J. Marsh. 365 2478
v. Dillon, 6 Ont. App. 116 885, 913
v. Donovan, 63 Ind. 513 2057
v. Dowie, 4 Cal. App. 176 1503
v. Kline, 65 Pa. 399 4318
v. McHenry, 35 Pa. 120 4273
v. Parker, 8 West Aust. L. R. 161 72
v. Parkis, 40 N. Y. 181 2787, 3021
v. Pennick, 3 J. J. Marsh. 16 1109
v. Pierson L. Co., 169 Ala. 548 2230
v. Price, 23 Ark. 663 1908
v. Pride, 2 Spear 121 2539
v. Shippensburg, 11 Pa. Super. Ct. 490 3770
v. Warren, 99 Minn. 246 4505
Craige v. Morris, 25 N. J. Eq. 467 3727
Craighead v. Swartz, 219 Pa. 149 2841
Craigs v. Whips, 1 Dana 375 695
Cra'n v. Beach, 2 N. Y. 86, 2 Barb. 120 415
v. McGoon, 86 Ill. 431 816, 827
v. Miles, 154 Mo. App. 338 2504
v. Petrie, 6 Hill 522 129, 158, 3596
Craker v. Chicago, etc., R. Co., 36 Wis. 657 340, 465, 1307, 1308, 1318, 1332, 1337, 1338, 3467, 3474, 3475, 3513, 3650, 4662, 4668, 4670
Cram v. Dresser, 2 Sandf. 120 548, 3127, 3129, 3260
v. Gas E. & P. Co., 75 Hun 316 2374, 2428
v. Hadley, 48 N. H. 191 1503
v. Hendricks, 7 Wend. 569 1873, 2783, 2784
v. Laconia, 71 N. H. 41 3952
Cramer v. American Exp. Co., 56 Mo. 524 3344
v. Barmon, 136 Mo. App. 673 4616
v. Danielson, 99 Mich. 531 4, 4788
v. Eagle Mfg. Co., 23 Kan. 399 1815, 1910
v. Lepper, 26 Ohio St. 59 980, 1206
v. Marsh, 5 Colo. App. 302 4176
v. Metz, 57 N. Y. 659 252
v. Noonan, 4 Wis. 231 4506, 4543
v. Willetts, 61 Ill. 481 631
Crampton v. Brooklyn E. R. Co., 3 App. Div. (N. Y.) 263 4084
v. Valido M. Co., 60 Vt. 291 4211
Crance v. Roselle, 157 Ill. App. 595 1725
Crandall v. Chicago Great Western R. Co., 127 Minn. 498 5067
v. Eldridge, 46 Hun 411 75
v. Greeves, 181 Mo. App. 235 4531
v. Kirk, 185 Ill. App. 460 2060
v. Quin, 19 J. & S. 276 3679, 3690
v. Quin, 51 N. Y. Super. Ct. 276 3689
Crane v. Aiken, 13 Me. 229 3034, 3036
v. Andrews, 10 Colo. 265 1570, 1802
v. Bennett, 77 App. Div. (N. Y.) 102 4544, 4549
v. Bennett, 177 N. Y. 106 4510, 4544, 4547
v. Brooks, 189 Mass. 228 1199
v. Chicago, etc., R. Co., 233 Ill. 259 4954
v. Douglass, 2 Blackf. 195 4600
v. Dygert, 4 Wend. 675 1118, 1132
v. Ganung, 89 App. Div. (N. Y.) 398 2464
v. Gruenewald, 120 N. Y. 274 688, 689
v. Hardman, 4 E. D. Smith 339 3121, 3258
v. Hardman, 4 E. D. Smith 448 569, 3129, 3147, 3253
v. Knubel, 61 N. Y. 645 2664
v. Noel, 103 Mo. App. 122 2802
v. Onderdonk, 67 Barb. 47 2993
v. Oregon R. & N. Co., 66 Ore. 317 3700, 3715
v. Palme, 8 Blackf. 120 3728
v. Patton, 57 Ark. 340 65
v. Peer, 43 N. J. Eq. 553 838
v. Renville State Bank, 73 Kan. 287 807
v. Roselle, 157 Ill. App. 595 2480
v. Schaefer, 140 Ill. App. 647 1305, 2156, 4383, 4389, 4432
v. Western U. Tel. Co. (Tex. Civ. App.), 152 S. W. 444 3595
Crane Co. v. Columbus C. Co., 73 Fed. 984 2405, 2422
v. Pacific H. & P. Co., 36 Wash. 95 708
v. Specht, 39 Neb. 123 2753
v. Stammers, 83 Ill. App. 329 3933
v. United States F. & G. Co., 74 Wash. 91 722
Crane Elevator Co. v. Lippert, 11 C. C. A. 521, 63 Fed. 942 4676, 4681
Crane Mfg. Co. v. Adams, 142 Ill. 125 2522
Cranfill v. Hayden, 22 Tex. Civ. App. 656, 669 4511, 4540
Cranford Co. v. New York, 150 App. Div. (N. Y.) 195 261
Crank v. Forty-second St., etc., R. Co., 53 Hun 425 4749
Cranley v. Hillary, 2 M. & S. 120 621
Cranmer v. Kohn, 7 S. D. 247 258, 261, 2573
v. McSwords, 26 W. Va. 412 2849
Cranor v. Reardon, 39 Mo. App. 306 1784
Cranston v. Marshall, 5 Ex. 395 327, 3449, 3456
v. West Coast L. Ins. Co., 63 Ore. 427 656, 664
Crantz v. Nassau E. R. Co., 154 App. Div. (N. Y.) 247 1511
Crapo v. Brown, 40 Iowa 487 2760
Crary v. Donovan, 63 Ind. 513 2099
Craster Hall, The, 213 Fed. 436 2726, 2730
Crate v. Kohlsaat, 44 Ill. App. 274 1714

[REFERENCES ARE TO PAGES]

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Crathie, The, [1897] Prob. 178 5012
Craufurd v. Smith, 93 Va. 623 1116, 4212, 4232
Craven v. Bloomingdale, 171 N. Y. 439 4841, 4843
v. Clary, 8 Kan. App. 295 2097, 2116
v. Tickell, 1 Ves. 60 1019
v. Walker, 101 Ga. 845 1502, 4519
Cravens v. Gant, 4 T. B. Mon. 126, 2 T. B. Mon. 117 4382
Craw v. Abrams, 68 Neb. 546, 553 822
Crawford v. Andrews, 6 Ga. 244 1461, 1607, 1617, 1618, 1622
v. Atlantic C. L. Co., 89 S. C. 456 1736, 1737, 1741
v. Branch Bank, 6 Ala. 12 1151, 1896
v. Chandler, 5 Ala. 61 1620
v. Cochran, 2 Wash. Terr. 117 2927
v. Crawford, 1 Bailey 128 2202
v. Darrow, 87 Neb. 494 748
v. Delaware, etc., R. Co., 53 N. Y. Super. Ct. 255 4749
v. Doggett, 82 Tex. 139 4191
v. Earl, 38 Wis. 312 2227
v. Eidman, 129 Fed. 992 1349, 3699, 3701, 3703
v. Forest O. Co., 208 Pa. 5 3835
v. Gaulden, 33 Ga. 173 2814
v. Geiser Mfg. Co., 88 N. C. 554 2275, 2295
v. Heatwole, 110 Va. 358 833, 893
v. Jesup & M. P. Co., 24 Fed. 303 3305
v. Jones, 54 Ala. 459 3097
v. Krueger, 201 Pa. 348 756
v. McDaniel, 1 Rob. 448 2203
v. McDonald, 84 Ark. 415 523, 2146, 2150, 2198
v. McMickens, — Ala. —, 66 So. 712 92, 97
v. Maxwell, 3 Humph. 476 3808
v. Meredith, 6 Ga. 522 1559
v. Millspaugh, 13 Johns. 87 764, 767
v. Morris, 5 Gratt. 90 1531, 1532, 1534
v. Nimmons, 180 Ill. 143 978
v. Parsons, 63 N. H. 438 3220
v. Penn, 1 Swan 388 1649
v. Rice & Hutchins Baltimore Co., 98 S. C. 121 2482
v. Rittenhouse, 1 Fed. 638 3303
v. Simonton, 7 Port. 110 1052, 1179
v. Smith, 7 Dana 59 2226
v. Southern R., 153 Ky. 812 77
v. Southern R. Co., 106 Ga. 870 4938
v. State, 2 Yerg. 60 1482, 1483
v. Surety Inv. Co., 91 Kan. 748 2512
v. Turk, 24 Gratt. 176 295
v. Tyng, 10 N. Y. Misc. 143 681
v. Ward, 7 Ga. 445 1607
v. Western U. Tel. Co., 138 N. C. 162 3654
v. Whittaker, 42 W. Va. 430 684
v. Williams, 1 Sneed 205 3287, 3294, 3296
v. Willing, 4 Dall. 286 1108
Crawson v. Western U. Tel. Co., 47 Fed. 44 3642
Craythorne v. Swinburn, 14 Ves. 160 2853
Craze v. Alabama S. L. Co., 155 Ala. 431 4218, 4223
Cream City G. Co. v. Friedlander, 84 Wis. 53 2272
Creamer v. Bowers, 35 Fed. 206 1069, 4447, 4463, 4475, 4476
v. Moran, 41 Wash. 636 4875
Creamery P. Mfg. Co. v. Benton County C. Co., 120 Iowa 584 233, 2340, 2345, 2360, 2362
Creaser v. Creaser, 41 Nova Scotia, 480 143
Cree v. Lewis, 49 Colo. 186 4232
Creech v. Creech, 98 N. C. 155 272
v. Humptulips, B. & R. I. Co., 37 Wash. 172 3901, 3921
Creecy v. Pearce, 69 N. C. 67 3728
Creek v. McManus, 13 Mont. 152 1721, 1729
v. McManus, 17 Mont. 445 1728, 1729
Creek L. & I. Co. v. Davis, 28 Okla. 579 818
Creevy v. Carr, 7 C. & P. 64 4596, 4599
Cregin v. Brooklyn C. R. Co., 75 N. Y. 192 4757
Creiger v. Cheesbrough, 25 How. Pr. 200 2489
Creigh v. Shatto, 9 W. & S. 82 1953
Creighton v. Board of Water Com'rs, 143 N. C. 171 4055
v. Gregory, 142 Cal. 34 760
v. Haythorn, 49 Neb. 526 4358
v. Water Com'rs, 143 N. C. 171 507, 4133
Cremer v. Higginson, 1 Mason 323 712, 717, 733, 2745, 2749, 2753
Crenshaw v. Bishop (Tex. Civ. App.) 143 S. W. 284 2465
v. Louisville & N. R. Co., 15 Ga. App. 182 4917
v. Smith, 5 Munf. 415 2098, 2211
Crescent C. Co. v. L. & N. R. Co., 143 Ky. 73 3313
Crescent City L. S. Co. v. Butchers' Union S.-H. Co., 120 U. S. 141 4633, 4640
Crescent H.-S. & I. Co. v. Eynon, 95 Va. 151 2526, 2548
Crescent Mfg. Co. v. Nelson Mfg. Co., 100 Mo. 325 2260, 2697, 2706
v. Slattery, 132 La. 917 2277, 2307
Cressey v. Kimmel, 78 Ill. App. 27 1869
v. Parks, 76 Me. 532 4201
Creswell v. Herr, 9 Colo. App. 185 1789
v. Nesbitt, 16 Ohio St. 35 1586
v. Woodside, 8 Colo. App. 514 1711
v. Woodside, 15 Colo. App. 468 1711, 1712
Crete v. Childs, 11 Neb. 252 4786
v. Hendricks, 2 Neb. (Unof.) 847 1468
Creteau v. Chicago, etc., R. Co., 113 Minn. 418 5125
Creve Cocur Lake I. Co. v. Tamm, 90 Mo. App. 189 317
Crews v. Cortez, 102 Tex. 111 3193, 3194, 3202
Cribb v. Dwyer, Queensland St. Rep. (1910) 242 2907
Cribbs v. Stiver, 181 Mich. 82 3737
v. Yore, 119 Mich. 237 4537
Crichfield v. Julia, 147 Fed. 65 1415, 1418, 1458, 2330, 2514
Crider v. San Antonio R. E. B. & L. Ass'n, 89 Tex. 597 998
Crilly v. Ruyle, 87 Neb. 367 748, 2221
Crim v. Fleming, 101 Ind. 154 2792, 2816, 2821
v. Post, 41 W. Va. 397 978
v. Umbsen, 155 Cal. 697 2025
Criner v. Pike, 2 Head 398 4174, 4204
Crippen v. Thompson, 6 Barb. 532 2873, 2892
Cripple Creek v. Adams, 36 Colo. 320 1209
Crips v. Talvande, 4 McCord 20 376

[REFERENCES ARE TO PAGES]

Crisdee v. Bolton, 3 C. & P. 240 844, 849, 887
Crise v. Auditor, 17 Ark. 572 4094
Crisfield v. State, 55 Md. 192 2799
v. Storr, 36 Md. 129 303, 309, 2124, 2125, 2130, 2135, 2140
Crist v. Armour, 34 Barb. 378 2299
v. Burlingame, 62 Barb. 351 2745, 2749
Criswell v. Riley, 5 Ind. App. 496, 503 2914
Critcher v. Porter, 135 N. C. 542 2340, 2415, 2433
Crittenden v. Fiske, 46 Mich. 70 2749
v. Johnston, 7 App. Div. (N. Y.) 258 259
v. Posey, 1 Head 311 1101, 2395, 2396
v. Springfield F. & M. Ins. Co., 85 Iowa 652 3020, 3032
Croade v. Ingraham, 13 Pick. 33 3716
Croak v. Owens, 121 Mass. 28 2241
Crocker v. Fales, 13 Mass. 260 1600
v. New London, etc., R. Co., 24 Conn. 249 1329
Crockett v. Calvert, 8 Ind. 127 1520
v. Gray, 39 Kan. 659 1028
v. Grayson, 98 Va. 354 2502
v. Lashbrook, 5 T. B. Mon. 531 3693
Crockford v. Winter, 1 Camp. 124 1034
Crockrell v. Proctor, 65 Mo. 41 2057, 2074
Croco v. Oregon S. L. R. Co., 18 Utah 311 1383, 4683
Croff v. Cresse, 7 Okla. 408 66
Crofford v. Vassar, 95 Ala. 548 1687, 1689, 1695, 1696, 1706
Crofoot v. Bennett, 2 N. Y. 258 2227
Croft v. Alison, 4 B. & Ald. 590 1335
v. Chicago, etc., R. Co., 134 Iowa 411 1446, 1476, 4760
v. Thornton, 125 Ala. 391 2087
Crofts v. Beale, 5 Eng. L. & Eq. 408 1829
Crombie v. Waldo, 137 N. Y. 129 2511
Cromer v. Logansport, 38 Ind. App. 661 312, 315, 316, 327
Cromie v. Kentucky & L. Mut. Ins. Co., 15 B. Mon. 432 3009
Crommelin v. Coxe, 30 Ala. 318 16, 3933
v. New York & H. R. Co., 10 Bosw. 77 3310
v. Thiess, 31 Ala. 412 3102, 3103
Crommett v. Pearson, 18 Me. 344 1397
Crompton v. Pratt, 105 Mass. 255 729, 736, 744
Crompton & K. L. Works v. Hoffman, 5 Ont. L. R. 544 2615
Cromwell v. County of Sac, 96 U. S. 51 959, 962, 963, 1822
v. Lovett, 1 Hall 56 670
Cronan v. Cotting, 99 Mass. 334 1638
v. Stutsman, 168 Mo. App. 46 459
Crone v. Dawson, 19 Mo. App. 214 1055
v. Mississippi Valley T. Co., 85 Mo. App. 601 2502
Cronemillar v. Duluth S. M. Co., 134 Wis. 248 40, 2545
Cronfeldt v. Arrol, 50 Minn. 327 4166
Cronheim v. Postal Tel. C. Co., 10 Ga. App. 716 3574
Cronin v. American S. Co., 163 Ala. 533 2511
v. Zimmerman, 44 Ind. App. 118, 90 Ind. App. 339 4505
Croninger v. Marthen, 83 Ky. 662 1111
Cronnse v. Fitch, 14 Abb. Pr. 346 1438, 2302
Crook v. Hudson, 4 Lea 448 1649
v. McGreal, 3 Tex. 487 1009
Crook v. Newborg, 124 Ala. 479 1639
v. New York L. Ins. Co., 112 Md. 268 796, 1089
v. Tull, 111 Mo. 283 1050
v. Wright, R. & M. 278 436
Crooke v. Moore, 1 Sandf. 297 2244
Crooker v. Hutchinson, 2 D. Chip. 117 2942
v. Jewell, 29 Me. 527 2123, 2124
v. Melick, 18 Neb. 227 1621
Crooks v. Tazewell Coal Co., 263 Ill. 343 4794, 4800, 5149
Crookshank v. Mallory, 2 Greene 257 494
Cropsey v. Murphy, 1 Hilt. 126 3839
Crosby v. Bradley, 11 Ky. L. Rep. 954 4668, 4830
v. Cuba R. Co., 158 Fed. 144 4809
v. Fitch, 12 Conn. 410 140, 141
v. Humphreys, 59 Minn. 92, 96 1291, 4774, 4783
v. Loop, 13 Ill. 625 3132
v. Merriam, 31 Minn. 342 1121, 1130
v. New London, etc., R. Co., 26 Conn. 121 1209
v. Plummer, 111 Me. 355 31, 313, 476
v. Portland R. Co., 53 Ore. 496 1424
v. Scott-G. I. Co., 93 Minn. 475 523
v. Watkins, 12 Cal. 85 2275
v. Woodbury, 37 Colo. 1 2804, 2806, 2814
v. Wyatt, 10 N. H. 318 2823
v. Wyatt, 23 Me. 156 2835, 2853
v. Wynkoop, 56 Wash. 475 1953, 1986, 1995
Crosby L. Co. v. Smith, 51 Fed. 63 285, 1134, 2321
Crosby V. Co. v. Safety V. Co., 141 U. S. 441 4455, 4466, 4470, 4476
Croshaw v. Ins. Co. of North America, 66 Fed. 604 3034
Crosier v. Craig, 47 Hun 83 3676
Crosland v. Graham, 83 S. C. 228 4257
v. Hall, 33 N. J. Eq. 111 4379, 4392
Cross v. Ballanoa, The, Bee 193 2726
v. Beard, 26 N. Y. 85 3302
v. Bell, 34 N. H. 82 977
v. Brown, 19 R. I. 220 1200
v. Brown, 51 N. H. 486 586
v. Chicago, etc., R. Co., 191 Mo. App. 202 5034, 5035, 5036, 5070, 5085
v. Coffin-F. P. Co., 123 Ga. 817 1430
v. Commercial Agency, 18 New Zeal. L. R. 153 4608
v. Gabeau, 1 Bailey 211 1559
v. Grant, 62 N. H. 675 1530, 4973, 4976
v. Johnson, 30 Ark. 396 709
v. Kent, 32 Md. 581 57
v. Lee L. Co., 130 La. 66 4782
v. Noble, 67 Pa. 74 2206
v. Sackett, 6 Abb. Pr. 247 4386
v. Syracuse, 200 N. Y. 393 4746
v. Tome, 14 Md. 247 3112, 3114
v. United States, 1 Gall. 26 1536
v. White, 80 Minn. 413 1639
v. Wilkin, 43 N. H. 332 1503
v. Wood, 30 Ind. 378 990
Crosse v. Bilson, 6 Mod. 102 4315, 4348
Crossen v. Chicago & J. E. R. Co., 158 Ill. App. 42 4168, 4189, 4723
v. Hutchinson, 9 Mass. 205 2937
Crosskill v. Bower, 32 Beav. 86 1013
Crossley v. City of Glasgow L. Assur. Co., 4 Ch. Div. 421 1091
v. Hojer, 11 N. Y. Misc. 57 4312, 4335
v. O'Brien, 24 Ind. 325 4057
Crossly v. Ham, 13 East 498 1824

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Crossman v. Lurman, 192 U. S. 189 2215
Crosthwait v. Pitts, 139 Ala. 421 1599
Crotshin v. Pennsylvania R. Co., 87 N. J. L. 11 4809
Crouch v. Briles, 7 J. J. Marsh. 255 3096
v. Davis, 23 Gratt. 62, 93 640
v. Great Northern R. Co., 11 Ex. 742 3314, 3319
v. Gutmann, 134 N. Y. 45 2597, 2606, 2665, 2682, 2683
v. Johnson, 7 Tex. Civ. App. 435 2204
v. Miller, 5 Humph. 586 537
v. Quigley, 258 Mo. 651 762
Croucher v. Oakman, 3 Allen 185 4993
Crounse v. Syracuse, etc., R. Co., 32 Hun 497 1722, 1727
Crouse v. Chicago, etc., R. Co., 102 Wis. 196 1478, 4739, 4752, 4779
v. Chicago, etc., R. Co., 104 Wis. 473 1428, 4676, 4679, 4743
v. Holman, 19 Ind. 30 1419
Crow v. Kimball L. Co., 69 Fed. 127 746
v. National Bank, 62 Ill. App. 24 1696
v. San Joaquin, etc., C. & I. Co., 130 Cal. 309 2617
Crowbarger v. United States F. & G. Co., 126 Ky. 118 1601
Crowder v. Continental Cas. Co., 115 Mo. App. 535 3083
v. Horgan, 3 West Aust. L. R. 31 2578
v. Long, 8 B. & C. 598 1628
Crowe v. Aiken, 2 Biss. 208 4478
v. Colbeth, 63 Wis. 643 699
v. Gallenkamp, 58 Mo. App. 396 2475
v. Kell, 7 Ind. App. 683 548
Crowell v. Hospital of St. Barnabas, 12 C. E. Gr. 650 3729
v. Northwestern Nat. L. Ins. Co., 99 Minn. 214 374, 1929
v. Simpson, 7 Jones 285 2401
Crowl v. Goodenberger, 112 Mich. 683 624
Crowley v. Apted, 14 New South Wales, L. R. 146 4202
v. Burnes B. Mfg. Co., 100 Minn. 178 188, 189, 207, 243, 294, 1413, 2614, 2615
v. Pennsylvania R. Co., 231 Pa. 286 4768
v. Vitty, 7 Ex. 322 764
Crown O. Co. v. Probert, 28 Ohio C. C. 739 865, 888
v. Probert, 8 Ohio C. C. (N. S.) 489 889
Crown V. & S. Co. v. Wehrs, 59 Mo. App. 493 2214, 2250
Crozer v. Pilling, 6 D. & R. 129 829, 1237
Crozier v. Boston, etc., S. Co., 43 How. Pr. 466 3530
v. Grayson, 4 J. J. Marsh. 514 2836, 2837
Cruce v. Cruce, 81 Mo. 676 1127, 1128
Crucible Steel Forge Co. v. Moir, 219 Fed. 151 5149
Crug v. Gorham, 74 Conn. 541 2275, 2341
Cruger v. Armstrong, 3 Johns. Cas. 5 671
v. McLaury, 41 N. Y. 219 3132
Cruikshank v. Gordon, 118 N. Y. 178 473, 4504, 4520, 4570, 4586
Crumb v. Oaks, 38 Vt. 566 4211
Crummey v. Bentley, 114 Ga. 746 3711
Crump v. Ingersoll, 44 Minn. 84 2902
v. People, 2 Colo. 316 1556
v. Picklin, 1 Pat. & Heath 201 2886
Crumpler v. Governor, 1 Dev. 52 1590
Crumrine v. Estate of Crumrine, 14 Ind. App. 641 1032
Crutcher v. Big Four R. Co., 132 Mo. App. 311 78, 79
v. Choctaw, etc., R. Co., 74 Ark. 358 40, 172, 3345, 3375, 3400
v. Elliott, 13 Ky. L. Rep. 592 (Ky. Super. Ct.) 2439
v. Sims, 184 Mo. App. 488 1922
v. Stamp, 5 Hayw. 100 2094
Cruts v. Wray, 19 Neb. 581 4359
Cruver Mfg. Co. v. Spooner, 147 App. Div. (N. Y.) 471 1452
Crux v. Aldred, 14 Week. Rep. 656 888
Crymble v. Mulvaney, 21 Colo. 203 4165, 4191, 4194
Crystal City & U. R. Co. v. Boothe (Tex. Civ. App.), 126 S. W. 700 2962, 4034, 4140
v. Isbell (Tex. Civ. App.), 126 S. W. 47 4042, 4141
Crystal Ice Co. v. Holliday, 106 Miss. 714 2301, 2592, 2645
v. Wylie, 65 Kan. 104 2283
Cuba, The, 3 Ware 260 3288
Cubbage v. Estate of Youngerman, 155 Iowa 39 1477, 4217, 4703
v. Napier, 62 Ala. 518 1146
Cuckson v. Stones, 1 El. & El. 248 2533
Cud v. Rutter, 1 P. Wms. 572 4241
Cudahy P. Co. v. Broadbent, 70 Kan. 535 1377, 1417, 4683
v. New Amsterdam Cas. Co., 132 Fed. 623 1092, 2877, 2878
v. State Nat. Bank, 134 Fed. 538 1924
Cudderback v. Fanely, 2 Wend. 624 1530
Cuddy v. Foreman, 107 Wis. 519 2005
v. Horn, 46 Mich. 603 433
v. Major, 12 Mich. 368 182, 196, 2341
Cue v. Breeland, 78 Miss. 864 4174, 4189
Cuello v. Fuster, 3 Porto Rico Fed. 193 10, 210
Cuesta v. Royal Ins. Co., 98 Ga. 720 3000
Cuff v. Dorland, 57 N. Y. 560 1499
v. Newark, etc., R. Co., 35 N. J. L. 17 52, 160
v. Penn, 1 M. & S. 21 764
Culberson v. Alabama C. Co., 127 Ga. 599 2468
v. Ashland C. & C. Co., 144 Ky. 614 2596
v. Salinger, 131 Iowa 307 2797
Culbertson I. & W. P. Co. v. Wildman, 45 Neb. 663 2514
Culbertson & Blair P. & P. Co. v. Chicago, 111 Ill. 651 1451
Culbreth v. Hall, 159 N. C. 588 4406
Culin v. Woodbury G. Works, 108 Pa. 220 2286
Cull v. San Francisco & F. L. Co., 124 Cal. 591 3189, 3198
Cullar v. Missouri, etc., R. Co., 84 Mo. App. 347 360, 4703, 4726
Cullen v. Bimm, 37 Ohio St. 236 2237
v. Dickinson, 33 S. D. 27 4842
v. Gallagher, 15 N. Y. Misc. 146 2482
v. Green, 5 Harr. 17 816, 820
v. Higgins, 216 Ill. 78 4653
v. Sears, 112 Mass. 299 356, 2667, 2676
Cullerton v. Miller, 26 Ont. 36, 45 312, 315
Culliford v. Walser, 158 N. Y. 65 1786

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Cullum v. Branch Bank, 4 Ala. 21 556, 1025, 1953, 2053, 2195
v. Casey, 9 Port. 131 1398
v. Emanuel, 1 Ala. 23 2797, 2804
v. Erwin, 4 Ala. 452 733
Cullumber v. Winter, 154 Iowa 263 1983, 1990, 1997
Cully v. Isham, 125 App. Div. (N. Y.) 97 376, 1110
Culmer v. Caine, 22 Utah 216, 230 1005
Culp v. Virginian Ry. Co., — W. Va. —, 87 S. E. 187 5080, 5111, 5133, 5134
Culver v. Blake, 6 B. Mon. 528 534
v. Green, 4 Hill 570 1568
v. Harper, 27 Ohio St. 464 3728
v. Hill, 68 Ala. 66 547, 549, 3244, 3250
v. Jennings, 157 N. C. 565 2141
v. Osborne, 231 Ill. 104 991
Cumber v. Morley, 4 Vict. L. R. 3 4962
v. Wane, 1 Str. 426 749
Cumberland, The, 135 Fed. 234 5008
Cumberland v. Pennell, 66 Me. 357 1581
Cumberland B. L. Ass'n v. Gibbs, 119 Mich. 318 2745
Cumberland C. Co. v. Hoffman C. Co., 15 Abb. Pr. 78 1759
Cumberland C. & I. Co. v. Sherman, 30 Barb. 553 2903
v. Tilghman, 13 Md. 74 1675, 1677
Cumberland G. Co. v. Baugh, 151 Ky. 641 3880, 3922
Cumberland G. Mfg. Co. v. Wheaton, 208 Mass. 425 2886
Cumberland Island Co. v. Bunkley, 108 Ga. 756 523
Cumberland P. L. Co. v. Stambaugh, 137 Ky. 528 140
Cumberland R. Co. v. Bays, 159 Ky. 609 3903
v. Bays, 153 Ky. 159 3903, 3905, 3906, 3912
Cumberland Tel. & T. Co. v. Anderson, 89 Miss. 732 4928
v. Atherton, 122 Ky. 154 3574, 3622
v. Baker, 85 Miss. 486 1280
v. Cartwright Tel. Co., 128 Ky. 395 1258, 3548
v. Cassedy, 78 Miss. 666 3828
v. Dooley, 110 Tenn. 104 3753
v. Hendon, 114 Ky. 501 3185
v. Hobart, 89 Miss. 252 50, 3589
v. Jackson, 95 Miss. 79 3589, 3642
v. Overfield, 127 Ky. 548 1373, 4702, 4719, 4743
v. Paine, 94 Miss. 883 1280
v. Poston, 94 Tenn. 696 1280, 1316
v. Quigley, 129 Ky. 788 3574, 3591, 3624
v. Ware, 115 Ky. 581 432
Cumberland Valley Mut. P. Co. v. Schell, 29 Pa. 31 3041
Cumberland & O. C. Co. v. Hitchings, 65 Me. 140 391, 397, 398, 401, 402, 414, 3845, 3850, 3855, 3862
Cumberland, etc., R. Co. v. Slack, 45 Md. 161 2556
Cuming v. Brooklyn City R. Co., 109 N. Y. 95 3517, 4771, 4772
v. Sibley, 4 Burr. 2489 1573
Cummerford v. McAvoy, 15 Ill. 311 473, 4599
Cumming v. Hackley, 8 Johns 202 2846
v. Lawrence, 87 S. C. 457 1357
Cummings v. Arnold, 3 Metc. (Mass.) 486 764
v. Bradford, 15 Ky. L. Rep. 155 1116
v. Burleson, 78 Ill. 281 305
v. Cummings, 8 Watts 366 1645
Cummings v. Dudley, 60 Cal. 383 2328
v. Hamrick, 74 W. Va. 406 1935
v. Harrison, 57 Miss. 275 2124, 2131
v. Hurd, 49 Mo. App. 139 686, 687
v. Little, 45 Me. 183 2804, 2811, 2819
v. Masterson, 42 Tex. Civ. App. 549 4256, 4257
v. Mugge, 94 Ill. 186 1748
v. Putnam, 19 N. H. 569 790, 801
v. Riley, 52 N. H. 368 4
v. St. Louis, 90 Mo. 259 17
v. Smith, 50 Me. 568 1400
v. Williamsport, 84 Pa. 472 3964
Cummington v. Wareham, 8 Cush. 590 385
Cummins v. Crawford, 88 Ill. 312 1495, 3527
v. Des Moines, etc., R. Co., 63 Iowa 397 3983, 4017, 4030, 4095, 4125
v. Ennis, 4 Penne. 424 2446
v. Hanson, 10 Daly 493 3108
v. Kennedy, 3 Litt. 118 2060, 2098, 2104
v. Line, 43 Okla. 575 2852
Cummins' Est., In re, 143 Cal. 525 683, 1031
Cunard v. The King, 43 Can. Supt. Ct. 88 4022
Cunningham v. Alexander, 58 Ill. App. 296 1360
v. Ashbrook, 20 Mo. 553 2221
v. Atlas T. Co., 187 Mass. 51 152
v. Brown, 18 Vt. 123 127
v. Daves (Tex. Civ. App.), 141 S. W. 808 2682
v. Dickerson, 104 Mo. App. 410 4186
v. Dillard, 71 Miss. 61 2055
v. Dorsey, 6 Cal. 19 2696
v. Evansville, etc., R. Co., 102 Ind. 478 488
v. Finch, 63 Neb. 189 1721
v. Fourth Baptist Church, 159 Pa. 620 2656
v. Hall, 1 Sprague 404 2376
v. Illinois Cent. R. Co., 179 Ill. App. 505 4799
v. Irwin, 182 Mich. 629 753
v. Jones, 4 Abb. Pr. 433 2660
v. Jones, 20 N. Y. 486 376
v. Knight, 1 Barb. 399 2123
v. McCready, 219 Pa. 594 2491
v. Metropolitan L. Co., 110 Fed. 332 4346
v. Morrell, 10 Johns. 203 2545
v. Neal, 49 Tex. Civ. App. 613 1425
v. Northwestern Imp. Co., 44 Mont. 180 5151, 5152, 5153, 5156, 5159, 5162, 5164
v. O'Connor, 136 Mich. 293 1449, 4223
v. Pease H. F. Co., 74 N. H. 435 4364, 4372
v. Pell, 5 Paige 607 434
v. San Saba County, 11 Tex. Civ. App. 557, 563 1241
v. Seattle E. R. & P. Co., 3 Wash. 471 3521, 3529
v. Standard C. Co., 134 Ky. 198 760
v. Stein, 109 Ill. 375 3918
v. Stockton, 81 Kan. 780 918, 921, 932
v. Stoner, 10 Idaho 549 4332, 4356, 4358
v. Ware, Cro. Jac. 239 1488
Cunningham C. Co. v. Rauch-D. G. Co., 98 Ark. 269 760
Curd v. Wunder, 5 Ohio St. 92 4208, 4283

[REFERENCES ARE TO PAGES]

Curl v. Chicago, etc., R. Co., 63 Iowa 417 3506
Curlee v. Rogan (Tex. Civ. App.), 136 S. W. 1126 531, 1525, 4272
v. Rose, 27 Tex. Civ. App. 259 4621
v. Thomas, 74 N. C. 51 521
Curlewis v. Clark, 3 Ex. 375 753
v. Laurie, 12 Q. B. 640 3823
Curley v. Jenkins, 46 Vt. 721 2465
v. Security Sav. Soc., 51 Wash. 242 1447
Curling v. Evans, 2 M. & G. 349 1629
v. Long, 1 B. & P. 634 3286
Curnan v. Delaware & O. R. Co., 138 N. Y. 480 835, 2703
Curphy v. Terrell, 89 Miss. 624 1725, 1730
Curran v. Carnell, Newf. Rep. 1884-96, 375 2060
v. Grand Trunk R. Co., 25 Ont. App. 407 22
v. Lewiston, A. & W. St. R. Co., 112 Me. 96 4922, 4926
v. Rogers, 35 Mich. 221 1936, 1957
v. Smith, 149 Fed. 945 234, 293, 2702, 2712
Currelli v. Jackson, 77 Conn. 115 1376
Currie v. Lockwood, 40 Conn. 349 1151
v. St. John St. R. Co., 36 New Bruns. 194 1498
v. Thomas, 8 Port. 293 1605
v. White, 1 Sweeny 166 2230
v. White, 6 Abb. Pr. (N. S.) 352 2333
Currie F. Co. v. Krish, 24 Ky. L. Rep. 2471 2343
Currier v. Baker, 51 N. H. 613 2864, 2870
v. Boston & M. R. Co., 37 N. H. 223 591
v. Davis, 111 Mass. 480 606
v. Fellows, 27 N. H. 366 2860, 2865
v. Gale, 9 Allen 522 827
v. Jordan, 117 Mass. 260 821
v. Kretzinger, 162 Ill. 511, aff'g 58 Ill. App. 288 1035, 1116
v. McKee, 99 Me. 364 59, 60, 158
v. Swan, 63 Me. 323 435, 461, 462, 1531
Curry v. American Freehold L. M. Co., 124 Ala. 614 1728, 1743
v. Catlin, 12 Wash. 322 4220
v. Commonwealth Ins. Co., 10 Pick. 535 3047
v. Curry, 87 Ky. 667 2977
v. E. M. F. Co., 28 Ont. L. R. 427 262
v. Homer, 62 Ohio St. 233 1789
v. Kansas, etc., R. Co., 58 Kan. 6 245, 285, 380
v. Kansas, etc., R. Co., 61 Kan. 541 285
v. La Fon, 155 Mo. App. 678 1196, 1198
v. Larer, 7 Pa. 470 918
v. Lyles, 2 Hill (S. C.) 404 2068
v. Pringle, 11 Johns. 444 4841
v. Sandusky F. Co., 88 Minn. 485 3699, 3704
v. Warner, 2 Marvel 98 2219
v. Wilson, 48 Ala. 638 1407, 1408, 1415, 4218, 4225
v. Wright, 86 Tenn. 636 1607
Curtin v. Harvey, 120 Cal. 620 1710
v. Nittany Valley R. Co., 135 Pa. 20 4026, 4133, 4134
v. Western U. Tel. Co., 13 App. Div. (N. Y.) 253 3608, 3649
v. Western U. Tel. Co., 16 N. Y. Misc. 347 3547, 3550
Curtis v. Aspinwall, 114 Mass. 187 1947
v. Bachman, 110 Cal. 433 1751
v. Banker, 136 Mass. 355 2861, 2863
v. Baugh, 79 Ill. 242 2898, 3747
v. Brannon, 98 Tenn. 153 2056, 2060, 2063, 2073, 2075, 2076, 2083, 2089
v. Brewer, 17 Pick. 513 888, 893
v. Brooks, 37 Barb. 476 779, 1871
v. Buckley, 14 Kan. 449 1814
v. Chicago, etc., R. Co., 18 Wis. 312 1421
v. Curtis, 134 Mich. 220 1441
v. Curtis, 2 Bro. Ch. 632 3724
v. Deering, 12 Me. 499 2094, 2095, 2096, 2120
v. Fairbanks, 16 N. H. 542 17
v. Groat, 6 Johns. 168 362, 363, 4256
v. Hannay, 3 Esp. 82 304, 2400
v. Hubbard, 9 Metc. (Mass.) 322 661
v. Innerarity, 6 How. 146 1101
v. Leavitt, 15 N. Y. 9 1171, 1174, 1193
v. Leavitt, 17 Barb. 309, 15 N. Y. 9 1194
v. Lehman, 115 La. 40 2554, 2558
v. McNair, 173 Mo. 270 4732
v. Parks, 57 Wash. 223 2274, 2276
v. Plumptre, [1913] W. C. & Ins. Rep. 195, 6 B. W. C. C. 87 5173
v. Rochester, etc., R. Co., 18 N. Y. 534 390, 4748, 4749
v. St. Paul, etc., R. Co., 20 Minn. 28 3964, 3977, 4138
v. Sioux City, etc., R. Co., 87 Iowa 622 339, 341, 3475
v. Smith, 75 Conn. 429 1110
v. Tyler, 9 Paige 432 2867
v. Van Bergh, 161 N. Y. 47 863, 894
v. Ward, 20 Conn. 204 485, 4201, 4305, 4307
Curtiss v. Bachman, 110 Cal. 433 1720, 1721, 1723, 1728, 1729
v. Bush, 39 Barb. 661 2194
v. Greenbanks, 24 Vt. 536 790, 801, 817
v. Martin, 20 Ill. 575 748
v. Rochester, etc., R. Co., 18 N. Y. 534 3487
v. Rochester, etc., R. Co., 20 Barb. 282 412, 3472, 3489
Curtley v. Security Sav. Soc., 46 Wash. 50 319, 502, 2101, 2145, 4380, 4390, 4412
Cuscachs v. Sewerage & W. Board, 116 La. 510 182, 2712
Cushing v. Boston, 144 Mass. 317 4028, 4029
v. Breed, 14 Allen 376 2380
v. Cable, 54 Minn. 6 2792
v. Drew, 97 Mass. 445 887, 922
v. Longfellow, 26 Me. 306 364, 4260
v. Rice, 46 Me. 303 2066
v. Seymour, 30 Minn. 301 266, 4265, 4308, 4322
v. Wells, Fargo & Co., 98 Mass. 550 616, 3389, 3400
v. Wyman, 44 Me. 121 737
Cushingham v. Phillips, 1 E. D. Smith 416 3129
Cushman v. Blanchard, 2 Me. 266 2110, 2136, 2139
v. Northwestern Ins. Co., 34 Me. 487 3006, 3029
v. Ryan, 1 Story 91 460, 464, 465, 4783
v. Sim, 2 Har. & J. 352 2524
v. Sutphen, 42 Ill. 256 985, 991
v. Waddell, 1 Baldwin 57 466, 4783

[REFERENCES ARE TO PAGES]

Cushwa v. Cushwa, 9 Gill 242 3692
Cusick v. Boyne, 1 Cal. App. 643 2485
v. Langan, 157 Ill. App. 472 1127
Cusimano v. Olive Oil I. Co., 114 La. 312 4484, 4494
Custer Tp. v. Dawson, 178 Mich. 367 4055, 4110
Cuthbert v. Kuhn, 3 Whart. 357 3133, 3137, 3146
v. Street, 9 Up. Can. C. P. 115 2123
Cutler v. Bell, 4 Camp. 184 2925
v. Boston, 200 Mass. 400 4138
v. Close, 5 C. & P. 337 494, 2599
v. How, 8 Mass. 257 867, 870, 998, 1000, 1002
v. James Goold Co., 43 Hun 516 811, 4212
v. Johnson, 8 Mass. 266 867
v. Pittsburg S. P. G. M. Co., 34 Nev. 45 1506
v. Putnam L. & P. Co., 80 Conn. 470 1406
v. Smith, 57 Ill. 252 1261, 3827
v. Tully, 5 Ind. Terr. 180 2754
Cutter v. Des Moines, 137 Iowa 643 54, 4705
v. Emery, 37 N. H. 567 2856, 2870
v. Gillette, 163 Mass. 95 2552
v. Gudebrod, 190 N. Y. 252 1051, 4490, 4491
v. Mayor, 92 N. Y. 166 940, 1049, 1199, 4157
v. Powell, 2 Smith Lead. Cas. 17, 26 2390, 2666
v. Powell, 6 T. R. 320 2527
v. Reynolds, 8 B. Mon. 596 756
Cutting v. Ballou, 136 Mass. 337 2755
v. Cox, 19 Vt. 517 3733
v. Grand Trunk R. Co., 13 Allen 381 2368, 3352, 3353, 3354, 3356, 3387
v. Miner, 30 App. Div. (N. Y.) 457 237, 287
Cutting F. P. Co. v. Canty, 141 Cal. 692 1056
Cuxon v. Chadley, 3 B. & C. 591 630
Cuyler v. Cuyler, 2 Johns. 186 452, 780
Cyclone, The, 16 Fed. 486 2729, 2732
Cypress Avenue, In re, 87 Misc. (N. Y.) 111 3959
Czarnecki v. Bolen-D. C. Co., 91 Ark. 58 3877, 3880
Czarnikow v. Baxter, 146 App. Div. (N. Y.) 81 317, 2346, 2356
Czarnowski v. Zeyer, 35 La. Ann. 796 2463

D

D. B. Steelman, The, 5 Hughes 210 741
D. H. McBride, The, 132 Fed. 285 760
D. S. Gregory, The, 2 Bene. 226 3498
Dabney v. Dabney, 2 Rob. (Va.) 622 701
v. New England Mut. M. Ins. Co., 14 Allen 300 3034, 3036
Dabovich v. Emeric, 12 Cal. 171 2381, 2395
Dackich v. Barich, 37 Mont. 490 1712
Dady v. Condit, 104 Ill. App. 507 1451
v. Condit, 163 Ill. 511 4379
v. Condit, 188 Ill. 234 33, 1980, 2008
v. Condit, 209 Ill. 488 1007, 1449, 1981, 2008, 2011
Daffin v. Zimmerman Mfg. Co., 158 Ala. 637 3742
Daggett v. Davis, 53 Mich. 35 4282
v. Pratt, 15 Mass. 177 971, 1876
v. Reas, 79 Wis. 60 2163
Daggett v. Wallace, 75 Tex. 352 3662, 3663, 3664, 3677
Dagnall v. Southern R., 69 S. C. 110 1310, 3506
Dahill v. Booker, 140 Mass. 308 4296, 4300
Dahl v. Hansen, 152 Iowa 555 4548
Daigneau v. Grand Trunk R. Co., 153 Fed. 593 4745
Daiker v. Strelinger, 28 App. Div. (N. Y.) 220 4380
Dailey v. Crowley, 5 Lans. 301 480, 4201, 4296
v. Dismal Swamp C. Co., 2 Ired. 222 390
v. Green, 15 Pa. 118 535, 557, 2225
v. Grimes, 27 Md. 440 3132
v. Houston, 58 Mo. 361 1317, 1385, 4775, 4781
Daily v. Litchfield, 10 Mich. 29 919
v. Maitland, 88 Pa. 384 1921
v. New York, etc., R. Co., 32 Conn. 356 1404
Dain v. Wycoff, 7 N. Y. 191 4525, 4960, 4962, 4969
v. Wyckoff, 18 N. Y. 45 4963, 4970
Dair v. United States, 16 Wall. 1 2818
Dairy v. Iowa Cent. R. Co., 113 Iowa 716 3918
Daisley v. Douglass, 119 Fed. 485 4531
v. Dun, 107 Fed. 218 4534
Dakin v. Anderson, 18 Ind. 52 644
v. Dunning, 7 Hill 30 830, 1412
v. Elmore, 127 App. Div. (N. Y.) 457 1367, 4264
v. Oxley, 15 C. B. (N. S.) 665 3288, 3290
v. Williams, 17 Wend. 447 843, 869, 887, 891, 922
Dal v. Fischer, 20 S. D. 426 2507
Dalay v. Savage, 145 Mass. 38 3845
Dalbeattie S. Co. v. Card, 59 Fed. 159 3269
Dalby v. Assur. Co., 15 C. B. 365 3069
v. Campbell, 26 Ill. App. 502 1259, 1664, 1665, 1669, 1670
v. India & L. L. Assur. Co., 15 C. B. 365 3069
v. Insurance Co., 15 C. B. 365 3071
v. Stearns, 132 Mass. 230 2946, 2947
Dale v. Atchison, etc., R. Co., 57 Kan. 601 4955
v. Grant, 34 N. J. L. 142 127
v. Hall, 64 Ark. 221 542
v. Lester, 16 Ves. 7, 11 2052
v. Moulton, 2 Johns. Cas. 205 1555
v. Pope, 4 Litt. 166 1856
v. Richards, 21 D. C. 312 801, 1118
v. St. Joseph, 59 Mo. App. 566 3954
v. Scranton, 231 Pa. 604 1046
v. Shively, 8 Kan. 276 2056, 2117, 2136, 2139
v. Smithson, 12 Abb. Pr. 237 4487
v. Sollet, 4 Burr. 2133 457
v. Southern R. Co., 132 N. C. 705 3741, 3742
Daley v. Lundin, 8 New South Wales St. Rep. 447 4529, 4550
Dalgleish v. Gartside & Co., J. H., Ltd., [1914] W. C. & Ins. Rep. 319, 7 B. W. C. C. 535 5202
Dallam v. Fitler, 6 W. & S. 323 483, 4199
Dallas v. Chaloner, 3 Dall. 501 1599
v. Hollingsworth, 3 Ind. 537 2540
v. Jones, 93 Tex. 38 1360
v. Kahn, 9 Tex. Civ. App. 19 4110, 4114
v. Moore, 32 Tex. Civ. App. 230 4740, 4779

[REFERENCES ARE TO PAGES]

Dallas v. Sallers, 17 Ind. 479 4979
Dallas H. & L. Ass'n v. Thomas, 36 Tex. Civ. App. 268 2684
Dallas O. & R. Co. v. Carter (Tex. Civ. App.), 134 S. W. 418 1382
Dallas, etc., R. Co. v. Chambers, 55 Tex. Civ. App. 331 4832
v. Ison, 37 Tex. Civ. App. 219 4735, 4739, 4740
v. Motwiller, 51 Tex. Civ. App. 432 4755
v. Osom, 37 Tex. Civ. App. 219 1377
v. Spicker, 61 Tex. 427 4875
Dallmeyer v. Dallmeyer, [1896] 1 Ch. 372 1088
Dalman v. Koning, 54 Mich. 320 4971
D'Almeida v. Boston & M. R., 209 Mass. 81 56, 432
Dalrymple v. Green, 88 Kan. 673 3663, 3665, 3666
v. Hannum, 54 N. Y. 654 1451
v. Williams, 63 N. Y. 361 1482, 1484, 1488
Dalton v. Bowker, 8 Nev. 190 2098, 2130, 2131, 2137
v. Bunn, 152 Ala. 577 530
v. Calhoun Co. v. Dist. Court, 164 Iowa 187 4515
v. Gerrish, 9 Cush. 89 3138
v. Irwin, 4 C. & P. 289 2500
v. Kansas City, etc., R. Co., 78 Kan. 232 330, 3449, 3519
v. Laudahn, 27 Mich. 529 4302
v. Laudahn, 30 Mich. 349 3097, 3108
v. Miami Tribe No. 1, 2 Am. L. Record (Ohio) 329 1559
v. Moore, 141 Fed. 311 129, 3880
v. St. Louis Smelting & Refining Co., 188 Mo. App. 529 4866, 4914, 4929, 4939
v. Southeastern R. Co., 4 C. B. (N. S.) 296 4912, 4914, 4935
Daly, Matter of, 29 App. Div. (N. Y.) 286 4086
Matter of, 72 App. Div. (N. Y.) 394 4049
Daly v. Busk Tunnel R. Co., 129 Fed. 513 754, 760
v. Byrne, 77 N. Y. 182 4516
v. Byrne, 1 Abb. N. C. 150 4518
v. Dublin, etc., R. Co., 30 L. R. Ir. 514 4851
v. Egan, 12 Vict. L. R. 81 801
v. Everett P. & P. Co., 31 Wash. 252 4740
v. Litchfield, 11 Mich. 497 1799
v. Piza, 45 N. Y. Misc. 608 3237
v. Smith, 18 App. Div. (N. Y.) 194 4037, 4044
Daly I. S. & M. Co. v. United States M. & Mfg. Co., 76 N. Y. Misc. 574 760
Dalzell v. Davenport, 12 Iowa 437 4138
v. Fahy's W. C. Co., 138 N. Y. 285 2230
Dalziel v. Press P. Co., 52 N. Y. Misc. 207 4591, 4597
Dam v. Kirk La Shelle Co., 175 Fed. 902 4480
Damainville v. Mann, 32 N. Y. 197 3134
Dame v. Kenney, 25 N. H. 323 4577
v. Wood, 73 N. H. 222 1030
v. Wood, 75 N. H. 38 1030, 2663
D'Amelio v. Abraham, 54 N. Y. Misc. 386 529, 2152, 2156
Damhorst v. Missouri Pac. R. Co., 32 Mo. App. 350 1137
Damkroger v. Pearson, 74 Minn. 77 3127
Dammann v. St. Louis, 152 Mo. 186 3878
Damon v. Williamson, 18 Ohio St. 515 1870
Damron v. Roach, 4 Humph. 134 3738, 3815
v. Sweetzer, 16 Ill. App. 339 423, 1705, 1707
Dana v. Boyd, 2 J. J. Marsh. 587 2388
v. Conant, 30 Vt. 246 2788
v. Fiedler, 1 E. D. Smith 463 803
v. Fiedler, 12 N. Y. 40 368, 1097, 1099, 1100, 1101, 1425, 1435, 2236, 2275, 2280, 2297, 3202
v. Goodfellow, 51 Minn. 375 2189, 2190, 2874, 2896
v. Gulf & S. I. R. Co., — Miss. —, 64 So. 214 757
v. King, 2 Me. 155 2231
v. Sessions, 46 N. H. 509 509, 510, 1411
v. Tucker, 4 Johns. 487 1481, 1482, 1484
Danby v. Beardsley, 43 L. T. (N. S.) 603, 604 4607
Dance v. Girdler, 1 New Rep. 42 2753
Dancey v. Grand Trunk R. Co., 19 Ont. App. 664 3465, 3472, 3521, 3529
Dando v. Home Tel. Co., 126 Mo. App. 242 4858
Dane v. Gilman, 49 Me. 173 1601
Danforth v. Freeman, 69 N. H. 466 2597, 2599, 2600, 2666, 2668
v. National State Bank, 48 Fed. 271 978
v. Pratt, 9 Cush. 318 1624
v. Smith, 23 Vt. 247 3728
v. Smith, 41 Kan. 146 2121
v. Tennessee & C. R. Co., 93 Ala. 614 2696, 2704
v. Walker, 37 Vt. 239 291, 368, 2237, 2258
v. Walker, 40 Vt. 357 2258
v. Williams, 9 Mass. 324 1064
Dangerfield v. Wilby, 4 Esp. 159 670
Daniel v. Allen, 149 Ill. App. 351 1492
v. Atlantic C. L. R. Co., 145 N. C. 51 4722
v. Atlantic C. L. R. Co., 136 N. C. 517 1330
v. Bailey, 118 Ga. 408 1514
v. Ballard, 2 Dana 296 2861
v. Bush, 80 Ga. 218 584
v. Gordy, 84 Ark. 218 531, 665
v. Ft. Worth, etc., R. Co. (Tex. Civ. App.), 69 S. W. 198 3866, 3878, 3880
v. Ft. Worth, etc., R. Co., 96 Tex. 327 3905
v. Gibson, 72 Ga. 367 958
v. Giles, 108 Tenn. 242 4783
v. Hallenbeck, 19 Wend. 408 754
v. Holland, 4 J. J. Marsh. 26 4211
v. Jordan, 146 Ala. 229 4318
v. Judy, 14 B. Mon. 393 1537
v. Learned, 188 Mass. 294 1838
v. McRae, 2 Hawks 590 2860
v. Obert, 20 Ill. App. 557 3808
v. Park, 2 N. J. L. 1004 1358
v. Perkins L. Co., 9 Ga. App. 842 3741, 3742, 3744, 3826
v. Perkins L. Co. (N. C.), 72 S. E. 438 1387
v. St. Louis Nat. Bank, 67 Ark. 223 627
v. Western U. Tel. Co., 61 Tex. 452 3560
Daniell v. Boston & M. R., 184 Mass. 337 2546
v. Sinclair, 6 App. Cas. 181 1013
Danielly v. Cheeves, 94 Ga. 263 3859

[REFERENCES ARE TO PAGES]

Daniels v. Ballentine, 23 Ohio St. 532 139, 2636, 3332
v. Benton, 180 Mass. 559 1079, 1087, 1220
v. C. I. & N. R. Co., 41 Iowa 52 4053, 4097
v. Cheshire R. Co., 20 N. H. 85 1960
v. Chicago, etc., R. Co., 35 Iowa 129 4097
v. Hatch, 21 N. J. L. 391 762
v. McGinnis. 97 Ind. 549 1522
v. Newton, 114 Mass. 530 377, 2255
v. New York, etc., R. Co., 183 Mass. 393 131
v. Osborn, 75 Ill. 615 1014
v. Savannah, etc., R. Co., 86 Ga. 236 4917
v. Saybrook, 34 Conn. 377 1404
v. Tearney, 102 U. S. 415 1560
v. Union Pac. R. Co., 6 Utah 357 4803
v. Ward, 4 Minn. 168 870, 968
v. Wilber, 60 Ill. 526 559, 2482
v. Wilson, 21 Minn. 530 936, 1822
Danks, Ex parte, 2 De Gex, M. & G. 936 803
Danley v. Williams, 16 Wis. 581 2698
Danmead v. Coburn, 15 Md. 29 2667
Danna v. Monroe, 129 La. 138 110
Dannat v. Fuller, 120 N. Y. 554 930
Dannenberg v. Berkner, 118 Ga. 885 1279
Dannenhower v. Western U. Tel. Co., 218 Pa. 216 146
Danner v. Fort Worth I. Co., 18 Tex. Civ. App. 621 2405, 2415
Danolds v. State, 89 N. Y. 36 243, 246, 2693
Danskin v. Pennsylvania R. Co., 83 N. J. L. 522 4881
Danville v. Danville W. Co., 180 Ill. 235 1044
v. Pace, 25 Gratt. 1 1194
Danville B. Co. v. Pomroy, 15 Pa. 151 543, 2659
Danville & I. Harbor R. R. Co. v. Tidrick. 137 Ill. App. 553 3904
Danvers Farmers' E. Co. v. Johnson, 93 Minn. 323 2750
Danziger v. Boyd, 54 N. Y. Super. Ct. 365 3693, 3704
v. Boyd, 120 N. Y. 628 1964, 3695
v. Hoyt, 46 Hun 270 767, 2463
Darbishire v. Butler, 5 Moore 198 1555
Darby v. Missouri, etc., R. Co., 156 Mo. 391 396
Darcey v. Steger, 23 N. Y. Misc. 145 3109
D'Arcy v. Adams Exp. Co., 162 Mich. 363 3414
D'Arcy v. Lyle, 5 Bin. 441 2970, 2976
Darcy v. Presbyterian Hospital, 202 N. Y. 259 3652, 4163
Darden v. Mathews, 22 Tex. 320 1522, 1523
v. Orgain, 5 Cold. 211 1079, 1200
Dare v. Harper, 101 Ark. 37 4634
Darien & W. R. Co. v. McKay, 132 Ga. 672 3956
Darks v. Scudder-G. G. Co., 146 Mo. App. 246 99, 2448, 4876
Darley Main C. Co. v. Mitchell, 11 App. Cas. 127 3760
Darling v. Atchison, etc., R. Co., 76 Kan. 893 3328, 3345
v. McBride, 86 Neb. 481 1728
v. March, 22 Me. 184 995
v. Tegler, 30 Mich. 54 4352
v. Vulcan I. Works, 26 Ore. 405 2570
Darling v. Wooster, 9 Ohio St. 517 1109, 1880
Darlington v. De Wald, 194 Pa. 305 3162
v. Gates L. Co., 142 Wis. 198 2053
v. J. L. Gates Land Co., 151 Wis. 461 1098, 4382, 4394
v. Mayor, 31 N. Y. 164 5
v. Missouri Pac. R. Co., 99 Mo. App. 1 3309
v. Western U. Tel. Co., 127 N. C. 448 3654
Darlington County Fair & D. Ass'n v. Atlantic C. L. R. Co., 90 S. C. 436 1281
Darly v. Maitland, 88 Pa. 384 871
D'Armond v. Pullen, 13 La. Ann. 137 549, 3128
Darmstaetter v. Hoffman, 120 Mich. 48 3136
Darnall v. Hill, 12 Gill & J. 388 3719
Darnell v. Columbus S. C. Co., 129 Ga. 62 3182, 3194, 3207
v. Morehouse, 36 How. Pr. 511 656
v. Sallee, 7 Ind. App. 581 4639
v. Williams, 2 Stark. 166 494, 534, 1830
v. Wilmoth, 69 W. Va. 704 3788
Darrah v. Steamboat, 15 Mo. 187 1403
Darrin v. Whittingham, 107 Md. 46 2274, 2315
Darrow v. Cornell, 12 App. Div. (N. Y.) 604 834
v. Cornell, 30 App. Div. (N. Y.) 115 1952
Darst v. Brockway, 11 Ohio 462 2381
v. Mathieson A. Works, 81 Fed. 284 2511, 2526, 2548
Dart v. Laimbeer, 107 N. Y. 664 244, 2573
Dartmouth College, Trustees of, v. International P. Co., 132 Fed. 92 4259, 4263
Darty v. Robinson, 86 Ind. 382 2821
v. Providence P. Ass'n, 27 R. I. 377 1090
Das v. Lal, L. R. 22 India App. 199 961
Dash v. Van Kleeck, 7 Johns. 477 26, 1189
Dashiel v. Harshman, 113 Iowa 283 4379
v. Moody, 44 Tex. Civ. App. 87 1876, 1918
v. Moorley, 44 Tex. Civ. App. 87 1876
Daskam v. Ullman, 74 Wis. 474 1870
Daube v. Philadelphia & R. C. & I. Co., 77 Fed. 713 2756
v. Rock Island & T. R. Co., 39 Tex. Civ. App. 24 3322
Daubet v. Kirkman, 15 Ill. App. 622 3686
Dauchy I. Works v. McKim Gasket & Mfg. Co., 85 Ill. App. 584 3109
Daugherty v. American U. Tel. Co., 75 Ala. 168 187, 419, 3561, 3613
Daughette v. Ohio Oil Co., 263 Ill. 518 2646
Dauntless, The, 121 Fed. 420 4907
Dauphiny v. Buhne, 153 Cal. 757 4503, 4510, 4567
Davaney v. Eggenhoff, 43 Cal. 397 695
Davelaar v. Milwaukee, 123 Wis. 413 3887, 3890, 3919, 3921
Davenport v. Bradley, 4 Conn. 309 1357
v. Harbert, 2 Tenn. Cas. 287 1723, 1745
v. Ledger, 80 Ill. 574 4179, 4184
v. Ludlow, 4 How. Pr. 337 592
v. McKee, 98 N. C. 500 1037
v. Muir, 3 J. J. Marsh. 310 2131
v. Newton, 71 Vt. 11 3736

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Davenport v. Norfolk & S. R. Co., 148 N. C. 287 1445
v. Palmer, 152 App. Div. (N. Y.) 761 665
v. Peoria Ins. Co., 17 Iowa 276 2999
v. Richards, 16 Conn. 310 1639
v. Russell, 5 Day 145 3814, 3820
v. Wells, 3 Iowa 242 2311
Davenport, etc., R. Co. v. Sinnet, 111 Ill. App. 75 3877, 3898
Davern v. Drew, 153 App. Div. (N. Y.) 844 4840
Davey v. Bank, 9 Vict. L. R. (law) 252 4212
v. Davey, 22 N. Y. Misc. 668 4549
v. Janesville, 111 Wis. 628 1428
David v. Conard, 1 G. Greene 336 1241
v. Louisville, etc., R. Co., 158 Ky. 721 3961, 4034, 4035, 4131, 4135
v. Park, 103 Mass. 501 4382
v. Southwestern R. Co., 41 Ga. 223 4871
v. Whitmer, 46 Pa. Super. 307 2274, 2281, 2340
Davidge v. Guardian T. Co., 136 App. Div. (N. Y.) 78 4395
Davidor v. Bradford, 129 Wis. 524 319, 2245
Davidson v. Alfara, 80 N. Y. 660 2830
v. Boston & M. R. Co., 3 Cush. 91 3948
v. Brown, 1 Cranch C. C. 250 1557
v. Browning, 73 W. Va. 276 700
v. Dallas, 8 Cal. 227, 254 2890
v. Des Barres, New Rep. 1884 1896, 672 3191
v. Ernest, 7 Ala. 817 3097
v. Fischer, 11 Colo. 583 3233
v. Geoghagan, 3 Bibb 233 580
v. Gohagin, 2 Bibb 634 1182
v. Goodall, 18 N. H. 423 4958, 4959, 4963, 4967
v. Graham, 2 Ohio St. 131 3385, 3386
v. Gunsolly, 1 Mich. 388 4176, 4284
v. Gwynne, 12 East 381 3301
v. Hill, [1901] 2 K. B. 606 4856
v. Hirsch, 45 Tex. Civ. App. 631 3108, 3111, 3112
v. Hughes, 76 Kan. 247 862
v. Laughlin, 138 Cal. 320 2547
v. Lee (Tex. Civ. App.), 139 S. W. 904 168, 340
v. Mexican Nat. R. Co., 58 Fed. 653 1104
v. Michigan Cent. R. Co., 49 Mich. 428 4188
v. Montgomery Ward & Co., 171 Ill. App. 355 101, 2428, 2449, 4698, 4822, 4831
v. Munsey, 29 Utah 181 4493
v. Nichols, 11 Allen 514 99, 2448
v. Oberthier, 42 Tex. Civ. App. 337 4210, 4297
v. Rake, 45 N. J. Eq. 767 1083
v. Rountree, 69 Wis. 655 521
v. Tulloch, 3 Macq. 783 4407, 4408
v. Vorse, 52 Iowa 384 1920
v. Westchester G. L. Co., 99 N. Y. 559 2466
v. Western U. Tel. Co., 21 Ky. L. Rep. 1292 3636
v. Wheeler, 17 R. I. 433 549
Davidson D. Co. v. Southern R. Co., 147 N. C. 503 3329, 3344
Davies v. Benton, 6 Barn. & Cress. 216 971, 972
v. Bond, 13 Aust. Com. L. R. 518 4550
Davies v. Chesapeake & O. R. Co., 122 Ky. 528 23
v. Daniels, 8 Hawaii 88 891, 928
v. Dow, 80 Minn. 223 785, 793
v. Hotchkiss (Misc.), 113 N. Y. 233 3236
v. Hughes, 86 Va. 909 1087
v. Humphreys, 6 M. & W. 153 2861, 2869
v. Jenkins, 11 M. & W. 745 10
v. Penton, 6 B. & C. 216 860
v. Stevenson, 59 Kan. 648 4277
v. Turton, 13 Wis. 185 2540
v. Underwood, 2 H. & N. 570 3157
v. Western U. Tel. Co., 93 S. C. 318 3577
Davin v. Syracuse, 69 N. Y. Misc. 285 835, 888
Davis v. Adams, 18 Ala. 264 2237
v. Adrian, 147 Mich. 300 1474
v. Alden, 2 Gray 309 1782
v. Alexander, 99 Me. 40 3734
v. Alpha P. C. Co., 134 Fed. 274 886, 889
v. Arkansas S. R. Co., 117 La. 320 4870
v. Atchison, etc., R. Co., 81 Kan. 505 3464, 3528
v. Atlantic Dredging Co., 212 Fed. 351 5007
v. Ayres, 9 Ala. 292 1938, 2556
v. Bangor, 42 Me. 522 162
v. Barada-G. R. E. Co., 115 Mo. App. 327 1934, 1953
v. Barrington, 30 N. H. 517 2539
v. Bean, 114 Mass. 358 556, 2212
v. Big Muddy C. & I. Co., 173 Ill. App. 162 55
v. Bliss, 187 N. Y. 77 4290
v. Blue Ridge R. Co., 81 S. C. 466 1433, 3340, 3345, 3387, 3390
v. Bly, 164 N. Y. 527 2779
v. Borland, 83 Neb. 281 1477
v. Bowers G. Co., 75 Vt. 286 4233
v. Bowker, 2 Nev. 487 765
v. Boyd, 6 Jones 249 642
v. Bronson, 2 N. D. 300 2702
v. Brown, 27 Ohio St. 326 4502, 4505
v. Carlisle, 142 Fed. 106 718
v. Cary, 15 Q. B. 418 2308
v. Cayuga, etc., R. Co., 10 How. Pr. 330 3532
v. Central R. Co., 60 Ga. 329 1495, 3527
v. Central Vermont R. Co., 66 Vt. 290 3332, 3333
v. Chance, 2 Yerg. 94 1534
v. Charles River Branch R. Co., 11 Cush. 506 4134
v. Chesapeake & O. R. Co., 61 W. Va. 246 1267, 1343
v. Chesapeake & O. R. Co., 122 Ky. 528 3342
v. Chicago, etc., R. Co., 93 Wis. 470 3336
v. Cincinnati, etc., R. Co., 1 Disney 23 234, 3364
v. Cochran, 76 Miss. 439 1920
v. Coleman, 7 Ired. 424 1148, 1881
v. Coleman, 11 Ired. 303 1147
v. Collins, 69 S. C. 460 461, 4782
v. Creamer, 179 Mo. App. 374 1238
v. Crow, 7 Blackf. 129 1668, 1670
v. Davis, [1902] 2 Ch. 314 1128
v. Davis, 30 Ga. 296 4314
v. Davis, 93 Ark. 93 531, 2469
v. Davis, 97 Mich. 419 4389
v. Dickey, 23 Ala. 848 515, 2456
v. Dodge, 126 App. Div. (N. Y.) 469 2551, 2554

[REFERENCES ARE TO PAGES]

Davis v. Dow, 80 Minn. 223 813
v. Dudley, 4 Allen 557 103, 107
v. Dycus, 7 Bush 4 1953
v. Easley, 13 Ill. 192 363, 3784, 4256
v. East Tennessee, etc., R. Co., 87 Ga. 605 3929
v. Elliott, 15 Gray 90 1838, 4392
v. Emerson, 17 Me. 64 2854, 2862
v. Fain (Tex. Civ. App.), 152 S. W. 218 1443, 2101, 2113
v. Fairclough, 63 Mo. 61 4211
v. Fish, 1 G. Greene 406 210, 312, 323, 2309
v. Ford, 81 Md. 333 2599
v. Frederick, 6 Mont. 300 529, 550
v. Freeman, 10 Mich. 188 897, 898
v. Gardiner, 4 Coke 16 4556
v. Garrett, 6 Bing. 617 140, 141, 2910, 2919, 2937, 2999
v. George, 67 N. H. 393 3138, 3139, 3140, 3150
v. Gibson, 70 Ill. App. 273 2684, 2685
v. Gillett, 52 N. H. 126 855
v. Gosser, 41 Kan. 414 2392
v. Gott, 130 Ky. 486 683, 1135, 1594, 4210, 4292
v. Grand Rapids S. F. Co., 41 W. Va. 717 2275, 2284
v. Greely, 1 Cal. 422 941
v. Griffith, 4 Gill & J. 342 4595
v. Guarnieri, 45 Ohio St. 470 488, 4889, 4891, 4944, 5110
v. Hall, 2 Bibb 590 2069, 2098
v. Hall, 52 Md. 673 2013
v. Hall, 70 Neb. 678 1359
v. Hall, 72 Ore. 220 1595
v. Hamilton, 88 Minn. 64 4573, 4576, 4597
v. Hamlin, 108 Ill. 39 2902
v. Harding, 3 Allen 302 1674, 1675
v. Harrington, 160 Mass. 278 637, 1199, 3149
v. Hartel, 56 Pa. Super. Ct. 557 3190
v. Hearst, 160 Cal. 143 1310, 1328, 4507, 4508, 4509, 4529, 4531, 4542, 4545, 4546, 4547, 4551, 4570, 4577, 4580
v. Hedges, L. R. 6 Q. B. 687 517, 546, 561
v. Hendrie, 1 Mont. 499 877
v. Henry, 63 Miss. 110 827
v. Hibbs, 73 Wash. 315 381, 1920
v. Hill, 3 N. H. 382 2225
v. Holy Terror M. Co., 20 S. D. 399 4656
v. Home Ins. Co., 127 Tenn. 330 656
v. Humphreys, 6 M. & W. 153 2834
v. Hutton, 127 Ind. 481, 1006 3717
v. Jackson, 22 Ind. 233 1847
v. Jefferson G. Co., 147 Pa. 130 4037, 4038
v. Kendall, 2 R. I. 566 4487
v. Kornman, 141 Ala. 479 4713
v. La Crosse H. Ass'n, 121 Wis. 579 837, 858, 888
v. Lambertson, 56 Barb. 480 3845
v. Lee, 52 Wash. 330 1953, 1998
v. Lewis, 4 Bibb 456 1989
v. Lewis, 7 T. R. 17 4599
v. Logan, 5 B. Mon. 153 2122, 2211
v. Louk, 30 Wis. 308 3698, 3705, 3809
v. Lyman, 6 Conn. 249 2012, 2058, 2153, 2157
v. McCary, 100 Ala. 545 1541
v. McMillan, 142 Mich. 391 4634, 4640, 4641, 4647
v. McVickers, 11 Ill. 327 1845, 1952, 1954
v. Marxhausen, 103 Mich. 315 4586, 4590
Davis v. Maxwell, 12 Metc. (Mass.) 286 376, 2525, 2541, 2544
v. Mercer L. Co., 164 Ind. 413 111, 143
v. Michigan Cent. R. Co., 147 Mich. 479 4790
v. Miller's Auction Rooms, Inc., 144 N. Y. Supp. 672 4217
v. Miller B. L. Co., 151 Ala. 580 3773
v. Missouri Pac. R. Co., 119 Mo. 180 3953
v. Mohn, 145 Iowa 417 4535
v. Moss, 38 Pa. 346 3256
v. Moyles, 76 Vt. 25 3741
v. Murphy, 14 Ind. 158 2377
v. National L. Ins. Co., 188 Mass. 299 1091
v. New England Cotton Yarn Co., 77 N. H. 403 170
v. Newkirk, 5 Denio 92 435
v. New York, etc., R. Co., 70 Minn. 37 3391, 3411, 3429
v. Noaks, 3 J. J. Marsh. 494 747, 754
v. Northwestern E. R. Co., 170 Ill. 595 3965
v. Oregon S. L. R. Co., 31 Utah 307 1425
v. Pacific Tel. & T. Co., 127 Cal. 312 4608
v. Panhandle Nat. Bank (Tex.), 29 S. W. 926 716
v. Parker, 14 Allen 104 1026
v. Patrick, 57 Fed. 909 1765
v. Patterson, 27 N. Y. 317 3301
v. Pattison, 24 N. Y. 317 540
v. Penton, 6 B. & C. 216 887
v. People, 6 Ill. 409 1597
v. Poland, 102 Me. 192 323, 3810
v. Pryor, 3 Ind. Ty. 396 1480, 1482, 3661, 3663, 3682
v. Rake, 44 N. J. Eq. 506 1085
v. Randolph, 3 Mo. App. 454 4311
v. Red River L. Co., 61 Minn. 534 1404
v. Reynolds, 91 S. C. 439 4218
v. Richardson, 1 Bay 105 2276
v. Richardson, 76 Ark. 348 340, 1316
v. Rider, 53 Ill. 416 870, 946, 975, 998, 1003
v. Ruff, 1 Cheves 17 4532
v. Ryan, 47 Iowa 642 3150
v. St. Louis, etc., R. Co., 53 Ark. 117 4773, 4847, 4851
v. Sanders, 133 Ala. 275 4843
v. Schmidt, 126 Wis. 461 424
v. School Dist., 84 Neb. 858 1447
v. Seaboard Air Line R. Co., 136 N. C. 115 109, 1475
v. Seeley, 91 Iowa 583 1379, 1385, 4614, 4615, 4620, 4624, 4649
v. Severance, 49 Minn. 528 689
v. Shepstone, L. R. 11 App. Cas. 187 4510
v. Shields, 24 Wend. 322 2276, 2297
v. Sladden, 17 Ore. 259 4502
v. Smith, 5 Ga. 274 2094, 2098
v. Smith, 7 Minn. 414 2381
v. Smith, 15 Mo. 469 3139
v. Smith, 48 Vt. 52 1103
v. Smith, 144 N. C. 297 3923
v. Snyder, 196 Pa. 273 104
v. Spencer, 24 N. Y. 386 628
v. Standard Nat. Bank, 50 App. Div. 210 135, 165, 281, 343
v. Standish, 26 Hun 608 1290
v. Starrett, 97 Me. 568 4502, 4510, 4513, 4550, 4565
v. State, 121 Cal. 210 1040

[REFERENCES ARE TO PAGES]

Davis v. Stearns, 85 Neb. 121 1824
v. Stonestreet, 4 Ind. 101 804
v. Strobridge, 44 Mich. 157 2043
v. Swedish-Am. Nat. Bank, 78 Minn. 408 2471, 2493
v. Tacoma R. & P. Co., 35 Wash. 203 98, 342
v. Tallcot, 14 Barb. 611, rev'd 12 N. Y. 184 193, 512, 566, 2624
v. Tandy, 107 Mo. App. 437 981, 1161, 1169, 1170
v. Taylor, 2 Chitty 268 1484
v. Texas & P. R. Co., 91 Tex. 505 3311
v. Thorn, 6 Tex. 486 1010
v. Trimble, 76 Ark. 115 2466
v. Tubbs, 7 S. D. 488 2688
v. United States, 17 Ct. of Cls. 201, 215 848, 865, 883
v. Wabash R. Co., 122 Mo. App. 637 3334, 3394
v. Wabash, etc., R. Co., 89 Mo. 340 3332
v. Wait, 12 Ore. 425 1837
v. Walker, 18 Mich. 25 1107
v. Wall, 142 N. C. 450 3773, 3794
v. Wells, 104 U. S. 159, 29 L. ed. 686 2746, 2770
v. Western U. Tel. Co., 1 Cin. Super. Ct. 100 3618
v. Western U. Tel. Co., 46 W. Va. 48 3618, 3642
v. Wilbourne, 1 Hill (S. C.) 27 311, 2399
v. Yazoo, etc., R. Co., 95 Miss. 540 3507
v. Yuba County, 75 Cal. 452 937, 1041, 1211
Davis' Est., In re, 35 Mont. 273 1119
Davis C. Co. v. Polland, 158 Ind. 607 22
Davis C. D. Co. v. Mallory, 137 Fed. 332 2373, 2374
Davis' Est. v. Watkins, 56 Neb. 288 1076
Davis I. Works Co. v. White, 31 Colo. 82 1505, 1508
Davis Regulator Co. v. Phoenix I. Works Co., 17 Pa. Dist. 889 1008
Davis S. M. Co. v. Best, 50 Hun 76 4307, 4321
v. Mills, 55 Iowa 543 2769
Davis S. O. Co. v. Atlanta G. Co., 109 Ga. 607 1944, 2241, 2244, 2248
Davis & Co. v. Insurance Co., 115 Mich. 382 3048
Davis & R. B. & Mfg. Co. v. Montrose B. & C. Co., 59 Ill. App. 573 668
Davison, Ex parte, Buck 31 1884
v. Burgess, 31 Ohio St. 78 1559
v. Guardian Storage & Transfer Co. (Misc.), 144 N. Y. Supp. 601 4171, 4177, 4233
v. Maryland C. Co., 197 Mass. 167 2879, 2890
v. Sealskins, 2 Paine 324 2721
v. Smith, 18 Pa. Dist. 709 918
Davys v. Richardson, 21 Q. B. 202 784, 823
Dawe v. Morris, 149 Mass. 188, 191 4376
Dawes v. Howard, 4 Mass. 97 1646
v. Pinner, 2 Camp. 486n 1013
v. Winship, 5 Pick. 97n 1143
Daws v. Shea, 15 Mass 6 1636
Dawson v. Baum, 3 Wash. Ty. 464 2880
v. Clay, 1 J. J. Marsh. 165 1061
v. Collis, 10 C. B. 523 494, 2390
v. Dawson, 25 Ohio St. 443 1631, 1634
v. Donati, 2 E. D. Smith 121 3129
v. Ewing, 16 S. & R. 371 796
Dawson v. Holt, 12 Lea 27 1790
v. Kemper, 32 Weekly L. Bull. 15 14
v. L. & N. R. R. Co., 6 Ky. L. Rep. 668 1343, 1345
v. Lee, 83 Ky. 49 2843
v. Louisville & N. R. Co., 4 Ky. L. Rep. 801 3475, 3481, 3501
v. McClelland, [1899] 2 Irish 486 1531
v. McGill, 4 Whart. 230 3695
v. Morgan, 9 B. & C. 618 1897, 1927, 2848
v. Niagara, etc., R. Co., 23 Ont. App. 670 4886
v. Owen, 78 Ark. 93 696
v. Peterson, 110 Mich. 431 2498
v. Petway, 4 Dev. & Batt. 396 2855
v. Pittsburgh, 159 Pa. 317 1434, 2620, 3975
v. Shirk, 102 Ind. 184 1538
v. State, 38 Ohio St. 1 1595
v. Vickery, 150 Ill. 398 4415
v. Wetherbee, 2 Allen 461 4351
Day v. Brawley, 1 Pa. 429 1408
v. Brett, 6 Johns. 24 1030
v. Clarke, 1 A. K. Marsh. 521 696
v. Connecticut L. Ins. Co., 45 Conn. 480 3088
v. Essex County Bank, 13 Vt. 97 210
v. Ewen, 140 Ky. 498 731
v. Gravel, 72 Minn. 159 3317, 3366
v. Holland, 15 Ore. 464 1268, 1276, 3748
v. Lafferty, 4 Ark. 450 1233
v. Lea, 22 Q. B. Div. 610 814
v. Lockwood, 24 Conn. 185, 198 1071, 1073
v. Louisville C. & C. Co., 60 W. Va. 27 440, 3941
v. McPhee, 41 Colo. 467 1765, 2798, 2804, 2852
v. Mapes-R. C. Co., 174 Mass. 412 2220
v. Martin, 78 Va. 1 2815
v. New York Cent. R. Co., 51 N. Y. 583 1947
v. Nix, 9 Moore 159 557, 1832
v. Owen, 5 Mich. 520 1347
v. Perkins, 2 Sandf. Ch. 359 368
v. Pool, 53 N. Y. 416 535, 2370, 2390, 2393
v. Ramey, 40 Ohio St. 446 2804
v. Singleton, [1899] 2. Ch. 320 1980
v. Stickney, 14 Allen 255 2843, 2874
v. Thompson, 65 Ala. 269 668
v. Washburn, 76 N. H. 203 2469
v. Watson, 8 Mich. 535 3121
v. Woodworth, 13 How. 363 306, 1264, 1314, 1326, 1724, 4191, 4271, 4439, 4450, 4451
Daylight B. Co. v. Odlin, 51 N. H. 56 2955
Daymon v. Westchester St. R. Co., 154 App. Div. (N. Y.) 796 3449, 3473, 3514
Dayton v. Dusenbury, 25 N. J. Eq. 110 2211
v. Estate of Dakin, 103 Mich. 65 1242
v. Gunnison, 9 Pa. 347 2894
v. Hooglund, 39 Ohio St. 671 2371, 2375, 2456
v. Lincoln, 39 Neb. 74 4108
v. Monroe, 47 Mich. 193 4382
v. Parke, 142 N. Y. 391, 398 3302, 3303
v. Rowland, 1 Daly 446 2228
v. Trull, 23 Wend. 345 670, 675, 2940
Dayton & W. T. Co. v. Marshall, 36 Ind. App. 491 3519, 3527

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v. Western U. Tel. Co., 139 N. C. 79 3607
Dazey v. Roleau, 111 Ill. App. 367 2903, 2946
Deagan v. Weeks, 67 App. Div. (N. Y.) 410 559, 560
Deakin v. Lea, 11 Biss. 34 1715
Deal v. Coal & Coke Co., 215 Fed. 285 5969
v. Dodge, 26 Ill. 458 1845
v. Osborne, 42 Minn. 102 4361
v. St. Louis, etc., R. Co., 144 Mo. App. 684 1445, 3798, 3800, 3802, 3811, 3812
Dealy v. Lance, 2 Spears 487 4234
De Amado v. Friedman, 11 Ariz. 56 4946, 4947, 4950
Deamarest v. Little, 47 N. J. L. 28 4951
Dean v. Chicago & N. R. Co., 43 Wis. 305 486, 4171, 4189, 4198
v. Governor, 13 Ala. 526 1602
v. Hawes, 21 Cal. App. 350 1981
v. International T. Co., 47 Hun 319 684
v. James, 4 B. & Ad. 546 799
v. Kansas City, etc., R. Co., 199 Mo. 386 4717
v. Mason, 20 How. 198 4455
v. Melbourne Stock Exchange A. & B. Co., 16 Vict. L. R. 403 276
v. Newhall, 8 T. R. 168 773, 781
v. Nichols & S. C., 95 Iowa 89 4270, 4273, 4278, 4279
v. Oregon R. & N. Co., 38 Wash. 565 4922
v. Oregon R. & N. Co., 44 Wash. 564 4923, 4940
v. Radford, 141 Mich. 336 119
v. Raplee, 145 N. Y. 319 479
v. Ritter, 18 Mo. 182 3269, 3278
v. Roberts, 182 Ala. 221 2512, 2902, 2903
v. Roesler, 1 Hilt. 420 1989, 3189
v. St. Louis T. Co., 121 Mo. App. 379 4744
v. Standifer, 37 Tex. Civ. App. 181 2420, 2432, 2455
v. Toledo, etc., R. Co., 148 Mo. App. 428 3288, 3410
v. Tucker, 58 Miss. 487 3695
v. Vaccaro, 2 Head 488 3389
v. Wabash R. Co., 229 Mo. 425 1461, 1475, 4711, 4739
v. Wabash R. Co., 229 Mo. 689 1511
v. White, 5 Iowa 266 234, 294, 2599
v. Williams, 17 Mass. 417 1214
Dean P. Works v. Astoria L. Works, 40 Ore. 83 183
Dean & Son, Ltd., v. W. B. Conkey Co., 180 Ill. App. 162 1103
Deane v. Hodge, 35 Minn. 146 4443
v. Michigan S. Co., 69 Ill. App. 106 179, 2415, 2437
v. O'Brien, 13 Abb. Pr. 11 1360
v. Willamette Bridge Co., 22 Ore. 167 1397, 1398
Deany v. Scriba, 2 Call 415 1061
Dearborn v. Boston, etc., R. Co., 24 N. H. 179 3964, 3992
v. Cross, 7 Cow. 48 452
v. Newhall, 63 N. H. 301 1491
Deardorff v. Chicago, etc., Ry. Co., — Mo. —, 172 S. W. 333 5053
Dearing v. Pearson, 8 N. Y. Misc. 269, 276 2561
Dearing W. L. B. Co. v. Thompson, 156 Mich. 365 559
Deariso v. First Nat. Bank, 7 Ga. App. 841 2792
Dearle v. Barrett, 2 Ad. & E. 82 784, 1229, 1230
Dearlove v. Edwards, 166 Ill. 619 1184
v. Herrington, 70 Ill. 251 1499, 3827
Deas v. Harvie, 2 Barb. Ch. 448 1874
Deason v. Findley, 145 Ala. 407 2123
Deatherage v. Henderson, 43 Kan. 684 656
DeBaker v. Southern California R. Co., 106 Cal. 257 6
De Berard v. Prial, 34 App. Div. (N. Y.) 502 1715
De Bernales v. Wood, 3 Camp. 258 1033, 1034
Deberry v. Young, 1 Tenn. Cas. 51 2597
Deblois v. Earl, 7 R. I. 26 2766
De Blois v. Great Northern R. Co., 99 Minn. 18 3527, 4823
DeBoard v. Camden I. R. Co., 62 W. Va. 41 3527
DeBoom v. Priestly, 1 Cal. 206 2664
De Boul v. Freeport, etc., R. Co., 111 Ill. 499 4040, 4131
De Bruhl v. Neuffer, 1 Strobh. 426 739, 1206, 1212
Debuhr v. Thompson, 134 Mo. App. 21 748
De Camp v. Bullard, 159 N. Y. 450, aff'g 33 App. Div. (N. Y.) 627 2887, 3747
v. Burns, 33 App. Div. (N. Y.) 517 1741, 1742, 1759
v. Stevens, 4 Blackf. 24 2525, 2544
v. Thompson, 159 N. Y. 444 580, 581
Decatur v. Fisher, 53 Ill. 407 1499, 4831
v. Hamilton, 89 Ill. App. 561 4672
v. Vaughan, 233 Ill. 50 3962
Decatur C. W. & Mfg. Co. v. Mehaffey, 128 Ala. 242 4880
Decatur St., In re, 133 App. Div. (N. Y.) 321 4066
De Celles v. Casey, 48 Mont. 568 1262, 1311, 1494, 4295
Dechenbach v. Rima, 50 Ore. 540 823
Deck v. Baltimore & O. R. Co., 100 Md. 168 1332, 1344
v. Feld, 38 Mo. App. 674 2216, 2301, 2302
v. Smith, 12 Neb. 389 4328, 4356
Decker v. Chicago, etc., R. Co., 102 Minn. 99 3471
v. Gaylord, 8 Hun 110 2766
v. Gammon, 44 Me. 322 122
v. Hassel, 26 How. Pr. 528 2556
v. Livingston, 15 Johns. 479 770
v. McSorley, 111 Wis. 91 4877, 4930, 4935
v. Mathews, 12 N. Y. 313 2897, 4272, 4273, 4275
v. Myers, 31 How. Pr. 372 1419, 1431, 2405
v. School Dist., 101 Mo. App. 115 2682
v. Washburn, 8 Ind. App. 673 4146
De Clerq v. Mungin, 46 Ill. 112 4255
DeClerque v. Campbell, 231 Ill. 442 2783
De Comas v. Prost, 3 Moore's P. C. (N. S.) 158, 12 L. T. 682 4295
De Costa v. Massachusetts M. Co., 17 Cal. 613 3761
DeCourcey v. Prendergast C. Co., 140 Mo. App. 169 1471
Decoux v. Lieux, 33 La. Ann. 392 4634, 4635, 4645
De Crano v. Moore, 50 App. Div. (N. Y.) 361 1128

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De Cuadra v. Swann, 16 C. B. (N. S.) 772 3301
Dedebant v. Maestri, 134 La. 366 4628
Dedekam v. Vose, 3 Blatchf. 44 807, 3301
Dederick v. Leman, 9 Johns. 333 748
Dedham v. Natick, 16 Mass. 135 4960
Dedham Bank v. Chickering, 4 Pick. 314 717
De Donato v. Morrison, 160 Mo. 581 440
Deegan v. Gutta Percha & R. Mfg. Co., 131 App. Div. (N. Y.) 101 149
Deel v. Berry, 21 Tex. 463 2336
v. Heiligenstein, 244 Ill. 239 4885, 4887
Deem v. Crume, 46 Ill. 69 1184, 1879
Deems v. Canal Line, 13 Blatch. 474 5013
Deen v. Herold, 37 Pa. 150 534, 556
De Ende v. Wilkison, 2 Pat. & H. 663 1214
Deep M. & D. Co. v. Fitzgerald, 21 Colo. 533 4813, 4833
Deere v. Lewis, 51 Ill. 254 2280, 2294, 2298
Deere P. Co. v. Spatz, 78 Kan. 786 10, 2417, 2418
Deering, The Abbie M., 105 Fed. 400 2558
Deering v. Barzak, 227 Ill. 71 4654
v. Chapman, 22 Me. 488 1848, 1850, 1852
v. Creighton, 19 Ore. 120 2779
v. Johnson, 86 Minn. 172 372, 1928
v. Moore, 86 Me. 181 2823, 2824, 2851
v. Schreyer, 110 App. Div. (N. Y.) 200 1115
Deering H. Co. v. Hamilton, 80 Minn. 162 802
Deery v. Williams, 27 App. Div. (N. Y.) 131 2263
Dees v. Thompson, — Tex. Civ. App. —, 166 S. W. 56 1322
Deeter v. Burk, — Ind. App. —, 107 N. E. 304 1823
Deffenbach v. New York, etc., R. Co., 5 App. Div. (N. Y.) 91 4826
De Figaniere v. Young, 2 Robert. 670 581, 591
De Foor v. Stephens, 133 Ga. 617 3212
De Ford v. Johnson, 152 Mo. App. 209 4978
v. Maryland S. Co., 113 Fed. 72 172, 2633
De Forest v. Fulton F. Ins. Co., 1 Hall 84 3059
v. Leete, 16 Johns. 122 1364, 1370, 3941
DeForge v. New York, etc., R. Co., 178 Mass. 59 1475
De Forrest v. Leet, 16 Johns. 122 2151
DeFrance v. Austin, 9 Pa. 309 2540
De Francesco v. Piney Min. Co., — W. Va. —, 86 S. E. 777 5155
Defries v. Davis, 7 C. & P. 112 4515
Degnon-McL. C. Co. v. City Trust, etc., Co., 99 App. Div. (N. Y.) 195 1097, 2741
De Goer v. Kellar, 2 La. Ann. 496 820
De Goey v. Van Wyek, 97 Iowa 491 1694, 1696
De Graff v. Wickham, 89 Iowa 720 859, 860, 865, 885, 888, 893, 2585
De Graffenreid v. Menard, 103 Ga. 651 809, 815
De Groff v. American L. T. Co., 24 Barb. 375 886, 887
De Groot v. Darby, 7 Rich. 120 1239
De Harn v. Mexican National R. Co., 86 Tex. 68 4954
De Haven v. Helvie, 126 Ind. 82 4970
De Haviland v. Bowerbank, 1 Camp. 50 1033, 1108
Dehers v. Harriot, 1 Showers 163 1904
Dehler v. Held, 50 Ill. 491 1676, 1710, 1711
Dehon v. Stetson, 9 Metc. (Mass.) 341 629
Deibeikis v. Link-Belt Co., 261 Ill. 454 5153, 5154, 5157, 5158, 5159, 5160, 5163
Deighton v. Hover, 58 Wash. 12 4395
Deisenrieter v. Kraus-M. M. Co., 97 Wis. 279 52, 129
Deisher v. Gehre, 45 Kan. 583 4217
v. Stein, 34 Kan. 39 3184
Deitz v. Leete, 28 Mo. App. 540 536
Deitzler v. Wilhite, 55 Kan. 200 3705, 3714
DeJarnatt v. Marquez, 127 Cal. 558 1920
De Jarnette v. De Jarnette, 41 Ala. 708 1120
v. Dreyfus, 166 Ala. 138 2151, 2164
De Jernette v. Fidelity & C. Co., 98 Ky. 558 2752
DeLa Bere v. Pearson, [1908] 1 K. B. 280, aff'g [1907] 1 K. B. 483 179
De La Chaumette v. Bank, 9 B. & C. 208 1184, 1879
De La Cuesta v. Montgomery, 144 Cal. 115 1103
Delafield v. Armsby, 131 App. Div. (N. Y.) 572 2339, 2345
v. De Grauw, 3 Keyes 467 2371
v. Parish, 25 N. Y. 9 1424
v. Smith, 101 Wis. 664 2976
v. Westfield, 77 Hun 124 2656
De La Gardelle v. Hampton Co., 167 N. Y. App. Div. 617 5184
De La Garza v. Booth, 28 Tex. 478 1608
De La Grange v. Southwestern Tel. Co., 25 La. Ann. 383 3550
Delahunt v. United Tel. & T. Co., 215 Pa. 241 4894
Delamarre v. Bott, 78 N. J. L. 234 3855, 3881
Delancey St., In re, 120 App. Div. (N. Y.) 700 4089
De Lancy v. Georgia, etc., R. Co., 58 S. C. 357 3842
Deland v. Amesbury Mfg. Co., 7 Pick. 244 767
Deland M. & M. Co. v. Hanna, 112 Md. 528 2379
De Laney v. Blizzard, 7 Hun 7 3936
v. Great Bend I. Co., 79 Kan. 126 2456
v. Rochereau, 34 La. Ann. 1123 2994
v. United States Exp. Co., 70 W. Va. 502 3323, 3329
Delano v. Bartlett, 6 Cush. 364 1824
v. Bedford Ins. Co., 10 Mass. 347 3010
v. Bruerton, 148 Mass. 619 5101
v. Case, 121 Ill. 247 4369
v. Curtis, 7 Allen 470 480, 4201, 4298
v. Montague, 4 Cush. 42 3101
v. Smith, 206 Mass. 365 3836, 3837, 3838
Delany v. Hill, 1 Pittsb. 28 4277
v. Lindsay, 46 Pa. Super. Ct. 26 4639
v. Stoddard, 1 T. R. 22 2933
Delaplain v. Kansas City, 109 Mo. App. 107 4683
De Lashmutt v. Chicago, etc., R. Co., 148 Iowa 556 1359, 3858, 3893, 3936

[REFERENCES ARE TO PAGES]

Delaski v. Northwestern I. Co., 70 Wash. 143 1503, 4858
De Lavallette v. Wendt, 75 N. Y. 579 1093
Delavergne v. Norris, 7 Johns. 358 555, 556, 2136, 2151, 2152, 2157
De La Vergne R. M. Co. v. Stahl, 24 Tex. Civ. App. 471 4717, 4728, 4813
Delaware Bank v. Jarvis, 20 N. Y. 226 1869, 2382, 2383
Delaware C. Co. v. Lee, 22 N. J. L. 243 4145
Delaware Ins. Co. v. DeLaunie, 3 Bin. 295 1107, 1108
Delaware & H. C. Co. v. Dubois, 15 Wend. 87 2663
v. Mitchell, 92 Ill. App. 577 2275, 2294
v. Mitchell, 113 Ill. App. 429 2277
Delaware, etc., C. Co. v. Wright, 21 N. J. L. 469 3849, 3853
Delaware, etc., I. Co. v. Oxford I. Co., 38 N. J. Eq. 151 2835, 2841
Delaware, etc., R. Co. v. Burson, 61 Pa. 369 1139, 3855, 4098, 4150, 4156
v. Devore, 114 Fed. 155 4701, 4772
v. Jones, 188 Pa. 308 4890
v. Toffey, 38 N. J. L. 525 1491
v. Walsh, 47 N. J. L. 548 3476
v. Yurkonis, 220 Fed. 429, aff'g 213 Fed. 537, 238 U. S. 439 5048
Delaware, etc., Tel. Co. v. Fiske, 40 Ind. App. 348 3774
De Lazardi v. Hewitt, 7 B. Mon. 697 2955
De La Zerda v. Korn, 25 Tex. Supp. 188 3189, 3216
Del Col v. Arnold, 3 Dall. 333 236
Del Curto v. Billingsley, — Tex. Civ. App. —, 169 S. W. 393 2278
Delegal v. Highley, 3 Bing. N. C. 950 4635
v. Highley, 8 C. & P. 444 4513, 4566
v. Naylor, 7 Bing. 460 616, 4278
DeLeon v. McKernan, 25 N. Y. Misc. 182 165, 3538
Deleshaw v. Edelen, 31 Tex. Civ. App. 416 4159
Delevan v. Bates, 1 Mich. 97 461
Delie v. Chicago, etc., R. Co., 51 Wis. 400 138, 4683
De Lisle v. St. Louis, etc., R. Co., 149 Mo. App. 8 3345
Delker v. Hess, S. & A. Co., 138 Fed. 647 2259
Dellapiazza v. Foley, 112 Cal. 380 664
Deluage v. Crow, 22 N. Y. Misc. 511 4669
Delmer-Wallen Co. v. Delaware L. & W. R. Co., 89 Misc. (N. Y.) 252 231
Delmonte v. Southern Pac. Co., 2 Cal. App. 211 3438, 3461, 3471
Deloach v. Dixon, Hempst. 428 423
DeLoach M. Mfg. Co. v. Bonner, 64 Ark. 510 2645
Delong v. Curtis, 35 Hun 94 773
v. Peragio, Bee 212 2723
v. Spring Lake & S. G. Co., 65 N. J. L. 1 2056, 2060, 2061, 2073, 2135, 2159, 2182, 2185
Delp v. Edlis, 190 Pa. 25 233, 257, 1072
Delphos, The, 1 Newb. 412 2721
Delta B. Co. v. Leyland, 173 Ill. App. 38 3340, 3414, 3419
Deluise v. Long Island R. Co., 65 App. Div. (N. Y.) 487 3188
De Luna v. Union R. Co., 130 App. Div. (N. Y.) 386 4907, 4944
Delvee v. Boardman, 20 Iowa 446 4965
DeMange v. Bloomington, 155 Ill. App. 49 40
Demarest v. Little, 47 N. J. L. 28 4889, 4903
Demarett v. Bennett, 29 Tex. 262 2204
Demars v. Hudon, 33 Mont. 170 1119
v. Kohler, 62 N. J. L. 203 2093, 2149
v. Musser-S. L. Co., 37 Minn. 418 757
Demartin v. Albert, 68 Call. 277 531
De Mattos v. Saunders, 7 C. P. 570 453
De May v. Roberts, 46 Mich. 160 3650
De Medina v. Grove, 10 Q. B. 168 4606
v. Polson, Holt's N. P. 47 3098
Demenstein v. Richardson, 2 Pa. Dist. 825 1462
Dement v. Walla Walla, 58 Wash. 60 3888
Demeules v. Jewel T. Co., 103 Minn. 150 748
Deming v. Chicago, etc., R. Co., 80 Mo. App. 152 3480
v. Foster, 42 N. H. 165 2373, 2374, 2386
v. Grand Trunk R. Co., 48 N. H. 455 3349, 3354, 3364, 3378
v. Kemp, 4 Sandf. 147 553, 2231
v. Merchants' C. P., etc., Co., 90 Tenn. 306 2914
DeMinico v. Craig, 207 Mass. 593 334
Deming I. Co. v. Baird, 32 Okla. 393 833
v. Wallace, 73 Kan. 291 1824
De Montague v. Bacharach, 187 Mass. 128 2464, 2466
Dempsey v. Baltimore & O. R. Co., 219 Fed. 619 488, 4791
v. Bush, 18 Ohio St. 376 772
v. Dorrance, 151 Mo. App. 429 2498
v. Schawacker, 140 Mo. 680 1102
v. Western U. Tel. Co., 77 S. C. 399 3618, 3630
Dempster v. Lansingh, 128 Ill. App. 388 1491, 1713, 1730, 1760
v. Lansingh, 234 Ill. 381 1719, 1725, 1728
v. Mann, 157 Fed. 319 4505
v. Simpson, 7 West Aust. L. R. 103 2403, 2448
Den v. McShane, 13 N. J. L. 35 3693
Den's Est., 35 Cal. 692 1214
Denbeigh v. Oregon-W. R. & N. Co., 23 Idaho 663 1512, 4659, 4690, 4725, 4729, 4746
Den Bleyker v. Gaston, 97 Mich. 354 2284, 2285
Denchfield v. Minneapolis, etc., R. Co., 114 Minn. 58 115
Dendy v. Russell, 84 Kan. 377 10
Denecke v. Miller, 142 Iowa 486 3175
Deneen v. Unverzagt, 225 Ill. 378 4148
Denew v. Daverell, 3 Camp. 451 494, 537
Dengler v. Auer, 55 Mo. App. 548 2626
Denham v. Kirkpatrick, 64 Ga. 71 4428
v. Stone, 7 J. J. Marsh. 176 985
Denicke, The A., 138 Fed. 645 3318, 3322
Dening v. Grand Trunk R. Co., 48 N. H. 455 140
Deninger v. American Locomotive Co., 107 C. C. A. 126, 185 Fed. 22 4923, 4931, 4932
Denio v. State, 60 Miss. 949 1596
Denison v. Ford, 10 Daly 412 3220, 3815
v. Gibson, 24 Mich. 187 2825
v. Lewis, 5 D. C. App. Cas. 328 1503
v. Shawmut M. Co., 135 Fed. 864 1447
v. Taylor, 6 Ont. App. 93 2404
Denison, etc., R. Co. v. Barry, 98 Tex. 248 94, 3877, 3906

[REFERENCES ARE TO PAGES]

Denison, etc., R. Co. v. Freeman, 38 Tex. Civ. App. 152 147
v. Randell, 29 Tex. Civ. App. 460 3502
Denman v. Chicago, etc., R. Co., 52 Neb. 140 3328
Denn v. Chubb, 1 N. J. L. 466 3694, 3696, 3698
Dennery v. Bisa, 6 La. Ann. 365 265
Denney v. Northwestern C. Ass'n, 55 Wash. 331 1370, 4540
Dennick v. Central R., 103 U. S. 11 4952, 4953
Denning v. Carlisle P. Co., 226 U. S. 102 1806
v. Henderson, 1 DeG. & Sm. 689 1968
Dennis v. Barber, 6 S. & R. 420 4211, 4271, 4273
v. Belt, 30 Cal. 247 534, 537, 558
v. Clark, 2 Cush. 347 3515, 4767, 4771
v. Crocker-H. L. & W. Co., 6 Cal. App. 58 3893, 3895
v. Cummins, 3 Johns. Cas. 297 858, 864, 869, 881, 883, 884
v. Dennis, 2 Saund. 328 3721
v. McLaurin, 31 Miss. 606 703, 706
v. Maxfield, 10 Allen 138 252, 255, 2552, 2555
v. Rider, 2 McLean 451 2820
v. Ryan, 65 N. Y. 385 4614
v. Stoughton, 55 Vt. 371 191, 4194
Dennison v. Aldrich, 114 Mo. App. 700 2511
v. Daily News P. Co., 82 Neb. 675 4510, 4523, 4536
v. Gault, 132 Mo. App. 301 2512
v. Grove, 52 N. J. L. 144 3260
v. Hyde, 6 Conn. 507 4198
v. Lee, 6 Gill & J. 383 1067, 3147
v. Mair, 14 East 622 1404
v. Nyde, 6 Conn. 507 4160
v. Plumb, 18 Barb. 89 1601
v. Soper, 33 Iowa 183 2834
v. Taylor, 6 Ont. L. R. 93 179
v. Van Wormer, 107 Mich. 461 61
Denniston v. Philadelphia Co., 1 Pa. Super. Ct. 599 4003
Denny v. New York Cent. R. Co., 13 Gray 481 139, 2636, 3332
v. Reynolds, 24 Ind. 248 1674
v. Seeley, 34 Ore. 364, 368 2810
v. Wickliffe, 1 Metc. (Ky.) 226 2211
Deno v. Thomas, 64 Vt. 358 4286
Densch v. Scott, 58 Ill. App. 33 1720, 1728, 1742, 1751
Denser v. Gunn, 74 Kan. 748 1953
Denslow v. Van Horn, 16 Iowa 476 502, 1284, 3671, 3677, 3681, 3686
Densmore v. Mathews, 58 Mich. 616 4173, 4174, 4175
Denson v. Love, 58 Tex. 471 2117
Denston v. Henderson, 13 Johns. 322 1903, 1907
v. Perkins, 2 Pick. 86 2905, 2973
Dent v. Davison, 52 Ill. 109 1556
v. Dunn, 3 Camp. 290 1229, 1231
v. King, 1 Ga. 200 2852, 2858
v. McGrath, 3 Bush 174 2396
v. Pickens, 34 W. Va. 240 3663, 3669, 3674, 3676, 3679
v. Smith, L. R. 4 Q. B. 414 3034
v. South Bound R. Co., 61 S. C. 329 1432, 3774
v. State Bank, 12 Ala. 275 703, 715
Dentley v. Harris, 2 Gratt. 358 2859
Denton v. Butler, 99 Ga. 264 980
v. Crouch, 101 Ky. 386 1638
v. Denton, 17 Md. 403 418
v. Gill, 102 Md. 386 294, 2446
Denton v. Great Northern R. Co., 5 El. & B. 860 327, 3449, 3456
v. Jackson, 106 Ill. 433 2965
v. Livingston, 9 Johns. 98 633
v. Nanny, 8 Barb. 618 3731
v. Nashville T. Co., 112 Tenn. 320 209
v. Rodie, 3 Camp. 491 1072
v. Smith, 61 Mich. 431 1438
v. Wood, 11 Lea 505 1790
Dentzel v. City & S. R. Co., 90 Md. 434 684
Denver v. Atchison, etc., R. Co., 96 Kan. 154 5106
v. Barber A. P. Co., 141 Fed. 69 1111
v. Bayer, 7 Colo. 113 12, 3876
v. Bonesteel, 30 Colo. 107 3963
v. Dunsmore, 7 Colo. 328 1495
v. Hayes, 28 Colo. 110 1044
v. Human, 9 Colo. App. 144 1363
v. Hyatt, 28 Colo. 129 135, 136, 3452, 4676, 4691
v. Johnson, 8 Colo. App. 384 104
v. Sherret, 88 Fed. 226 4714, 4727, 4748
Denver B. & M. Co. v. McAllister, 6 Colo. 261 1202
Denver City I. & W. Co. v. Middaugh, 12 Colo. 434 4014, 4145
Denver City T. Co. v. Cowan, 51 Colo. 64 1382, 4711
v. Martin, 44 Colo. 324 1471, 4656
v. Roberts, 43 Colo. 522 1461
Denver Con. E. Co. v. Lawrence, 31 Colo. 301 4793
Denver Con. T. Co. v. Riley, 14 Colo. App. 132 412, 4757, 4759
Denver E. Works Co. v. Elkins, 179 Fed. 922 2236
Denver L. & S. Co. v. Rosenfeld C. Co., 19 Colo. 539 858
Denver P. B. Co. v. Young, 49 Colo. 498 1031, 2218
Denver Pressed Brick Co. v. Le Fevre, 25 Colo. App. 304 2603
Denver U. & P. R. Co. v. Barsaloux, 15 Colo. 297 769
Denver, etc., R. Co. v. Conway, 8 Colo. 1 1140
v. De Witt, 1 Colo. App. 419 3365
v. Dotson, 20 Colo. 304 3750
v. Frame, 6 Colo. 382 430, 3397
v. Frederic, 57 Colo. 90 4865
v. Gunning, 33 Colo. 280 4889, 4891, 4892, 4905
v. Hannegan, 43 Colo. 122 3968, 3980, 4020
v. Harp, 6 Colo. 420 816
v. Harris, 122 U. S. 597 1265, 1331, 1332, 1336, 1384, 3507, 4680, 4683, 5092
v. Heckman, 45 Colo. 470 1440, 1494, 3860
v. Howe, 49 Colo. 256 1357, 3962, 4033
v. Hutchins, 31 Neb. 572 2341
v. Lorentzen, 24 C. C. A. 592, 79 Fed. 291 4732
v. Mitchell, 42 Colo. 43 1381
v. Roller, 100 Fed. 738 77, 1427, 1428, 4667, 4742, 4746, 4748
v. Schmitt, 11 Colo. 56 3969
v. Scott, 34 Colo. 99 1499, 4797
v. Spencer, 25 Colo. 9 4859, 4899
v. Sullivan, 21 Colo. 302 767, 768, 773
v. Whan, 39 Colo. 230 3341
v. Young, 30 Colo. 349 4700
Deobold v. Oppermann, 111 N. Y. 531 1638

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Depau v. Ocean Ins. Co., 5 Cow. 63 3034
Depeau v. Humphreys, 8 Mart. (N. S.) 1 1162
Depew v. Ketchum, 75 Hun 227 250
v. Peck H. Co., 121 App. Div. (N. Y.) 28 2370, 2438, 2439, 2443
v. Robinson, 95 Ind. 109 4502, 4531, 4543
De Peyster v. Clarkson, 2 Wend. 77 1127
Deppe v. Chicago, etc., R. Co., 38 Iowa 592 1480
Deputy v. Dollarhide, 42 Ind. App. 554 1357, 1361
Depuy v. Clark, 12 Ind. 427 678, 4289
v. Cook, 90 Hun 43 4921
v. Gray, 1 Ala. 357 1557
v. Kann, 32 App. Div. (N. Y.) 638 1504
Deragon v. Sero, 137 Wis. 276 1267
Derberry v. Darnell, 5 Yerg. 451 1890
Derby v. Gallup, 5 Minn. 119 1457
v. Johnson, 21 Vt. 17 291, 1938, 2663, 2688, 2696
Derdeyn v. Donovan, 81 Miss. 696 1718
v. Derham, 123 Mich. 451 4537
v. Derham, 125 Mich. 109 4981, 4982
DeRham v. Grove, 18 Abb. Pr. 43 1904
Deri v. Union Bank, 65 N. Y. Misc. 531 4273, 4308
Dering v. Earl of Winchelsea, 1 Cox 318 2851, 2865
v. Earl of Winchelsea, 2 B. & P. 270 2859
Derleth v. Degraaf, 51 N. Y. Super. 369 2331
Dermott v. Jones, 2 Wall. 1 537, 2458, 2527, 2607, 2666
v. Jones, 23 How. 220 356, 2667
Dern v. Kellogg, 54 Neb. 560 2929, 2939
Derocher v. Continental Mills, 58 Me. 217 2466, 2540
Derosa v. Hamilton, 3 Pa. Dist. Rep. 404 774
Derr C. Co. v. Gelruth, 29 Okla. 538 1417
Derrick v. Jones, 1 Stew. 18 1357
Derringer v. Plate, 29 Cal. 292 4485
Derry v. Board of Education, 102 Mich. 631 2546
v. Flitner, 118 Mass. 131 113
v. Handley, 16 L. T. (N. S.) 263 157
v. Peek, 14 App. Cas. 337 4384, 4408
Derry Bank v. Heath, 45 N. H. 524 306, 1719, 1754
De Rutte v. New York, etc., Tel. Co., 30 How. Pr. 403, 1 Daly 547 3546, 3550, 3579
Des Allemands L. Co. v. Morgan City T. Co., 117 La. 1 227, 2695, 2701, 2704
Deschamps v. Atlantic C. L. R. Co., 84 S. C. 358 3419
De Severinus v. Press P. Co., 147 App. Div. (N. Y.) 161 4549, 4590
v. Press Pub. Co., 148 App. Div. (N. Y.) 921 1500
De Sewhanberg v. Buchanan, 5 C. & P. 343 516, 1835, 1848
Desha v. Robinson, 17 Ark. 228 537, 561, 2456
v. Smith, 20 Ala. 747 1071
Deshler v. Beers, 32 Ill. 368 2956
v. Holmes, 44 N. J. Eq. 581 1048
De Silver, Estate of, 9 Phila. 302 2770
Desio v. Hutchinson, 36 App. D. C. 68 1788
De Sisto v. Stimmel, 58 App. Div. (N. Y.) 486 1603
Deslandes v. Scales, 187 Ala. 25 226, 3240
Deslonde v. O'Hern, 39 La. Ann. 14 4623
Desnoyer v. McDonald, 4 Minn. 515 1184, 1879
De Sobry v. De Laistre, 2 H. & J. 193 1145
De Soysa v. De Pless Pol, [1912] App. Cas. 194 832, 889
Dessinger v. Gevurtz, 69 Ore. 304 821
De Steiger v. Hannibal, etc., R. Co., 73 Mo. 33 1140
DeStruve v. McGuire, 25 Ont. L. R. 87 59, 153
v. McGuire, 25 Ont. L. R. 491 59, 153
De Sylva v. Henry, 3 Port. 132 638
De Tastet, Ex parte, 1 Rose 10 1816, 1817
De Tastet v. Baring, 11 East 265 1895
De Tastett v. Crousillat, 2 Wash. C. C. 132 287, 2914
Deter v. Jackson, 76 Kan. 568 2511
Dethample v. Lake Koen N., R. & I. Co., 73 Kan. 54 4018, 4095
Detmer-Wallen Co. v. Delaware, L. & W. R. Co., 89 Misc. (N. Y.) 252 171
Detmold v. Drake, 46 N. Y. 318 4152
Detrich v. Metropolitan St. R. Co., 125 Mo. App. 608 4732
Detroit v. Beecher, 75 Mich. 454 4007, 4019, 4026, 4028
v. Detroit United R., 156 Mich. 106 3969, 3983, 3989, 4006
v. Detroit, etc., R. Co., 112 Mich. 304 4063
v. Gleason, 116 Mich. 564 3101
v. Grand Trunk R. Co., 163 Mich. 229 12
v. Grant, 135 Mich. 626 298, 299
v. Little, 146 Mich. 373 4012, 4091
v. People's Tel. Co., 135 Mich. 696 835, 866, 888
v. Weber, 26 Mich. 184 1592
v. Weber, 29 Mich. 24 1582, 1584
Detroit Daily Post v. McArthur, 16 Mich. 447 163, 1298, 3515, 4519, 4547, 4551, 4598
Detroit Free Press v. Pattengill, 155 Mich. 272 2749
Detroit G. Co. v. Moreton T. & S. Co., 111 Mich. 401 344
Detroit River T. Co. v. Aldrich, 176 Mich. 357 569
Detroit W. L. Works v. Knaszak, 13 N. Y. Misc. 619 172, 183, 2341
Detroit & M. R. Co. v. Griggs, 12 Mich. 45 556, 2210
Detroit, etc., R. Co. v. Kimball, 211 Fed. 633 4711
v. Smith, 50 Mich. 112 623
v. Van Steinburg, 17 Mich. 99 1421
Detzur v. Stroh B. Co., 119 Mich. 282 1503
Deuninck v. West Gallatin I. Co., 28 Mont. 255 886
Deutsch v. Pratt, 149 Mass. 415 2405, 2408
Deux v. Jefferies, Cro. Eliz. 353 780
Devaney v. Otis E. Co., 251 Ill. 28 488, 1531
Devaughn v. Heath, 37 Ala. 595 1281, 3827, 4165
Development Co. v. King, 170 Fed. 923 2559
Devencenzi v. Cassinelli, 28 Nev. 222 699

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Devereux v. Burgwin, 11 Ired. 490 1038
Devers v. May, 124 Ky. 387 3189, 3191, 3196, 3231
Devery v. Grand C. Co., 9 Irish C. L. 194 3876
Devin v. Himer, 29 Iowa 297 1959, 1996
Devine v. Brooklyn Heights R. Co., 131 App. Div. (N. Y.) 142 4654, 4666, 4684
v. Chicago, 172 Ill. App. 246 4885
v. Chicago City R. Co., 153 Ill. App. 382 1510, 4944
v. Chicago, etc., R. Co., 185 Ill. App. 488, aff'd 266 Ill. 248, aff'd 239 U. S. 52 5067, 5085, 5104, 5105
v. City of St. Louis, 257 Mo. 470 1500
v. Edwards, 10 Ill. 138 1014
v. Grand Trunk Western Ry. Co., 188 Ill. App. 612 4878
v. Lewis, 38 Minn. 24 2134
Devir v. Curley, 3 New South Wales L. R. 322 4779
Devis v. Vanceburg Tel. Co., 121 Ky. 177 109
De Visme v. De Visme, 1 Macn. & G. 336 1026, 1970, 2036
Devitt v. Providence W. Ins. Co., 173 N. Y. 17 3005, 3014, 3015
Devlin v. Mayor, 60 Hun 68 940
v. Mayor, 63 N. Y. 8 252
v. Mayor, 131 N. Y. 123 4157
v. Philadelphia, 206 Pa. 518 4098
v. Pike, 5 Daly 85 4215
Devoe v. Brandt, 53 N. Y. 462 3685
Devol v. McIntosh, 23 Ind. 529 2192
Devonian, The, 150 Fed. 831 2726, 2729, 2738
Devore v. Sunderland, 17 Ohio 52 2058, 2086, 2173
Devoy v. St. Louis T. Co., 192 Mo. 197 3528, 4745
De Wald v. Ingle, 31 Wash. 616 1430
Dewall v. Price, 2 Show. P. C. 15 1572
De Wardener v. Metropolitan St. R. Co., 1 App. Div. (N. Y.) 240 4811
Deweese v. Muff, 57 Neb. 17 685
Dewey v. Bell, 5 Allen 165 661
v. Bobbitt, 79 Kan. 505 1824
v. Bowman, 8 Cal. 145 949, 1874
v. Clark I. Co., 48 Minn. 130 2791
v. Derby, 20 Johns. 462 767
v. Gray, 2 Cal. 374 3122
v. Humphrey, 5 Pick. 187 785, 1230
v. Osborn, 4 Cow. 329 3699
v. Railroad, 142 N. C. 392 6
Dewing v. Sears, 11 Wall. 379 606
Dewint v. Wiltse, 9 Wend. 325 216, 357, 1369, 3213
Dewire v. Hanley, 79 Conn. 454 2
Dewit v. Greenfield, 5 Ohio 225 471, 472, 4569, 4573, 4574, 4579, 4581, 4584
De Witt v. Barly, 17 N. Y. 340 1420, 1423
v. Berry, 134 U. S. 312 2386
v. Cullings, 32 Wis. 298 538
v. Keystone Nat. Bank of Pittsburgh, 243 Pa. 534 1117
v. Morris, 13 Wend. 496 4357
v. Perkins, 22 Wis. 445 1823
v. Pierson, 112 Mass. 8 3127
v. Scarlett, 113 Md. 47 4505, 4539
DeWitz v. Saner-W. L. Co. (Tex. Civ. App.), 155 S. W. 980 3789
De Wolf v. Ford, 193 N. Y. 397 347
v. Johnson, 10 Wheat. 367 992, 1147, 1156, 1158, 1159, 1178
De Wolf v. Long, 7 Ill. 679 817
v. Royal T. Co., 173 Ill. 435 3100
De Wolfe v. Taylor, 71 Iowa 648 802
Dexter v. Arnold, 3 Mason 284 1073, 1117
v. Collins, 21 Colo. 455 1093
v. Manley, 4 Cush. 14 548, 2068, 3183, 3188, 3189, 3205, 3206, 3261
v. Norton, 47 N. Y. 62 2307, 2534, 2607
v. Norton, 55 Barb. 272 2225
v. Spear, 4 Mason 115 47, 4518
v. Syracuse, etc., R. Co., 42 N. Y. 326 3531
Dey v. Dox, 9 Wend. 129 2276, 2297, 2310
v. Nason, 100 N. Y. 166 1999
Deyo v. Hudson, 89 Misc. (N. Y.) 525 49
v. Van Valkenburgh, 5 Hill 242 37
v. Waggoner, 19 Johns. 241 183, 290
De Zeng v. Bailey, 9 Wend. 336 778
Diagneau v. Grand Trunk R. Co., 153 Fed. 593 1510
Dial v. Holter, 6 Ohio St. 228 4502
v. Inland L. Co., 52 Wash. 81 632
Diamond v. Fay, 23 Cal. App. 566 2513
Diamond D. Co. v. Gott, 137 Ky. 585 684
Diamond D. & M. Co. v. Kelley, 131 Fed. 89 4463
Diamond M. Co. v. Roeber, 106 N. Y. 473 929
v. Silberstein, 165 Cal. 282 1032
Diamond Mills E. Co. v. Philadelphia, 8 Pa. Dist. 30 3996
Diamond R. Co. v. Harryman, 41 Colo. 415 1378, 4721, 4672, 4718
Diamond State Tel. Co. v. Blake, 105 Md. 570 1522
Diamond Stone-S. Mach. Co. v. Brown, 155 Fed. 753 4440, 4476
v. Brown, 166 Fed. 306 4439
Diamond, etc., S. Co. v. Smith, 27 Tex. Civ. App. 558 3827
Diana Shooting Club v. Kohl, 146 Wis. 257 32, 3737
v. Lamoreux, 114 Wis. 44 32
Dias v. Freeman, 5 T. R. 195 1655
v. Glover, Hoff. Ch. 71 1026
v. Wanmaker, 1 Sandf. 469 753
Dibbert v. Metropolitan Inv. Co., 158 Wis. 69 3469
Dibble v. Brown, 12 Ga. 217 3531
v. Dimick, 143 N. Y. 549 2519
v. Morris, 26 Conn. 416 170, 4190, 4271
v. New York & E. R. Co., 25 Barb. 183 760, 4854
Di Benedetto v. Milwaukee E. R. & L. Co., 149 Wis. 566 1310, 3503
Diblin v. Murphy, 3 Sandf. 19 1495, 1512, 3528
Dice v. Sherberneau, 152 Mich. 601 59
Dice's Adm'r v. Zweigart's Adm'r, 161 Ky. 646 171
Dick v. Crowder, 10 Sm. & M. 71 2767
v. Flanagan, 122 Ind. 277 661
v. Webster, 6 Wis. 481 396
Dick Co. v. Sherwood L. F. Co., 157 Ill. 325 1035
Dick's Est., 183 Pa. 647 1130
Dicken v. Morgan, 54 Iowa 684 1841
v. Shepherd, 22 Md. 399 4539, 4540
v. Smith, 1 Litt. 209 1397
Dickenson v. Bankers' L. & I. Co., 93 Va. 498 978
v. Fitchburg, 13 Gray 546 1461, 3957, 3964, 4033, 4096, 4104, 4134
v. Harrison, 4 Price 282 1033

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v. Duluth, 88 Minn. 288 3951
v. New York, etc., R. Co., 72 Conn. 271 3990
v. Reeder, 59 Wash. 405 888, 2683
Dickerson v. Bradford, 59 Ala. 581 2490
v. Finley, 158 Ala. 149 170, 196, 475
v. Robinson, 6 N. J. L. 202 1635
v. State, 20 Neb. 72 1560
Dickey v. Linscott, 20 Me. 453 2307, 2529, 2534
v. Thompson, 8 B. Mon. 312 572
v. Trustees Putnam School, 197 Mass. 468 2464
v. Western, 61 N. H. 23 2056, 2084
Dickins v. New York Cent. R. Co., 23 N. Y. 158 417
v. Sheppard, 3 Murph. 526 2112
Dickinson v. Arkansas City I. Co., 77 Ark. 570 3107
v. Atkins, 100 Ill. App. 401 1322, 4377, 4386, 4433
v. Baltimore, 48 Md. 583 3836
v. Barber, 9 Mass. 225 1461
v. Boyle, 17 Pick. 78 73, 1368, 3814, 3815
v. Bull, 72 Ill. App. 75 1815
v. Delaware, L. & W. R. Co., — N. J. L. —, 93 Atl. 703 3982
v. Edwards, 77 N. Y. 573 1167
v. Gould, 2 Tyler 32 1101
v. Hall, 14 Pick. 217 556, 1826, 1828, 1956
v. Hart, 142 N. Y. 183 244, 254, 268, 2573
v. Hoomes, 8 Gratt. 406 2124
v. Kansas City E. R. Co., 74 Kan. 863 1461
v. Maul, 4 B. & Ad. 638 2396
v. Noland, 7 Ark. 25 4349
v. Northeastern R. Co., 2 H. & C. 735 418
v. Norwegian P. Co., 101 Wis. 157 2522
v. Pere Marquette R. Co., 148 Mich. 461 1511
v. Shee, 4 Esp. 68 802, 804
v. Talmage, 138 Mass. 249 2559, 2570
v. Tunstall, 4 Ark. 170 1874
Dickinson C. Co. v. Lyle, — Tex. Civ. App. —, 130 S. W. 904 3209
Dickinson F. & P. Co. v. Crowe, 63 Wash. 550 1094, 2218
Dickinson's Est., 14 P. Dist. 4 1035
Dickson, In re, L. R. 12 Eq. 154 2211
Dickson v. Bichkershoff, 48 N. Y. Misc. 353 1668
v. Burks, 11 Ark. 307 1824
v. Chicago, etc., R. Co., 71 Mo. 575 401, 3852
v. Desire, 23 Mo. 151 2117, 2127, 2173, 2187
v. Hollister, 123 Pa. 421 4681
v. Lough, 18 L. R. Ir. 518 918
v. McCoy, 39 N. Y. 400 66, 70, 122
v. Reuter Tel. Co., 2 C. P. Div. 62 3607
v. Screven, 23 S. C. 212 2942
v. Stewart, 71 Neb. 424 740
v. Surginer, 3 Brev. 417 1008
v. Tel. Co., 2 C. P. Div. 62 3607
v. Zizinia, 10 C. B. 602 2386
Diddle v. Augur, 7 Blatch. 86 4450
Diebold v. Sharp, 19 Ind. App. 474 4930
Diebold S. & L. Co. v. Holt, 4 Okla. 479 1433
v. Huston, 55 Kan. 104 2369, 2376
Diedrich v. Northwestern R. Co., 47 Wis. 662 1538
Diefendorff v. Gage, 7 Barb. 18 1437, 1826
Diehl v. Adams County Mut. Ins. Co., 58 Pa. 452 3021
v. Davis, 75 Kan. 38 2793
v. Friester, 37 Ohio St. 473 591, 593
Diels v. Kennedy, 88 Neb. 777 2236, 2274
Diermeyer v. Hackman, 52 Mo. 282 756
Diestal v. Stevenson, [1906] 2 K. B. 345 862, 865, 884, 889, 919, 923
Dietrich v. Badders, 4 Boyce (Del.) 499 2389, 2455
v. Ely, 63 Fed. 413 548
v. Hannibal, etc., R. Co., 89 Mo. App. 36 312, 476
v. Northampton, 138 Mass. 14 29, 4895
Dietz v. Big Muddy C. & I. Co., 263 Ill. 480 5149, 5150, 5177, 5178
Digby v. Atkinson, 4 Camp. 275 3153, 3165
Digges v. Norris, 3 Hen. & Munf. 268 1354
Diggs v. Henson, 181 Mo. App. 34 2097, 2127
v. Wabash R. Co., 131 Mo. App. 457 3774, 3782
Dighera v. Wheat, 85 Kan. 458 4158
Digman v. Spokane County, 43 Wash. 419 104
v. Spurr, 3 Wash. 309 2369
Dike v. Andrews, 80 Neb. 455 1054
v. Greene, 4 R. I. 285 839
v. Propeller St. Joseph, 6 McLean 573 3037
Dikeman v. Arnold, 71 Mich. 656 1989, 1996, 2052
v. Arnold, 78 Mich. 455 1958
Dilenbeck v. Rehse, 105 Iowa 749 685
Dill v. Ellicott, Taney 233 983
v. Lawrence, 109 Ind. 564 860, 2755
v. Mumford, 19 Ind. App. 609 2244
v. O'Ferrell, 45 Ind. 268 2370
Dillahunty v. Railway Co., 59 Ark. 629, 28 Ark. 657 2117, 2120
Dillard v. Evans, 4 Ark. 175 1886, 1887, 2330
v. McClure, 64 Mo. App. 488 4358
v. Moore, 7 Ark. 466 2388
v. Stringfellow, 50 Tex. Civ. App. 410 1758
Dille v. White, 132 Iowa 327 664
Dillehay v. Hickey, 24 Ky. L. Rep. 760 1288
Dillenbach v. Rossend Castle, The, 30 Fed. 462 823
Dillenback v. Jerome, 7 Cow. 294 4169, 4211, 4232
Dillender v. St. Louis, etc., R. Co., 149 Mo. App. 331 3311
Diller v. Northern California P. Co., 162 Cal. 531 4907
v. Roberts, 13 S. & R. 60 3100
Dilley v. Ratcliff, 29 Tex. Civ. App. 545 2364, 2415
v. Thomas, 106 Ark. 274 42, 883, 918
Dilliard v. Tomlinson, 1 Munf. 183 1117
Dillier v. Cleveland, etc., R. Co., 34 Ind. App. 52 4855
Dillingham v. Jenkins, 7 Sm. & M. 479 2743
v. Kerr (Tex. Civ. App.), 139 S. W. 911 785
v. Russell, 73 Tex. 47 1139, 1338, 3514
Dillman v. Nadelhoffer, 160 Ill. 121, 124 2743
Dillon v. Anderson, 43 N. Y. 231 293, 312, 314, 375

[REFERENCES ARE TO PAGES]

Dillon v. Dudley, 1 A. K. Marsh, 65 1105
v. Hudson, etc., R. Co., 73 N. H. 367 4891
v. Hunt, 105 Mo. 154, 163 489
v. McRae, 40 Ga. 107 985
v. Mundet (Misc.) 145 N. Y. Supp. 975 4187
v. Raleigh, 124 N. C. 184 104
v. Suburban Land Co., 73 W. Va. 363 2598, 2648, 2682
Dilts v. Plumville R. Co., 222 Pa. 516 3988, 3994, 3998, 4095, 4147
Diltz v. Spahr, 16 Ind. App. 591 2500
Dilworth v. Curts, 139 Ill. 508 1252
v. McKelvey, 30 Mo. 149 1680, 4359
v. Sinderling, 1 Bin. 488 1186
Dimes v. Scott, 4 Russ. 195 1085
Dimmey v. Wheeling & E. G. R. Co., 27 W. Va. 32 4891
Dimmick v. Lockwood, 10 Wend. 142 1028, 2012, 2112, 2159, 2185
Dimmitt v. Hannibal, etc., R. Co., 40 Mo. App. 654 148, 4657
Dimock v. Suffield, 30 Conn. 129 161
Dine v. Donnelly, 134 Ky. 776 1523, 2797
Dinger v. New York, 42 N. Y. Misc. 319 1418, 3881
Dingle v. Hare, 7 C. B. (N. S.) 145 4410
Dingley v. Oler, 11 Fed. 372 377, 2255
Dinkelspiel v. Lons, 119 La. 236 1447
v. New York Evening Journal P. Co., 42 N. Y. Misc. 74 4573, 4574, 4590
Dinnihan v. Lake Ontario Beach I. Co., 8 App. Div. (N. Y.) 509 4941
Dinock v. United States Nat. Bank, 55 N. J. L. 296 4245
Dinsman v. Wilke, 12 How. 405 4842
Dinsmore v. Austill, Minor 89 1358, 1541
Dinwiddie v. Stone, 21 Ky. L. Rep. 584 4403
Diossy v. Morgan, 74 N. Y. 1 1684
Di Palma v. Weinman, 16 N. M. 302 1490, 3209
Disbrow v. Creamery & P. Mfg. Co., 110 Minn. 237 19
v. Garcia, 52 N. Y. 654 1719, 1728
v. Westchester H. Co., 164 N. Y. 415 3774, 3776, 3781
Dismukes v. Wright, 3 Dev. & Bat. 78 674
Disney v. Lang, 90 Kan. 309 4391
Disosway v. Edwards, 134 N. C. 254 861, 887
Dissenger's Case, 39 N. J. Eq. 227 1127
Distilled Spirits, The, 11 Wall. 356 360
Distin v. Bradley, 83 Conn. 466 1302, 1310
v. Rose, 69 N. Y. 122 473, 4570, 4580, 4586
Distler v. Missouri Pac. R. Co., 163 Mo. App. 674 3501
District of Columbia v. Armes, 8 App. Cas. (D. C.) 393 4118
v. Ball, 22 App. Cas. D. C. 543 1627
v. Camden I. Works, 15 App. Cas. (D. C.) 198, 222 1004
v. Harlan, 30 App. Cas. (D. C.) 270 832, 833, 842, 888
v. Hess, 35 App. Cas. (D. C.) 38 4148
v. Hutchinson, 1 App. Cas. D. C. 403 3759
v. Johnson, 165 U. S. 330 1039
v. Metropolitan R. Co., 8 D. C. App. Cas. 322 1032
v. Prospect Hill Cemetery, 5 App. Cas. (D. C.) 497, 518 4118
v. Robinson, 14 App. Cas. (D. C.) 512, 547 3765
District of Columbia v. Wilcox, 4 App. Cas. (D. C.) 90 1395
v. Woodbury, 136 U. S. 450, 459 4711, 5133
Ditmars v. Sackett, 81 Hun 317 4347, 4351
Dittman v. Edison E. Co., 87 App. Div. (N. Y.) 68 1381
Dittrich v. Gobey, 119 Cal. 599 834
Divina, The, [1892] Prob. 58 2738
Divine v. McCormick, 50 Barb. 116 2377
Divoll v. Atwood, 41 N. H. 449 994
Dix v. Marcy, 116 Mass. 416 2465
Dixie v. Harrison, 163 Ala. 304 4222
Dixie C. Co. v. Southern Exp. Co., 120 N. C. 348 3335
Dixie F. Ins. Co. v. Betty, 101 Miss. 880 4591
Dixon, In re, 2 McCrary 556 754
Dixon v. Bell, 5 M. & S. 198 70
v. Bell, 1 Stark. 287 403, 412, 4734
v. Calcraft, [1892] 1 Q. B. 458 3309
v. Caldwell, 15 Ohio St. 412 4211
v. Caskey, 18 Ala. 97 1614
v. Clark, 5 C. B. 365 796, 825, 1229, 1233
v. Clow, 24 Wend 188 37
v. Fawcas, 3 E. & E. 537 223, 306
v. Fawcus, 3 L. T. Rep. (N. S.) 693 4494
v. Gravely, 117 N. C. 84 2667
v. Hunter, 3 Hill (S. C.) 204 1120
v. New York, etc., R. Co., 207 Mass. 126 149
v. Niccolls, 39 Ill. 372 3109
v. Oliver, 5 Watts 509 1942
v. Parkes, 1 Esp. 110 1199
v. Pluns, 98 Cal. 384 1481
v. Scott, 74 Ill. App. 277 4830
v. Spencer, 59 Md. 246 2757
v. United States, 1 Brock. 177 1558
v. Volunteer Co-op. Bank, 213 Mass. 345 2497
v. Western U. Tel. Co., 3 App. Div. (N. Y.) 60 3549, 3604
v. Yates, 5 B. & Ad. 313 2225, 2226
Dixon C. Co. v. Guggenheim, 2 Brewster 321 4485
v. Paul, 167 Fed. 784 4208
Dixon-W. Co. v. Phillips G. Co., 169 Pa. 167 2600, 2622
Doak v. Mammoth C. M. Co., 192 Fed. 748 392, 3899
v. Snapp, 1 Cold. 180 2275, 2309, 2318, 2328, 2329
Doan v. Dow, 8 Ind. App. 324 1646
v. Rogan, 79 Ohio 372 886
v. Warren, 4 Up. Can. C. P. 423 2576
v. Warren, 11 Up. Can. C. P. 423 538
Doane v. Chicago City R. Co., 51 Ill. App. 353 858
v. Garretson, 24 Iowa 351 1419
v. Keating, 12 Leigh 391 3036
v. Lake St. E. R. Co., 165 Ill. 510 3759
v. Preston, 183 Mass. 569 2346
Dob v. Ralsey, 16 Johns. 34 422
Dobbin v. Bradley, 17 Wend. 422 2750, 2767
v. Thornton, 6 Esp. 16 3303
Dobbins v. Duquid, 65 Ill. 464 193, 257, 312, 324, 476, 3189, 3205, 3209, 3216, 3222, 3231
Dobbins v. Graer, 50 Colo. 10 2478, 2575
v. Higgins, 78 Ill. 440 1078, 2539, 2670, 2691
Dobbs v. Justices, 17 Ga. 624 1607
v. Norcross, 24 N. J. Eq. 327 1953

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v. Turner-Feinsat v. Burstein, 78 N. Y. Misc. 259 865
Dobell v. Stevens, 3 B. & C. 623 4379, 4382
Dobie v. Fidelity & C. Co., 95 Wis. 540 2841
v. Larkan, 10 Ex. 776 785, 1230
Dobson v. Cothran, 34 S. C. 518 4790
v. Dornan, 118 U. S. 10 4457
v. Duncan, 90 S. C. 414 3501
v. Espei, 2 H. & N. 79 764
v. Hartford C. Co., 114 U. S. 439 4437, 4447, 4457, 4466
v. Hudson, 1 C. B. (N. S.) 652 2650
v. Land, 8 Hare 216 3060
v. Zimmerman, 55 Tex. Civ. App. 394 1986, 1997
Dobyns v. Yazoo, etc., R. Co., 119 La. 72 161, 1511, 4863, 4877
Dock v. Pratt, 30 Pa. Super. 598 379, 2696, 3108, 3110
Docker v. Somes, 2 Myl. & K. 674 366
Dockstader v. Young Men's C. Ass'n, — Iowa —, 109 N. W. 906 253
Docter v. Riedel, 96 Wis. 158 13
Doctor v. Darling, 68 Hun 70 2147, 2149, 2184
Dod v. Monger, 6 Mod. 215 4204
Dodd v. Churton, [1897] 1 Q. B. 562 931
v. Jones, 137 Mass. 322 2339, 3177
v. Norris, 3 Camp. 519 4971
v. Spartanburg R., G. & E. Co., 95 S. C. 9 4774
v. Wilson, 4 Dela. Ch. 108 2840
v. Winn, 27 Mo. 501 2823, 2864
Dodd G. Co. v. Postal Tel. C. Co., 112 Ga. 685 3562, 3608
Dodder v. Moberly, 28 Okla. 334 2841
Dodds v. Hakes, 114 N. Y. 260 3189
v. Snyder, 44 Ill. 53 574, 576
v. Toner, 3 Ind. 427 547
Dodge v. Adams Exp. Co., 51 Pa. Super. Ct. 481 3336
v. Adams Exp. Co., 54 Pa. Super. Ct. 422 3338
v. Alger, 53 N. Y. Super. Ct. 107 4840
v. Barton, 5 Me. 286 3036
v. Birkenfield, 29 Mont. 115 686
v. Brown & Hill, 74 W. Va. 466 531
v. Chandler, 13 Minn. 114 4359
v. Chicago, etc., R. Co., 111 Minn. 123 3334, 3337
v. Cohen, 14 D. C. App. Cas. 582 1738, 1741, 1752
v. County Com'rs, 3 Metc. (Mass.) 380 4145
v. Emerson, 131 Mass. 467 660
v. Gilman, 122 Minn. 177 4572, 4583
v. Hatchett, 118 Ga. 883 2958
v. King, The, 38 Can. Sup. Ct. 149 1448
v. McClintock, 47 N. H. 383 1843
v. Perkins, 9 Pick. 368 287, 1009, 1018, 1031, 1105, 1107, 1119, 2910, 2945
v. Rockport, 199 Mass. 274 4152
v. Tileston, 12 Pick. 328 2577, 2975
v. Waterman, 36 N. H. 186 2228
Dodrill v. Gregory, 60 W. Va. 118 697, 698
Dodson v. Bolard (Tex. Civ. App.), 150 S. W. 317 1806
v. Cohen, 14 D. C. App. Cas. 582 1758
v. Cooper, 37 Kan. 346 480, 4215, 4296, 4307
v. McAdams, 96 N. C. 149 2473
v. Racey, 8 N. Y. 216 2512
Dody v. State Bank, 82 Kan. 406 274, 4172, 4184, 4190, 4191
Doe v. Davis, 1 Esp. 358 3696
v. Doe, 2 Houst. 321 3710
v. Filliter, 13 M. & M. 145, 11 M. & M. 80 3696, 3827
v. Gwinnell, 1 Q. B. 682 3717
v. Hare, 2 Cr. & M. 145 503, 3709
v. Hare, 2 Dowl. P. C. 245 3696
v. Huddart, 2 Cr., M. & R. 316 3696
v. Perkins, 8 B. Mon. 198 3695, 3696, 3697
v. Pitcher, 6 Taunt. 358 1851
v. Regan, 5 Blackf. 217 1461
v. Roe, 32 Hun 628 473, 4570
v. Rowland, 9 C. & P. 734 2587
v. Stanion, 1 M. & W. 695 1953, 2052
v. Transportation Co., 78 Fed. 62 2500
v. Vallejo, 29 Cal. 285 1205
v. Warren, 7 Me. 48 1197, 1202, 1207
Doe ex d. Marshall v. Dupey, 4 J. J. Marsh. 388 3693
Doedwine v. Webster, 2 Up. Can. Q. B. 224 2087
Doerhoefer v. Shewmaker, 123 Ky. 646 460, 1261, 1305, 4668
Doerner v. St. Louis, etc., R. Co., 149 Mo. App. 170 3531
Doff v. Lyon, 1 E. D. Smith 536 1431
Dogan v. Ashbey, 1 Rich. 36 625
Doggett v. Black, 40 Fed. 439 1709
v. Waterloo Taxicab Co., [1910] 2 K. B. 336, 79 L. J. K. B. 1085, 102 L. T. 874, 54 Sol. J. 541, 26 T. L. R. 491 5176
Doherty v. Des Moines City R. Co., 137 Iowa 358 4751, 4835
v. Doherty, 155 Mo. App. 481 699
v. Dolan, 65 Me. 87 1981, 1984, 2110, 3188
v. Lord, 8 N. Y. Misc. 227 4706
v. Munson, 127 Mass. 495 4839
v. Schipper, 250 Ill. 128 371, 2551, 2555
Doig v. Barclay, 3 Rich. 125 1206, 1207
Doiron v. Baker-W. C. Co., 131 La. 618 4808
Dolan v. Chicago, etc., R. Co., 118 Wis. 362 3841
v. Fagan, 63 Barb. 73 463
v. Mayor, 68 N. Y. 274 693, 694
v. Rodgers, 149 N. Y. 489 2607
v. Thompson, 129 Mass. 205 4610
v. Van Demark, 25 Kan. 304 4359
Dolbeare v. Coultas, 94 Ill. App. 55 2473
Dolbeer v. Suncook W. W. Co., 72 N. H. 562 3993
Dolcoath, The, 16 Fed. 264 2734
Dole v. Hayden, 1 Me. 152 659
v. Hickey, 67 N. H. 496 1736
v. Lyon, 10 Johns. 447 4562
v. Olmstead, 36 Ill. 150 361
Dolevin v. Wilder, 7 Robert. 319, 34 How. Pr. 488 4585, 4587
D'Olier v. New York Cent., etc., R. Co., 98 N. Y. Supp. 649 3436
D'Olier E. Co. v. United States, 45 Ct. of Cls. 471 863
Doll v. Cooper, 9 Lea 576 1688, 1689, 1693, 1694, 1700
v. Hennessy M. Co., 33 Mont. 80 4219
Dollar S. & T. Co. v. Crawford, 69 W. Va. 109 713, 720
Dollard v. Roberts, 130 N. Y. 269 4770
Dolley v. Gladiator Consol. Gold Mines & Milling Co., 134 Iowa 468 481
Dolliff v. Robbins, 83 Minn. 498 4210, 4260

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Dolph v. Ferris, 7 W. & S. 367 1390
v. Troy L. M. Co., 28 Fed. 553 2260, 2267, 2276
Dolson v. Lake Shore, etc., R. Co., 128 Mich. 444 4849, 4851
Dolton v. Sickel, 66 N. J. L. 492 3123, 3125
Doman v. Dibden, Ry. & M. 381 1874
Domenicis v. Fleisher, 195 Mass. 281 3233, 3251
Dominick v. Western Coal & Mining Co., 255 Mo. 463 1515
Dominion Tel. Co. v. Silver, 10 Can. Sup. Ct. 238 4552
Dommerich v. Garfunkel, 28 N. Y. Misc. 433 2408
Don v. Lippmann, 5 Cl. & F. 1 1147, 1157, 1878
Donaghy v. Brennan, 19 New Zeal. L. R. 289 57
Donahue v. Drexler, 82 Ky. 157 4854, 5120
v. Johnson, 9 Wash. 187 1728, 1734
v. Keystone G. Co., 90 App. Div. (N. Y.) 386 3898
v. Parkman, 161 Mass. 412 836, 859
v. Partridge, 160 Mass. 336 1032
Donald v. Ballard, 34 Wash. 576 4740
v. Chicago, etc., R. Co., 93 Iowa 284 25
v. Green, 9 Sm. & M. 138 2212
v. Hodge, 5 Hayw. 85 2276
v. Magruder, 3 Pet. 470 2860
v. Woodruff, 2 Dill. 244 4519
Donaldson v. Allen, 213 Mo. 293 2480
v. Beckel, 4 Burr. 2408 4478
v. Carmichael, 102 Ga. 40 424
v. Eaton, 136 Iowa 650 2490, 2491
v. Fuller, 8 S. & R. 505 1938
v. Mississippi & M. R. Co., 18 Iowa 280 350, 2089, 3488, 4858, 4862, 4906
v. Severn River G. Co., 138 Fed. 691 797, 820, 3288
v. Temple, 96 S. C. 240 1258
Donally v. Wilson, 5 Leigh 329 709, 725
Donalson v. Norman, 14 Ga. App. 146 745
Donely v. Rockfeller, 4 Cow. 253 2892
Donivan v. Manhattan R. Co., 47 Alb. L. J. 50 (N. Y. of Com. Pleas) 3511
Donk C. & C. Co. v. Novero, 135 Ill. App. 633 3767
v. Retzloff, 229 Ill. 194 4700
v. Retzloff, 133 Ill. App. 277 4701
v. Slata, 133 Ill. App. 280 3767
v. Stroeter, 133 Ill. App. 199 2481
Donlan v. American B. & T. Co., 139 N. C. 212 2601, 2627, 2643, 2743, 2754
Donley v. Bailey, 48 Colo. 373 1031
v. Hays, 17 S. & R. 400 733
Donlon v. Evans, 40 Minn. 501 1958, 2053, 2097, 4399
Donnell v. City of Greensboro, 164 N. C. 330 4000
v. Jones, 11 Ala. 689 1694
v. Jones, 13 Ala. 490 1380, 4194, 4605, 4606
v. Sandford, 11 La. Ann. 645 334
v. Thompson, 10 Me. 170 2072, 2147
Donnelly v. Baltimore T. & G. Co., 102 Md. 1 4375, 4378, 4384
v. Booth, 90 Me. 110 4795
v. Brooklyn, 121 N. Y. 9 1063, 1112
v. District of Columbia, 119 U. S. 339 673, 678
v. Fitch, 136 Mass. 558 1434
Donnelly v. Graves, 6 Vict. L. R. (law) 247, 254 4286
v. Harris, 41 Ill. 126 467, 4783
v. Hufschmidt, 79 Cal. 74 4732
v. Poliakoff, 79 N. Y. Misc. 250 4187
Donner v. Ogilvie, 49 Hun 229 3127
v. Palmer, 23 Cal. 40 1481
v. Redenbaugh, 61 Iowa 269 1994
Donnon v. Moore, 1 Chester Co. Rep. 65 3166
Donohoe v. Emery, 9 Metc. (Mass.) 68 2012, 2115
Donohoe v. Star P. Co., 4 Pennew. (Del.) 166 4542, 4576, 4585
Donohoe-K. B. Co. v. Puget Sound Sav. Bank, 13 Wash. 407 2780
Donohue v. Brooklyn, etc., R. Co., 53 App. Div. (N. Y.) 348 1472
v. Chase, 139 Mass. 407 1232
v. Flanagan, 9 N. Y. Supp. 273 2503
v. Kendall, 50 N. Y. Super. 386 3234
v. Woodbury, 6 Cush. 148 626, 748, 759, 814
Donovan v. Chicago & N. R. Co., 93 Wis. 373 1493
v. Clark, 76 Hun 339 1765, 1797
v. Consolidated C. Co., 88 Ill. App. 589, 187 Ill. 32 3791, 3827
v. Consolidated C. Co., 187 Ill. 28, aff'g 88 Ill. App. 589 435, 3793
v. Hanauer, 32 Utah 317 833, 2013
v. Hoenig, 157 Wis. 250 2025
v. Johnson, 13 D. C. App. Cas. 356 2755, 2762
v. New Orleans R. & L. Co., 132 La. 239 4786
v. Weed, 182 N. Y. 43 2502
Donshkess v. Burger B. Co., 20 App. Div. (N. Y.) 375 275
Dood v. Wakeman, 26 N. J. Eq. 484 2902
Doody v. Boston & M. Railroad, 77 N. H. 161 1492
Dooley v. Boston E. R. Co., 201 Mass. 429 311, 4685
v. Gladiator Con. G. M. & M. Co., 134 Iowa 468 4222, 4239
v. Meisenback, 83 Ill. App. 75 4608
v. Missouri Pac. R. Co., 36 Mo. App. 381 1391
v. Smith, 13 Wall. 604 601, 800, 811, 1229
v. Virginia F. & M. Ins. Co., 3 Hughes 221 637
v. Watson, 1 Gray 414 839, 840, 910
Doolin v. Omnibus C. Co., 125 Cal. 141 1509
Doolittle v. Callender, 88 Neb. 747 2696
v. Dwight, 2 Metc. (Mass.) 561 659, 2843
v. Eddy, 7 Barb. 74 1431
v. McCullough, 7 Ohio St. 299 480, 486, 4201
v. McCullough, 12 Ohio St. 360 252, 2478, 2689, 2690
v. Murray, 134 Iowa 536 282
v. Nash, 48 Vt. 441 2693
Doom v. Curran, 52 Kan. 360 2060, 2065, 4432
Dooner v. Delaware & H. C. Co., 164 Pa. 17, 34 4834
Door v. Fisher, 1 Cush. 271 2391
Dopp v. Richards, 43 Utah 332 841, 865, 867
Doran v. Butler, 74 Mich. 643 1609
v. Davis, 43 Iowa 86 2826
v. O'Reilly, 3 Price 250 1035
v. Seattle, 24 Wash. 182 3850

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Dorchester, The, 134 Fed. 564 5008
Dorchester v. Coventry, 11 Johns. 509 3718
Doremus v. Bond, 8 Blackf. 368 556, 2198
v. Hennessy, 62 Ill. App. 391 1311
v. Hennessy, 176 Ill. 608 442
v. Paterson, 81 N. J. Eq. 27 3874
v. Selden, 19 Johns. 213 422
Dorgan v. Boston, 12 Allen 223 4104
v. Telegraph Co., 1 Am. Law Times (N. S.) 406 3551
Doris Eckhoff, The, 41 Fed. 156 5987
Doris Eckhoff, The, 50 Fed. 134 4987
Doris v. Coleman, 7 Ired. 424 1877
Dority v. Dunning, 78 Me. 381 3855
Dorlan v. East Brandywine & W. R. Co., 46 Pa. 520 3885
Dorland's Est., In re, 63 Cal. 282 2480
Dorman v. Benham F. Co., 102 Tenn. 303 4350
v. Sebree, 21 Ky. L. Rep. 634 4974
Dormer v. Fortesque, 3 Atk. 130 3724
Dorn v. Clarke-W. D. Co., 65 Ore. 516 4675, 4681
v. Cooper, 139 Iowa 742 4503, 4508, 4597, 4600
v. Fenno, 12 Pick. 521 1480
Dornblatt v. Carlton, 10 Ga. App. 741 2597
Dornhoff v. Paul Stier, 157 App. Div. (N. Y.) 204 3734
Dorr v. Camden, 55 W. Va. 226 2490, 2493
v. Clark, 7 Mich. 310 1711, 1712
v. Cory, 108 Iowa 725 4379
v. Dudley, 135 Iowa 20 2471
v. Fisher, 1 Cush. 271 2380
v. Kershaw, 18 La. 57 1712
v. New England Ins. Co., 11 Mass. 1 3010
v. Shaw, 4 Johns. Ch. 17, 20 577
v. Streichen, 18 Minn. 26 2209
Dorr C. Co. v. Des Moines Nat. Bank, 127 Iowa 153 1694, 4605, 4618, 4647
Dorrah v. Illinois Cent. R. Co., 65 Miss. 14 345, 3449, 3481
Dorrance v. Dearborn P. Co., 233 Ill. 354 2455
v. International, etc., R. Co., 53 Tex. Civ. App. 460 3323, 3345, 3400
Dorrill v. Eaton, 35 Mich. 302 674
v. Stephens, 4 McCord 59 3147
v. Warford, 124 Ky. 768 4659, 4662, 4690, 4832
Dorsett, In re, 92 App. Div. (N. Y.) 523 4155
Dorsett v. Atlantic C. L. R. Co., 156 N. C. 439 3501
v. Gray, 98 Ind. 273 3132
v. Dashiel, 1 Md. 198 2894
v. Dashiell, 6 Md. 204 2189
v. Gassaway, 2 Har. & J. 402 743, 1664, 4314
v. Habersack, 84 Md. 117 1474
v. Henderson, 148 N. C. 423 12
v. Manlove, 14 Cal. 553 4168, 4169
v. Moore, 100 N. C. 41 3836
v. Smith, 28 Cal. 21 693, 694
v. Wayman, 6 Gill 59 705, 711, 2814
v. Wolff, 142 Ill. 589 1917, 1924
Dorwin v. Potter, 5 Denio 306 312, 315, 564, 3213, 3243, 3247, 3257
Dose v. Tooze, 37 Ore. 13 1363, 2325, 2327
Dos Hermanos, The, 10 Wheat. 306, 6 L. ed. 328 2726
Doss v. Billington, 98 Tenn. 375 3760, 3769
v. Doss, 14 Week. Rep. 590 4161
v. Jones, 5 How. (Miss.) 158 4568
v. Missouri, etc., R. Co., 59 Mo. 27 3503
Doster v. Western U. Tel. Co., 77 S. C. 56 1325, 3618, 3619, 3634, 3637
Doten v. Boston, 138 Fed. 406 4460, 4463, 4475
v. Doten, 66 N. H. 331 1080
Dothage v. Stuart, 35 Mo. 251 3710
Dothard v. Sheid, 69 Ala. 135 1368, 1705
Dottarer v. Bushbey, 16 Pa. 204 4502
Dotter v. Bennett, 5 Rich. 295 1107
Doty v. Brown, 4 N. Y. 71 383
v. Burdick, 83 Ill. 473 3736
v. Case & W. T. Co., 50 Hun 595 2804
v. Doty, 118 Ky. 204 2004, 2008
v. Knox County Bank, 16 Ohio St. 133 1852
v. Miller, 43 Barb. 529 2506
v. Quincy, etc., R. Co., 136 Mo. App. 254 3773, 3780, 3823, 4169
v. Steinberg, 25 Mo. App. 328 1513
Doubleday v. Kress, 50 N. Y. 410 688, 690
Doud v. Guthrie, 13 Ill. App. 653 38
v. Duluth M. Co., 55 Minn. 53 178, 2622
v. Reid, 53 Mo. App. 553 2787
Dougal v. Cowles, 5 Day 511 658
Douge v. Pearce, 13 Ala. 127 469
Dougherty v. American U. Tel. Co., 75 Ala. 168, 177 175
v. Chesnutt, 86 Tenn. 1 3794
v. Dore, 63 Cal. 170 1714, 1744
v. Duvall, 9 B. Mon. 57 2112, 2124, 2125
v. Miller, 38 Cal. 548 1251
v. New Orleans R. & L. Co., 127 La. 225 1519
v. Smith, 5 New Zeal. (Supreme Ct.) 374 68
v. Stepp, 1 Dev. & B. 371 3736
v. Stewart, 43 Iowa 648 1431
v. Tift, 75 Ga. 815 4077
Dougherty T. & A. Co. v. Peru-Van Zandt I. Co., 75 Kan. 450 2214
Dougherty's Est., 9 W. & S. 189 1069
Doughty v. Cottraux, 8 Tex. Civ. App. 125 2204
v. Hildt, 1 McLean 334 1814
v. Savage, 28 Conn. 146 1847
Douglas v. Allen, 56 Ohio St. 156 4602
v. Bank, 97 Tenn. 133 1905
v. Chapin, 26 Conn. 76 424
v. Chesebrough B. Co., 56 App. Div. (N. Y.) 403 3258
v. Hoffman, 72 Ill. App. 110 3829, 4167
v. Kessler, 57 Iowa 63 1651
v. Lowell, 194 Mass. 268 2678
v. Merceles, 25 N. J. Eq. 144 4224
v. Patrick, 3 T. R. 683 796, 798, 799, 804
v. Southern R. Co., 98 S. C. 346 3504
v. Spangenberg, 23 Cal. App. 294 2503
Douglas Co. v. Minnesota T. Co., 62 Minn. 288 3411, 3414
Douglass v. Clark, 14 Johns. 177 2873, 2892
v. Douglass, 21 Wall. 98 1684
v. Ferris, 138 N. Y. 192 1638
v. Gausman, 68 Ill. 170 3677, 3680

[REFERENCES ARE TO PAGES]

Douglass v. Glawey, 76 Conn. 683 1671
v. Howland, 24 Wend. 35 296, 2768, 2822
v. Kraft, 9 Cal. 562 4211, 4245
v. Moody, 9 Mass. 548 2843, 2874
v. Moses, 89 Iowa 40 2404
v. Murphy, 16 Up. Can. Q. B. 113 2916, 3176, 3178
v. New York Cent., etc., R. Co., 209 Pa. 128 55
v. Northern Cent. R. Co., 59 App. Div. (N. Y.) 470 4893, 4908
v. Railroad Co., 51 W. Va. 523 32, 232
v. Reynolds, 7 Pet. 113, 8 L. ed. 626 2746, 2748
v. Seattle E. Co., 73 Wash. 561 4188
v. State, 31 Ind. 429 693
v. Tousey, 2 Wend. 352 471, 1486, 4549
v. Wilson, 3 Tenn. Cas. 561 2853
Doulon v. Evans, 40 Minn. 501 2102
Dounce v. Dow, 57 N. Y. 16 564, 2370
v. Dow, 64 N. Y. 411 2373
Doupe v. Genin, 37 How. Pr. 5, 45 N. Y. 119 3139, 3233
Doushkess v. Burger B. Co., 20 App. Div. (N. Y.) 375 282
Douthart v. Congdon, 197 Ill. 349 1849
Douty v. Bird, 60 Pa. 48 267
Dover v. Plemmons, 10 Ired. 23 2539
v. Twombly, 42 N. H. 59 1596, 1614, 2755
Dow, Guardianship of, 133 Cal. 446 1121
Dow v. Adams, 5 Munf. 21 1068, 1116, 3150
v. Clark, 7 Gray 198 416
v. Higgins, 72 Ill. App. 302 1847
v. Humbert, 91 U. S. 294 39, 481, 498, 499, 1626
v. Oroville, 22 Cal. App. 215 1473, 4793
v. Rowell, 12 N. H. 49 1905
v. Tuttle, 4 Mass. 414 781
v. Updike, 11 Neb. 95 872, 1922
v. Winnipesaukee G. & E. Co., 69 N. H. 312 67, 3911
Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473 259
v. Gibson, 73 Iowa 525 532
v. Superior D. Co., 162 Fed. 479 4447
v. White Rock L. & H. Co., 18 S. D. 105 2238
Dowd v. Faucett, 4 Dev. 92 3710
v. Krall, 32 N. Y. Misc. 252 2458
v. Seawell, 3 Dev. 185 1361
v. Westinghouse, A. B. Co., 132 Mo. 579 1493
Dowdall v. King, 97 Ala. 635 1363
Dowdell v. Carpy, 137 Cal. 333 1545
v. Carpy, 129 Cal. 168 4601
Dowdy v. Calvi, 14 Ariz. 148 531, 559, 1056
Dowell v. Dowell, 137 Ky. 167 2472
v. Griswold, 5 Sawyer 23 1245
Dowling v. Hastings, 211 N. Y. 199 701
v. Jones, 2 New South Wales 359 277
v. Morrill, 165 Mass. 491 2501
v. Nuebling, 97 Wis. 350 3234
v. Walker, 120 Ky. 528 1781, 1794, 1795
Dowling L. Co. v. King, 62 Fla. 151 1454
Downer v. Baxter, 30 Vt. 467 1484, 2849
v. Madison County Bank, 6 Hill 648 1929, 2944
v. Sinclair, 15 Vt. 495 628
v. Smith, 38 Vt. 464 2089, 2113
Downes v. Back, 1 Stark. 318 2316, 4252
v. Phoenix Bank, 6 Hill 297 876
Downey v. Armstrong, 1 Ont. L. R. 237 4595
v. Beach, 78 Ill. 53 832, 870, 871, 976, 1003
v. Burk, 23 Mo. 228 2539
v. Pennsylvania R. Co., 219 Pa. 32 3923, 3924
v. Riggs, 102 Iowa 88 2013
v. Stirton, 1 Ont. L. R. 186 4593, 4594, 4595, 4599
Downing v. Brown, 3 Colo. 571 469
v. Dean, 3 J. J. Marsh. 378 1540
v. Major, 2 Dana 288 2462
v. Outerbridge, 79 Fed. 931 4212, 4226, 4268, 4271
v. Palmateer, 1 T. B. Mon. 64 3147
v. Wilcox, 84 Conn. 437 531
Downman v. Downman, 1 Wash. (Va.) 26 600, 607
v. Jones, 9 Jur. 454 2979
Downs v. Allen, 22 Fed. 805 1051
v. Cassidy, 47 Mont. 471 4509, 4525, 4548
v. New York, etc., R. Co., 38 Conn. 287 3464
v. Pacific Exp. Co., 135 Mo. App. 330 3401
Dows v. Faneuil Hall Ins. Co., 127 Mass. 346 3024
v. Morewood, 10 Barb. 183 728, 729, 736, 741, 743
v. National Exch. Bank, 91 U. S. 618 1135, 4214
Dox v. Dey, 3 Wend. 356 1107, 1357, 1360
Doxey v. Miller, 2 Ill. App. 30 1117
Doyle v. American F. Ins. Co., 181 Mass. 139 3023, 3065
v. Baltimore & O. R. Co., 126 Fed. 841 3416
v. Brundred, 189 Pa. 113 2061, 2066, 2093, 2113
v. Burns, 123 Iowa 488 4209, 4217, 4222, 4244, 4282
v. Central R. Co., 45 Pa. Super. Ct. 216 3416
v. Corey, 170 Mass. 337 687
v. Duckworth, 149 Iowa 623 1072
v. Eccles, 17 Up. Can. C. P. 644 4274
v. Emerson, 145 Iowa 358 2149, 2151
v. Fuerst, 129 La. 838 2448
v. Jessup, 29 Ill. 462 4958, 4971
v. Kiser, 6 Ind. 242 3531
v. Manhattan R. Co., 128 N. Y. 488 1433, 4132
v. Nesting, 37 Colo. 522 425, 524, 1031
v. Parish, 110 Mo. App. 470 2373, 2404
v. Teas, 5 Ill. 202 817
v. Union Pac. R. Co., 147 U. S. 413, 429 3139
v. Vance, 6 Vict. L. R. (law) 87 65
Doyley v. Roberts, 3 Bing. N. C. 835 4532
Dozier v. Jarman, 30 Mo. 216 1524
Draffen v. Boonville, 8 Mo. 395 737, 1584
Drago v. Mead, 30 App. Div. (N. Y.) 258 3235, 3236, 3253
Drain v. Doggett, 41 Iowa 682 2944
Drainage Com'rs v. Knox, 237 Ill. 148 4055
Drake v. Auerbach, 37 Minn. 505 4325
v. Baker, 34 N. J. L. 358 284, 354, 1981, 1987, 1989, 1993, 1995, 2008

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Drake v. Bosworth, 140 Mo. App. 37 4128
v. Chicago, etc., R. Co., 63 Iowa 302 239, 3803, 3878, 3893, 3894
v. Cockroft, 10 How. Pr. 377 548
v. Cockroft, 4 E. D. Smith 34 3129, 3260
v. Drake, 142 Wis. 602 697
v. Eubanks, 61 Ark. 120 1987, 4396
v. Holbrook, 23 Ky. L. Rep. 1941 4392, 4403
v. Howell, 133 N. C. 162 3734
v. Industrial Works, 174 Mich. 622 4677
v. Kiely, 93 Pa. 492 151
v. Lady Ensley C. I. & R. Co., 102 Ala. 501 9, 3885
v. Latham, 50 Ill. 270 1195
v. Lowry, 14 Iowa 125 985, 990, 994
v. Lux, 233 Ill. 522 712
v. Markle, 21 Ind. 433 1887
v. Mitchell, 3 East 251 658
v. Sherman, 179 Ill. 362 731, 2754
v. Smythe, 44 Iowa 410 1797
v. Sworts, 24 Ore. 198 1707
v. Vickery, 81 Kan. 519 4644
v. Webb, 63 Ala. 596 1795
Dralle v. Reedsburg, 135 Wis. 293 1484
v. Reedsburg, 140 Wis. 319 1382
Drane v. Scholfield, 6 Leigh 397 1823
Dranow v. MacDonald, 76 N. J. L. 259 2957, 4364
Draper v. Baker, 61 Wis. 450 1217, 4775
v. Hitt, 43 Vt. 439 755
v. Horton, 22 R. I. 592 976
v. Miller, 92 Kan. 695 2681
v. Pierce, 29 Vt. 250 816
v. Sweet, 66 Barb. 145 317, 2393, 2436
v. Tucker, 69 Neb. 434 1500, 4935, 4941
Drennan v. Bunn, 124 Ill. 75 1869, 2398
v. Charles, 12 Pa. Super. Ct. 476 4212, 4268
Drenning v. Wesley, 189 Pa. 160 4389
Drescher-Rotberg Co. v. Strauss, 145 N. Y. Supp. 280 2455
Dresher v. Becker, 88 Neb. 619 4377, 4395, 4434
Dresser v. Ainsworth, 9 Barb. 619 2401
v. Dresser, 35 Barb. 573 415
Dresser Mfg. Co. v. Waterston, 3 Metc. (Mass.) 9 364, 457, 4262
Dressler v. Davis, 12 Wis. 58 1360
Drew v. Beall, 62 Ill. 164 4410
v. Edmunds, 60 Vt. 401 525
v. Ellis, 6 Tex. Civ. App. 507 4606
v. King, 76 N. H. 184 1436
v. Pedlar, 87 Cal. 443 1947, 2018
v. Red Line T. Co., 3 Mo. App. 495 3385
v. Roe, 41 Conn. 41 2454
v. Sixth Ave. R. Co., 26 N. Y. 49 390, 411, 3487
v. Towle, 27 N. H. 412 515, 1827, 1836
v. Towle, 30 N. H. 531 2098, 2114, 2136, 2139
v. Wabash R. Co., 129 Mo. App. 459 3456
Drews v. Williams, 50 La. Ann. 579 1718, 1749
Drewyour v. Merrell, 112 Mich. 681 4348
Drexel v. Man, 2 Pa. 271 3693, 3699
Drexler v. Braddock, 2 S 8 Pa. 376 4130, 4135
Drey & K. G. Co. v. Missouri Pac. R. Co., 156 Mo. App. 178 3414
Dreyer v. McCormack Real Estate Co., 164 App. Div. (N. Y.) 41 377
Dreyfus v. Goss, 67 Kan. 57 684
v. Peruvian G. Co., 42 Ch. Div. 66 1741
v. Roberts, 75 Ark. 354 746, 752
v. St. Louis & S. R. Co., 124 Mo. App. 585 87
Driesbach v. National Bank, 104 U. S. 52 977
Driess v. Frederick, 73 Tex. 460 4680
Driessel v. Urkart, 147 Wis. 154 4508
Driggers v. Bell, 94 Ill. 223 1097, 1099
Driggs v. Dwight, 17 Wend. 71 294, 1369, 1989, 3189, 3197
Drinkwater v. Dismore, 80 N. Y. 390 488, 4728, 4733
v. Dinsmore, 16 Hun 250 3081, 4748
Drischman v. McManemin, 68 N. J. L. 337 3196, 3203
Driscoll v. Allis-C. Co., 144 Wis. 451 144
v. Collins, 31 N. B. 604 4668
v. Damp, 17 Wis. 419 638
v. Gaffey, 207 Mass. 102 88, 4757
v. Tannock, 76 Ill. 154 992
v. Taunton, 160 Mass. 486 3947
Driskell v. Hanks, 18 B. Mon. 855 3727
Driver v. Fortner, 5 Porter 9 722
v. Maxwell, 56 Ga. 11 312
v. Western Union R. Co., 32 Wis. 569 319, 4009, 4100, 4142
Drogmund v. Metropolitan St. R. Co., 122 Mo. App. 154 4737, 4770
Drohn v. Brewer, 77 Ill. 280 1269, 1316
Drown v. Allen, 91 Pa. 393 4530, 4574
Drucker v. Manhattan R. Co., 106 N. Y. 157 4081
Drug Co. v. Byrd, 92 Fed. 290 194
Drum v. Harrison, 83 Ala. 384 35
v. Miller, 135 N. C. 204 57
Drumlanrig, The, [1910] Prob. 249 4986
Drumm v. Cessnum, 58 Kan. 331 1494, 1503, 4616, 4618
Drumm-F. C. Co. v. Edmisson, 208 U. S. 534 4210, 4232
v. Edmisson, 17 Okla. 344 4212
Drummond v. Crane, 159 Mass. 577 407, 413
v. Humphreys, 39 Me. 347 2976
v. Prestman, 12 Wheat. 515 2746, 2748
v. Van Ingen, L. R. 12 App. Cas. 284 2374, 2379
v. White-Swearingen Realty Co., — Tex. Civ. App. —, 165 S. W. 20 2915, 3006
Drury v. Drury, 36 Mo. 281 1584
v. Holden, 121 Ill. 130 1957, 2061
v. Merrill, 20 R. I. 2 3661
v. Midland R., 127 Mass. 571 3993, 4003, 4149
v. Shumway, D. Chip. 111 2110, 2114
v. Wolfe, 134 Ill. 294 1202, 1210
Druse v. Wheeler, 22 Mich. 439 1390
Dry v. Davy, 10 Ad. & E. 30 2767
Dryden v. Stephens, 19 W. Va. 1 658, 659
Dryer v. Kistler, 118 Minn. 112 883
v. Lewis, 57 Ala. 551 315
Dryfoos v. Uhl, 69 App. Div. (N. Y.) 118 2260, 2264
Duane v. Simmons, 4 Yeates 441 1527
Duaval v. Davey, 32 Ohio St. 604 4573
Dubay v. Kelly, 137 Mich. 345 2054, 2060, 2113, 2136
Du Belloix v. Waterpark, 1 D. & R. 348n 954, 961
Duberly v. Gunning, 4 T. R. 657 4974, 4976
Dubinsky v. Wells Bros. Co. of New York, 218 Mass. 232 476, 2593

[REFERENCES ARE TO PAGES]

Dublin, City of, v. Ogburn, 142 Ga. 840 50, 53
Dubois v. Beaver, 25 N. Y. 123 1393
v. Bowles, 30 Colo. 44 1990
Du Bois v. Decker, 130 N. Y. 325 4677, 4785, 4786
v. Delaware & H. C. Co., 4 Wend. 285 2530
Dubois v. Delaware & H. Canal, 13 Wend. 334 2654
v. Glaub, 52 Pa. 238 1437
v. Hermance, 56 N. Y. 673 306, 2849
v. Roby, 84 Vt. 465 1267, 1279, 1309
v. Spinks, 114 Cal. 289 4173
Du Bois T. P. R. Co. v. Buffalo, etc., R. Co., 149 Pa. 1 4075
Dubois' App., 38 Pa. 231 2490
Du Bose v. Western U. Tel. Co., 73 S. C. 218 3570, 3654
Du Bost v. Beresford, 2 Camp. 511 4182
Dubreuil v. Waterman, 84 Conn. 47 1393
Dubuque L. Co. v. Kimball, 111 Iowa 48 3099, 3147
Dubuque, etc., Ass'n v. Dubuque, 30 Iowa 176 114, 210
Ducas v. American S., D. & F. Co., 48 N. Y. Misc. 411 2409
Ducey v. Patterson, 37 Colo. 216 773
Duche v. Wilson, 37 Hun 519 355, 1258
Duck v. McGrath, 160 App. Div. (N. Y.) 482 1643
v. Mayeu, [1892] 2 Q. B. 513 772, 782
Duckett v. Pool, 34 S. C. 311 1268
Ducktown S., C. & I. Co. v. Barnes (Tenn.) 60 S. W. 593 3840, 3892, 3928
Duckworth v. Allison, 1 M. & W. 412 894
v. Duckworth, 98 Md. 92 2472
v. Ewart, 2 Hurl. & C. 129 283
v. Ferland (R. I.) 83 Atl. 261 1360
v. Johnson, 4 H. & N. 653 4869
v. Stalnaker, 68 W. Va. 197 59, 60, 1282, 1311
v. Stalnaker, 74 W. Va. 247 1312
Duclos v. Cunningham, 102 N. Y. 678 2501
Duclos, Succession of, 11 La. Ann. 406 2477
Du Costa v. Cole, Skin. 272 599
Dudgeon v. Pembroke, L. R. 9 Q. B. 581, 1 Q. B. Div. 96, L. R. 2 App. Cas. 284 2999
Dudley v. Barrett, 66 W. Va. 363 664
v. Chicago, etc., R. Co., 58 W. Va. 604 4296
v. Johnson, 102 Ga. 1 3713
v. Kennedy, 63 Me. 465 16, 3935
v. Minnesota & N. R. Co., 77 Iowa 408 3977, 3984, 4125
v. New Britain, 77 Conn. 322 1418, 3880, 3902
v. Peoria R. Co., 153 Ill. App. 619 108
v. R. P. Hazzard Co., 112 Me. 453 4813
v. Reynolds, 1 Kan. 285, aff'd 2 Kan. 83 870, 967
v. Stiles, 32 Wis. 371 629
v. Wabash R. Co., 171 Mo. App. 652 108, 4652, 4822
Duecker v. Goeres, 104 Wis. 29 2395, 2774
Duerr v. Kentucky & I. B. Co., 132 Ky. 228 4640
Duerson v. Bellows, 1 Blackf. 217 1541
Duesenbury v. Ellis, 3 Johns. Cas. 70 2986
Duester v. Mittag, 105 Wis. 459 3241
Dufau v. Wright, 25 Wend. 636 2766
Duff v. Judson, 160 Mich. 386 3670
v. Read, 74 Kan. 730 1313, 1314, 1343, 4158
v. Wells, 7 Heisk. 17 583
v. Williams, 85 Pa. 490 4383
Duffey v. Consolidated B. C. Co., 147 Iowa 225 1471
Duffield v. Elwes, 1 Bligh (N. S.) 497 642
v. Hicks, 1 Dow. & C. 11 642
v. Pike, 71 Conn. 521 1079, 1080
v. Rosenzweig, 144 Pa. 520, aff'g 150 Pa. 543 3211
v. Scott, 3 T. R. 374 296, 307
Duffle v. Hayes, 15 Johns. 327 3272
Duffy v. Buena Vista Ice Co., 122 Md. 275 2795
v. Byrne, 7 Mo. App. 417 4434
v. Chicago, etc., R. Co., 34 Wis. 188 3527
v. Dubuque, 63 Iowa 171 1510
v. McKenna, 82 N. J. L. 62 4391, 4395
v. Patten, 74 Me. 396 819
v. St. Louis T. Co., 104 Mo. App. 235 4747
v. Scheerger, 91 Neb. 511 4644
v. Shockey, 11 Ind. 70 859, 862, 922
v. Thompson, 4 E. D. Smith 178 3531
Dufort v. Abadie, 23 La. Ann. 280 4537
Dufourcet v. Bishop, 18 Q. B. Div. 373 3391
Dugan v. Anderson, 36 Md. 567 375, 2255, 2542
v. Sprague, 2 Ind. 600 674
v. Tyson, 6 Gill & J. 458 1675, 1677
Duggan v. Baltimore & O. R. Co., 159 Pa. 248 3450, 3475, 4836
Dugger v. Insurance Co., 95 Tenn. 245 3008
v. Wright, 51 Ark. 232 1649
Duggleby v. Lewis R. Co., 139 Iowa 432 2596, 2646
Dugherty v. American U. Tel. Co., 75 Ala. 168 3565
Duke v. Harper, 8 Mo. App. 296 2494
v. Missouri Pac. R. Co., 99 Mo. 347 4733
v. Norfolk & W. R. Co., 106 Va. 152 2241, 2262, 2704
v. Postal-Tel. C. Co., 71 S. C. 95 1498
v. St. Louis, etc., R. Co., 172 Fed. 684 1519, 4860, 4898, 4900, 4905, 4914
Duke of Manchester, The, 6 Moore's P. C. 91 2724
Dukeman v. Cleveland, etc., R. Co., 237 Ill. 104, aff'g 142 Ill. App. 622 4894, 5098
Dukette v. Northwestern W. Co., 61 Wash. 95 4794
Dulaney v. Nolan County, 85 Tex. 225 4119
v. Payne, 101 Ill. 325 939
Dulany v. Wells, 3 Har. & McHen. 20 1227
Du Laurans v. First Division, etc., R. Co., 15 Minn. 49 3467
v. St. Paul R. Co., 15 Minn. 49 3503
Dulien v. White, [1901] 2 K. B. 669 93, 94
Dullard v. Phelan, 83 Iowa 471 1920
Dullea v. Taylor, 35 Up. Can. Q. B. 395 237
Dulles v. De Forest, 19 Conn. 190 703
Duluth F. Co. v. Iron Belt M. Co., 117 Fed. 138 2238
Duluth L. & L. Co. v. Kloovdahl, 55 Minn. 341 2199

[REFERENCES ARE TO PAGES]

Duluth & W. R. Co. v. West, 51 Minn. 163 3964, 4038, 4043
Dumas v. Patterson, 9 Ala. 484 1613
Dumee v. Regal, 17 Pa. Dist. 1012 132
Dummars v. Miller, 34 Pa. 319 1999
Dumont v. Fry, 14 Fed. 293 2806
v. Smith, 4 Denio 319 1364
Du Moulin v. Board of Education, — Misc. (N. Y.) —, 124 N. Y. Supp. 901 759
Dumper No. 8, The, 129 Fed. 98 2735
Dun v. Weintraub, 111 Ga. 146 4532, 4540, 4552
Dunbar v. Charleston & W. C. Ry. Co., 186 Fed. 175 5109
v. Cowger, 68 Ark. 444 1494
v. De Boer, 44 Ill. App. 615 784
v. Dunn, 10 Price 542 1654
v. Garrity, 58 N. H. 75 721
v. Jones (Conn.) 87 Atl. 787 1392
v. Lindenberger, 3 Munf. 169 1403
v. Marden, 13 N. H. 311 1826
v. Springer, 256 Ill. 53 807
Ducan v. Thomas, 81 Cal. 56 735
Duncan v. Bloomstock, 2 McCord 318 586
v. Blumdell, 3 Stark. 6 2474
v. Board of Levee Com'rs, 74 Miss. 125 4014
v. Breithaupt, 1 McCord 149 2489
v. Brown, 15 B. Mon. 186 468
v. Charles, 5 Ill. 561 1952
v. Citizens' Nat. Bank, 20 Ky. L. Rep. 237 10
v. Finnyhorn, Sneed 262 1495
v. Gilbert, 29 N. J. L. 521 1817
v. Great Western Ins. Co., 5 Abb. (N. S.) 173 3015
v. Griswold, 92 Ky. 546 10
v. Harris, 17 S. & R. 436 633
v. Hayes, 22 N. J. Eq. 27 3839
v. Helm, 22 La. Ann. 418 1163
v. Hill, L. R. 8 Ex. 242 2976
v. Holder, 15 N. M. 323 2903, 2967
v. Lane, 8 Sm. & M. 744 2197
v. McMahon, 18 Tex. 597 2275, 2279
v. Markley, Harp. 276 389, 414, 3850
v. Nassau E. R. Co., 127 App. Div. (N. Y.) 252 3750, 3754
v. Owens, 47 Ark. 388 1663
v. Post, 3 Cal. 373 2276, 2278
v. St. Luke's Hospital, 113 App. Div. (N. Y.) 68 4846
v. Stanton, 30 Barb. 533 563
v. Topham, 8 Man. Gr. & S. 229 3021
v. United States, 7 Pet. 435 1153
v. Western U. Tel. Co., 87 Wis. 173 3587
v. Western U. Tel. Co., 93 Miss. 500 3591, 3642
v. Wilder S. Co., 8 Hawaii 411, 415 1339
Duncanson v. Kirby, 90 Ill. App. 15 2780, 2781
Dunckle v. Kocker, 11 Barb. 387 123
Duncombe v. New York, etc., R. Co., 84 N. Y. 193, 88 N. Y. 1 675
Dundas v. Bowler, 3 McLean 400 1905
Dundore v. McCormick, 21 Pa. Dist. 856 1311
Dunford v. Weaver, 84 N. Y. 445 1133, 1618
Dung v. Parker, 52 N. Y. 494 15
Dungan v. St. Louis, etc., R. Co., 178 Mo. App. 164 5132
v. Von Puhl, 8 Iowa 263 3706
Dunham v. Commercial Ins. Co., 11 Johns. 315 3032
v. Hastings P. Co., 95 N. Y. App. Div. 360 259, 389, 1359
Dunham v. Jackson, 6 Wend. 22 802, 803
v. Miller, 154 Mo. App. 314 3827
v. Orange L. Co. (Tex. Civ. App.), 125 S. W. 89 2701, 2704
v. Seiberling, 12 Ind. App. 210 1738
Dunham's App., 27 Conn. 192 1461
Duniston v. Imbrie, 3 Wash. C. C. 396 1227
Dunkin v. Hoquiam, 56 Wash. 47 1466, 1468
v. Vandenbergh, 1 Paige 622 589
Dunklee v. Locke, 13 Mass. 525 591
Dunlap, A. R., The, 1 Low. 350 730
Dunlap v. Chicago & A. R. Co., 187 Mo. App. 201 3420
v. Clark, 25 Ill. App. 573 3668, 3669, 3677
v. Eden, 15 Ind. App. 575 2754
v. Foster, 7 Ala. 734 2857
v. Hand, 26 Miss. 460 2575
v. Hayden, 29 Ind. 303 1527
v. International S. Co., 98 Mass. 371 3412, 3531
v. Kelley, 115 Mo. App. 610 1876
v. New Zealand F. & M. Ins. Co., 109 Cal. 365 4638, 4644
v. Raywood R., C. & M. Co., 43 Tex. Civ. App. 269 2618
v. Schofield, 152 U. S. 244 4436
v. Snyder, 17 Barb. 561 493, 1460
v. Wagner, 85 Ind. 529 57, 158
v. Watson, 124 Mass. 305 285, 1075
v. Wilson S. M. Co., 81 Ill. 496 2755
v. Yoakum, 18 Tex. 582 3705
Dunlavey v. Watson, 38 Iowa 398 4767
Dunlevy v. Wolferman, 106 Mo. App. 46 4840, 4842, 4843
Dunlop v. Gordon, 10 La. Ann. 243 2755
v. Gregory, 10 N. Y. 241 888, 922
v. Higgins, 1 H. of L. Cas. 381 3219
Dunman v. Harrison (Tex. Civ. App.), 41 S. W. 499 987
Dunn v. Allen, 59 App. Div. (N. Y.) 561 2705
v. Bucknall, [1902] 2 K. B. 614 3361
v. Burlington, etc., R. Co., 35 Minn. 73 4813, 4814
v. Bushnell, 63 Neb. 568 2440
v. Currie, 141 N. C. 123 2472
v. Daly, 78 Cal. 640 2542, 2561
v. Davis, 37 Ala. 95 1722
v. Gunn, 149 Ala. 583 4705, 4711, 4718, 4720
v. Hall, 8 Blackf. 32 1480
v. Hearst, 139 Cal. 239 4512
v. Hunt, 76 Minn. 196 825
v. Johnson, 33 Ind. 54 476
v. Large, 3 Doug. 333 3701
v. Lippard-Stewart Motor Car Co., 144 N. Y. Supp. 349 757
v. Mackey, 80 Cal. 104 2967
v. Malone, 6 Ont. L. R. 484 943
v. Mills, 70 Kan. 656 1943
v. Morgenthau, 73 App. Div. (N. Y.) 147 834
v. Oneal, 1 Sneed 106 362
v. Patrick, 156 N. C. 248 3132
v. Rodgers, 43 Ill. 260 1917
v. Slee, 1 Holt's N. P. 399 2823
v. Smith (Tex. Civ. App.), 74 S. W. 576 333, 416
v. Sutliff, 1 Mich. 24 1798
v. Trout, 87 Ill. App. 432 3682
v. Western U. Tel. Co., 2 Ga. App. 845 168
v. White, 1 Ala. 645 2195
v. White, 63 Mo. 181 4383
Dunn & Co., J. E., v. Smith (Tex. Civ. App.), 74 S. W. 576 4431, 4433

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Dunnahoe v. Williams, 24 Ark. 264 4314
Dunne v. Mastick, 50 Cal. 244 1195
v. St. Louis, etc., R. Co., 166 Mo. App. 372 3323
v. Thorpe, B., D. & O. 128 4277, 4427
Dunnell v. Mason, 1 Story 543 2958
Dunnett & Slack v. Gibson, 78 Vt. 439 1032
Dunnica v. Sharp, 7 Mo. 71 1987
Dunning v. Humphrey, 24 Wend. 31 1230, 1701, 1702, 1704
v. Merchants' Mut. M. Ins. Co., 57 Me. 108 3010
v. Reid, 76 N. J. L. 384 175, 1502, 2645
Dunnington v. Kirk, 57 Ark. 595 716, 737
Dunphy v. Whipple, 25 Mich. 10 495, 1621
Dunscomb v. Dunscomb, 1 Johns. Ch. 508 1130
Dunseth v. Bank of U. S., 6 Ohio 77 3717
Dunsford v. Webster, 14 Manitoba 529 286, 1427, 3119
Dunshee v. Geohegan, 7 Utah 113 1989
v. Standard Oil Co., 152 Iowa 618 13, 1140, 1269
v. Standard Oil Co., 165 Iowa 625 1329, 1331, 1338
Dunsmore v. Central Iowa R. Co., 72 Iowa 182 3925
Duntley v. Boston & M. R., 66 N. H. 263 3333, 3412
Dunton v. Brown, 31 Mich. 182 2540
v. Westchester F. Ins. Co., 104 Me. 372 3017
Dupee v. Blake, 148 Ill. 453 2753
Duperoy v. Johnson, 7 T. R. 473 1402
Dupont v. McAdow, 6 Mont. 226 3674, 3675, 3686
Dupree v. Savage, — Tex. Civ. App. —, 154 S. W. 701 4403
v. Wabash R. Co., 155 Iowa 544 4950
Duprey de Lome, The, 55 Fed. 93 2733
Dupuis v. Chicago, etc., R. Co., 115 Ill. 97 4005, 4102
v. Saginaw Valley T. Co., 146 Mich. 151 1498
Dupuy De Lome, The, 55 Fed. 93 2726, 2733
Duque v. Levy, 114 La. 21 2676, 2685, 2712
v. Levy, 120 La. 369 2687, 2696
Duquesne D. Co. v. Greenbaum, 135 Ky. 182 436
Duran v. Ayer, 67 Me. 145 958
Durand v. Bowen, 73 Iowa 573 2787
Durant v. Iowa County, Wool. C. C. 69 1210
v. Lexington C. M. Co., 97 Mo. 62 22
v. Murdock, 3 App. Cas. (D. C.) 114 946
v. Rogers, 87 Ill. 508 449
Durant M. Co. v. Percy Con. M. Co., 93 Fed. 166 4260, 4263, 4264
Durbin v. Northwestern S. Co., 36 Ind. App. 123 782
v. Shenners, 133 Wis. 134 2094
Durbrow & H. Mfg. Co. v. Cuming, 35 App. Div. (N. Y.) 376 2391
Durden v. Barnett, 7 Ala. 169 4767, 4771
v. Southern R. Co., 2 Ga. App. 66 3321
Durell v. Haley, 1 Paige 492 4377
v. Wendell, 8 N. H. 369 781
Durfee v. Newkirk, 83 Mich. 522 1300, 1301
Durgin v. American Exp. Co., 66 N. H. 277 3411, 3412, 3415, 3333
v. Neal, 82 Cal. 595 112
Durham v. Commercial Nat. Bank, 45 Ore. 385 1135, 4210
v. Hadley, 47 Kan. 73 1953
v. Hastings P. Co., 95 App. Div. (N. Y.) 835 294
v. Lisbon Falls F. Co., 100 Me. 238 6
v. Wadlington, 2 Strobh. Eq. 258 759
v. Wick, 210 Pa. 128 2003
Durham Con. L. & I. Co. v. Guthrie, 116 N. C. 381 2007
Durhan & N. R. v. Trustees of Bullock Church, 104 N. C. 525 4014, 4039
Durkee v. Central Pac. R. Co., 56 Cal. 388 4767
v. Chino L. & W. Co., 151 Cal. 561 4
v. Gunn, 41 Kan. 496 2477, 2508
v. Mott, 8 Barb. 423 293, 2697, 2714
Durland v. Durland, 153 N. Y. 67 1824
Durment v. Tuttle, 50 Minn. 426 1835, 1838
Duroe v. Stephens, 101 Iowa 358 2096, 2148, 2151, 2159
Duroth Mfg. Co. v. Cauffiel, 243 Pa. 24 32, 1309, 4318, 4336
Durrell v. Carver, 9 Ohio St. 72 3528
v. Wendell, 8 N. H. 369 781
Durst v. Burton, 47 N. Y. 167 1437, 1438, 2296, 2297, 2301
v. Swift, 11 Tex. 273 884
Durward v. Hubbell, 149 Iowa 722 2928, 4395
Duryea v. Mayor, etc., 26 Hun 120 403, 3853, 3855
Duryee v. Mayor, 96 N. Y. 477 1140, 1142
Dusar v. Murgatroyd, 1 Wash. C. C. 13 3410
Dusenbury, Matter of, 10 N. Y. Misc. 633 2472
Dushane v. Benedict, 120 U. S. 630 534, 540, 547, 550, 2375, 2435, 2599
Duskey v. Green Lake S. Co., 51 Wash. 145 1477
Dussol v. Bruguire, 50 Cal. 456 674
Dustan v. Carter, 3 Dema. 149 1079, 1083
v. McAndrew, 44 N. Y. 72 230, 368, 2224, 2227, 2235, 2238, 2242, 2244, 2259
Dustin v. Newcomer, 8 Ohio 49 1989, 2008, 2047
Dustin Co. v. St. Petersburg I. Co., 126 Fed. 816, 13 Pa. Dist. 567 234, 2360, 2361, 2415, 2421, 2429, 2433
Dutch v. Warren, 2 Burr. 1010 2317
Dutch Church v. Ackerman, 1 N. J. Eq. 40 1081
Dutchess Cotton Mfg. v. Davis, 14 Johns. 238 1527
Dutchess of Kingston's Case, 2 Smith's L. Cas. (7th ed.) 778 2071
Duthie v. Hilton, L. R. 4 C. P. 138 3287, 3288
Dutro v. Kennedy, 9 Mont. 101 4321
v. Wilson, 4 Ohio St. 101 3834
Dutton v. Gerrish, 9 Cush. 89 2376, 3127, 3140
v. Lansdowne, 198 Pa. 563 434
v. Mason, 21 Tex. Civ. App. 389 587

[REFERENCES ARE TO PAGES]

Dutton v. Solomonson, 3 B. & P. 582 2227, 2229
v. Willner, 52 N. Y. 312 2904
Duval v. Bibb, 4 Hen. & M. 113 2068
v. Davey, 32 Ohio St. 604 4530, 4574
v. Hunt, 34 Fla. 85 4937, 4939, 4944, 4945
v. Railroad Co., 134 N. C. 331 109
Duvall v. Craig, 2 Wheat. 62 2095, 2148
v. Ferwerda, 146 Mich. 13 226, 2343
v. Fuhrman, 3 Ohio C. C. 305 3670, 3671, 3673, 3688
v. Waters, 1 Bland's Ch. 569 3835
Duxbury v. Vermont, etc., R. Co., 26 Vt. 751 295, 298, 299
Dwelle v. Wilson, 14 Ohio C. C. 551 1728, 1737
Dwiggins v. Clark, 94 Ind. 49 2225, 2237
Dwight v. Appleton, 8 Fed. Cas. 143 4480
v. Chase, 3 Ill. App. 67 4378
v. County Com'rs, 11 Cush. 201 1419, 2620
v. Cutler, 3 Mich. 566 1953, 3096
v. Elmira, etc., R. Co., 132 N. Y. 199 3778, 3780
v. Enos, 9 N. Y. 470 1683, 4327
v. Hampden, 11 Cush. 201 4033, 4108, 4130
v. Webster, 10 Abb. Pr. 128 1220
v. Williams, 4 McLean 581 2787
Dwinel v. Brown, 54 Me. 468 844, 848, 854
Dwinelle v. New York, etc., R. Co., 120 N. Y. 117 3468
Dwyer v. Administrators, 47 La. Ann. 1232 172
v. Carroll, 86 Cal. 298 3206, 3209
v. Chicago, etc., R. Co., 84 Iowa 479 4864
v. Meehan, 18 L. R. Ir. 138 4552
v. St. Louis T. Co., 108 Mo. App. 152 4607, 4613, 4637
v. United States, 93 Fed. 616 1574, 1575
v. Woulfe, 40 La. Ann. 46 1620
Dyar v. Slingerland, 24 Minn. 267 1204
v. Stone, 23 Cal. App. 143 2503
v. Southern Pac. Co., 140 Cal. 296 4873
Dybdal v. Fagerberg, 102 Minn. 130 4411
Dye v. Chicago & A. R. Co., 135 Mo. App. 254 135, 3456, 3472
v. Dye, 12 Colo. App. 206 1765, 1789
v. Dye, 21 Ohio St. 86 2814
v. Mann, 10 Mich. 291 2875, 2894
Dyer v. Britton, 53 Miss. 279 2120
v. Combs, 65 Mo. App. 148 1485
v. Cowden, 168 Mo. App. 649 889
v. Denham, 54 Ga. 224 1321
v. Dorsey, 1 Gill & J. 440 1995
v. Grand Trunk R. Co., 42 Vt. 441 3301
v. Hargrave, 10 Ves. 506 2032, 2051
v. Homer, 22 Pick. 253 1836, 1837
v. Hunt, 5 N. H. 401 1145
v. Hutchins, 87 Tenn. 198 443
v. Jones, 8 Vt. 205 2667, 2679, 2680
v. Libby, 61 Me. 45 2225, 2226
v. Piscataqua Ins. Co., 53 Me. 118 3000, 3036
v. Rich, 1 Metc. (Mass.) 180 2309, 2328, 2333
v. Sutherland, 75 Ill. 583 2510
v. Wightman, 66 Pa. 425 3145
Dyettt v. Hyman, 129 N. Y. 351 2888
v. Pendleton, 8 Cow. 727 3122, 3123, 3125
Dyke v. National T. Co., 22 App. Div. (N. Y.) 360 4260, 4263
Dykes v. Wyman, 67 Mich. 236 977
Dyott's Est., 2 W. & S. 463 677, 678
Dyrenforth v. Palmer P. T. Co., 240 Ill. 25 2489
Dyson v. Rhode Island Co., 25 R. I. 600 1397
v. Union Bank, 8 Vict. L. R. (law) 106 278
Dzialgnski v. Bank, 23 Fla. 346 1805

E

E. B. Ward, Jr., The, 16 Fed. 255 4953
Eachus v. Los Angeles, etc., R. Co., 103 Cal. 614 3951, 3952, 3990
Eagan v. Gault, 1 McMull. 468 4581
Eager v. Atlas Ins. Co., 14 Pick. 141 3032
Eagle v. Swaye, 2 Daly 140 3248
Eagle City I. Works v. Barber, 102 Pa. 156 4415
Eagle Glass & Mfg. Co. v. Second Hand Pipe & Supply Co., 74 W. Va. 228 2390, 2403
Eagle I. Co. v. Baugh, 147 Ala. 613 2236
Eagle I. Works v. Des Moines S. R. Co., 101 Iowa 289 2387, 2391, 2406, 2438
Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443 3092
Eagle M. & I. Co. v. Lund, 14 N. M. 417 1815
Eagle Pass Lumber Co. v. Galveston, H. & S. A. Ry. Co., — Tex. Civ. App. —, 164 S. W. 402 3286
Eagle Point, The, 136 Fed. 1010, rev'd 142 Fed. 453 5015, 5017
Eagle T. Co. v. Barr, 32 N. Y. St. Rep. 299 2343
v. Barr Co., 16 Daly 212 2645
Eagle & P. Mfg. Co. v. Browne, 58 Ga. 240 2305
Eagleton v. Kabrich, 66 Mo. App. 231 4620, 4629
Eaken v. Harrison, 4 McCord 249 2526, 2539
Eaker v. Western U. Tel. Co., 75 S. C. 97 3547
Eakin v. Scott, 70 Tex. 442 848, 858, 899
Eames v. Armstrong, 142 N. C. 506 2056, 2058, 2061
v. Armstrong, 146 N. C. 1 2116
v. Cushman, 135 Mass. 573 939
v. New England W. Co., 11 Metc. (Mass.) 570 3970
v. Prentice, 8 Cush. 337 1390, 3823
Eames V. B. Co. v. Prosser, 157 N. Y. 289 814
v. Spooner, 3 Denio 246 1702, 4303
v. Tupper, 45 Vt. 275 170, 1314, 4190
Earl of Bath v. Earl of Bedford, 2 Ves. Sr. 587 2211
Earl of Chesterfield v. Duke of Bolton, 2 Comyn 627 3150
v. Jansen, 1 Wils. 287 867, 940
Earl of Egmont v. Smith, 6 Ch. Div. 469 2041
Earl of Falmouth v. Thomas, 1 Cr. & M. 89 2517
Earl of Leicester v. Walter, 2 Camp. 251 4528
Earl of Mansfield v. Ogle, 4 De. G. & J. 41 1034, 1078
Earl of Northampton's Case, 12 Coke 132 4599

[REFERENCES ARE TO PAGES]

Earl of Sheffield v. London Joint Stock Bank, 13 App. Cas. 333 4252
Earle v. Abrogast, 180 Pa. 409 3150
v. Berry, 27 R. I. 221 766
v. Burland, 6 Ont. L. R. 327 1121
v. Commonwealth, 180 Mass. 579 3947, 4024
v. De Witt, 6 Allen 520 2053
v. Gorham Mfg. Co., 2 App. Div. (N. Y.) 460 4312
v. Holderness, 4 Bing. 462 4301
v. Mark, 80 Tex. 39 2204
v. Middleton, 1 Cheves 127 2098
v. Owings, 72 S. C. 362 958
v. Whiting, 196 Mass. 371 1117
Earley v. Winn, 129 Wis. 291 4502, 4572, 4573, 4574, 4577
Early v. Flannery, 47 Vt. 253 703, 717
v. Friend, 16 Gratt. 21 1116
v. Hampton, 15 Ga. App. 95 1709
v. Mahon, 19 Johns. 147 984
v. Moore, 4 Munf. 262 1539
v. Tussing, 182 Mich. 314 931, 2585
Earmes v. T. & N. O. R. Co., 63 Tex. 660 73
Earn Line S. S. Co. v. United States, 170 Fed. 834 2735
Earnest v. Express Co., 1 Woods 573 3412
Earnshaw v. Whittemore, 194 Mass. 187 2455
Earp v. Gilliam, 1 New South Wales St. Rep. 281 916
v. Lilly, 217 Ill. 582 158
v. Lilly, 120 Ill. App. 123 448, 1290
Easdaile v. Sowerby, 11 East. 114 2937
Easler v. Beard, 39 Minn. 32 834
Easley v. Brand, 18 Iowa 132 994
Eason v. Sutton, 4 Dev. & Batt. 484 1598
East v. Chapman, 2 C. & P. 570 470
v. Pace, 57 Ala. 521 4303
East 161st St., In re, 159 App. Div. (N. Y.) 662 4133, 4136
East 172nd St., In re, 141 App. Div. (N. Y.) 623 4105
East Brandywine, etc., R. Co. v. Ranck, 78 Pa. 454 3964, 4135
East Galer St., In re, 47 Wash. 603 3962, 4127
East India Co. v. Glover, 1 Strange 612 1408
East Jersey W. Co. v. Bigelow, 60 N. J. L. 201 411, 3847, 3858, 3919, 3927
East Line, etc., R. Co. v. Scott, 72 Tex. 70 766
v. Smith, 65 Tex. 167 4907
East Moline Co. v. Weir P. Co., 95 Fed. 250 41, 918
East Pennsylvania R. Co. v. Hiester, 40 Pa. 53 4133
East River L. Co., In re, 206 N. Y. 545 1057
East Saginaw City R. Co. v. Bohn, 27 Mich. 503 151
East St. Louis & C. R. Co. v. Frazier, 26 Ill. App. 437 4795
v. Illinois State T. Co., 248 Ill. 559 3976
East Tennessee L. Co. v. Leeson, 183 Mass. 37 1135, 1222
East Tennessee & G. R. Co. v. Nelson, 1 Cold. 272 3329, 3342
East Tennessee, etc., R. Co. v. Burnett, 11 Lea 525 4150
v. Fain, 12 Lea 35 478
v. Fleetwood, 90 Ga. 23 1268, 1318, 1343
v. Hale, 85 Tenn. 69 3349, 3433
East Tennessee, etc., R. Co. v. Herrman, 92 Ga. 384 3387
v. Hesters, 90 Ga. 11 72
v. Hunt, 15 Lea 261 3287, 3310
v. Johnson, 85 Ga. 497 3346, 3357, 3370, 3400
v. Johnston, 75 Ala. 596 3334, 3387, 3428
v. King, 88 Ga. 443 4795, 4798
v. Lockhart, 79 Ala. 315 135, 3452, 3461
v. Thompson, 12 Lea 200 478
v. Williams, 3 Tenn. Cas. 8 657
v. Winters, 85 Tenn. 240 1480, 1483
v. Wright, 76 Ga. 532 798
East Texas F. Ins. Co. v. Brown, 82 Tex. 631 1090
Easter v. Boyd, 79 Ill. 325 1917
v. Foster, 173 Mass. 39 1676
v. Minard, 26 Ill. 494 1827
Easter v. Virginian Ry. Co., — W. Va. —, 86 S. E. 37 5059, 5073
Easterbrook v. Erie R. Co., 51 Barb. 94 3761
v. Farquharson, 110 Cal. 311 1093
Eastern Counties R. Co. v. Broom, 6 Ex. 314 1330, 1332
v. Hawkes, 5 H. of L. Cas. 331, 336 1938
Eastern D. Co., In re, 182 Fed. 179 4989, 4990
Eastern D. Co. v. Keystone P. Mfg. Co., 164 Fed. 47 4437
Eastern G. Co. v. Heim, 89 Iowa 698 2260
Eastern I. Co. v. King, 86 Va. 97 2403
Eastern R. Co. v. Benedict, 10 Gray 212 2318, 2329, 2330, 2331
v. Littlefield, — Tex. —, 154 S. W. 543 3329
v. Littlefield, — Tex. Civ. App. —, 135 S. W. 1086 3396
v. Montgomery (Tex. Civ. App.), 139 S. W. 885 1480, 3431
v. Tuteur, 127 Wis. 382 2741
Eastern T. Co. v. Cushing S. F. Co., 3 New Pruns. Eq. 392 957
Eastern T. & B. Co. v. Cunningham, 103 Me. 455 4381, 4383
Eastern Tennessee, etc., R. Co. v. Staub, 7 Lea 397 375, 380, 389, 2552, 2554
Eastern Texas R. Co. v. Eddings, 30 Tex. Civ. App. 170 3963, 3967, 4107, 4133, 4135
v. Scurlock, 97 Tex. 305 3969
Eastern, etc., R. Co. v. Brown, 6 Ex. 314 3509
Easterwood v. Quin, 2 Brev. 64 471, 4599
Eastfield S. S. Co. v. McKeon, 208 Fed. 580 1005, 1146, 1182
Easthampton L. & C. Co. v. Worthington, 186 N. Y. 407 2678
Eastin v. Bank, 66 Cal. 123 223, 4609, 4623
v. Board of School Directors, 40 La. Ann. 705 2743
v. Vandorn, Walk. (Miss.) 214 941, 1051
Eastland v. Longshorn, 1 N. & McC. 194 802, 804
Eastman v. Amoskeag Mfg. Co., 44 N. H. 143 1421, 3842
v. Commissioners, 114 N. C. 524 4318
v. Cooper, 15 Pick. 276 383
v. Dunn, 34 R. I. 416 286, 2515
v. Grant, 34 Vt. 390 778
v. Harris, 4 La. Ann. 193 363, 4256
v. Keasor, 44 N. H. 518 4645

[REFERENCES ARE TO PAGES]

Eastman v. Mayor, 152 N. Y. 468 250, 3188
v. Monastes, 32 Ore. 291 4639, 4640
v. Palmer, 32 N. Y. 238 637
v. Porter, 14 Wis. 39 666, 669, 670
v. Ramsey, 3 Ind. 419 416
v. Rapids, 21 Iowa 590 802
Easton v. Cressey, 100 Cal. 75 868, 2018
v. Hyde, 13 Minn. 90 1890
v. New York, etc., R. Co., 26 N. J. Eq. 359 1719
v. Pennsylvania & O. C. Co., 13 Ohio 80 884, 906
v. Pratchett, 1 Cr. M. & R. 798 1827
v. Woods, 1 Mo. 506 4296
Eastwood v. Klamm, 83 Neb. 546 4711, 4782
Eaton v. B. C. & M. R. Co., 51 N. H. 504 3948
v. Bell, 5 B. & Ald. 34 1013
v. Bell, 7 Eng. C. L. 13, 5 B. & Ald. 34 1213
v. Benton, 2 Hill 576 639, 2471
v. Blackburn, 52 Ore. 300 2271
v. Boissonnault, 67 Me. 540 958
v. Boston, etc., R. Co., 11 Allen 500 160
v. Caldwell, 3 Minn. 134 4353
v. Cincinnati, etc., R. Co., 11 Interstate Com. 619 3312
v. Emerson, 14 Me. 335 786
v. Gladwell, 121 Mich. 444, 449 2597
v. Hasty, 6 Neb. 419 2797
v. J. B. Crowe Coal & Mining Co., 178 Mo. App. 320 2274
v. Kelly, 72 N. C. 110 1604
v. Knowles, 61 Mich. 625 689, 2384
v. Lambert, 1 Neb. 339 2835, 2837, 2838
v. Lanfley, 65 Ark. 448 4345
v. Larimer & W. R. Co., 3 Colo. App. 366 1763
v. Lincoln, 13 Mass. 424 421, 761, 763
v. Lyman, 24 Wis. 438 303, 2136
v. Lyman, 30 Wis. 41, 33 Wis. 34 40, 1521, 2057, 2084, 2151, 2153, 2173
v. Mellus, 7 Gray 566 1180, 1437, 1456, 2305, 2395
v. Mississippi Valley T. Co., 123 Mo. App. 117 2858
v. Railroad Co., 51 N. H. 504 3949
v. Redick, 1 Neb. 305 1983
v. Tallmadge, 22 Wis. 526 2157, 2209
v. Welton, 32 N. H. 352 2905
v. Winnie, 20 Mich. 156 4583
v. Woolly, 28 Wis. 628 538
Eaton, etc., Co. v. Avery, 83 N. Y. 31 4377, 4387
Eau Claire v. Eau Claire W. Co., 137 Wis. 517 796, 821, 1229
Eau Claire Nat. Bank v. Chippewa Valley Bank, 124 Wis. 520 1051
Eaves v. Harris, 95 Miss. 607 1366, 2274
v. Henderson, 17 Wend. 190 628, 631
Ebberts v. Edgewood, 243 Pa. 595 3962, 3963
Ebbetts v. Conquest [1895], 2 Ch. 377 3155, 3168
Ebenhardt's App., 8 W. & S. 327 577
Ebenreiter v. Dahlman, 19 N. Y. Misc. 9, aff'g 18 N. Y. Misc. 351 4268
Eberg v. Heisler, 12 Pa. Super. 388 2025
Eberhardt v. Federal Ins. Co., 14 Ga. App. 340 3053
Eberley v. Rupp, 90 Pa. 259 4609
Eberling v. Deutscher Verein, 72 Tex. 339 2025
Eberly v. Rupp, 90 Pa. 259 10
Ebersole v. Addington, 156 Ala. 575 796
v. Supreme Council, 146 Ala. 506 377
Ebert v. Hartley, 72 Conn. 453 1406
v. Johns, 206 Pa. 395 749
v. Mutual Reserve Fund L. Ass'n, 81 Minn. 116 3087
Eberz v. Heisler, 12 Pa. Super. 388 1997
Ebey S. Co. v. Snohomish River B. Co., 73 Wash. 52 3902
v. Schumacher, 29 Pa. 40 2920, 2954
Ebner v. Mackey, 186 Ill. 297, 87 Ill. App. 306 2477
Eby v. Larkin, 53 Wash. 454 2025
Eccardt v. Eisenhauer, 74 App. Div. (N. Y.) 35 4434
Eccles v. Herrick, 15 Colo. App. 350 976, 1148
v. Radam, 75 Hun 535 4516
v. Stephenson, 3 Bibb 517 2942
v. Union Pac. C. Co., 15 Utah 14 1536
v. United States F. & G. Co., 72 Neb. 734 1608
v. Walker, 75 Neb. 722 1608
Ecker v. Cottrell, 24 App. Div. (N. Y.) 496 3198
Eckert v. Myers, 45 Ohio St. 525 1646
v. Van Pelt, 69 Kan. 357 4505
v. Wallace, 75 N. J. L. 171 748
v. Wilson, 12 S. & R. 393 1107
Eckhoff v. Eickenbary, 52 Neb. 332 2814
Eckington, etc., R. Co. v. McDevitt, 18 App. Cas. (D. C.) 497 175, 2620
v. McDevitt, 191 U. S. 103 236
Eckles v. Carter, 26 Ala. 563 537
Eckman v. Chicago, etc., R. Co., 169 Ill. 312, aff'g 64 Ill. App. 444 24, 25, 755, 765
v. Lehigh, etc., C. Co., 50 Pa. Super. 427 32, 3937, 3938
Eckstein v. Whitehead, 10 Up. Can. C. P. 65 2984
Economy L. & P. Co. v. Cutting, 49 Ill. App. 422 3894
Edam, The, 13 Fed. 135 2733
Eddings v. Boner, 1 Ind. Ty. 173 1663
Eddington v. Nix, 49 Mo. 134 2153, 2212
Eddowes v. Hopkins, 1 Doug. 376 1488, 1527
Eddy v. Clement, 38 Vt. 486 2630, 2635, 2667, 2679
v. Coffin, 149 Mass. 463 3202
v. Lafayette, 163 U. S. 456 1137, 1142
v. Lafayette, 49 Fed. 807 1437, 3433, 4171, 4173
v. O'Hara, 14 Wend. 221 809, 811
v. People, 187 Ill. 304 1200, 2808
v. Syracuse R. T. Co., 50 App. Div. (N. Y.) 109 3451, 3482, 3514
v. Wallace, 49 Fed. 801 4748
Eddystone, The, 33 Fed. 925 4989
Edelman v. St. Louis T. Co., 3 Mo. App. 503 1269
Edelmuth v. Prendergast, 202 N. Y. 602 4156
Edelsten v. Edelsten, 1 DeGex, J. & S. 199 4463
v. Edelsten, 9 Jur. (N. S.) 479 4487
v. Edelsten, 10 L. T. Rep. (N. S.) 780 4491
Eden v. Drey, 75 Ill. App. 102 3530
v. Lexington, etc., R. Co., 14 B. Mon. 204 4757, 4763, 4846
v. Luyster, 60 N. Y. 252 4678
v. Risdale's Railway Lamp and Lighting Co., 23 Q. B. Div. 368 4253
v. Silberberg, 89 App. Div. (N. Y.) 259 2545
Edens v. Fletcher, 79 Kan. 139 774
Edenton v. Dickinson, 2 Tenn. Cas. 324 1054

[REFERENCES ARE TO PAGES]

Ederlen v. Thompson, 2 Har. & Gill 31 1487
Edes v. Goodridge, 4 Mass. 103 1214
Edgar v. Boise, 11 S. & R. 445 2329, 2337
v. Breck, 172 Mass. 581 2439
v. Castello, 14 S. C. 20 4847
v. Newall, 24 Up. Can. Q. B. 215 4576, 4596
Edgar & T. Works v. United States, 34 Ct. of Cls. 205 860, 863
Edge v. Griffin (Tex. Civ. App.), 63 S. W. 148 3689, 3690
v. Strafford, 1 Cr. & J. 391 3102
v. Third Ave. R. Co., 57 App. Div. (N. Y.) 29 1378
Edgecombe v. Rodd, 5 East 294 680
Edgerly v. Bush, 81 N. Y. 199 1145
v. Emerson, 23 N. H. 555 2800
v. Farmers' Ins. Co., 43 Iowa 587 3018
Edgerton v. Edgerton, 153 N. C. 167 834
v. O'Neil, 4 Kan. App. 73 4748
v. Page, 20 N. Y. 281 548, 3127, 3129, 3260
Edison G. E. Co. v. Blount, 96 Ga. 272 2454
Edith L. Allen, The, 122 Fed. 729, 129 Fed. 209 2728, 2729, 2734
Edith L. Allen, The, 139 Fed. 888 2727, 2735
Edlund v. St. Paul City R. Co., 78 Minn. 434 1472, 1473
Edmands v. Boston, 108 Mass. 535 3146, 4020, 4021, 4022, 4045, 4091
Edmison v. Sioux Falls W. Co., 10 S. D. 440 1734, 1743, 1745
v. Sioux Falls W. Co., 14 S. D. 486 1738, 1743
Edmonds v. Edmonds, 73 Iowa 427 1643
v. Hughes, 115 Ky. 561 3680, 3683
Edmondson v. Hyde, 2 Sawyer 205 604
v. Kite, 43 Mo. 176 3097
v. Nuttall, 17 C. B. (N. S.) 280 4202, 4303
Edmunds v. Black, 13 Wash. 490 696
v. Digges, 1 Gratt. 359 644, 648
v. Porter, 2 Cold. 42 2198
v. Sheahan, 47 Tex. 443 2836, 2869
Edmundson v. Baxter, 4 Hayw. 112 3301
v. Welsh, 27 Ala. 578 3727
Edmunson v. Machell, 2 T. R. 4 4963
Edsall v. Brooks, 2 Robert. 414 4521
v. Jersey Shore, 220 Pa. 591 4032, 4098, 4111
Edson v. Dellage, 8 How. Pr. 273 695
v. Magee, 43 Pa. Super. 297 2226, 2245, 2248, 2249, 2250, 2256
v. Weston, 7 Cow. 278 4284
Education Ass'n, etc., v. Hitchcock, 4 Kan. 36 1524
Edward v. Clark, 83 Mich. 246 2186
Edward Hines L. Co. v. Alley, 73 Fed. 603 377
Edwards v. Armour P. Co., 190 Ill. 467 2979
v. Baltimore Ins. Co., 3 Gill 176 3018, 3021
v. Baugh, 11 M. & W. 641 758
v. Bay State G. Co., 172 Fed. 971 2498
v. Beach, 3 Day 447 164, 4164
v. Beebe, 48 Barb. 106 4186
v. Bodine, 11 Paige 223 305, 1719, 1720, 1722, 1725
v. Bodine, 26 Wend. 109 555
v. Boyd, 136 Ga. 733 1599
v. Bricker, 66 Kan. 241 1668, 1670, 1671
v. Chapman, 1 M. & W. 231 762
Edwards v. Charlotte, etc., R. Co., 39 S. C. 472 8
v. Cheyenne, 19 Wyo. 900 4031, 4034, 4037
v. Clark, 83 Mich. 246 2093, 2122, 2149
v. Collson, 5 Lans. 324 2406, 2428, 2429
v. Dargan, 30 S. C. 177 2814
v. Dickinson, 102 N. C. 519 4282
v. Durgen, 19 Grant's Ch. (Up. Can.) 101 1645
v. Edwards, 31 Ill. 474 1742
v. Farmers' F. Ins. & L. Co., 21 Wend. 467 826
v. Goldsmith, 16 Pa. 43 2458, 2507
v. Hale, 129 Ga. 302 41
v. Hartshorn, 72 Kan. 19 2684
v. Hill, 11 Ill. 22 3742
v. Hodding, 1 Marsh. 377, 5 Taunt. 815 2993
v. Howell, 10 Ired. 211 4504
v. Jones, 2 M. & W. 414 1818
v. Jones, 7 C. & P. 633 1819
v. Kansas City Times Co., 32 Fed. Rep. 813 471, 4573
v. Leavitt, 46 Vt. 126 1305
v. Melbourne & M. Board of Works, 19 Vict. L. R. 432 57
v. Morris, 1 Ohio 239 1891, 2212
v. New York & H. R. R. Co., 98 N. Y. 245 3127, 3250
v. Plains Light & Water Co., 49 Mont. 535 2547, 2554
v. Pope, 4 Ill. 465 1718, 1754, 1757
v. Pyle, 23 Ill. 354 1846
v. Randle, 63 Ark. 318 18
v. Reynolds, Hill & Denio 53 1529
v. Rumph, 48 Ark. 479 721
v. Sanborn, 6 Mich. 348 2357, 2624
v. San Jose P. & P. Soc., 99 Cal. 431, 439 4574
v. Sartor, 69 S. C. 540 947
v. Seattle, etc., R. Co., 62 Wash. 77 1511
v. Southern R. Co., 162 N. C. 278 3472, 3473
v. Todd, 2 Ill. 462 540, 3301
v. Van Patten, 46 Kan. 509 3257
v. Vere, 5 B. & Ad. 232 1034
v. Weister, 2 A. K. Marsh. 382 1358
v. Western U. Tel. Co., 147 N. C. 126 311, 3570
v. White, 12 Conn. 28 1634
v. Wooldridge, 52 Tex. Civ. App. 512 2373
Edwards B. Co. v. Stevenson, 160 Mo. 516 1147
Edwards B. Works v. Jarnagin, 11 Ga. App. 162 664
Edwards & Bradford Lumber Co. v. Lamb, 95 Neb. 263 658
Edwardsen v. Jarvis Lighterage Co., 168 N. Y. App. Div. 368 5172
Edwick v. Hawkes, 18 Ch. Div. 199 3825
Edwin v. Cox, 61 Ill. App. 567 1669, 1676
Eeraert v. Eureka L. Co., 43 Mont. 517 3942
Effinger v. Henderson, 3 Miss. 449 717
v. Kenney, 115 U. S. 566, 9 Sup. Ct. 179 611
Efroymson v. Smith, 29 Ind. App. 451 4840
Efta v. Swanson, 115 Minn. 373 2089, 2097, 2122
Egan v. Browne, 128 App. Div. (N. Y.) 184 226, 3209, 3214
v. Martin, 71 Mo. App. 60 2056, 2074
v. Southern T. Co., 189 Fed. 543 4934

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v. Hanford P. Co., 92 App. Div. (N. Y.) 252 2370, 2404
v. Hanson, 34 N. Y. Misc. 596 2860
Ege v. Kille, 84 Pa. 333 365, 3703
Eggert v. Pratt, 126 Iowa 727 1994, 1995
Eggett v. Allen, 106 Wis. 633 4629, 4634, 4635
v. Allen, 119 Wis. 625 4628, 4638, 4639
Eggland v. South 22 S. D. 467 2501
Eggleston v. Boardman, 37 Mich 14 2486, 2491, 2510
v. Macauley, 1 McCord 237 1101
Eginorie v. Union County, 112 Iowa 558 4929
Egle v. Roman C. Church, 36 La. Ann. 310 731
Egler v. Marsden, 5 Taunt. 25 3098
Egleston v. Knickerbacker, 6 Barb. 458 638, 767
Egypt, The, 17 Fed. 359 2726, 2728
Ehle v. Chittenango Bank, 24 N. Y. 548 1888
v. Purdy, 6 Wend. 629 422
Ehly v. Philadelphia & Reading R. Co., 56 Pa. Super. Ct. 512 4657
Ehmer v. Title G. & T. Co., 156 N. Y. 10 305
Ehrensperger v. Anderson, 3 Ex. 148 594
Ehret v. Schuylkill River Eastside R. Co., 151 Pa. 158 4005
Ehrgott v. Mayor, 96 N. Y. 264 54 135, 136, 1382, 4680, 4684, 4693, 4695
Ehrhardt v. Varn, 51 S. C. 550 968, 999
Ehrlich v. Brucker, 121 Wis. 495 1110
Ehrman v. Stanfield, 80 Ala. 118 1737
v. Swiftsure, 4 Fed. 463 2727
Ehrsam v. Brown, 76 Kan. 206 2373
Ehrsam Mfg. Co. v. Jackman, 73 Kan. 435 2227
Eichar v. Kistler, 14 Pa. 282 4973
Eichbaum v. Caldwell, 58 Wash. 163 2358
Eichelberger v. Mann, 115 Va. 774 762
v. Miller, 20 Md. 332 2611
v. Mills L. & W. Co., 9 Cal. App. 628 4380
v. Morris, 6 Watts 42 779
Eichelberger's Est., 170 Pa. 242 1078
Eichhold v. Tiffany, 20 N. Y. Misc. 680 2749
Eichholz v. Bannister, 17 C. B. (N. S.) 708 2382, 2397
Eichorn v. Le'maitre, 2 Wils. 367 1409
v. New Orleans, etc. R., L. & P. Co., 112 La. 236 418
v. New Orleans, etc. R., L. & P. Co., 114 La. 712 4882, 4894, 4896, 4899, 4900
Eickhoff v. Fidelity & C. Co., 74 Minn. 139 4610, 4611
Eidem v. Chicago, etc. R. Co., 158 Ill. App. 82 4806
Eidemiller I. Co. v. Guthrie, 42 Neb. 238 3797
Eigenmann v. Clark, 21 Ind. App. 129 2830
Eighmy v. Brock, 126 Iowa 535 4400
Eight Hundred Bales of Cotton, 8 Blatch. 221 3037
Eikrem v. New England B. C. Co., 125 Fed. 987 3303
Eilbert v. Finkbeiner, 68 Pa., 243 2781
Eilers Music House v. Hopkins, 73 Wash. 281 2741
v. Oriental Co., 69 Wash. 618 833, 886, 913
Eimolf v. Thomson, 95 Minn. 230 2473
Einstein v. Dunn, 61 App. Div. (N. Y.) 195 4233, 4284
v. Levi, 25 App. Div. (N. Y.) 565 3142
v. Tutelman, 59 N. Y. Misc. 462 3141
Eisele v. Oddie, 128 Fed. 941 56, 324, 1367, 3814, 3825
Eiseman v. Gallagher, 24 Neb. 79 978
Eisenbud v. Gellert, 26 N. Y. Misc. 367 1709, 1711
Eisenhart v. Slaymaker, 14 S. & R. 154 421
Eisleben v. Brooks, 179 Fed. 86 208, 1934
Eitzen v. Hilbert, 165 Mich. 650 4322
Eke v. Hart-Dyke, [1910] 2 K. B. 677 5189
Ek'ns v. East India Co., 1 P. Wms. 395 616, 1135, 1878
Eklund v. Lewis L. Co., 13 Idaho 581 1399
Ekstrand v. Barth, 41 Wash. 321 2601
Ela v. Card, 2 N. H. 175 2060, 2089
v. French, 11 N. H. 356 2916, 3025, 3039
Elam v. Majestic C. & C. Co., 155 Ill. 375 1377, 4734, 4832
v. Western U. Tel. Co., 113 Mo. App. 538 3566
Elba v. Bullard, 152 Ala. 237 4690, 4720, 4730, 4737
Elbert County v. Swift, 2 Ga. App. 47 4019
Elbin v. Wilson, 33 Md. 135 1268
Elfinger Actien-Gesellschaft v. Armstrong, L. R. 9 Q. B. 473 197, 2350, 2427
Elder v. Frevert, 18 Nev. 446 552
v. Johnson, 115 Ga. 691 815
v. Kutner, 97 Cal. 490 1689, 1690, 1694, 1695, 1706, 4620
v. Lykens Valley C. Co., 157 Pa. 490 147
v. Sabin, 66 Ill. 126 305, 1719
v. True, 32 Me. 104 1985, 2110, 2115, 3188
Elder & Co., R. A. v. Shoffstal, 90 Ohio St. 265 4391
Elderkin v. Fellows, 60 Wis. 339 796
Eldorado, The, 53 Fed. 840, rev'g 50 Fed. 951 2724
El Dorado v. Scruggs, 113 Ark. 239 3961, 3963, 4001, 4032, 4034
Eldorado, etc. R. Co. v. Everett, 225 Ill. 529 3975, 3997, 4114, 4134, 4137
El Dorado, etc. R. Co. v. Knox, 90 Ark. 1 1459, 1461
Eldorado, etc., R. Co. v. Sims, 228 Ill. 9 3986, 4038
Eldred v. Leahy, 31 Wis. 546 537, 547, 3128, 3258, 3261
v. Peterson, 80 Iowa, 264 749
Eldridge v. Crow, 7 N. Y. Misc. 150 2873
v. Fuhr, 59 Mo. App. 44 930, 2650, 2657, 2684, 2687
v. Gorman, 77 Conn. 699 1368, 3776, 3814
v. Hoefer, 45 Ore. 239 4299, 4300
v. Wadleigh, 12 Me. 371 2399
Eleanor, The, 48 Fed. 842 2735
Electrelle Co. v. Maguire, 215 Mass. 550 381
Electric A. Co. v. United States F. & G. Co. 110 Wis. 434 2792
Electric L. Co. v. Rust, 131 Ala. 484 4314
Electric R. Co. v. Tennessee C. I. & R. Co., 98 Ga. 189 2280, 2287

[REFERENCES ARE TO PAGES]

Electron, The, 56 Fed. 304 2386, 2402, 7402
Elena G., The, 61 Fed. 519 2729
Elerick v. Reid, 54 Kan. 579 4376
Elevator Safety D. Co. v. Brown-K. I. Works, 153 Ill. App. 313 2373
Elfelt v. Smith, 1 Minn. 125 1446
Elfenbein v. Abbondanza, 64 N. Y. Misc. 176 2339, 3177
Elfers v. Wooley, 116 N. Y. 294 1318, 1467
Elfrida, The, 172 U. S. 186, 196, 43 L. ed. 413, 417 2719
Elgin v. Joslyn, 136 Ill. 525 2656
v. Welch, 16 Ill. App. 483 3938
Elgin City B. Co. v. Hall, 119 Tenn. 548 1826, 1847, 2772
Elgin L. & S. Co. v. National T. Co., 10 Ont. L. R. 41 4254
Elgin National W. Co. v. Illinois W. C. Co. 179 U. S. 665, 674 4490
Elgin W. P. & P. Co. v. Nichols, 105 Fed. 780 4466
Elgin, etc. R. Co. v. Fletcher, 128 Ill. 619 3987
v. Northwestern Nat. Bank, 165 Ill. App. 35 858, 1036, 1224
Elias v. Coleman & Krause (Misc.) 137 N. Y. Supp. 883 2670
Elida, The, 31 Fed. 420 3306
Elijah v. Dowling, 49 Ind. App. 515 1378
Eliot Five Cent Sav. Bank v. Commercial Union Assur. Co. 142 Mass. 142 785
Eliza Lines, The, 114 Fed. 307, 61 Fed. 308, 102 Fed. 184 3287
Eliza Lines, The, 132 Fed. 242 5011
Elizabeth and Jane, The, 1 Ware 33 2735
Elizabeth v. Pavement Co., 97 U. S. 126 4456, 4466
Elizabethtown, etc., R. Co. v. Combs, 10 Bush 382 400, 3870, 3878
v. Geoghegan, 9 Bush 56 918
v. Helm's Heirs, 8 Bush 681 4121, 4123
v. Pottinger, 10 Bush 185 252, 1422
v. Price, 11 Ky. L. Rep. 367 3834
Elizalde v. Murphy, 11 Cal. App. 32 1635, 1637
Elkhart v. Ritter, 66 Ind. 136 4662, 4748
Elkhart Mut. A. B. & R. Ass'n v. Houghton, 103 Ind. 286 3076
Elkhart P. Co. v. Fulkerson, 36 Ind. App. 219 442
Elkhart R. Works v. Neff, 46 Ind. App. 332 2551
Elkin v. Baker, 11 C. B. (N. S.) 526 1816
v. Moore, 6 B. Mon. 462 1032, 1067, 3147
v. People, 4 Ill. 207 1614
v. Rives, 82 Miss. 744 2499
Elkins v. East India Co., 1 P. Wms. 395 1147
v. Empire T. Co. 81 Pa. St. 315 3411
Elkinton v. Newman, 20 Pa. 281 636
Ell v. Northern Pac. R. Co., 1 N. D. 336 1142
Ellard v. Scottish-Am. M. Co., 97 Ga. 329 1201
Ellege v. Todd, 1 Humph. 43 1481
Ellenwood v. Futts, 63 Barb. 321 2018
Eller v. Railroad, 140 N. C. 140 381, 3323
Ellerbe v. Marion County Lumber Co., 99 S. C. 158 4200
Ellery v. Cunningham, 1 Metc. (Mass.) 112 1119, 2960
Ellesmere B. Co. v. Cooper, [1896] 1 Q. B. 75 2792
Ellet v. Paxson, 2 W. & S. 418 1942
Ellick v. Wilson, 58 Neb. 584 149
Ellicott v. Lamborne, 2 Md. 131 3941, 3942, 3944
Ellicott Mach. Co. v. United States, 43 Ct. of Cls. 232 887
Ellicottville, etc. R. Co. v. Buffalo, etc. R. Co., 20 Barb. 644 39
Ellingson v. Chicago & A. R. Co., 60 Mo. App. 679 1396
Ellington v. Ellington, 47 Misc. 329 4958, 4959
Elliot v. Davis, Bunb. 22 1572
v. Fitchburg R. Co., 10 Cush. 191 3847
v. Gantt, 64 Mo. App. 248 3120
v. Sleeper, 2 N. H. 527 655
Elliotson v. Feetham, 2 Bing. N. C. 134 3839
Elliott v. Aiken, 45 N. H. 30 3121
v. Black, 45 Mo. 372 1654
v. Bowles, 31 Pa. 65 4513
v. Caldwell, 43 Minn. 357 2665, 2666
v. Capital City S. Bank, 149 Iowa 309 701
v. Chilton, 5 Ark. 181 1891, 2331
v. Gilmore, 145 Fed. 964 1488
v. Hawley, 34 Wash. 585 361
v. Heath, 14 N. H. 131 537
v. Herz, 29 Mich. 202 1282
v. Hughes, 3 F. & F. 387 2317
v. Kansas City, 174 Mo. 554 4681
v. Minott, 2 McCord 125 1103
v. Missouri Pac. R. Co., 8 Kan. App. 191 3741, 3742
v. Missouri, etc., R. Co., 77 Mo. App. 652 1719, 1725
v. Pray, 10 Allen 378 3234
v. Puget Sound & Cent. Am. S. Co., 22 Wash. 220 2406
v. Pybus, 10 Bing. 512 2225, 2227
v. Russell, 92 Ind. 526 4785
v. Saufey, 89 Ky. 52 2132
v. Sawyer, 107 Me. 195 4715
v. Swartwout, 10 Pet. 137 2993
v. Thompson, 4 Humph. 99 2098, 2212
v. Van Buren, 33 Mich. 49 1299, 4551, 4657, 4668
v. Walker, 1 Rawle 126 2905, 2958, 2959, 2970, 2976
v. Wilkinson, 8 Yerg. 411 2667, 2682
v. Worcester T. Co., 189 Mass. 542 682
Elliott M. Co. v. United States, 43 Ct. of Cls. 469 2704
Ellis v. Abbott, 69 Ore. 234 2137
v. Albany City Ins. Co., 50 N. Y. 402 3040
v. American Tel. Co., 13 Allen 226 3550, 3579
v. American Tel. Co., 95 Mass. 226 3550
v. Barkley, 160 Iowa 658 2388
v. Bibb, 2 Stew. 63 2743
v. Bitzer, 2 Ohio 295 759, 775
v. Brockton Pub. Co., 198 Mass. 538 1295, 4537, 4590
v. Casey, 4 Ala. App. 650 1445
v. Cleveland, 55 Vt. 358 74, 97
v. Cothran, 117 Ill. 458 529
v. Craig, 7 Johns. Ch. 7 937, 1235
v. Duncan, 11 How. Pr. 515 7
v. Ellis & Co., Joseph, [1905] 1 K. B. 324, 74 L. J. K. B. 229, 92 L. T. 718, 53 W. R. 311, 21 T. L. R. 182 5176

[REFERENCES ARE TO PAGES]

Ellis v. Emmanuel, 1 Ex. Div. 157 2773, 2807
v. Esson, 50 Wis. 138 424, 682, 762, 773, 774, 775, 776, 778
v. Garrison, — Tex. Civ. App. —, 174 S. W. 962 4542
v. Gosney, 7 J. J. Marsh. 109 2395
v. Grooms, 1 Stew. 47 2383
v. Hamlin, 3 Taunt. 52 2655
v. Hampton, 123 N. C. 194 4623
v. Hill, 6 Rich. 37 2202
v. Hilton, 78 Mich. 150 321
v. Kansas City, etc. R. Co., 63 Mo. 131 3903
v. Lersner, 48 Barb. 539 4327
v. Lindley, 38 Iowa 461 4513, 4514
v. London, etc. R. Co., 2 H. & N. 424 161
v. McLemoor, 1 Bailey 13 1, 422
v. Miller, 164 N. Y. 434 2275
v. Nowell, 198 Mass. 367 303, 2714
v. Pond, [1898] 1 Q. B. 427 2976
v. Republic O. Co., 133 Iowa 11 4941
v. Riddick, 34 Tex. Civ. App. 256 2372
v. Rock Island, etc. R. Co., 125 Ill. 82 4052
v. Salomon, 57 App. Div. (N. Y.) 118 2047
v. Tips, 16 Tex. Civ. App. 82 2423
v. Wahl, 180 Mo. App. 507 1260, 1266, 1507, 4774
v. Welch, 6 Mass. 246 2059
v. Whitehead, 95 Mich. 105 4511, 4519
v. Wild, 6 Mass. 321 1870
v. Willard, 9 N. Y. 529 3290
v. Wire, 33 Ind. 127 3784, 3804, 4215, 4256, 4258
Ellis' Adm'r v. Louisville, etc., R. Co., 155 Ky. 745 5077, 5080
Ellison v. Adams Exp. Co., 152 Ill. App. 1 3416
v. Adams Exp. Co., 245 Ill. 410 3419, 3420
v. Dove, 8 Blackf. 571 2238
v. Johnson, 74 S. C. 202 2406
v. Langdon, 135 Ky. 607 1578
Ellithorpe Airbrake Co. v. Sire, 41 Fed. 662 2698
Ellmaker v. Franklin Ins. Co., 5 Pa. 183 2768, 3066
Elsler v. Brooks, 54 N. Y. Super. Ct. 73 2514, 2516
Ellsworth v. Central R. Co., 34 N. J. L. 93 1499, 3876
v. Chicago, etc. R. Co., 91 Iowa 386 4101, 4127
v. Cordrey, 63 Iowa 675 2903
v. Cummins, 134 Ill. App. 397 1290
v. Fogg, 35 Vt. 355 643, 755
v. Potter, 41 Vt. 685 1269
v. Thompson, 13 Wend. 658 461, 464
Ellsworth, etc. R. Co. v. Gates, 41 Kan. 574 3931, 4087
Ellwood Mfg. Co. v. Rankin, 70 Iowa 403 1726
Ellyson v. International & G. N. R. Co., 33 Tex. Civ. App. 1 4740
v. Lord, 124 Iowa 125 1569, 1637, 1639
Elmbank, The, 69 Fed. 104 2718
Elm Branch, The, 106 Fed. 952 2727, 2729
Elm City L. Co. v. Mackenzie, 77 Conn. 1 655, 696
Elmendorf v. Classen, 92 Tex. 472 2646
Elmer A. Keeler, The, 194 Fed. 339 5000
Elmer v. Fessenden, 151 Mass. 359 157, 4540, 4600, 4728
v. Loper, 25 N. J. Eq. 475 361
Elminger v. Drew, 4 McLean 388 515
Elmira I. & S. R. M. Co. v. Elmira, 5 N. Y. Misc. 194 951
El Modello C. Mfg. Co. v. Gatto, 25 Fla. 886 4485, 4488
Elmore v. Booth, 83 Ark. 47 2432
v. Brooks, 5 Heisk. 45 2994
v. Johnson, 143 Ill. 513 2490, 2491
Elms v. Southern P. Co., 79 S. C. 502 1316
v. Wright-B. Co., 106 La. Ann. 19 1725, 1734, 1735
Eloina, The, 4 Fed. 573 5013
El Paso C. Co. v. Stafford, 176 Fed. 41 2013
El Paso, etc., R. Co. v. Barrett, 46 Tex. Civ. App. 14 56, 1373, 1375
v. Eichel (Tex. Civ. App.), 130 S. W. 922 244, 252, 2374, 2387, 2634, 2693
v. Kendall, 38 Tex. Civ. App. 221 1424
v. London, 58 Tex. Civ. App. 397 3439
v. Lumbley, 56 Tex. Civ. App. 418 3428
v. Murphy, 49 Tex. Civ. App. 586 4690, 4721, 4729
v. Sawyer, 54 Tex. Civ. App. 387 185, 329, 3439
v. Shaklee (Tex. Civ. App.), 138 S. W. 188 4787
Elphicke v. White, L. T. Co., 106 Fed. 945 2719
El Reno v. Cullimane, 4 Okla. 457 918
Elrod v. M. C. Kiser & Co., 13 Ga. App. 471 745
Elsam v. Faucett, 2 Esp. 562 4977
Elsas v. Second Ave. R. Co., 56 Hun 161 4749
Elsbarg v. Myrman, 41 Minn. 541 767
Elsee v. Smith, 1 D. & R. 97 4607
Elser v. Southern Pac. Co., 7 Cal. App. 493 3465, 3513, 3528
Elshire v. Schuyler, 15 Neb. 561 4865
Elswick S. Co. v. Montaldi, [1907] 1 K. B. 626 3340
Elsworth v. Potter, 41 Vt. 685 3827
Elting v. Sturtevant, 41 Conn. 176 2478
Elton, Ex parte, 3 Ves. 238 2869
Elton's Est., 48 Pa. Super. 585 1122
Eltringham v. Earhart, 67 Miss. 488 4781
Elward v. Illinois Central R. Co., 184 Ill. App. 107 208, 1417, 4742
Elwell v. Bosshard, 151 Wis. 46 4661
v. Bradham, 2 Speers 141 1521
v. Crocker, 4 Bosw. 22 1855
v. Daggs, 108 U. S. 143 959
v. Jackson, 1 Cab. & Ellis 362 624, 659
v. Seattle S. F. Co., 2 Alaska 617 1706
v. Skiddy, 77 N. Y. 282 487
Elwood v. Addison, 26 Ind. App. 28 69, 4920, 4929
v. Deifendorf, 5 Barb. 398 297, 2835, 2843
v. McDill, 105 Iowa 437 949, 2414
v. Western U. Tel. Co., 45 N. Y. 549 3584, 3610
Elwood Mfg. Co. v. Rankin, 70 Iowa 403 1730
Elwood P. M. Co. v. Harting, 21 Ind. App. 408 1430, 1433, 2431, 2596
Ely v. Bibb, 4 J. J. Marsh. 71 2787
v. Davis, 111 N. C. 24 4608
v. Detroit United Ry., 162 Mich. 287 5108

[REFERENCES ARE TO PAGES]

Ely v. Ely, 70 N. J. L. 31 756
v. Ely, 80 Ill. 532 3150, 3165
v. Kilborn, 5 Denio 514 1856
v. King-Richardson Co., 265 Ill. 148 2526
v. Liscomb, 24 Cal. App. 224 1684
v. McNight, 30 How. Pr. 97 629
v. Mumford, 47 Barb. 629 4382
v. Parsons, 55 Conn. 83 40, 42, 1521
v. Witherspoon, 2 Ala. 131 949, 1874
Elysville Mfg. Co. v. Okisko Co., 1 Md. Ch. 392 2067
Elzig v. Bales, 135 Iowa 208 1474, 4735, 4742
Elzy v. Adams Exp. Co., 141 Iowa 407 284, 3373, 3438
Emack v. Campbell, 14 D. C. App. 186 844, 893
Emanuel v. Barnard, 71 Neb. 756 6
Emblem, The, Davies 61 2728
Emblem v. Bickler, 34 Colo. 496 2462, 2464
Emblen v. Myers, 6 H. & N. 54 164, 1269, 1312
Embler v. Gloucester Lumber Co., 167 N. C. 457 4871
Emblin v. Dartnell, 12 M. & W. 830 1528
Embree v. Ellis, 2 Johns. 119 3718
v. Hanna, 5 Johns. 101 579
Embrey v. Owen, 6 Ex. 353 35, 38, 43
Emerald, The, [1896] Prob. Div. 192 5001
Emeric v. O'Brien, 36 Ohio St. 491 646
v. Tams, 6 Cal. 155 1060
Emerson v. Atwater, 7 Mich. 12 1854
v. Atwater, 12 Mich. 314 1203
v. Baylies, 19 Pick. 55 771
v. Brigham, 10 Mass. 197 2371, 2377, 2381
v. Booth, 51 Barb. 40 1664
v. Butte E. R. Co., 46 Mont. 454 1505
v. Cochran, 111 Pa. 619 4634
v. Converse, 106 Iowa 330 1691
v. Howland, 1 Mason 45 287
v. Mallett, Phill. Eq. 236 612
v. Miller, 115 Iowa 315 4548, 4592
v. Pacific Coast & N. P. Co., 92 Minn. 523 226
v. Pacific Coast & N. P. Co., 96 Minn. 1 56, 259, 2572
v. Providence H. Mfg. Co., 12 Mass. 237 661
v. Schoonmaker, 135 Pa. 437 1139
v. Skidmore, 7 Tex. Civ. App. 641 1339, 1700
v. Western Union R. Co., 75 Ill. 176 4106
v. White, 10 Gray 351 798, 1237
Emerton v. Mathews, 7 H. & N. 586 2373
Emery v. Baltz, 94 N. Y. 408 2771
v. Boston Ins. Co., 138 Mass. 398 2999
v. Boston T. Co., 178 Mass. 172 4090
v. Boston & M. R. Co., 67 N. H. 434 4676
v. Boyle, 200 Pa. 249 886, 908, 912
v. Dunbar, 1 Daly 408 3301
v. Gowen, 4 Me. 33 4957
v. Huntington, 109 Mass. 431 3036
v. Lowell, 109 Mass. 197 225, 476, 3881, 3901, 3923
v. Philadelphia, 208 Pa. 492 1477, 4879
v. Smith, 46 N. H. 151 2517
Emfeld v. Shermer, 56 Pa. Super. Ct. 4 3186
Emigh v. B. & O. R. Co., 4 Hughes 271 4444, 4476
v. Earling, 134 Wis. 565 663
Emilie, The, 4 Benc. 235 5008
Emily B. Souder, The, 8 Blatch. 337 605, 606
Emily B. Souder, The, 15 Blatch. 185, Fed. Cas. No. 4458 2730
Emily, The, v. Carney, 5 Kan. 645 3389
Emly v. Lye, 15 East 7 648
Emma, The, 2 W. Rob. Adm. 315 2734
Emma Kate Ross, The, 46 Fed. 872 5005
Emma Kate Ross, The, 50 Fed. 845 5005
Emmitt v. Brophy, 42 Ohio 82 1053
Emmittsburg R. Co. v. Donoghue, 67 Md. 383 749, 758
Emmons v. Alvord, 177 Mass. 466 4391
v. Minneapolis, etc., R. Co., 35 Minn. 503 76
v. Quade, 176 Mo. 22 151
v. Stevane, 77 N. J. L. 570 122
v. Westfield Bank, 97 Mass. 230 1455
Emory v. Addis, 71 Ill. 273 158
v. Eggan, 75 Kan. 82 4613, 4630, 4644
v. Vinall, 26 Me. 235 2848
Emory Mfg. Co. v. Salomon, 178 Mass. 582 2275, 2289
Empie v. Empie, 35 App. Div. (N. Y.) 51 407, 416
Empire C. S. Co. v. De Laval D. S. Co., 75 N. J. L. 207 4503, 4508
Empire Coal Co. v. Gravlee, 9 Ala. App. 657 1473
Empire D. F. Co. v. Chatham Nat. Bank, 30 App. Div. (N. Y.) 476 545
Empire G. M. Co. v. Bonanza G. M. Co., 67 Cal. 406 35, 3737, 3791
v. Jones, 19 Up. Can. C. P. 245 2109, 2168
Empire L. Ins. Co. v. Beaumont, L. & B. Co., — Tex. Civ. App. —, 146 S. W. 335 4365, 4389
Empire M. Co. v. Lovell, 77 Iowa 100 1702
Empire Realty Co. v. Sayre, 107 App. Div. (N. Y.) 415 1948, 1953, 1986, 1997, 2000
Empire State B. Co. v. McDermott, 89 App. Div. (N. Y.) 234 318
Empire State C. Co. v. Atchison, etc., R. Co., 210 U. S. 1 139
Empire State S. Co. v. Lindermeier, 54 Colo. 497 1242, 1569
v. Moran, 71 Wash. 171 1030
Empire State T. F. Co. v. Grant, 44 Hun 434 4359
Empire T. Co. v. Boggiano, 52 Mo. 294 540
v. Philadelphia & R. Coal & I. Co., 77 Fed. 919 3302, 3303, 3306
v. Wamsutta O. R. & M. Co., 63 Pa. 14 3334, 3385
Empire Trust Co. v. Coleman, 85 Misc. (N. Y.) 312 995
Empress Eugenie, The, Lush 139 4998
Empson v. Griffin, 11 A. & E. 186 1527
Emrich v. Ireland, 55 Miss. 390 3692, 3702, 3704
Emu Gravel & R. Co. v. Gibson, 3 New South Wales St. Rep. 204 197, 2339
Emulus, The, 1 Sumn. 207 2719, 2720
Ende v. Seabury, 43 Fed. 672 4459
Endel v. Norris, 15 Tex. Civ. App. 140 4213, 4226, 4233
Ender v. Scott, 11 Ill. 35 2388
Enders v. Board of Public Works, 1 Gratt. 364 368, 1101, 1102, 2309, 2318, 2320, 4239
v. Skannal, 35 La. Ann. 1000 331, 354, 356

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Energia, The, 13 C. C. A. 653, 66 Fed. 604, 61 Fed. 222 3034, 5016
Enfield v. Colburn, 63 N. H. 218 4379, 4432
Eng v. Southern Pac. Co., 210 Fed. 92 5063
Engart v. Inman-P. L. Co., 54 Wash. 38 2569
Engbretson v. Seiberling, 122 Iowa 522 626
Engel v. Fitch, 9 B. & S. 85, 10 B. & S. 738 355, 1947
v. Fitch, L. R. 3 Q. B. 314, L. R. 4 Q. B. 659 1977, 1979, 1989, 2008, 2009
v. Georgiacles, — App. Div. —, 140 N. Y. Supp. 93 209
Engelman v. Metropolitan St. R. Co., 133 Mo. App. 514 4737
Engelsdorff v. Sire, 64 Hun 209 3197
v. Sire, 18 N. Y. Supp. 907 3220
England v. Cox, 89 Ill. App. 551 1290
Englander v. Rogers, 41 Cal. 420 815
Engle v. Johnson, 34 Ind. App. 593 2511
v. Simmons, 148 Ala. 92 94, 3820
Englebach v. Simpson, 12 Tex. Civ. App. 188 815
Engleken v. Webber, 47 Iowa 558 487
Engleman v. Craig, 2 Bush 424 2067
Engler v. Ell's, 16 Ind. 475 962, 1879
Englert v. New Orleans R. & L. Co., 128 La. 473 4796
v. White, 92 Iowa 97 686, 687
English v. Carney, 25 Mich. 178 733
v. Danville, 69 Ill. App. 288 1363
v. Delaware & H. C. Co., 66 N. Y. 454 3465
v. Grant, 102 Ga. 35 2885
v. Harvey, 2 Rawle 305 1121
v. Key, 39 Ala. 113 3132
v. Missouri Pac. R. Co., 73 Mo. App. 232 218, 1434
v. Smock, 34 Ind. 115 947
v. Southern Pac. Co., 13 Utah 407 4872, 4882, 4906
v. Spokane C. Co., 57 Fed. 451 2341, 2370, 2371, 2392, 2405
v. Thomason, 82 Ky. 280 2205
v. Wilson, 34 Ala. 201 2667
English & Am. Mach. Co. v. Union B. & S. Mach. Co., 13 Rep. of Pat. Cas. 64 4448
English & S. M. Ins. Co., Matter of, L. R. 5 Ch. 737 2573, 2574
Englishman, The, and Australian, The, [1894] Prob. 239 4987
Engstrom v. Merriam, 25 Wash. 73 3185
Engvall v. Des Moines City R. Co., 145 Iowa 560 1510, 4878
Enid & A. R. Co. v. Wiley, 14 Okla. 310 3768
Enloe v. Western U. Tel. Co., 5 Ga. App. 502 3642
Enlow v. Hawkins, 71 Kan. 633 1432, 4185
Ennis v. Buckeye Pub. Co., 44 Minn. 105 407, 1365
v. Curry, 22 Hun 584 591
v. Hultz, 46 Iowa 76 2464
v. Pullman P. C. Co., 165 Ill. 161 814
v. Shiley, 47 Iowa 552 487
Eno v. Christ, 25 N. Y. Misc. 24 3761
v. Crooke, 6 How. Pr. 462 1251, 1253
Enoch v. Mining & P. Co., 23 W. Va. 314 1357
v. Spokane Falls & N. R. Co., 6 Wash. 393 3965, 4087, 4120
Enoch Morgan's Sons Co. v. Troxell, 57 How. Pr. 121 4488
Enos v. Cole, 53 Wis. 235 37, 40
v. Enos, 135 N. Y. 609 4514, 4519, 4523
v. Enos, 58 Hun 45 4525
Enos Soule, The, 95 Fed. 483 2724
Enquirer Co. v. Johnston, 72 Fed. 443 4524, 4537
Enright v. Toledo, etc., R. Co., 158 Ill. App. 323 3894
Ensign v. Colt, 75 Conn. 111 2146, 2152
Ensley v. Ensley, 105 Tenn. 107 1081
v. Nashville, 2 Baxter 144 3774, 3788
Ensley L. Co. v. Lewis, 121 Ala. 100 433
Enslow v. Ennis, 155 Iowa 266 1032
Entermann's Est., 18 Pa. Dist. 343 1080
Enterprise B. & L. Soc. v. Balin, 12 Colo. App. 304 1035
Enterprise L. Co. v. Porter, 155 Ala. 426 3854, 3953, 3966, 4134
v. Porter, 165 Ala. 579 1443
Enterprise Mfg. Co. v. Campbell (Ky.) 121 S. W. 1040 2346
v. Taulbee, 152 Ky. 783 3155
Entzminger v. Seaboard A. L. R., 79 S. C. 151 3506
Enyart v. Inman-P. L. Co., 54 Wash. 38 291
Eoff v. Spokane, etc., R. Co., 70 Wash. 270 4778, 4797
Ephland v. Missouri Pac. R. Co., 57 Mo. App. 147 148, 4728
Epling v. Dickson, 170 Ill 329 1049, 3959, 4154
Epp v. Hinton, 91 Kan 513 4391
Epperly v. Bailey, 3 Ind. 72 531, 543
Epperson v. Epperson, 108 Va 471 384
Eppes v. Cole, 4 Hen. & Munf. 161 3096
v. Tucker, 4 Call 346 3036
Eppinger v. Canepa, 20 Fla. 262 1121, 1127
v. Kendrick, 114 Cal. 620 703
Eppstein v. Kuhn, 225 Ill. 115 2043, 2146, 3099
Epstein v. Berkowsky, 64 Ill. App. 498 4629, 4645
v. Buckeye C. O. Co., 106 Ark. 241 531
v. Pennsylvania R. Co., 143 Mo. App. 135 4654
Equitable L. Assur. Soc. v. Trimble, 83 Fed. 85 1247
Equitable L. Ins. Co. v. Patterson, 41 Ga. 338 3071
Equitable M. Co. v. Weddington, 2 Tex. Civ. App. 373 252, 2507
v. Montfort, 121 Ga. 696 683
Equitable P. Mfg. Co. v. Cleveland, etc, R. Co., 155 Ill. App. 265 438
Equitable S. & L. Ass'n v. Bowes, 70 Wash. 169 739
Equitable Surety Co. v. United States, 234 U. S. 448 2794
Erath v. Allen, 55 Mo. App. 107 2755
Erb v. Western U. Tel. Co., 162 Ill. App. 494 3560, 3571
Erben v. Lorrillard, 2 Keyes 567 2462, 2509, 2510
Erd v. Chicago, etc., R. Co., 41 Wis. 65 1457
Erde v. Fenster (App. Div.), 141 N. Y. Supp. 943 4420
Ereza, The, 124 Fed. 659 2727, 2728, 2729, 2731
Erichsen v. Barkworth, 3 H. & N. 601 3305
Erickson v. Bennet, 39 Minn. 326 1989, 2008
v. Brooklyn Heights T. Co., 11 N. Y. Misc. 662 4805

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Erickson v. Crookston W. P. & L. Co., 100 Minn. 481 7
v. Green, 47 Wash. 613 862, 888, 930
v. Stockton & T. C. R. Co., 148 Cal. 206 1108
Erie City Iron Works v. Barber, 102 Pa. 156 2615
v. Barber, 106 Pa. 125 2433
v. Cushnoc Paper Co., 113 Me. 229 171
v. Noble (Tex. Civ. App.), 124 S. W. 172 1240, 1450
v. Tatum, 1 Cal. App. 286 170, 2392, 2403, 2417
Erie County N. G. & F. Co. v. Carroll, [1911] App. Cas. 105 35, 2281, 2286
Erie Dispatch v. Johnson, 87 Tenn. 490 3340, 3390
Erie R. Co. v. Erie & W. T. Co., 204 U. S. 220 4987
v. Jacobus, 221 Fed. 335 5039, 5069
v. Lockwood, 28 Ohio St. 358 3386, 3400
v. McCormick, 3 Ohio C. C. (N. S.) 652 4907
v. Salisbury, 66 N. J. L. 233 160
v. Waite, 62 N. Y. Misc. 372 3310
v. Wanaque L. Co., 75 N. J. L. 878 3310
v. Welsh, 89 Ohio St. 81 5067
v. Wilcox, 84 Ill. 239 3336
Erie Tel. & T. Co. v. Grimes, 82 Tex. 89 3604, 3659
Erie & W. T. Co. v. Chicago, 178 Fed. 42 5016, 5017
Erie, etc., R. Co. v. Douthet, 88 Pa. 243 389, 407, 2515
Erlanger v. Avegno, 24 La. Ann. 77 1541
Erman v. Great Central Palace Co. (Misc.) 151 N. Y. Supp. 481 4394
Ermentrout v. Girard F. & M. Ins. Co., 63 Minn. 305 3000
Ernest A. Hamill, The, 100 Fed. 509 4998
Ernest v. Brown, 4 Bing. N. C. 162 1488
v. Stoller, 5 Dill. 438 2910, 2956
Ernst v. Hogue, 86 Ala. 502 1676
v. Ganahl, 166 Cal. 493 2507
Ernstman v. Black, 14 Ill. App. 381 449
Eroe, The, 17 Blatch. 16 5014
Errington v. Aynesley, 2 Bro. Ch. 342 1556
Erskine v. Johnson, 23 Neb. 261 2655
v. Van Arsdale, 15 Wall. 75 1039
Ervin v. Epps, 15 Rich. 223 2475
v. St. Louis, etc., R. Co., 158 Mo. App. 1 4865
Erwin v. Davenport, 9 Heisk. 44 2993
v. Devine, 2 T. B. Mon. 124 424
v. Dezell, 64 Hun 391 4552
v. Downs, 15 N. Y. 575 2382, 2384
v. Saunders, 1 Cow. 249 1857
v. Shaffer, 9 Ohio St. 43 699
Eschbach v. Hughes, 7 N. Y. Misc. 172 3247
Escher v. Carroll County, 146 Iowa 738 4712
v. Carroll County, 159 Iowa 627 4697, 4743
Escondido O. & D. Co. v. Glaser, 144 Cal. 494 888
Escopiniche v. Stewart, 2 Conn. 391 3294
Escott v. White, 10 Bush. 160 2656, 2667
Esdaile v. Stephenson, 1 Sim. & S. 122 1969, 2031
Eshelby v. Cincinnati Board of Education, 66 Ohio St. 71 1133
Esher v. Mineral R. & M. Co., 28 Pa. Super. Ct. 393 4923, 4930, 4931
Eshleman v. Bolenius, 144 Pa. 269 2862
v. Martic, 152 Pa. 68 3890
Eslava v. Crampton, 61 Ala. 507 978
Eslow v. Mitchell, 26 Mich. 500 792, 793, 826
Esmond v. Brown, 18 R. I. 48 1080
v. Van Benschoten, 12 Barb. 366 857, 860, 884, 885
Espert v. Ahlschlager, 117 Ill. App. 484 1014
Espy v. Jones, 37 Ala. 379 3662, 3687
Esque v. United R. Co., 174 Mo. App. 317 4758
Esseltyne v. Elmore, 7 Biss. 69 3304, 3305
Essex v. Daniel, L. R. 10 C. P. 538 2013, 2016
Essex County Bank v. Russell, 29 N. Y. 673 1820
Essex Fertilizer Co. v. Danforth, 111 Me. 212 698
Essley v. Sloan, 116 Ill. 391 979
Estabrook v. Moulton, 9 Mass. 258 1199
v. Smith, 6 Gray 572 2117
Estate of King, 18 Phila. 81 2150
Estate of Long v. Jones, 69 Ill. App. 615 1829
Estebene v. Estebene, 5 La. Ann. 738 739
Estell v. Myers, 54 Miss. 174, 56 Miss. 800 532, 554, 559, 4392
Estep v. Estep, 23 Ind. 114 3233
v. Fenton, 66 Ill. 467 533, 2664, 2671, 2682
Esterly v. Cole, 3 N. Y. 502 1101, 1108
Estes v. Browning, 11 Tex. 237 2013
v. Estes, 75 Me. 478 4513
v. Macon, 103 Ga. 780 3991
v. Missouri Pac. R. Co., 110 Mo. App. 725 152, 1471, 4681
v. Odom, 91 Ga. 600 2048, 4397
Estey v. Snyder, 76 Wis. 624 685
Estill v. New York, etc., R. Co., 41 Fed. 849, 853, 856 3392
Estus v. Baldwin, 9 How. Pr. 80 1546
Esty v. Baker, 48 Me. 495 402, 3845, 3858
v. Read, 29 Vt. 278 2370
Eten v. Luyster, 60 N. Y. 252 51, 176, 3209
Etheridge v. Binney, 9 Pick. 272 1018
v. Osborn, 21 Wend. 529 3128
Etherington v. Prospect Park, etc., R. Co., 88 N. Y. 641 4862, 4889, 4939
Ethier, In re, 217 Mass. 511 5206
Etna Ins. Co. v. Tyler, 16 Wend. 285 3026
Etnyre v. McDaniel, 28 Ill. 201 962, 963
Ettinger v. Weil, 94 App. Div. (N. Y.) 291 4387, 4391
v. Weil, 184 N. Y. 179 4363, 4395
Ettor v. Tacoma, 228 U. S. 148 26
Etzkorn v. Oelwein, 142 Iowa 107 1472, 4660
Eufaula v. Simmons, 86 Ala. 515 3881, 3904
Eugene F. Moran, The, 143 Fed. 187 4987
Eugene F. Moran, The, 212 U. S. 466 4987
Euler v. Sullivan, 75 Md. 616 3847
Eupes v. Nephue, 120 App. Div. (N. Y.) 621 1311
Eureka v. Merrifield, 53 Kan. 794 4850
Eureka Cotton Mills v. Western U. Tel. Co., 88 S. C. 498 1142, 3568, 3609

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Eureka F. Co. v. Baltimore C. S. & R. Co., 78 Md. 179 534
Europe, The, 175 Fed. 596 4993
European Cent. R. Co., In re, 4 Ch. Div. 33 961
Eustice v. Meytrott, 100 Ark. 510 2242
Eustis v. Cowherd, 4 Tex. Civ. App. 343 2095
Euston v. Erie R. Co., 147 Ill. App. 594 2302, 3345, 3367, 3370, 3375, 3428
Eutaw v. Botnick, 150 Ala. 429 4107, 4111, 4112, 4119, 4134, 4135, 4138, 4143
Eva v. McMahon, 77 Cal. 467 882
Evans v. Adams, 4 Blackf. 54 1766
v. Atlantic C. L. R. Co., 105 Va. 72 4634, 4647
v. Bank, 15 Ala. 81 1614
v. Beckwith, 37 Vt. 285 936, 1107
v. Bennett, 7 Wis. 404 2458, 2525, 2539
v. Brandon, 2 H. Bl. 548 1656
v. Central L. Ins. Co., 87 Kan. 641 1313
v. Chicago & N. R. Co., 109 Minn. 64 125, 147
v. Chicago, etc., R. Co., 26 Ill. 189 553
v. Cincinnati, etc., R. Co., 78 Ala. 341 208, 236
v. Clark, 1 Port. 388 1179, 1184, 1878, 1879
v. Cumberland Tel. & T. Co., 135 Ky. 66 208, 3571
v. Drummond, 4 Esp. 89 753
v. Elliott, 20 Ind. 283 2328
v. Elwood, 123 Iowa 92 1373, 4742
v. Evans, 16 Ala. 465 2871
v. Evans, [1899] Prob. 195 4974
v. Finn, 4 New South Wales, St. Rep. 297 3891
v. Fisher, 26 Mo. App. 541 1050
v. Forster, 1 B. & Ad. 118 3303
v. Freeman, 142 N. C. 61 1865
v. Fulton, 134 Mo. 653 2060, 2066, 2102
v. Gee, 11 Pet. 80 1868
v. Graden, 125 Mo. 72 2792
v. Haefner, 29 Mo. 141 399
v. Harlow, 5 Q. B. 624 4565
v. Harries, 1 H. & N. 25 4556
v. Harries, 38 Eng. L. & Eq. 347 4558
v. Howell, 211 Ill. 85 295, 2676
v. Hughey, 76 Ill. 115 537, 553
v. Irvin, 1 Port. 390 1179, 1398, 1878
v. Jacobitz, 67 Kan. 249 1937
v. Keystone G. Co., 148 N. Y. 112 3773
v. Kister, 92 Fed. 828 2813
v. Kohn, 113 Minn. 45 3836, 3837
v. Kymer, 1 B. & Ad. 528 1825, 4273, 4275, 4277
v. Lewis, 5 Harr. 162 2094
v. Middlesex County, 209 Mass. 474 2684
v. Mohr, 153 Ill. 561 2464
v. Moseley, 84 Kan. 322 860, 868, 918, 1436
v. Munro (R. I.) 83 Atl. 82 4821
v. Murphy, 1 Stew. & P. 226 3123
v. Murphy, 87 Md. 498 3249
v. Negley, 13 S. & R. 218 986
v. Norris, Hayw. (by Batt.) 473 644
v. O'Connor, 174 Mass. 287 4974
v. Ozark O. Co., 103 Ark. 212 1874, 2010
v. Pearce, 15 Gratt. 513 1645, 1646
v. Potter, 2 Gall. 13 2946
v. Powis, 1 Ex. 601 753
v. Reeves, 6 Tex. Civ. App. 254 1523
Evans v. Rice, 96 Va. 50 962, 970
v. Rott, 7 N. Y. 186 2946
v. Rudy, 34 Ark. 383 3364
v. St. Louis, etc., R. Co., 11 Mo. App. 463 54, 134, 135, 136, 3450, 3507
v. Smith, 4 Bin. 366 1904
v. Trenton, 24 N. J. L. 764 26
v. Waite, 83 Wis. 286 126, 501
v. Wells, 22 Wend. 324 764, 767
v. Western B. Mfg. Co., 118 Mo. 548 1102
v. Western U. Tel. Co., 102 Iowa 219 3565, 3599
v. White, Hemp. 296 1180
v. Whyle, 5 Bing. 485 2749, 2761
v. Winona L. Co., 30 Minn. 515 3098
Evansich v. Railway Co., 57 Tex. 123 4767
Evanston v. Clark, 77 Ill. App. 234 4154
Evansville Furniture Co. v. Freeman, 57 Ind. App. 576 4698
Evansville Nat. Bank v. Kauffmann, 93 N. Y. 273 2750, 2752, 2755
Evansville, etc., R. Co. v. Allen, 34 Ind. App. 636 56, 143
v. Charlton, 6 Ind. App. 56 4126
v. Holcomb, 9 Ind. App. 198 1378, 4731
v. Fitzpatrick, 10 Ind. 120 1431
v. McKee, 99 Ind. 519 2976
v. McKinney, 34 Ind. App. 402 3418
v. Welch, 25 Ind. App. 308 132
Evarts v. Nason's Est., 11 Vt. 122 1023
v. Santa Barbara C. R. Co., 3 Cal. App. 712 4882, 4908
Eve v. Louis, 91 Ind. 457 530
Eveleigh v. Stitt, 1 Bay 92 2110
Evelyn v. Raddish, Holt's N. P. 543 3156, 3242
Evening News Ass'n v. Tryon, 42 Mich. 549 4544, 4570, 4590, 4598
Evening Post Co. v. Hunter, 18 Ky. L. Rep. 726 4586
Everard v. Hopkins, 2 Bulst. 332 161, 210
Everest v. Buffalo L. O. Co., 31 Fed. 742 4466
Everett v. Combs, 40 Okla. 645 2501
v. Dilley, 39 Kan. 73 947
v. Gores, 92 Wis. 527 1250, 3810
v. Great Northern R. Co., 100 Minn. 309 124
v. Hores, 89 Wis. 421 3793
v. Ingram, 142 Ga. 145 1805
v. Mansfield, 148 Fed. 374 2025
v. O'Leary, 10 Minn. 154 2914
v. Railroad, 138 N. C. 68 3340, 3397
v. Saltus, 15 Wend. 474 803, 804
v. Southern Exp. Co., 36 Ga. 303 3412
v. State, 28 Md. 190 1779
v. Union Pac. R. Co., 59 Iowa 243 4042
v. Vendryes, 19 N. Y. 436 1150, 1151, 1152, 1878, 1905
Everett L. Co. v. Maney, 16 Wash. 552 862, 885
Everett's Est., 19 Pa. Dist. 477 1121
Everill v. Swan, 20 Utah 56 2557
Everly v. Rice, 20 Pa. 297 2805, 2811
Everroad v. Gabbert, 83 Ind. 489 435
Evers v. Glynn, 126 App. Div. (N. Y.) 519 1090
v. Sager, 28 Mich. 47 1786, 1787
Evershed v. London & N. R. Co., 3 Q. B. Div. 135 3280
Everson v. Powers, 89 N. Y. 527 2551, 2552, 2556
v. Seller, 105 Ind. 266 4256, 4258
Everts v. Lawther, 165 Ill. 487 656

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Evertson v. Booth, 19 Johns. 492 574
v. Sawyer, 2 Wend. 507 1503, 3099, 3101
v. Tappen, 5 Johns. Ch. 497 1024, 3728
Evesson v. Ziegfield, 22 Pa. Super. Ct. 79 2563, 2566, 2569
Evetts v. Tendick, 44 Tex. 570 3705
Evey v. Mexican Cent. R. Co., 26 C. C. A. 407, 81 Fed. 294 4756
Evins v. Metropolitan St. R. Co., 47 App. Div. (N. Y.) 511 1380
Eviston v. Cramer, 57 Wis. 570 1268, 1291, 1338, 4545, 4547
Evrit v. Bancroft, 22 Ohio St. 172 1947, 2506
Ewald v. Boyd, 24 S. D. 16 4339
Ewalt v. Gray, 6 Watts 427 3709
Ewan v. Brooks-W. Co., 55 Ohio St. 596 2780, 2781
Ewart v. Kerr, 2 McMull. 141 537, 540, 3301, 4255
v. Street, 2 Bailey 157 3385
Ewbank v. Nutting, 7 C. B. 797 4226
Ewell v. Daggs, 108 U. S. 143 988, 1178, 1194
Ewen v. Chicago, etc., R. Co., 38 Wis. 625 4860, 4942, 4951
v. Terry, 8 Cow. 126 589
Ewin v. Lancaster, 6 B. & S. 571 2806
Ewing v. Blount, 20 Ala. 694 480, 4199, 4200, 4212, 4240, 4299, 4307
v. Codding, 5 Blackf. 433 1402, 1404
v. Davis, 2 Ohio C. C. (N. S.) 90 887, 928
v. Handley, 4 Litt. 346 3710
v. Ingram, 24 N. J. L. 520 2524, 2541
v. Janson, 57 Ark. 237 2522, 2576
v. Leaton, 17 Mo. 465 1536
v. Litchfield, 91 Va. 575 832
v. Louisville, 140 Ky. 726 3877, 3880, 3881, 3928
v. Neversink S. Co., 23 Hun 578 1143
v. Pittsburgh, etc., R. Co., 147 Pa. 40 77, 97, 343, 344, 4686
v. Reilly, 34 Mo. 113 2873
v. Stickney, 107 Minn. 217 1506
v. Tees, 1 Bin. 450 1943
v. United States, 11 Ariz. 1 1614
Ewing's Est., In re, 103 App. Div. (N. Y.) 500 740, 1084
Ewins v. Calhoun, 7 Vt. 79 4374
Ewton v. McCracken, 9 Ala. App. 619 1349, 1594, 1608, 4167
Exall v. Partridge, 8 T. R. 308 2831
Exchange B. & I. Co. v. Bayless, 91 Va. 134 2803
Exchange Bank v. Apalachian L. & L. Co., 128 N. C. 193 1922, 1923
v. Gaitskill, 18 Ky. L. Rep. 532 4388, 4392
v. Knox, 19 Gratt. 739 627
v. McMillan, 76 S. C. 561 1174
v. Tuttle, 5 N. M. 427 1918, 1921
Exchange Nat. Bank v. Wolverton, 11 Wash. 108 1919
Exchange Tel. Co. v. Gregory, [1896] 1 Q. B. 147 266
Excelsior C. Works v. DeCamp, 40 Ind. App. 26 531, 559
Excelsior E. Co. v. Sweet, 59 N. J. L. 441, rev'g 57 N. J. L. 224 1360
Excelsior F. Ins. Co. v. Royal Ins. Co., 55 N. Y. 343 3062
Excelsior N. Co. v. Smith, 61 Conn. 56 3
Excelsior Stove Mfg. Co. v. Million, 174 Mo. App. 718 2393, 2403, 2418, 2455
Excelsior T. C. Co. v. Harde, 181 N. Y. 11 1093, 1094, 1097, 1102
Exeter Bank v. Gordon, 8 N. H. 66 677, 4289
v. Rogers, 7 N. H. 21 1597, 1614, 2756
Exeter Mach. Works v. Wonham-M. E. Works, 134 App. Div. (N. Y.) 386 2666
Exley v. Berryhill, 37 Minn. 182 979
v. Southern C. O. Co., 151 Fed. 101 3840, 3941
Expanded Metal F. Co. v. Boyce, 233 Ill. 284 2683
v. Noel Const. Co., 87 Ohio St. 428 762
Express, The, 59 Fed. 476 5013
Eyck v. Holmes, 3 Sandf. Ch. 428 2867
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Eyre v. Dunsford, 1 East 327 4372
v. Woodfine, Cro. Jac. 278 1545
Eyrich v. Capital State Bank, 67 Miss. 60 1921
Ezell v. Dodson, 60 Tex. 331 416, 4763

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Fabbricotti v. Launitz, 3 Sandf. 743 537, 542, 565, 2582
Fabens v. Mercantile Bank, 23 Pick. 330 2929
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v. Reiss C. Co., 124 Wis. 554 4742
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Factors' & T.'s Ins. Co. v. Werlein, 42 La. Ann. 1046 312, 318
Fagan v. Hook, 134 Iowa 381 2102, 2106, 2586
v. McDonnell, 115 App. Div. (N. Y.) 89 3695, 3699, 3707, 3709
v. McWhirter, 71 Tex. 567 2204
v. New York Evening Journal Pub. Co., 129 App. Div. (N. Y.) 28 1366
v. Whitcomb, 4 Tex. Civ. Cas. 47 3155
Fagen v. Davidson, 2 Duer 153 1363
Faget v. Brayton, 2 Har. & J. 350 4315
Fagnan v. Knox, 40 N. Y. Super. 41 4618, 4620
v. Knox, 66 N. Y. 525 4638
Fahey v. Frawley, 26 L. R. Ir. 78 2845
Fahs v. Roberts, 54 Ill. 192 1762
Fahy v. North, 19 Barb. 341 2529, 2531, 2533
Fail v. McRee, 36 Ala. 61 252, 2293, 2591
v. Presley, 50 Ala. 342 4168, 4172, 4233
v. Western U. Tel. Co., 80 S. C. 207 3557, 3622, 3639
Fair v. Citizens' State Bank, 69 Kan. 353 4334
v. London & N. W. R. Co., 21 L. T. (N. S.) 326 4748, 4753
Fairbank v. Bahre, 112 Ill. App. 290 1498
v. Humphreys 18 Q. B. Div. 54 2514

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v. Nicolai, 167 Ill. 242 3883
v. Windsor, 118 Fed. 96 4485, 4487, 4488, 4491, 4496
Fairbank C. Co. v. Metzger, 118 N. Y. 260 2371, 2387
Fairbank's Ex'rs v. Humphreys, 18 Q. B. Div. 54, 56 L. J. (Q. B.) 57 2984
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v. Devereux, 58 Vt. 359 591
v. Heltsley, 135 Ky. 397 2225
v. Hooper, 147 Ky. 154 2340, 2360
v. Kerr, 70 Pa. 86 129
v. Midvale M. & Mfg. Co., 105 Mo. App. 644 2218
v. Williams, 58 Cal. 241 4246
v. Witter, 18 Wis. 287 462, 1314, 4190
Fairbanks, Morse & Co. v. Carson-Muse Lumber Co., 160 Ky. 346 2358
Fairbanks Steam Shovel Co. v. Holt & Jeffery, 79 Wash. 361 2378
Fairchild v. Bay Point & C. R. Co., 22 Cal. App. 328 1099
v. California S. Co., 13 Cal. 599 3472, 3474, 4662
v. Cunningham, 84 Minn. 521 2502
v. Hedges, 14 Wash. 117 1578, 1581
v. Holly, 10 Conn. 475 724, 736
v. Llewellyn Realty Co., 82 N. J. L. 423 1982
v. Lynch, 99 N. Y. 359 2799
v. McMahon, 139 N. Y. 290 4376
v. Pennsylvania R. Co., — N. Y. App. Div. —, 155 N. Y. S. 751 5043, 5067
v. Philadelphia, etc., R. Co., 148 Pa. 527 3335, 3430
v. Rich, 68 Vt. 202 443
v. Rogers, 32 Minn. 269 253
v. Southern Ref. Co., 158 Cal. 264 2280, 2289
v. Whitmore, 6 Cal. App. 52 2478
Faires v. Cockerell, 88 Tex. 428, 436 2831, 2834, 2835, 2836, 2861
Fairfax v. Fairfax, 5 Cranch 19 1636
v. New York Cent., etc., R. Co., 73 N. Y. 167 3531, 3536
Fairfield v. Day, 71 N. H. 63 295, 2873, 2893, 2899
v. Salem, 213 Mass. 296 476, 3921
v. Southport Nat. Bank, 80 Conn. 92 4232
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Fairgrieve v. Moberly, 29 Mo. App. 141 1495
Fairley v. Smith, 87 N. C. 367 1445, 1452
v. Western U. Tel. Co., 73 Miss. 11 3593
Fairlie v. Lawson, 5 Cow. 424 1038
Fairman v. Fluck, 5 Watts 516 548, 549, 3236, 3257, 3263, 4361
Fairmont Plumbing Co. v. Carr, 54 W. Va. 272 2683
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Faison v. Grandy, 128 N. C. 438 978, 981, 1159
Faisst v. Waldo, 57 Ark. 270 738
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Fajardo v. New York Cent., etc., R. Co., 84 App. Div. (N. Y.) 354 4908, 4911
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Fakes v. Price, 18 Okla. 413 2891
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Falender v. Blackwell, 39 Ind. App. 121 4858, 4905
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v. Hemenway, 64 Me. 373 375, 388, 407, 415, 1555, 2595
Falk v. Curtis Pub. Co., 107 Fed. 126 4481
v. Fletcher, 18 C. B. (N. S.) 403 4211
v. Waterman, 49 Cal. 224 1314, 4190
Falkner v. Hendy, 80 Cal. 636 959
v. Schultz, 160 Wis. 594 3662, 3675
v. Woodard, 104 Wis. 608 2199
Fall River Works v. Fall River, 110 Mass. 428 4134
Falldin v. Seattle, 57 Wash. 307 1376
Falley v. Courter, 93 Mich. 473 3810
Fallon v. Manning, 35 Mo. 271 430, 1680, 4351, 4359
v. Wright, 82 App. Div. (N. Y.) 193 10
Falls v. United States Sav., L. & B. Co., 97 Ala. 417 1161
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Fanjoy v. Portland, 29 New Bruns. 24 4840
Fannie Tuthill, The, 17 Fed. 87 5007, 5010
Fanning v. Brandl, 178 Ill. App. 224 434, 4668
v. Consequa, 17 Johns. 511, 3 Johns. Ch. 587 1146, 1155, 1180
v. Dunham, 5 Johns. Ch. 122 978, 979
v. Main, 77 Conn. 94 1086
v. Murphy, 126 Wis. 538 2831, 2834
Fant v. Miller, 17 Gratt. 47 1148, 1853
Fanton v. Boomgaarden, 111 Ill. App. 37 4199
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Farber v. National F. & I. Co., 140 Ind. 54 1823, 1833
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Faris v. American Tel. & T. Co., 84 S. C. 102 3826
v. Lewis, 2 B. Mon. 375 2447, 4371
Farish v. Reigle, 11 Gratt. 697 1495
Farkas v. Towns, 103 Ga. 150 3878, 3928
Farley v. Byers, 106 Minn. 260 3233
v. Charleston B. & V. Co., 52 S. C. 222 4730
v. Craig, 11 N. J. L. 262 3133, 3137
v. Danks, 4 El. & Bl. 493 4605
v. Evening Chronicle Co., 113 Mo. App. 216 4505, 4508
v. Farley, 91 Ky. 497 632, 637
v. Gate City G. L. Co., 105 Ga. 323 3846, 3878
v. Larson, 5 Cow. 424 1568
v. Missouri, etc., R. Co., 34 Tex. Civ. App. 81 1498
v. Moore, 21 N. H. 146 1200, 1624

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Farman v. Lauman, 73 Ind. 568 1268, 1305, 4840
Farmer v. Behmer, 9 Cal. App. 773 3845
v. Francis, 12 Ired. 282 2666, 2668
v. Lewis, 1 Bush 66 13
v. Mitchell, 128 Ill. App. 297 1190
v. Stewart, 2 N. H. 97 416, 420
Farmers' Bank v. Blair, 44 Barb. 641 766, 778
v. Brainerd, 8 Ohio 292 1914
v. Groves, 12 How. 51 764
v. Leonard, 4 Har. 536 701
v. McKee, 2 Pa. 318 4290
v. Reynolds, 13 Ohio 84 2814
v. Wickliffe, 129 Ky. 679 1046
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Farmers' Elevator Co. of Waverly v. Swanson, 33 S. D. 377 2741
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v. Frick, 29 Ohio St. 466 3021
Farmers' L. & T. Co. v. Central R. of Iowa, 8 Fed. 60 2499
v. Eaton, 114 Fed. 14 175, 243, 248, 251
v. Madison Mfg. Co., 153 Fed. 310 665
v. Northern Pac. R. Co., 94 Fed. 454 960
v. Wilson, 139 N. Y. 384 685
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Farmers' & T. Bank v. Harrison, 57 Mo. 503 985, 986
v. Kelsay, 186 Mo. 648 1229
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Farnandis v. Great Northern R. Co., 41 Wash. 486 6, 3764
Farnham v. California S. D. & T. Co., 8 Cal. App. 266 1095
v. Camden & A. R. Co., 55 Pa. 53 3335
v. Hotchkiss, 2 Keyes 9 555, 2194
v. Mallory, 3 Keyes 527 1556
v. Moor, 21 Me. 508 1680
Farnsworth v. Coots, 46 Mich. 117 2815
v. Garrard, 1 Camp. 38 494, 510, 1834, 2475, 2577
v. National Exp. Co., 166 Mich. 676 3413, 3415
v. Rockland, 83 Me. 508 4046
Farnum v. Foule, 12 Mass. 89 2937
v. Peterson, 111 Mass. 148 2156, 2164
Farnum's Est., 176 Pa. 366 1087, 1089
Faroux v. Cornwell, 40 Tex. Civ. App. 529 1327, 1349, 4158, 4633
Farquhar v. Farley, 7 Taunt. 592 1033, 1034
v. Morris, 7 T. R. 124 943, 1032, 1108, 2192
Farr v. Chandler, 51 N. H. 545 996
v. Griffith, 9 Utah 416 285*
v. Griffith, 71 Ark. 408 2592
v. Oregon S. L. R. Co., 14 Idaho 192 4661
v. Peterson, 91 Wis. 182 4375, 4381
v. Rasco, 9 Mich. 353 470, 4581
v. Semple, 81 Wis. 230 1101
v. State Bank, 87 Wis. 223 41, 4296, 4301, 4303
v. Swigart, 13 Utah 150 1268, 4159
v. Ward, 3 M. & W. 25 1880
Farrand v. Aldrich, 85 Mich. 593 4525, 4526
v. Marshall, 19 Barb. 380 3913
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Farrant v. Barnes, 11 C. B. (N. S.) 553 100, 1594
Farrar v. Beeman, 63 Tex. 175 918
v. Churchill, 135 U. S. 609 4382
v. Eash, 5 Ind. App. 238 4314, 4315
v. Metropolitan St. R. Co., 249 Mo. 210 4799
v. Paine, 173 Mass. 58 4294
v. Talley, 68 Tex. 349 4628
v. United States, 5 Pet. 373 1558, 1582, 1588
v. Wheeler, 75 C. C. A. 386, 145 Fed. 482 1501, 4700
Farrel v. Colwell, 30 N. J. L. 123 4178, 4199, 4299
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v. Farmers' Mut. F. Ins. Co., 66 Mo. App. 153 1238
v. Garfield M., M. & S. Co., 49 Colo. 159 1119
v. Illinois T. Co., 177 Ill. App. 425 4822
v. Manhattan M. Co., 198 Mass. 271 2377
v. St. Louis T. Co., 103 Mo. App. 454 4624
v. School Dist., 98 Mich. 43 2559, 2561, 2563
Farrell L. Co. v. Deshon, 65 Ark. 103 2151, 2152, 2156, 2159, 2198
Farrelly v. Cincinnati, 2 Disney 516 3935
Farren v. Dameron, 99 Md. 323 2372

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v. Cheponis, 82 Conn. 258 1374, 4705
v. Payne, 15 Johns. 432 376, 383
Farris v. Morrison, 66 Ark. 318 724
v. Ware, 60 Me. 482 4417
Farron v. Sherwood, 17 N. Y. 227 2547
Farrow v. Hoffecker, 7 Pennew. (Del.) 223 125
v. Hoffecker (Del.) 79 Atl. 920 1287
v. Mays, 1 N. & McC. 312 2200
Farson v. Gilbert, 85 Ill. App. 364 1667
Farver v. American C. & F. Co., 24 Pa. Super. Ct. 579 3904, 3905
Farwell v. Bean, 82 Vt. 172 2110, 2131, 2133, 2136
v. Becker, 129 Ill. 261 2891
v. Chicago, etc., R. Co., 52 Neb. 614 3990
v. Davis, 66 Barb. 73 3364
v. Kennett, 7 Mo. 595 1886, 1887, 2309, 2331
v. Meyer, 35 Ill. 40 991, 992, 993
v. Price, 30 Mo. 587 284, 368, 2919, 3389, 4226
v. Thomas, 5 Bing. 188 3305
v. Warren, 51 Ill. 467 3814, 3828
v. Warren, 70 Ill. 28 1269, 1281
Fasholt v. Reed, 16 S. & R. 266 1016
Fasler v. Beard, 39 Minn. 32 832, 834, 2191
Fass v. Western U. Tel. Co., 82 S. C. 461 3627, 3654, 3655
Fassler v. Love, 48 Pa. 410, 411 2639
Fatheree v. Williams, 13 Tex. Civ. App. 430 122
Fatjo v. Seidel, 109 La. 699 4591
Fatlock v. Harris, 4 D. & E. 180 629
Faucitt v. Booth, 31 Up. Can. Q. B. 263 4568
Faulk v. Columbia, etc., R. Co., 82 S. C. 369 3333
Faulkenau v. Dowland, 70 Ill. App. 20 4933
Faulkner, In re, 7 Hill 181 693
Faulkner v. Brown, 13 Wend. 63 4173
v. Closter, 79 Iowa 15 2275, 2295
v. Cooper, 4 Rep. of Com. Cas. 213 (1899) 2572
v. Greer, 17 Ont. L. R. 123 3783
v. Hendy, 103 Cal. 15 1128
v. Hyman, 142 Mass. 53 1829
v. South Pac. R. Co., 51 Mo. 311 3329, 3349
v. State, 6 Ark. 150 1618
v. State, 9 Ark. 14 1614
v. White, 33 Neb. 199 1818
Faunce v. Burke & Goner, 16 Pa. 469 836, 906
Fauntleroy v. Hannibal, 5 Dill. 219 962
Faure v. Martin, 7 N. Y. 210 2048
Faurot v. Gates, 86 Wis. 569 2861, 2864
Faurote v. State, 110 Ind. 463 2760
Faust v. Philadelphia & R. R. Co., 191 Pa. 420 108
v. Pope, 132 Mo. App. 287 432, 3738, 3761
v. Southern R., 74 S. C. 360 3425
Favar v. Riverview Park, 144 Ill. App. 86 239, 3189, 3212, 3213
Favenc v. Bennett, 11 East 36 724
Favor v. Philbrick, 5 N. H. 358 3379
Favorita, The, 18 Wall. 598 5005
Favorite, The, 4 Bene. 132 5010
Favorite v. Cottrill, 62 Mo. App. 119 1326
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Fawcett v. Woods, 5 Iowa 400 2117
Faxton v. Davison, 2 Duer 152 1996
Fay, Matter of, 6 N. Y. Misc. 462 1222
Fay v. Allen, 30 Fed. 446 4466
v. Bankers' Surety Co., 125 Minn. 211 2741
v. Dudley, 129 Ga. 314 2373
v. Guynon, 131 Mass. 31 388, 411, 416, 4618
v. Holloran, 35 Barb. 295 3132, 3140
v. Lovejoy, 20 Wis. 403 711
v. Lovejoy, 20 Wis. 407 721, 741
v. O'Neill, 36 N. J. L. 11 4602
v. Parker, 53 N. H. 342 1262, 1294, 1305
v. Prentice, 1 C. B. 828 3839
v. Swan, 44 Mich. 544 4668
v. Tower, 58 Wis. 286 2821
Fay F. Co. v. Talerico (Tex. Civ. App.), 69 S. W. 196 2369, 2411
Feamster v. Withrow, 9 W. Va. 296 2836
Fearing v. Irwin, 55 N. Y. 486 12
Fearon v. Earl of Aylesford, 14 Q. B. Div. 792 330
v. Little, 227 Pa. 348 1103, 1104
v. Mullins, 38 Mont. 45 1424
v. New York Life Ins. Co., 162 App. Div. (N. Y.) 560 4872
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v. Wilkinson, L. R. 8 Ex. 122 3297, 3320
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Feehan v. Hallinan, 13 Up. Can. Q. B. 440 2288, 2353
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Feemster v. May, 13 Sm. & M. 275 2198
Feeney v. Bardsley, 66 N. J. L. 239 2663
v. Long Island R. Co., 116 N. Y. 375 4735, 4748
Feeter v. Heath, 11 Wend. 477 1107, 2986, 2987
Fehlhaber v. Fehlhaber, 80 N. Y. Misc. 149 2148, 2156
Fehrenbach Wine & Liquor Co. v. Atchison, T. & S. F. R. Co., 182 Mo. App. 1 3348
Feige v. Burt, 118 Mich. 243 4287
v. Burt, 124 Mich. 565 4224, 4228
Feild v. Munster, 11 Tex. Civ. App. 341 4291
Feinsot v. Burstein, 78 N. Y. Misc. 259 881
v. Burstein, 141 N. Y. Supp. 330 889
v. Burstein, 161 App. Div. (N. Y.) 651 883

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Feld v. Borodofski, 87 Miss. 727 57, 1287
Feldman v. Beier, 78 N. Y. 293 726
v. Detroit United R., 162 Mich. 486 110
v. Gamble, 26 N. J. Eq. 494 711
Felker v. Bangor Ry. & Electric Co., 112 Me. 255 334
Felkner v. Scarlet, 29 Ind. 154 4964
Fell v. McHenry, 42 Pa. 41 748, 4278
v. Newberry, 106 Mich. 542 226, 245. 252, 2697
v. Northern Pac. R. Co., 44 Fed. 248 1343, 3452, 3474, 3480, 3481, 3507, 3524
v. Rich Hill C. M. Co., 23 Mo. App. 216 4664
v. Union Pac. R. Co., 32 Utah 101 3400
Feller v. Gates, 40 Ore. 543 1603
Fellerman v. Dolan, 7 Abb. Pr. 395 4593
Fellheimer v. Hamline, 65 Ill. App. 384 1671
Fellows v. Gilhuber, 82 Wis. 639 3234
v. Gilman, 4 Wend. 414 1558
v. Goodman, 49 Mo. 62 4841, 4842
v. Mitchel, 1 P. Wms. 81 361
v. Prentiss, 3 Denio 512 2748
v. Stevens, 24 Wend. 299 748, 756
Fells v. Vestvali, 2 Keyes 152 2458
Fels v. Massachusetts B. & I. Co., 48 Super. Ct. 27 2793
Felsch v. Babb, 72 Neb. 736 1468, 1470
Felschneider v. Chicago, etc., R. Co., 122 Wis. 423 3418
Felt v. Bell, 205 Ill. 213 1134
v. Puget Sound E. R., 175 Fed. 477 1506, 1510, 4860
v. Puget Sound E. R., 175 Fed. 282 4861
v. Smith, 62 Ill. App. 637 1014
Felter v. Weybright, 8 Ohio 168 1942
Feltham v. Sharp, 99 Ga. 260 2476
Felton v. Fuller, 29 Me. 121 2226
v. Spiro, 24 C. C. A. 321, 78 Fed. 576 4882
Fender v. Ramsey, 131 Ga. 440 10
Feneff v. Boston & M. R., 196 Mass. 575 444
v. New York Cent., etc., R. Co., 203 Mass. 278 4764
Fenelon v. Butts, 53 Wis. 344 466, 3643, 4616, 4662, 4836, 4837, 4843
Fenn v. Curtis, 23 Hun 384 4386
v. Dugdale, 31 Mo. 580 1927
v. Harrison, 3 T. R. 757 2988
v. Western R. Co., 112 Mass. 524 3408
Fenner v. Buffalo, etc., R. Co., 44 N. Y. 505 3363
Fenno v. Cullen, 162 Ill. App. 283 3233, 3250
Fensler v. Prather, 43 Ind. 119 626
Fenstermaker v. Tribune P. Co., 12 Utah 439, 13 Utah 532 4511, 4537, 4572, 4581, 4585, 4587, 4596
Fentiman v. Atchison, etc., R. Co., 44 Tex. Civ. App. 455 139
Fenton v. Braden, 2 Cr. C. C. 550 2218
v. Clark, 11 Vt. 557 542, 2528
v. Perkins, 2 Mo. 23 2309, 2330
v. Thorley & Co., [1903] App. Cas. 443, 72 L. J. K. B. 787, 89 L. T. 314, 19 T. L. Rep. 684, 5 W. C. C. 1 5186
Fenwick v. Robinson, 3 C. & P. 323 3032
Ferber v. Gazette & B. P. Ass'n, 212 Pa. 367 4569
Ferdinand R. Co. v. Bretz, 47 Ind. App. 642 3967, 3968
Ferdon v. Dickens, 161 Ala. 181 1422, 4512, 4580, 4581
v. Jones, 2 E. D. Smith 106 655
Ferebee v. Norfolk Southern R. Co., 163 N. C. 351 348
Fereira v. Sayres, 5 W. & S. 210 2556
Fererro v. Western U. Tel. Co., 9 D. C. App. Cas. 455 3560, 3576, 3604, 3608, 3614
Fergus v. Gore, 1 Sch. & Lef. 107 2211
Ferguson v. Anglo-Am. Tel. Co. 4 Pa. Dist. 88, 178 Pa. 377 3560
v. Arnow, 142 N. Y. 580 4633, 4639
v. Baber, 24 Ala. 402 1670, 1730
v. Bassett, 4 How. Pr. 168 586
v. Chronicle P. Co., 72 Mo. App. 462 4544
v. Davis County, 57 Iowa 601 339, 3643, 4662
v. Day, 33 Ind. App. 213 4360
v. Epperly, 127 Iowa 214 2019
v. Evening Chronicle Pub. Co., 72 Mo. App. 462 1324, 4506
v. Ferguson, 2 N. Y. 360 388, 416
v. Firmenich Mfg. Co., 77 Iowa 576 3905
v. Fyffe, 8 Cl. & F. 121 1146, 1878, 1913
v. Hogan, 25 Minn. 135 624, 4315
v. Hoshi, 25 Wash. 664 1399
v. Missouri Pac. R. Co., 144 Mo. App. 262 3466
v. Moore, 98 Tenn. 342 1311, 1480, 4968
v. Morris, 67 Ala. 389 611
v. Reiger, 43 Ore. 505 1242
v. Stafford, 33 Ind. 162 2620
v. State Bank, 11 Ark. 512 1530
v. Sutphen, 8 Ill. 547 985
Ferguson & Wheeler Land, Lumber & Handle Co. v. Good, 112 Ark. 260 4654, 4690, 4715, 4742
Ferguson's Est., 138 Pa. 208 1082
Fern v. Adams Exp. Co., 51 Pa. Super. Ct. 204 3333
Fernald v. Young, 76 Me. 356 820
Fernander v. Dunn, 19 Ga. 497 1028, 2134, 3196
v. Smith, 43 La. Ann. 708 12
v. Valdes, 4 Porto Rico Fed. 48 87, 405, 4667
Fernsler v. Moyer, 3 W. & S. 416 4963
Fernstein v. Jacobs, 15 N. Y. Misc. 474 4719
Fernwood Masonic Hall Ass'n v. Jones, 102 Pa. 307 4179
Fero v. Roscoe, 4 N. Y. 162 470, 4568, 4581
Ferrand v. Bouchell, Harp. 83 357
Ferrandini v. Bankers' L. Ass'n, 51 Wash. 442 1806
Ferrea v. Chabot, 121 Cal. 233 1093
v. Tubbs, 125 Cal. 687 786, 794, 809, 820, 825
Ferreira v. Diller, 176 Ill. App. 447 4700
v. Honolulu R. T. & L. Co., 16 Hawaii 615 4861, 4917, 4920, 4935, 4939
Ferrell v. Alder, 8 Humph. 44 2130, 2137
Ferrer v. Beale, 1 Ld. Raym. 692 47
Ferriday v. Grosvenor, 86 Conn. 698 3773, 3774
Ferrier v. Buzick, 2 Iowa 136 2047
v. Schoenberg M. Co., 158 Mo. App. 533 4699, 4706, 4717
Ferrill v. Simpson, 8 Pick. 359 1483

[REFERENCES ARE TO PAGES]

Ferrin v. Symonds, 11 N. H. 365 3737
Ferris v. Comstock, 33 Conn. 513 238, 284, 294, 408, 2439, 4392
v. Hard, 135 N. Y. 354, 365 951
v. Johnson, 136 Mich. 227 4358
v. Mosher, 27 Vt. 218 2121
v. Paris, 10 Johns. 285 2960
v. United States, 27 Ct. of Cls. 542 2697
v. United States, 28 Ct. of Cls. 332 2700
Ferry v. Ferry, 2 Cush. 92 1204
Ferry Co. v. Russell, 52 W. Va. 356 13
Ferry Cos. v. White, 99 Tenn. 256 3467, 3469
Fessenden v. Summers, 62 Cal. 484 2781
Fessinger v. El Paso Times Co. (Tex. Civ. App.), 154 S. W. 1171, 4545, 4591
Fessler v. Love, 43 Pa. 313 377
v. Love, 48 Pa. 407 2275
Fessman v. Seeley (Tex. Civ. App.) 30 S. W. 268 836, 841, 886
Fetrow v. Krause, 61 Ill. App. 238 639, 640
v. Wiseman, 40 Ind. 148 2814
Fetter v. Beale, 1 Salk. 11 390, 410
Fetternecht v. McKay, 47 N. Y. 426 555
Fetzer v. South Side L. Co., 202 Fed. 878 1138, 4210, 4285
Feuer v. Stewart, 83 Fed. 793 2149
Fewings, Ex parte, 25 Ch. Div. 399 961
Feyer v. Reiss, 154 App. Div. (N. Y.) 272 886
Fezler v. Gibson, 183 Mo. App. 385 3830, 4159
v. Willmar, etc., R. Co., 85 Minn. 252 162
Fiala v. Ainsworth, 63 Neb. 1 2777
v. Ainsworth, 68 Neb. 308 1592
Fick v. Runnels, 48 Mich. 302 2956
Ficklin v. Zwart, 10 Iowa 387 985, 990, 994
Fidalgo Island S. Co. v. Brown, 61 Wash. 516 4298
Fidelity Ins., etc., Co. v. Shenandoah Valley R. Co., 86 Va. 1 668
Fidelity L. & I. Co. v. Buzzard, 69 Kan. 330 4935, 4937
Fidelity Mut. L. Ass'n v. Dewey, 83 Minn. 389 2792
Fidelity S. D. & T. Co. v. Armstrong, 35 Fed. 567 3137
Fidelity T. Co. v. Shelbyville W. & L. Co., 33 Ky. L. Rep. 202 3877
v. Shelbyville W. & R. Co. (Ky.) 110 S. W. 239 3881
Fidelity & Cas. Co. v. Gibson, 131 Ill. App. 290 1261, 1312
v. Meyer, 106 Ark. 91 3046
v. Seattle, 16 Wash. 445 3767
Fidelity & D. Co. v. Art Metal C. Co., 162 Ala. 323 6171
v. Bowen, 123 Iowa 356 1704, 2857
v. Bucki L. Co., 189 U. S. 135 1689, 1694, 1706, 1724, 1725
v. Champion I. Mfg. Co., 133 Ky. 74 2753
v. Commonwealth, 104 Ky. 579, 49 Ky. 467 2796
v. Hardman, 132 La. 525 2899
v. Jordan, 134 N. C. 236 2798
v. Oliver, 57 Wash. 31 2877
v. Robertson, 136 Ala. 379 2743
v. Texas L. & M. Co., 40 Tex. Civ. App. 489 1655
v. United States, 137 Fed. 866 2792
v. Walker, 158 Ala. 129 1720, 1727, 1738, 1743
Fidler v. McKinley, 21 Ill. 308 3663, 4959
Field v. Austin, 131 Cal. 379 1832, 1835, 1859
v. Colson, 93 Ky. 347 270, 4555, 4561
v. Columbet, 4 Sawyer 523 3695, 3702
v. Des Moines, 39 Iowa 575 11
v. Farrington, 10 Wall. 141, 19 L. ed. 923 2950
v. Field, 117 Ill. App. 307, aff'd 215 Ill. 496 1049, 3723
v. Fletcher, 191 Mass. 494 4311
v. Haish, 85 Ill. App. 164, 167 2769
v. Holland, 6 Cranch 8 706, 728, 729, 741, 744
v. Insurance Co., 6 Biss. 121 1089
v. Kinnear, 4 Kan. 476 2271
v. Mayor, 6 N. Y. 179 691
v. Metropolitan St. R. Co., 156 Mo. App. 646 1417, 1504
v. Metropolitan St. R. Co., 169 Mo. App. 624 1377
v. Munster, 11 Tex. Civ. App. 341 4215, 4291, 4296, 4300
v. Newport, etc., R. Co., 3 H. & N. 409 808
v. Post, 38 N. J. L. 346 4330
v. United States, 16 Ct. of Cls. 434 2234
Fielden v. Lahens, 9 Bosw. 436 423
Fielder v. Adams Exp. Co., 69 W. Va. 138 3411, 3422
Fielding v. Silverstein, 70 Conn. 605, 1674, 1676
v. Waterhouse, 40 N. Y. Sup. Ct. 424 2818, 2865
Fields v. Bynum, 156 N. C. 413 4508, 4535, 4545
v. Fields, 105 Va. 714 1922
v. Lancaster C. Mills, 77 S. C. 546 1325, 1348
v. Mankato E. T. Co., 116 Minn. 218 4681
v. Moul, 15 Abb. Pr. 6 1501
v. Western U. Tel. Co., 68 Ore. 209 3593
v. Williams, 91 Ala. 502 480, 4199, 4216
Fieske v. Foster, 10 Metc. (Mass.) 597 1916
Fife v. Oshkosh, 89 Wis. 540 4701
Fifield v. Whittemore, 33 Fed. 835 4470
Fifth Ave., etc., In re, 62 Wash. 218 12
Fifth Ave. Bank v. Forty-second St., etc., F. R. Co., 137 N. Y. 231 4404
Fifth Blecher B. Ass'n v. Sylvester, 35 Pa. Super. 62 1943
Fifth Nat. Bank v. Ashworth, 123 Pa. 212 2944
v. Providence W. Co., 17 R. I. 112 4222, 4285
Fifty Associates v. Boston, 201 Mass. 585 312, 2716, 4025, 4116
Figh v. United States, 8 Ct. of Cls. 319 2709
Fike v. Pere Marquette R. Co., 174 Mich. 167 4819
Filber v. Dautermann, 26 Wis. 518 4502
Filbert v. Behney, 45 Pa. Super. 24 1997
v. Philadelphia, 181 Pa. 530 2612
Filer v. New York Cent. R. Co., 49 N. Y. 42 334, 389, 410, 3487, 4742
v. New York Cent. R. Co., 49 N. Y. 45 4749
v. New York Cent. R. Co., 49 N. Y. 47 148, 4700, 4727, 4757, 4761
v. Smith, 96 Mich. 347 4619
Files v. Magoon, 41 Me. 104 429
Filey v. Meyers, 43 Pa. 404 3114

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v. Hoar, 124 Mass. 580 222, 1296, 1369, 3124, 3205, 4762
Filley v. Fassett, 44 Mo. 168 4487
Fillingham v. Michigan United R., 154 Mich. 233 1374
Filmore v. Reithman, 6 Colo. 120 1121
Filston F. Co. v. Henderson, 106 Md. 335 1005, 2598
Fin & F. Club v. Thomas (Tex. Civ. App.), 138 S. W. 150 3761
Final v. Backus, 18 Mich. 218 27, 362, 4211, 4215, 4221, 4256
Finch v. Boning, 4 C. P. Div. 143 794
v. Brook, 1 Bing. N. C. 253 804
v. Brook, 1 Scott 70 803
v. Miller, 5 C. B. 428 809, 811
v. Zenith F. Co., 146 Ill. App. 257 2274
Fincher v. Baltimore, etc., R. Co., 179 Ill. App. 622 3872, 3875, 3880
Finckh v. Evers, 25 Ohio St. 82 295, 307
Finckle v. Evan, 25 Ohio St. 82 2881
Findlater v. Dorland, 152 Mich. 301 4408
Findlay v. Carson, 97 Iowa 537 1734, 1751
v. Hall, 12 Ohio St. 610 1144, 1158, 1878
v. Keim, 62 Pa. 112 1942, 1947
v. Knickerbocker I. Co., 104 Wis. 375 4312, 4329, 4340
v. Western U. Tel. Co., 64 Fed. 459 3555
Findley v. Coal & Coke Ry. Co., — W. Va. —, 87 S. E. 198 5039
v. Findley, 42 W. Va. 372 1653
v. Hill, 8 Ore. 247 2820
v. Hutzell, 29 Pa. 337 1607
v. Koch, 126 Iowa 131 2013
v. Mitchell, 50 Tex. 143 4623
Fine v. Navarre, 104 Mich. 93 4625
Finer v. Nichols, 158 Mo. App. 539 339, 3251, 4684
Finger v. McCaughey, 114 Cal. 64 970, 976
v. Pollack, 188 Mass. 208 1423, 4537
Fink v. Busch, 83 Neb. 599 1373, 1379, 4664
v. Cleveland, C., C. & St. L. R. Co., 181 Ind. 539 3973
v. Cox, 18 Johns. 145 1827
v. Farmers' Bank, 178 Pa. 154 2745, 2750
v. Hoke, 35 Ore. 17 2120
v. Joseph, 2 New Mex. 138 763
v. Justh, 14 Abb. Pr. (N. S.) 107 1391
v. Schroyer, 18 Ill. 416 3487
v. Thomas, 66 W. Va. 487 1281, 1311
v. United States C. & C. Co., 72 W. Va. 507 558
Finkelstein v. Barnett, 17 N. Y. Misc. 564 3663
v. Selwitz, 79 N. Y. Misc. 28 1354, 2344, 2348
Finken v. Elm City B. Co., 73 Conn. 423 1374, 4709, 4720
Finklestein v. Barnett, 16 N. Y. Misc. 488 3673
v. Chicago, 168 Ill. App. 475 1512
Finlen v. Heinze, 32 Mont. 354 2047
Finletter v. Philadelphia T. Co., 19 Phila. 413 4795
Finley v. Carothers, 9 Tex. 517 1049
v. Cudd, 42 S. C. 121 4325
v. Dyer, 79 Mo. App. 604 2502
v. Hershey, 41 Iowa 389 3867, 3868, 3878
Finley v. St. Louis R. & W. G. Co., 99 Mo. 559, 563 4601
v. Southern R. Co., 5 Ga. App. 722 432
v. Widner, 112 Mich. 230 4574
Finn v. Frink, 84 Me. 261 4648
v. Providence G. & W. Co., 99 Pa. 631 3996, 4013, 4030
v. Young, 46 Wash. 74 1449
v. Young, 50 Wash. 543 4399
Finnegan v. Allen, 60 Ill. App. 354 234
v. Eckerson, 26 N. Y. Misc. 574 3917
v. Fernandina, 15 Fla. 379 521
Finnell v. Finnell, 159 Cal. 535 2798
v. Meaux, 3 Bush 449 677, 679
Finnerty v. Tipper, 2 Camp. 72, 2 Stark. Ev. 635 465, 4516, 4517
Finnes v. Selover, 108 Minn. 331 1981
Finney v. Commonwealth, 1 P. & W. 240 2804
v. Moore, 9 Idaho 284 1048
v. Raudabaugh, 182 Mo. App. 246 532
v. Warren Ins. Co., 1 Metc. (Mass.) 16 3010
Finnie v. Montreal, 32 Can. Sup. Ct. 335 520
Finnigan v. Sullivan, 65 Wash. 625 4613
Finnucan v. Fiegenspan, 81 Conn. 378 2754
Finucane v. Board of Education, 190 N. Y. 76 2648, 2649
Fire Ass'n v. Brown (Tex. Civ. App.), 33 S. W. 997 3014
v. Farmers' G. Co., 39 Okla. 162 1443, 3041
v. Rosenthal, 108 Pa. 474 3029, 3059, 3065, 3068
Fire Ass'n of Philadelphia v. Strayhorn, — Tex. Civ. App. —, 165 S. W. 901 3011, 3012
Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 580 766
Fire Ins. Co. v. Felrath, 77 Ala. 194 3018
Firemen's Fund Ins. Co. v. Western Ref. Co., 162 Ill. 322 1092, 1185
Firestine v. Philadelphia, etc., R. Co., 56 Pa. Super. Ct. 42 4926
v. Firestone, 2 Ohio St. 415 3728
Firmin v. Firmin, 9 Hun 571 3791, 4259
Firmstone v. Spaeter, 1 Pa. Dist. 39 1935
First Bank v. Steffens, 51 Tex. Civ. App. 211 1267, 4165
First Baptist Church v. Brooklyn Ins. Co., 28 N. Y. 153 3039
v. Schenectady, etc., R. Co., 5 Barb. 79 3839, 3848, 3935
First Ecclesiastical Soc. v. Loomis, 42 Conn. 570 1191, 1193
First Employer's Liability Cases, 207 U. S. 463, aff'g 148 Fed. 986 5020, 5024
First M. E. Church of Strong City v. North, 92 Kan. 381 1941, 2236
First Nat. Bank v. Adam, 34 Ill. App. 159, 168 1322
v. Avery P. Co., 69 Neb. 329 434, 2859, 2891
v. Badham, 86 S. C. 170 1924
v. Bank, 221 Ill. 319 2929
v. Bentley, 27 Minn. 87 979
v. Boyce, 78 Ky. 42 4211, 4294
v. Breese, 39 Iowa 640 1865, 2771
v. Briggs' Assignees, 69 Vt. 12 2748, 2751
v. Buchanan, 87 Tenn. 32 646
v. Busch, 102 Minn. 365 1818

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v. Campbell, 52 Tex. Civ. App. 445 1223
v. Carroll, 35 Mont. 302 234, 2626
v. Case, 63 Wis. 504 663
v. Chilson, 45 Neb. 257 688
v. Church Federation, 120 Iowa 268 2979
v. Cleland, 36 Tex. Civ. App. 478 1357
v. Cooper, 91 Neb. 624 1015
v. County Com'rs, 14 Minn. 77 1883
v. Crowley, 24 Mich. 492 1680, 4359
v. Drew, 91 Ill. 186 2383
v. Felker, 185 Fed. 678 4272, 4273
v. Fidelity & D. Co., 106 Ill. App. 367 1797
v. Fidelity & D. Co., 145 Ala. 335 2792
v. First Nat. Bank, 4 Dill. 290 2929, 2930
v. First Nat. Bank, 116 Ala. 520, 538 2908, 2942
v. Fourth Nat. Bank, 77 N. Y. 320 2929, 2938
v. Fourth Nat. Bank, 84 N. Y. 469 1185
v. Fourth Nat. Bank, 89 N. Y. 412 1007, 2929
v. Fowler, 54 Wash. 65 540, 574
v. Gerke, 68 Md. 449 2756
v. Grimes, 49 Kan. 219 978
v. Grosshans, 61 Neb. 575 4434
v. Haulenbeck, 65 Hun 54 1855
v. Henry, 159 Ala. 367 1929
v. Hinton, 123 La. 1018 1855
v. Hockett, 2 Neb. (Unof.) 512, 89 N. W. 412 1440, 1728, 1758
v. Hollingsworth, 78 Iowa 575 743
v. Homesley, 99 N. C. 531 2814
v. Indianapolis P. Mfg. Co., 45 Ind. 5 1918
v. Jacobs, 73 Mo. 35 1924
v. John A. Bryant Piano Co., 185 Ill. App. 119 530
v. Johnson, 133 Mich. 700 2743
v. Kansas Grain Co., 60 Kan. 30 1322
v. Larsen, 60 Wis. 206 871, 1924
v. Latham, 37 Okla. 286 746
v. Leech, 94 Fed. 310 746
v. Lillard, 55 Mo. App. 675 2805
v. Lock-Stitch F. Co., 24 Fed. 221 2780
v. Lyman, 59 Kan. 410 4303
v. Lynch, 6 Tex. Civ. App. 590 876, 1037
v. McConnell, 103 Minn. 340 664
v. Mack, 35 Ore. 122 1922
v. Mattingly, 92 Ky. 650 2792
v. Miller, 235 Ill. 135 1849
v. Miller, 139 Wis. 126 1922, 1924
v. Mineola S. Bank (Tex. Civ. App.), 155 S. W. 603 4210
v. Minneapolis & N. E. Co., 8 N. D. 430 4241
v. Morris, 1 Hun 680 1166
v. National S. Co., 130 Fed. 401 707, 738
v. O'Connell, 84 Iowa 377 2813
v. Oliver, 16 Tex. Civ. App. 428 1825
v. Payne, 111 Mo. 291 2780
v. Peltz, 176 Pa. 513, 518 2809
v. Railsback, 58 Neb. 248 277
v. Red River Valley Nat. Bank, 9 N. D. 319 1439, 4219
v. Ricker, 71 Ill. 439 647
v. Roberts, 2 N. D. 195 698, 705
v. Rogers, 13 Minn. 407 1792
v. Rush, 85 Fed. 539 480, 481, 491, 4307
First Nat. Bank v. St. Cloud, 73 Minn. 219 244
v. Samuelson, 82 Neb. 532 2747, 2751
v. San Antonio, etc., R. Co., 97 Tex. 201 4224
v. Schween, 127 Ill. 573 360, 362
v. Shreiner, 110 Pa. 188 2809
v. Snell, 144 Wis. 433 2280, 2340
v. Sowles, 46 Fed. 731 4388
v. State Bank, 15 N. D. 594 1113
v. Stauffer, 1 Fed. 187 978
v. Strong, 28 Ill. App. 325 4211, 4239
v. Tenney, 43 Ill. App. 544 2977
v. Thurman, 69 Iowa 693 208, 245
v. Turner, 3 Kan. App. 352 1038
v. United States F. & G. Co., 150 Wis. 601 2745
v. Waddell, 74 Ark. 241 2749, 2807
v. Western U. Tel. Co. 30 Ohio St. 555 3596
v. Williams, 62 Kan. 431 223, 225, 4431, 4627
First Nat. Bank B. Co. v. Vandenberg, 29 Okla. 583 2696, 2701
First Nat. Bank of Champaign, Ill. v. John A. Bryant Piano Co., 185 Ill. App. 119 1804
First Nat. Bank of Ft. Smith v. Nakdimen, 111 Ark. 223 2768
First Nat. Bank of Lawton v. Thompson, 41 Okla. 88 4210
First Nat. Bank of Merkel v. Armstrong, — Tex. Civ. App. —, 168 S. W. 873 2797
First Nat. Bank of Princeton v. Ficklin, 185 Ill. App. 381 1804
First Nat. Bank of San Marcos v. Smith, — Tex. Civ. App. —, 160 S. W. 311 894
First Nat. Bank of Tipton v. Peck, 180 Md. 649 1118
First Nat. Bank of Waverly v. Winters, 165 App. Div. (N. Y.) 726 4531, 4550
First Parish of S. V. Smith, 14 Pick. 297 3745
First Parish of Woburn v. Middlesex, 7 Gray 106 4019, 4086
First St., In re, 66 Mich. 55 4063
First State Bank v. Barnett, 48 Tex. Civ. App. 82 4292
v. Hammond, 124 Mo. App. 177 1826
v. Jones (Tex. Civ. App.), 139 S. W. 671 4297
v. Noser, 133 Ill. App. 173 1288, 4609, 4634
First State Bank of Mannsville v. Howell, 41 Okla. 216 225, 4351
First Texas State Ins. Co. v. Jimenez, — Tex. Civ. App. —, 163 S. W. 656 3082
Firth v. Purvis, 5 T. R. 432 804
Fischer v. Bell, 91 Ind. 243 2501
v. Hope Mut. L. Ins. Co., 69 N. Y. 161 3084
v. St. Louis, 189 Mo. 567 1499
v. Sandford, 12 Pa. Super. Ct. 435 3882, 3905
Fish v. Chapman, 2 Ga. 349 3335, 3414
v. Chicago, etc., R. Co., 84 Minn. 179 3968
v. Chicago, etc., R. Co., 263 Mo. 106 5035, 5072
v. Correll, 4 Cal. App. 521 2666
v. Dana, 10 Mass. 46 2893, 2894
v. Dodge, 4 Denio 311 1431, 3839, 3842, 3845
v. Folley, 6 Hill 54 376, 387, 415
v. Glass, 54 Ill. App. 655 2558, 2561

[REFERENCES ARE TO PAGES]

Fish v. Nethercutt, 14 Wash. 582 4169, 4267
v. Robinson, 14 Ohio C. C. (N. S.) 414 862, 899
v. St. Louis County P. & P. Co., 102 Mo. App. 6 4509, 4593
v. Seeberger, 154 Ill. 30, aff'g 47 Ill. App. 580 1118, 2511, 2902, 2910, 2918
v. Sundahl, 82 Neb. 541 525
Fishback v. Miller, 15 Nev. 428 4379
Fishburn v. Burlington & N. R. Co., 127 Iowa 483 70, 151, 1471, 4724
Fishburne v. Engledove, 91 Va. 548 1363, 1530
v. Sanders, 1 N. & McC. 242 784, 1236
Fishbury v. Vineyard H. W. Co., 193 Mass. 196 1201
Fishel v. Fishel, 7 Watts 44 643, 779
v. Goddard, 30 Colo. 147 1449, 4368
Fishell v. Winans, 38 Barb. 228 1101
Fisher v. Abeel, 66 Barb. 381 3303
v. Anderson, 25 Iowa 28 870, 998
v. Barber (Tex. Civ. App.), 130 S. W. 871 355, 3675, 3688, 3690, 3666
v. Barret, 4 Cush. 381 905
v. Bertram, 100 Ill. App. 542 2415
v. Bidwell, 27 Conn. 363 870, 882, 967
v. Boston & M. R. Co., 99 Me. 338 3425
v. Brown, 70 Fed. 570 4258
v. Brown, 104 Mass. 259 4220, 4239, 4273
v. Brown, 135 N. C. 198 1129
v. Columbia B. & L. Ass'n, 59 Mo. App. 430 2797, 2801
v. Crescent Ins. Co., 33 Fed. 544 3044
v. Cutter, 20 Mo. 206 2755, 2772
v. Dow, 72 Tex. 432 2311, 2314
v. Dowling, 66 Mich. 370 3737
v. Edington, 85 Tenn. 23 3710
v. Fallows, 5 Esp. 171 307, 2885
v. Feige, 137 Cal. 39 7, 14
v. Fisher, 98 Mass. 303 675, 1817
v. Goebel, 40 Mo. 475 315, 316, 2604, 2626
v. Groff, 182 Ind. 29 3961, 4026
v. Hamilton, 49 Ind. 341 340
v. Jansen, 30 Ill. App. 91, aff'd 128 Ill. 549 4717
v. Jansen, 128 Ill. 549 4719, 4754
v. Jones Co., 108 Ga. 490 4278
v. Kay, 2 Bibb 434 2029, 2047
v. Kenyon, 56 Wash. 8 3677, 3679
v. Leland, 4 Cush. 456 1825
v. Lord, 63 N. H. 514 1829
v. Marvin, 47 Barb. 159 666
v. Mellen, 103 Mass. 503 4384, 4385
v. Morgan, 1 N. J. L. 125 3718, 3721
v. Mowbray, 8 East 330 1067
v. Mylius, 42 W. Va. 638 2495
v. Naysmith, 106 Mich. 71 3811, 4123
v. Newark City I. Co., 62 Fed. 569, 76 Fed. 427 2237
v. New York, etc., R. Co., 46 N. Y. 644 1574
v. Oliver, 172 Mo. App. 18 3666, 3670, 3675, 3676, 3678
v. Otis, 3 Pin. 78 870, 998
v. Parry, 68 Ind. 465 2099
v. Patterson, 14 Ohio 418 471, 4573, 4577, 4598
v. Pollard, 2 Head 314 2388
v. Portland Railway, Light & Power Co., 74 Ore. 229 4893, 4901
Fisher v. Prince, 3 Burr. 1363 4301, 4302
v. Rieman, 12 Md. 497 1870
v. Salmon, 1 Cal. 413 1828, 1956
v. Sargent, 10 Cush. 250 1009, 1012
v. Shaw, 42 Me. 32 838
v. Scherer, — Tex. Civ. App. —, 169 S. W. 1133 4168, 4622, 4643
v. Stockebrand, 26 Kan. 565 828
v. Thirkell, 21 Mich. 1 3127
v. Trumbauer, 160 Iowa 255 1963
v. Val de Travers A. Co., 1 C. P. Div. 511 194, 302
v. Western U. Tel. Co., 119 Wis. 146 56, 3563, 3571, 3644
v. Whoollery, 25 Pa. 197 4326, 4330
v. Zumwalt, 128 Cal. 493 3934
Fisher Hydraulic S. & M. Co. v. Warner, 188 Fed. 465 2261
Fisk v. Brunette, 30 Wis. 102 1020
v. Chesterfield, 14 N. H. 240 1063
v. City of New York, 119 Fed. 256 5007
v. Commercial Ins. Co., 18 La. 77 3032
v. Duncan, 83 Pa. 197 2053
v. Fowler, 10 Cal. 512 859, 886, 899
v. Gray, 11 Allen 132 861, 868, 869, 876
v. Hartford, 69 Conn. 375 4001
v. Hicks, 31 N. H. 535 4392, 4410
v. Holden, 17 Tex. 408 1538
v. Miller, 63 Cal. 377 2781
v. Neptune, —Kan. —, 149 Pac. 692 40
v. Tank, 12 Wis. 276 294, 534, 535, 537, 2429, 2432
Fisk & Co. v. Rickel, 108 Iowa 370 2745, 2749
Fiske v. Chesterfield, 14 N. H. 240 4156
v. Fisher, 100 Mass. 97 684
v. Fiske, 20 Peck 499 416
v. Stevens, 21 Me. 457 674, 677
Fitch v. Carpenter, 43 Barb. 40 2371
v. Casey, 2 G. Greene 300 2673
v. Douglass, 76 Kan. 60 3712
v. Huff, 134 C. C. A. 31, 218 Fed. 17 4795
v. Newberry, 1 Doug. (Mich.) 1 3282
v. Redding, 4 Sandf. 130 1826
v. Remer, 1 Biss. 337 1159, 1163
v. Sutton, 5 East 230 749, 754, 762
v. Western U. Tel. Co., 150 Mo. App. 149 3559, 3563
Fitchburg C. Mfg. Co. v. Melven, 15 Mass. 268 3124
Fitchburg R. Co. v. Boston & M. R. Co., 3 Cush. 58 3949
v. Donnelly, 30 C. C. A. 580, 87 Fed. 135 4708
v. Freeman, 12 Gray 401 1445, 2303
v. Gage, 12 Gray 393 3280
Fitchburg S. E. Co. v. Potter, 211 Ill. 138 2461
Fitchburg, etc., R. Co. v. Hanna, 6 Gray 539 537, 540
Fitchet v. Walton, 22 Ont. L. R. 40 4605
Fitton v. Phoenix Assur. Co., 25 Fed. 880 3040
Fitts v. Howard, 13 Ky. L. Rep. 302 (Ky. Super. Ct.) 4271
v. Reinhart, 102 Iowa 311 2685
Fitzgerald v. Allen, 128 Mass. 232 2676
v. Benner, 219 Ill. 485 2685
v. Caldwell, 2 Dall. 215 1224
v. Chicago, etc., R. Co., 48 Kan. 537 4145

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v. Dobson, 78 Me. 559 4, 4829
v. Evans, 49 Minn. 541 1444, 2389
v. Fitzgerald & M. C. Co., 41 Neb. 374, 472 1184
v. International F. T. Co., 104 Minn. 138 125
v. Jones, 1 Munf. 150 1117
v. Leonard, 32 Irish L. 675 128
v. Leonard, L. R. 32 Ir. 675 [1893] 2452
v. Lorenz, 181 Ill. 411, aff'g 79 Ill. App. 651 946
v. Mandas, 21 Ont. L. R. 312 3110
v. New York, etc., R. Co. 37 App. Div. (N. Y.) 127 1496
v. Paisley, 110 Iowa 98 1120
v. St. Paul, etc., R. Co., 29 Minn. 336 108
v. Stewart, 53 Pa. 343 471, 4579
v. Union S. Co., 89 Neb. 393 425, 432, 778
v. Union S. Co., 91 Neb. 493 489, 1504, 4943
v. Wellington, 37 Kan. 460 1799
v. Wiley, 22 App. D. C. 329 226, 558
Fitzgerald & M. C. Co. v. Fitzgerald, 137 U. S. 98 2468
Fitzgibbon v. Brown, 43 Me. 169 501, 4635, 4649
Fitzgibbons v. Freisem, 12 Daly 419 3231
Fitzherbert v. Shaw, 1 H. Bl. 258 3255
Fitzhugh v. Crogan, 2 J. J. Marsh. 429 2056, 2058
v. McPherson, 3 Gill 408 1202
v. Runyon, 8 Johns. 375, 8 Johns. 189 1853
v. Wiman, 9 N. Y. 559 1676, 1680, 1683, 4327
Fitzimmins, In re, 174 N. Y. 23 2490
Fitzmaurice's Minors, In re, 15 Irish Ch. 445 739
Fitzpatrick v. Age Herald Pub. Co., 184 Ala. 510 1361, 4543
v. Boston & M. R., 84 Me. 33 312
v. Branch Bank, 14 Ala. 533 1602
v. Cottingham, 14 Wis. 219 876, 884, 918
v. Dooley, 112 Mo. App. 165 2474, 2477
v. Flagg, 12 Abb. Pr. 189 1722
v. Gilson, 176 Mass. 477 2501
v. Graham, 122 Fed. 401 3694
v. Great Western R. Co., 12 Up. Can. Q. B. 645 90, 135
v. McGregor, 133 Ga. 332 1016
v. Paulding, 131 Ga. 693 1356
v. Todd, 79 Ky. 524 1766
Fitzpatrick Square B. G. Co. v. McLaney, 153 Ala. 586 2555
Fitzroy v. Gwillim, 1 T. R. 153 978
Fitzsimmons v. Baum, 44 Pa. 32 871
v. Brooklyn, 102 N. Y. 530 2557
v. Chapman, 37 Mich. 139 4424
Fitzsimons & C. Co. v. Braun, 199 Ill. 390 3738, 3767, 4189
Five Tracts of Land in Cumberland Tp., 101 Fed. 661 4034, 4035, 4041, 4049
Fivey v. Pennsylvania R. Co., 66 N. J. L. 23 4434
Fixel v. Tallman (N. Y. Misc.) 116 Supp. 639 1708
Flack v. Garland, 8 Md. 191 762
v. Neill, 22 Tex. 253 1314
Flagg v. Dow, 99 Mass. 18 3205
v. Hudson, 142 Mass. 280 106, 151
v. Tyler, 6 Mass. 33 1676, 1680
Flagler v. Hearst, 91 App. Div. (N. Y.) 12 4218, 4297
Flaherty v. Butte E. R. Co., 40 Mont. 454 109
v. Butte E. R. Co., 42 Mont. 89 4770
v. Minneapolis, etc., R. Co., 39 Minn. 328 433
v. Moran, 81 Mich. 52 14
v. St. Louis T. Co., 207 Mo. 318 4730
Flakne v. Great Northern R. Co., 106 Minn. 64 3281, 3349, 3413
Flam v. Lee, 116 Iowa 289 4615, 4616, 4619
Flanagan v. Baltimore & O. R. Co., 83 Iowa 639 4708, 4710, 4732, 4735
v. Demarest, 3 Robert. 183 2230
v. Hambleton, 54 Md. 222 674
v. Ward, 12 Tex. 209 2094
v. Womack, 54 Tex. 45 4776
Flanary v. Wood (Tex. Civ. App.), 73 S. W. 1072 327, 1322
Flanders v. Atkinson, 18 N. H. 167 1358
v. Chamberlain, 24 Mich. 305 1876
v. Daley, 120 Ga. 885 4504, 4531
v. Daley, 124 Ga. 714 4503
v. Tweed, 15 Wall. 450 223
Flanigan v. Seelye, 53 Minn. 231 692, 793, 796
Flannagan v. Cleveland, 44 Neb. 58 1765, 1802
v. Erwin, 173 Ill. App. 452 1655
Flannery v. Baltimore & O. R. Co., 4 Mackey (D. C.) 111 1338
v. Harley, 117 Ga. 483 655
v. Rohrmayer, 46 Conn. 558 2576
v. Wessels, 244 Pa. 321 2242
v. Wood, 32 Tex. Civ. App. 250 1312
Flannigan v. Stauss, 131 Wis. 94 4549, 4592
Flarsheim v. Brestrup, 43 Minn. 298 722
Flash, The, Abb. Adm. 119 3314, 3326, 3346
Flat Lick S. Co. v. Kinningham, 140 Ky. 306 538
Fleckenstein v. Inman, 27 Ore. 328 4222
Fleckinger v. Taffee, 149 Mich. 678 4615, 4644
Fleckner v. Bank, 8 Wheat. 338 982
Fleckten v. Spicer, 63 Minn. 454 1980, 1989, 2101
Fleddermann v. St. Louis T. Co., 134 Mo. App. 199 1363
Fleet v. Hollenkemp, 13 B. Mon. 219 1268
v. Lockwood, 17 Conn. 233 1202, 4348
Fleetford v. Barnett, 11 Colo. App. 77 3671, 3687, 4968, 4971
Fleig v. Sleet, 43 Ohio St. 53 663
Fleishauer v. Fabens, 8 Cal. App. 30 4635, 4637
Fleischman v. Southern R., 76 S. C. 237 3529, 3532
Fleischmann v. Samuel, 18 App. Div. (N. Y.) 97 4212
Fleischner v. Citizens' I. Co., 25 Ore. 119 3126
v. Pacific Postal Tel. C. Co., 55 Fed. 738 3585
Fleming v. Anderson, 39 Ind. App. 343 299
v. Bailey, 44 Miss. 132 1692, 1695, 1742
v. Bank of New Zealand, [1900] App. Cas. 577 277, 279, 1370
v. Beaver, 2 Rawle 128 2800
v. Beck, 48 Pa. 309 234, 2639, 2643
v. Chicago, etc., R. Co., 34 Iowa 353 4027

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v. Harrison, 2 Bibb 171 1953
v. King, 100 Ga. 449 3143
v. L. & N. R. Co., 148 Ala. 527 1499
v. Langton, 1 Strange 532 1402
v. Loughren, 139 Iowa 517 339, 1267, 4662
v. Lunsford, 163 Ala. 540 2596
v. Nall, 1 Tex. 246 1397
v. Norfolk Southern R. Co., 160 N. C. 196 5126
v. Parry, 24 Pa. 47 700
v. Smith, 1 H. of L. Cas. 513 3010
v. Springfield, 154 Mass. 529 1473
v. Toler, 7 Gratt. 310 1556, 1567
v. Tuttle, 98 App. Div. (N. Y.) 222 1382
v. Wilmington & W. R. Co., 115 N. C. 676 4145
Fleming's Est., 184 Pa. 80 944
Flemington v. Smithers, 2 C. & P. 292 348
Flentham v. Steward, 45 Neb. 640 2814
Fletcher v. Brewer, 88 Neb. 196 1995
v. Burroughs, 10 Iowa 557 471, 4576
v. Chapman, 2 Leigh 565 1608
v. Chicago & N. R. Co., 109 Mich. 363 4619
v. Cole, 26 Vt. 170 4174
v. Derrickson, 3 Bosw. 181 2768
v. Dixon, 113 Md. 101 1425
v. Dold P. Co., 41 App. Div. (N. Y.) 30 208
v. Dyche, 2 T. R. 32 869, 885, 888, 894, 928
v. Gillespis, 3 Bing. 637 2655
v. Great Western R. Co., 29 L. J. (Ex.) 253 4036
v. Grover, 11 N. H. 368 2868
v. Harmon, 78 Me. 465 539
v. Jackson, 23 Vt. 581 2854, 2863, 2871
v. Ketcham, 160 Iowa 364 3663, 3664
v. Peck, 6 Cranch 145 3945
v. Prestwood, 143 Ala. 174 2592
v. Pynsett, Cro. Jac. 102 1112
v. South Dakota Cent. Ry. Co., — S. D. —, 155 N. W. 3 5077, 5083
v. Tayleur, 17 C. B. 21 193, 273, 284, 1366, 2359, 2627
v. Tayleur, 33 Eng. L. & Eq. 187 2451
v. Verser, 79 Ark. 271 2545
Flick v. Wetherbee, 20 Wis. 392 238, 267, 2439, 3212
Flickinger v. Omaha B. & T. R. Co., 98 Iowa 358 4095
v. Price, 165 Iowa 570 2852
Flickwir's Est., 136 Pa. 374 1081
Flinders v. Bailey, 133 Iowa 616 4982
Flinn v. Barber, 64 Ala. 200 1029, 1030
v. Flinn, 4 Del. Ch. 44 1083
v. Frederickson, 89 Neb. 563 4793
v. Keefe, 37 Nova Scotia 67 371
v. Leander, The, 1 Bee 260 2737
v. Clark, 12 Johns. 374 627
v. Clark, 13 Conn. 361 37, 4510
v. Holman, 82 Vt. 297 4502, 4509
v. Lewis, 61 Ill. 299 4397
v. Lyon, 4 Cal. 17 534
v. Norwich, etc., R. Co., 6 Blatch. 158 3469
v. Norwich, etc., R. Co., 34 Conn. 554 3467
v. Steadman, 36 Vt. 210 1028, 2075
v. Sweeney, 49 Minn. 509 3127
Flint & W. Mfg. Co. v. Beckett, 167 Ind. 491 56, 217
Flint, etc., R. Co. v. Detroit, etc., R. Co., 64 Mich. 350 4074
v. Gordon, 41 Mich. 420 4087
Floding v. Floding, 137 Ga. 531 918
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v. Smith & Leishman, [1915] 1 Sc. L. T. 340, W. C. & Ins. Rep. 212 5203
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Flora Rodgers, The, 152 Fed. 286 2735
Florence, The, 16 Jur. 572 2723
Florence, The, 65 Fed. 248 2727, 2728, 2729
Florence, The, 215 Fed. 283 2717
Florence v. Jennings, 2 C. B. (N. S.) 454 969
v. Patillo, 105 Ga. 577 2404, 2456
Florence C. & I. Co. v. Louisville B. Co., 138 Ala. 588 1542
Florence M. Co. v. Daggett, 135 Mass. 582 2635
Florence O. & R. Co. v. Farrar, 119 Fed. 150 2597
v. First Nat. Bank, 38 Colo. 119 697, 1806
v. Huff, 14 Colo. App. 281 4633, 4634, 4635, 4648
v. McRae, 40 Colo. 303 1105, 1804
Florence W. Works v. Salmon, 8 Ga. App. 197 842, 858, 868, 925
Florence, etc., R. Co. v. Pember, 45 Kan. 625 3979
v. Shepherd, 50 Kan. 438 4120
v. Tennant, 32 Colo. 71 1104
Florida A. Club v. Hope L. Co., 18 Tex. Civ. App. 161 2388, 2405
Florida R. Co. v. Dorsey, 59 Fla. 260 478
Florida R. & N. Co. v. Webster, 25 Fla. 394, 419 1277
Florida, etc., R. Co. v. Brown, 23 Fla. 104 3754
v. Bucki, 68 Fed. 864 178
v. Burney, 98 Ga. 1 1505
v. Foxworth, 41 Fla. 1, 76 4862, 4873, 4874, 4875
v. Foxworth, 45 Fla. 278 1510, 4873, 4875
v. Groves, 55 Fla. 436 4644
v. Hayes, 66 Fla. 589 4863, 4929
v. Hayes, 67 Fla. 101 1507
v. Hirst, 30 Fla. 1, 38 1277, 1281
v. Jackson, 65 Fla. 393 4938
v. Lassiter, 58 Fla. 234 4751
v. Mooney, 45 Fla. 286 1282
v. Parsons, 33 Fla. 631 3755
v. Ragan, 104 Ga. 353 684
v. Smith, 61 Fla. 218 479
v. Southern S. Co., 112 Ga. 1 2636, 2691
v. Sullivan, 57 C. C. A. 167, 120 Fed. 799 4948, 4950
v. Wade, 53 Fla. 620 161
Florsheim v. Illinois T. & S. Bank, 93 Ill. App. 297 1058
v. Illinois T. & S. Bank, 192 Ill. 382, aff'g 93 Ill. 394 1051
Flottbek, The, 118 Fed. 954 2734
Flournoy v. Childress, Minor 93 1357
v. Lyon, 70 Ala. 308 1694, 1705, 1707, 1708
Flower v. Adam, 2 Taunt. 314 161
v. Elwood, 66 Ill. 438 666, 669, 828
v. Strickland, 107 Mass. 552 2838
Flower City, The, 16 Fed. 866 2735
Flowers v. Poorman, 43 Ind. App. 528 2470
Floyd v. Anderson, 36 Okla. 308 1689, 1690

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v. Hamilton, 33 Ala. 235 1258, 1281
v. Mann, 146 Mich. 356 2279
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Fludyer v. Cocker, 12 Ves. 25 1026
Fluker v. DeGrange, 117 La. 331 1968
Flukes, In re, 157 Mo. 125 15
Flureau v. Thornhill, 2 W. Bl. 1078 283, 355, 1972, 1974, 1978, 1981, 1991, 3184
Flying Fish, The, 34 L. J. (Adm.) 113 161
Flynn v. Allen, 57 Pa. 482 2383
v. American B. & T. Co., 104 Me. 141 1031, 2771
v. Bourneuf, 143 Mass. 277 2149
v. Butler, 189 Mass. 377 3936
v. Chicago City R. Co., 158 Ill. App. 405 4665, 4711
v. Fordal, 124 Iowa 457 2503
v. Hatton, 43 How. Pr. 333 3250
v. Judge, — App. Div. —, 133 N. Y. Supp. 794 207
v. Nash, 11 Allen 550 3245
v. Seale, 2 Cal. App. 665 524
v. Trask, 11 Allen 550 316
v. Union S. & G. Co., 61 App. Div. (N. Y.) 170 1618, 1811
v. White Breast C. & M. Co., 72 Iowa 738 909
Flynn's Est., In re, 21 Pa. Super. 126 1121
Flynt v. Chicago, etc., R. Co., 38 Mo. App. 98 3739
Foakes v. Beer, 9 App. Cas. 605, 11 Q. B. Div. 221 749, 752
Foard v. North Carolina R. Co., 8 Jones 235 3344
Focht v. Rosenbaum, 176 Pa. 14 931
Focke v. Blum, 82 Tex. 436 4286
Foden v. Sharp, 4 Johns. 183 1182
Fodor v. Fuchs, 79 N. J. L. 529 4569, 4573
Foehr v. New York S. L. R. Co., 40 Pa. Super. 7 208, 475
Foeller v. Heintz, 137 Wis. 169 2671, 2681, 2682
Foels v. Tonawanda, 59 Hun 567 4786
Foerderer v. Moors, 91 Fed. 476 2805
Foerster v. Faulk-C. L. Co., 105 Miss. 612 42
Fogarty v. Northern Pac. R. Co., 74 Wash. 397 5093, 5109, 5113
v. Wilson, 30 Minn. 289 636
Fogel v. Blitz, 128 Mich. 503 2755
Fogelsville L. & B. Ass'n, Appeal of, 89 Pa. 293 1062
Fogg v. Hill, 21 Me. 529 3106
v. Sawyer, 9 N. H. 365 595, 644, 648, 654
Fogil v. Boody, 76 Conn. 194 697
Fohrmann v. Consolidated T. Co., 63 N. J. L. 391 1338
Foley v. Brunswick T. Co., 69 N. J. L. 481 1511
v. Everett, 142 Ill. App. 250 1482, 1493, 4653, 4690, 4823
v. Kleinschmidt, 28 Mont. 198 2525
v. McKeegan, 4 Iowa 1 355, 881, 918, 1562, 1986, 1989, 2008
v. McMahon, 114 Mo. App. 442 56, 58
v. Manufacturers' & B.'s Fire Ins. Co., 152 N. Y. 131 3038, 3139
v. Martin, 142 Cal. 256 1340, 1349
v. Mason, 6 Md. 37 630
v. Northrup, 47 Tex. Civ. App. 277 1276, 1287, 1484
Foley v. Phelps, 1 App. Div. (N. Y.) 551 3
v. Philadelphia R. T. Co., 240 Pa. 169 4757, 4834
v. Southwestern L. Co., 94 Wis. 329 3193
v. Wyeth, 2 Allen 131 3913
Folger v. Fields, 12 Cush. 93 397, 1535
v. Heidel, 60 Mo. 285 1646
Folk v. Graham, 82 S. C. 66 2061, 2114
v. Seaboard Air Line Ry., 99 S. C. 284 339
Follansbee v. Adams, 86 Ill. 13 2289
Follett v. Jewett, 1 Am. L. Reg. 600, 11 N. Y. Leg. Obs. 193 4585
Follett W. Co. v. Utica T. & D. Co., 84 App. Div. (N. Y.) 151 4325
Folliott v. Hunt, 21 Ill. 654 2689
v. Ogden, 1 H. Bl. 135 1174
Folmar v. Carlisle, 117 Ala. 449 947
Folsom v. Apple River L. D. Co., 41 Wis. 602 408, 3799, 3893
v. Clemence, 119 Mass. 473 376, 383
v. McDonough, 6 Cush. 208 888
v. Marlette, 23 Nev. 459 1076
v. Mussey, 8 Me. 400 1853, 1862
v. Parker, 31 N. Y. Misc. 348 3250
v. Plumer, 43 N. H. 469 943
v. Underhill, 36 Vt. 580 1378, 4731
Folts v. Huntley, 7 Wend. 210 1935
Folwell v. Providence Journal Co., 19 R. I. 551, 555 4543, 4573, 4599
Folz v. Tradesmen's T. & S. Fund Co., 201 Pa. 583 1569, 1574
Fond du Lac H. Co. v. Bowles, 54 Wis. 425 2760
Fonda v. St. Paul City R. Co., 77 Minn. 336 4807
Fontaine v. Baxley, 90 Ga. 416 231, 2343, 2345
v. Boatman's Sav. Inst. 57 Mo. 552 3727
v. Schulenberg & B. L. Co., 109 Mo. 55 3119
Fontana, The, 119 Fed. 853 4995
Fontenot v. Colorado, etc., R. Co., 122 La. 779 3912
Fonville v. Monroe, 74 Ill. 129 1055
Fooks v. Horner, [1896] 2 Ch. 188 1095
Foord v. Noll, 2 Dowl. (N. S.) 617 809
Foot v. Bentley, 44 N. Y. 166 2370
v. Card, 58 Conn. 1 417, 4978
v. Great Northern Ry. Co., 81 Minn. 493 5121
v. Tracy, 1 Johns. 45 4576
Foot's Case, 1 Salk. 93 4348
Foote, Appellant, 23 Pick. 299 3131
Foote v. Blanchard, 6 Allen 221 1101, 1107
v. Brown, 2 McLean 369 677
v. Burlington G. Co., 103 Iowa 576 3856
v. Burlington W. Co., 94 Iowa 200 3852
v. Burnet, 10 Ohio 317 2012, 2058, 2086, 2153, 2156, 2163, 2173, 2176
v. Cincinnati, 11 Ohio 408 3145
v. Clifton, 22 Ohio St. 247 3846
v. Merrill, 54 N. H. 490 364, 3774, 3783, 4214, 4259
v. Sprague, 13 Kan. 155 868, 872
v. Van Zandt, 34 Miss. 40 1608
Foote & D. Co. v. Malony, 115 Ga. 985 34, 848, 1431
Forbell v. New York, 164 N. Y. 522 7, 3736, 3761
Forbes v. American Mut. L. Ins. Co., 15 Gray 249, 254 3071

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v. Boston & L. R., 133 Mass. 154 4211, 4293
v. Dallett, 9 Phila. 515 3385
v. Hagman, 75 Va. 168 4645
v. Howard, 4 Iowa 364 1480
v. Loftin, 50 Ala. 396 4730, 4733, 4740
v. Manufacturers' Ins. Co., 1 Gray 371 3006, 3014
v. Orange, 88 Conn. 255 4108
v. Rowe, 48 Conn. 413 2779, 2789
v. St. Louis, etc., R. Co., 107 Mo. App. 661 766
v. Sheppard, 98 N. C. 111 2815
v. Smith, 5 Ired. Eq. 369 2814
Force v. Elizabeth, 28 N. J. Eq. 403 1209
v. Peterson Mach. Co., 17 N. D. 220 4291
v. Sawyer-B. Mfg. Co., 131 Fed. 884 4460, 4467
v. Sawyer-B. Mfg. Co., 143 Fed. 894 4465
Forcheimer v. Stewart, 65 Iowa 593 2380
Ford v. Atlantic C. L. R. Co., 8 Ga. App. 295 3537
v. Beach, 11 Q. B. 842 780
v. Cheever, 105 Mich. 679 1301, 4775
v. Chicago & N. R. Co., 14 Wis. 609 402, 414, 3876
v. Cotesworth, L. R. 4 Q. B. 127 3303
v. Des Moines, 106 Iowa 94 1419, 4743
v. Fargason, 120 Ga. 708 1259, 1355, 3203, 3207
v. Fitchburg R. Co., 110 Mass. 240 23
v. Gaiety Theatre, Ltd., [1914] W. C. & Ins. Rep. 53, 7 B. W. C. C. 197 5202
v. Harris, 102 Ky. 169 2749
v. Hine, 237 Ill. 463 112
v. Jones, 62 Barb. 484 334, 340, 4668, 4784, 4785, 4971
v. Keith, 1 Mass. 139 2834, 2838
v. Kelsey, 4 Rich. 365 1390
v. Lawson, 133 Ga. 237 377, 1436, 2274
v. Loomis, 62 Iowa 586 1721, 1726
v. Manchester, 136 Iowa 213 2684
v. Minneapolis St. R. Co., 98 Minn. 96 1518, 3506
v. Mitchell, 15 Wis. 308 655
v. Monroe, 20 Wend. 210 3515, 3518
v. Providence C. Co., 124 Ky. 517 1467
v. Roberts, 14 Colo. 291 4211
v. Santa Cruz R. Co., 59 Cal. 290 3933
v. Schliessman, 107 Wis. 479 3735
v. Smith, 1 Wend. 48 15
v. Smith, 27 Wis. 261 1453
v. United States, 17 Ct. of Cls. 60 2655, 2656
v. Warner Co., 1 Marvel 88 4653, 4748
v. Washington Nat. B. & L. Ass'n, 10 Idaho 30 980
v. Williams, 13 N. H. 584 435
v. Williams, 24 N. Y. 359 480, 4215, 4305
v. Wilson (Del. Ch.) 85 Atl. 1073 1132
Ford H. L. Co. v. Clement, 97 Ark. 522 248, 2614
Ford L. Co. v. Cornett, 146 Ky. 475 4324
Ford L. & Mfg. Co. v. McQueen, 14 Ky. L. Rep. 521 3771
Forderer v. Schmidt, 154 Fed. 475 793
Fordham v. Thompson, 144 Ill. App. 342 1726
Fordyce v. Easthope, 10 Ohio Dec. 610 2466, 2579
v. Easthope, 52 Ohio Dec. 610, aff'd 52 Ohio St. 663 2579
v. McCants, 51 Ark. 509 4896, 4935, 4937
v. McCants, 55 Ark. 384 1416
v. Nix, 58 Ark. 136 3452, 3502, 3522, 3527
v. Peper, 16 Fed. 516 2951
v. Richmond, 78 Neb. 752 1297
v. Russell, 59 Ark. 312 3843
v. Withers, 1 Tex. Civ. App. 540 4719
Fore v. Gipe, 2 Pa. Dist. 822 1936
v. Western, etc., R. Co., 101 N. C. 526 3734, 3754
Forelander v. Hicks, 6 Ind. 448 705, 711
Foreman v. Western U. Tel. Co., 141 Iowa 32 3622, 3623, 3633
Forest v. Elwes, 4 Ves. 492 4251
Forest O. Co.'s App., 118 Pa. 138 813
Forestier v. Bordman, 1 Story 51 2925
Forgotston v. Cragin, 62 App. Div. (N. Y.) 243 2386
Foringer v. New Kensington S. Co., 233 Pa. 425 2562
Forke v. Homann, 14 Tex. Civ. App. 670 4512
Forman v. Forman, 17 How. Pr. 255 1202
v. Miller, 5 McLean 218 537, 2576
v. Wright, 11 C. B. 481 1930
Forney v. Geldmacher, 75 Mo. 113 62, 99
Forrest v. Elwes, 4 Ves. 492 2316, 4252
v. Johnson, 100 Mich. 321 531
v. McBee, 72 S. C. 189 4271
Forrester v. Boston & M. C. C. & S. M. Co., 29 Mont. 397 2485
v. O'Rourke Eng. C. Co., 48 N. Y. Misc. 390 3738
v. Southern Pac. Co., 36 Nev. 247 1259, 1262, 1343, 3473, 3501, 3526
v. Southern R. Co., 147 N. C. 553 3351
Forrestier v. Bordman, 1 Story 43 2905, 2955, 2958, 3425
Forrow v. Arnold, 22 R. I. 305 162
Forschirm v. Mechanics' & Traders' Bank, 137 App. Div. (N. Y.) 149 1199, 1222
Forstall v. Consolidated Ass'n of Planters, 34 La. Ann. 770 1209
Forster v. Clowser, [1897] 2 Q. B. 362 1198
v. Eberle, 7 N. Y. Misc. 490 3126
v. Mackinnon Mfg. Co., 130 Wis. 281 1418, 2404
Forsyth v. Butler, 152 Cal. 396 1074, 1076
v. Central Mfg. Co., 103 Tenn. 497 4768
v. Dickson, 1 Grant's Cas. 26 1626
v. Doolittle, 120 U. S. 73 1447, 2486
v. Hastings, 27 Vt. 646 2540, 2571
v. Mann, 68 Vt. 116 2284, 2592
v. Palmer, 14 Pa. 96 480
v. Wells, 41 Pa. 291 362, 365, 3787, 4260, 4261, 4263
Forsyth Boulevard, Matter of, 127 Mo. 417 4136
Forsythe v. Ellis, 4 J. J. Marsh. 299 1601
v. Los Angeles R. Co., 149 Cal. 569 435

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v. Orndoff, 7 Heisk. 107 2627, 3243, 3247
v. Union Pac. R. Co., 2 Dill. 259 389
Ft. Collins D. R. Co. v. France, 41 Colo. 512 1343, 1440, 3983, 4138
Ft. Madison L. Co. v. Batavian Bank, 77 Iowa 393 1544
Ft. Pitt G. Co. v. Evansville C. Co., 123 Fed. 63 4172
Ft. Plain B. Co. v. Smith, 30 N. Y. 62 3933
Ft. Scott, etc., R. Co. v. Fox, 42 Kan. 490 3982
v. Lightburn, 9 Kan. App. 642 4663, 4683
v. Tubbs, 47 Kan. 630 3761
v. Scott, 111 Ark. 449 4034, 4130
Ft. Smith W. Co. v. Baker, 84 Ark. 444 1110
v. Freidman-Howell & Co., 111 Ark. 15 3699
Ft. Smith & W. R. Co. v. Awbrey, 39 Okla. 270 3346
v. Ford, 34 Okla. 575 3439, 3450, 3501
Ft. Smith, etc., Co. v. Scott, 103 Ark. 405 4038
Ft. Wayne & S. T. Co. v. Ft. Wayne & W. R. Co., 170 Ind. 49 4103
Ft. Wayne, etc., R. Co. v. Haberkorn, 15 Ind. App. 479, 488 4444
Ft Worth v. Howard (Tex.), 22 S. W. 1059 3953, 3958, 3964
v. Morgan, — Tex. Civ. App. —, 168 S. W. 976 3962
v. Scott (Tex. Civ. App.), 145 S. W. 736 3879
v. Williams, 55 Tex. Civ. App. 289 1534
Ft. Worth, City of, v. Charbonneau, — Tex. Civ. App. —, 166 S. W. 387 3997, 4034
Ft. Worth Grain & Elevator Co. v. Walker Grain Co., — Tex. Civ. App. —, 168 S. W. 470 2406
Ft. Worth I. Works v. Stokes, 33 Tex. Civ. App. 218 4779
Ft. Worth Imp. Dist. v. Weatherred (Tex. Civ. App.), 149 S. W. 550 4107, 4117, 4136, 4140
Ft. Worth St. R. Co. v. Ferguson, 9 Tex. Civ. App. 610 4663
v. Witten, 74 Tex. 202 4701
Ft. Worth, etc., R. Co. v. Avers (Tex. Civ. App.), 149 S. W. 1068 1443
v. Brown, 45 Tex. Civ. App. 376 1359, 1457
v. Downie, 82 Tex. 383 3952
v. Dubose, — Tex. Civ. App. —, 171 S. W. 1090 3523
v. Floyd (Tex. Civ. App.), 21 S. W. 544 5109
v. Greathouse, 82 Tex. 104 3317
v. Hales, — Tex. Civ. App. —, 173 S. W. 991 3524
v. Hawes, 48 Tex. Civ. App. 487 4706, 4719, 4761
v. Hogsett, 67 Tex. 685 273, 3806
v. Hyatt, 12 Tex. Civ. App. 435 4929, 4936
v. Ikard (Tex. Civ. App.), 140 S. W. 502 268, 3325
v. Jones, 38 Tex. Civ. App. 129 1493, 3484, 3528
v. Jordan, — Tex. Civ. App. —, 155 S. W. 676 3327, 3403
v. Keith, — Tex. Civ. App. —, 163 S. W. 142 4922
v. Kennedy, 12 Tex. Civ. App. 654 4740
Ft. Worth, etc., R. Co. v. Limberg (Tex. Civ. App.), 152 S. W. 1180 4798
v. Linthicum, 33 Tex. Civ. App. 375 1508, 4858
v. McCrummen (Tex. Civ. App.), 133 S. W. 899 4785
v. Montgomery (Tex. Civ. App.), 141 S. W. 813 1449, 3400
v. Morris, 45 Tex. Civ. App. 596 146
v. Morrison, 93 Tex. 527 4920
v. Morrison (Tex. Civ. App.), 129 S. W. 1157 1374, 4705
v. Morrison (Tex. Civ. App.), 139 S. W. 884 4647
v. Pearce, 75 Tex. 281 3746
v. Shank, — Tex. Civ. App. —, 167 S. W. 1093 3331, 4177, 4188
v. Stalcup, — Tex. Civ. App. —, 167 S. W. 279 4884, 4907, 4908
v. Shanley, 36 Tex. Civ. App. 291 3430
v. Travis, 45 Tex. Civ. App. 117 1474, 3466
v. Turney (Tex. Civ. App.), 157 S. W. 274 4652, 4664, 4672
v. Walker, 48 Tex. Civ. App. 86 4739
v. Wallace, 74 Tex. 581 273
v. Wininger (Tex. Civ. App.), 151 S. W. 586 4663, 4717, 4798
v. Worsham (Tex. Civ. App.), 139 S. W. 927 3806
Fortaine v. Baxley, 90 Ga. 416 258
Fortescue v. Columbia R. E. Co., 75 N. J. L. 272 2055
Fortman v. Rottier, 8 Ohio St. 548 4604, 4605
Fortune v. Stockton, 182 Ill. 454, aff'g 82 Ill. App. 272 686
Forward v. Adams, 7 Wend. 204 4503
Forwood v. North Wales Mut. M. Ins. Co., 9 Q. B. Div. 732 3014
Fosdick v. Greene, 27 Ohio St. 484 2329, 4221
v. Van Husan, 21 Mich. 567 790, 801
Fosgate v. Hudson, 178 Mass. 225 4034
Foshay v. Ferguson, 2 Denio 617 4634, 4643
v. Glen Haven, 25 Wis. 288 161
Foss v. Chicago, 34 Ill. 488 2804
v. Heineman, 144 Wis. 146 48, 172, 182, 2340
v. Nutting, 14 Gray 485 1905
v. Stickney, 5 Me. 390 2072
Foss-S. B. Co. v. Bullock, 59 Fed. 83 377, 2255
Fossett v. Rock Island L. & Mfg. Co., 76 Kan. 428 523
Foster, The, Abb. Adm. 222 2720
Foster v. Adams, 60 Vt. 392 2229
v. Allanson, 2 D. & E. 479 658
v. Baer, 7 La. Ann. 613 2403
v. Beals, 21 N. Y. 247 690
v. Bellaire, 127 Mich. 13 1478
v. Bennett (Tex. Civ. App.), 152 S. W. 233 4626, 4629
v. Bussey, 132 Iowa 640 443
v. Caldwell's Est., 18 Vt. 176 1489
v. Chicago, etc., R. Co., 10 Tex. Civ. App. 476 4146
v. Cleveland, etc., R. Co., 56 Fed. 434 195, 200, 3496, 3497
v. Crooker, 142 App. Div. (N. Y.) 268 1384
v. Dawber, 6 Ex. 839 754, 763, 764
v. Deacon, 3 Madd. 394 2036
v. Dow, 29 Me. 442 4611, 4612
v. Drew, 39 Vt. 51 807, 813
v. Elliott, 33 Iowa 216 32
v. Epps, 27 Ill. App. 235 1788, 1801

[REFERENCES ARE TO PAGES]

Foster v. Equitable Mut. F. Ins. Co., 2 Gray 216 3059
v. Essex Bank, 17 Mass. 479 1329
v. Fletcher, 7 T. B. Mon. 534 3734
v. Foster, 62 N. H. 46 2183
v. Foster, 62 N. H. 532 2149, 2184
v. Gressett, 29 Ala. 393 2028, 2043
v. Hanchett, 68 Vt. 319 3680, 3682
v. Harris, 10 Pa. 457 936, 1197
v. Hill, 36 N. H. 526 658
v. Jack, 4 Watts 334 2490
v. Jackson, Hob. 52 1491
v. Jared, 12 Ill. 451 1842
v. Jolly, 1 Cr. M. & R. 703 1856, 1867
v. Kennedy, 38 Ala. 359 4392, 4420
v. McGraw, 64 Pa. 464 741
v. Mackinnon, L. R. 4 C. P. 704 1827
v. Maxey, 6 Yerg. 224 1642
v. Missouri Pac. R. Co., 115 Mo. 165 4826
v. Napier, 74 Ala. 393 823, 1670
v. Peyser, 9 Cush. 242 3127
v. Pitts, 63 Ark. 387 4606, 4635, 4637
v. Preston, 8 Cow. 198 2960
v. Purdy, 5 Metc. (Mass.) 442 674, 782
v. Rodgers, 27 Ala. 602 2405, 2410, 2415
v. St. Louis, etc., R. Co., 90 Mo. 116 76
v. Schofield, 1 Johns. 297 4967
v. Smith, 10 Wend. 377 1407, 1408
v. Smith, 184 Ill. App. 255 2391, 2447
v. Stafford Nat. Bank, 58 Vt. 658 1737
v. Taggart, 54 Wis. 391 4402
v. Thompson, 41 N. H. 373 2060, 2098
v. Trull, 12 Johns. 456 628
v. United Rys. Co. of St. Louis, 183 Mo. App. 602 1362
v. Wagener, 129 Minn. 11 40
v. Waller, 75 Ill. 464 2956
v. Weaver, 118 Pa. 42 4258
v. Weston, 6 Bing. 709 1033
v. Wise, 46 Ohio St. 20 1648
Foster L. Co. v. Arkansas Valley & W. R. Co., 20 Okla. 583 3982
Foster-M. Co. v. Chinn, 134 Ky. 424 4505, 4586
Foster Mfg. Co. v. Cutter-T. Co., 215 Mass. 136 4488, 4498
Foster's App., 74 Pa. 391 3729
Foth v. Macomber & Whyte Rope Co., 161 Wis. 549 5147, 5181
Fotheringham v. Adams Exp. Co., 36 Fed. 252 1289, 4840
Fottler v. Moseley, 179 Mass. 295 4365
v. Moseley, 185 Mass. 563 56, 152, 4364, 4401
Fougler v. McGrath, 34 Utah 86 2668
Fouke v. Fleming, 13 Md. 393 1184, 1879
Foulger v. Arding, [1902] K. B. 700 3120
v. McGrath, 34 Utah 86 1511, 2671
v. Newcomb, L. R. 2 Ex. 327 4531, 4554
Foulkes v. Sellway, 3 Esp. 236 3680, 3687
Fountain v. Boodle, 3 Q. B. 5 4520
v. Wabash R. Co., 114 Mo. App. 676 1445, 1452
v. West, 23 Iowa 9 4530
Fountain O. Co. v. Phelps, 95 Ind. 271 2903
Fountleroy v. Wilcox, 80 Ill. 477 2373
Fourche River Valley, etc., R. Co. v. Tippett, 101 Ark. 376 4823
Fourth Nat. Bank v. City Nat. Bank, 68 Ill. 398 521
v. Commonwealth, 212 Mass. 66 4135
v. Mayer, 96 Ga. 728 1692, 1704, 1705
v. Nooman, 88 Mo. 372 377, 391
v. Scott, 31 Hun 301 1760
Foust v. Gregg, 68 Ind. 399 1823
v. New Haven & N. Co., 107 Mass. 352 399, 400
v. Pennsylvania R. Co., 212 Pa. 213 3919, 3933
Fowle v. New Haven & N. Co., 112 Mass. 334 399, 400, 3759, 3852, 3868, 3876, 3878, 3923
v. Park, 48 Fed. 789 312, 322, 4489, 4490
Fowler v. Abrams, 3 E. D. Smith 1 4384
v. Armour, 24 Ala. 194 2550, 2556
v. B. & O. R. Co., 18 W. Va. 579 1247
v. Boling, 6 Barb. 165 2211
v. Bott, 6 Mass. 63 3138
v. Bowen, 30 N. Y. 23 4532
v. Bush, 21 Pick. 230 659, 662, 666
v. Chicago, etc., R. Co., 234 Ill. 619 4858, 4930, 4939
v. Chichester, 26 Ohio St. 9 1318
v. Davenport, 21 Tex. 626 1135
v. Fowler, 113 Mich. 575 4576
v. Frisbie, 37 Cal. 34 1715, 1716, 1762
v. Garrett, 3 J. J. Marsh. 682 992
v. Gilman, 13 Metc. (Mass.) 267 539, 4285
v. Harts, 149 Ill. 592 1968
v. Hoffman, 31 Mich. 215 361
v. Ludwig, 34 Me. 460 660
v. Merrill, 11 How. 375 4211
v. Norfolk & W. R. Co., 68 W. Va. 274 4114
v. Old North State Ins. Co., 74 N. C. 89 3044
v. Owen, 68 N. H. 270 3696
v. Pauly, 67 Mo. App. 632 2423
v. Payne, 49 Miss. 32 537, 548, 2581
v. Payne, 52 Miss. 210 559
v. Poling, 2 Barb. 300 2056, 2092
v. Poling, 6 Barb. 165 2092
v. Rathbones, 12 Wall. 102, 20 L. ed. 281 3033
v. Shearer, 7 Mass. 14 638, 1823
v. Smith, 153 Pa. 639 753
v. Strickland, 107 Mass. 552 1823
v. Throckmorton, 6 Blackf. 326 984
v. Waller, 25 Tex. 695 2548, 2561
v. Word, Harp. 372 874
Fowler W. Mfg. Co. v. Otto G. E. Works, 227 Pa. 314 2404, 2453
Fowles v. Atlantic C. L. R. Co., 83 S. C. 501 187
Fowlkes v. Southern R. Co., 96 Va. 742 135
v. Webber, 8 Humph. 530 1360
Fox v. Barekman, 178 Ind. 572 126, 4923, 4943
v. Barrow Hematite Steel Co., Ltd., [1915] W. C. & Ins. Rep. 321 5202
v. Boston & Mo. R. Co., 148 Mass. 220 3345, 3428, 3429
v. Boyd, 104 Tenn. 357 1491
v. Broderich, 14 Irish L. (N. S.) 453 4518
v. Chicago, etc., R. Co., 86 Iowa 368 4731
v. Davidson, 111 App. Div. (N. Y.) 174 1093
v. Davis, 55 Ga. 298 474
v. Everson, 27 Hun 335 189, 2443
v. Glynn, 191 Mass. 344 4486
v. Gray, 105 Iowa 433 1875

[REFERENCES ARE TO PAGES]

Fox v. Harding, 7 Cush. 516 182, 196, 252, 284, 2451, 2631
v. Jones, 39 La. Ann. 929 4229
v. Kitton, 19 Ill. 519 2255
v. Knickerbocker E. Co., 140 Fed. 714 4436
v. Knickerbocker E. Co., 158 Fed. 422 4440, 4451
v. Longly, 1 A. K. Marsh. 388 1027
v. Mackreth, 2 Cox 320 4425
v. Mountjoy, 6 Munf. 36 1758
v. Oakland Con. St. R. Co., 118 Cal. 55 4899
v. Oriel C. Co., 70 Ill. App. 322 1757
v. Poor Ridge, etc., T. R. Co., 8 Ky. L. Rep. 427 (Ky. Super. Ct.) 274
v. Ryan, 240 Ill. 391 2503
v. Saint John, 23 New Bruns. 244 4757
v. South Norwalk, 85 Conn. 237 3976, 4150
v. Stevens, 13 Minn. 272 1268, 4964, 4967
v. Stockton H., etc., Works, 83 Cal. 333 428, 2375, 2435
v. Williams, 92 Wis. 320 824
v. Woods (N. Y. Misc.), 96 N. Y. Supp. 117 2241, 2243, 2245
v. Wunderlich, 64 Iowa 187 1289, 1310, 4766, 4777
Foxley v. Rich, 35 Utah 162 796, 2026
Foxton v. Hamilton S. & I. Co., 1 Ont. L. R. 393 2456
Foy v. Barry, 159 App. Div. (N. Y.) 749 1534
v. Chicago, etc., R. Co., 63 Minn. 255 3425
Frace v. New York, etc., R. Co., 143 N. Y. 182 68
Fraenkel v. Friedmann, 199 N. Y. 351 2696
Fragano v. Long, 4 B. & C. 219 2227
Fragin v. Pearson, 42 Ala. 335 4336
Frahm v. Walton, 130 Cal. 396 1715, 1727
Frain v. Metropolitan L. Ins. Co., 67 Mich. 527 3083
Fraler v. Sears Union W. Co., 12 Cal. 555 3922
Fralick v. Presley, 29 Ala. 463 4314
Fraloff v. New York, etc., R. Co., 10 Blatch. 16 3531, 3536
France v. Gaudet, L. R. 6 Q. B. 199 204, 284, 4178, 4226, 4236, 4241, 4265
Frances-Mohawk Mining & Leasing Co. v. McKay, 37 Nev. 191 2904
Franceschini v. Chaucer (N. Y. Misc.), 110 N. Y. Supp. 775 869, 889
Francis v. Baker, 10 Ad. & E. 642 517
v. Baker, 45 Minn. 83 2503
v. Brock, 80 Kan. 100 1526
v. Castleman, 4 Bibb 383 1108, 1881
v. Ocean Ins. Co., 6 Cow. 404 3010
v. Rucker, 2 Amb. 672 1899, 1901
v. St. Louis T. Co., 5 Mo. App. 9 3081, 3457, 3459, 4680
v. Schoellkopf, 53 N. Y. 152 16, 491, 494, 1369, 3881, 3882, 3904, 3928, 3929, 3931, 3934
v. Somerville Ins. Co., 25 N. J. L. 78 3021
v. Western U. Tel. Co., 58 Minn. 252 3553, 3555, 3626, 3644, 3645, 3651
v. Wilson, Ry. & M. 105 1038, 1567
Franchot v. Leach, 5 Cow. 506 1936
Franck v. Stout, 139 Wis. 223 3176, 3180
Francois v. Maison Blanche Realty Co., 134 La. 215 1499
Frank v. Berry, 128 Iowa 223 4984
Frank v. Colhoun, 59 Pa. 381 605
v. Curtis, 58 Mo. App. 349 4165
v. Maguire, 42 Pa. 77 3133
v. Morrison, 55 Md. 399 1004
v. Pickens, 69 Ala. 369 820, 821, 827
v. Traylor, 130 Ind. 145, 148 2799
Franke v. Eby, 50 Mo. App. 579 482
Frankel v. Stern, 44 Cal. 168 1690, 1695
Frankem v. Trimble, 5 Pa. 520 416
Frankfort v. Coleman, 19 Ind. App. 368 4795
Frankfort B. Co. v. Williams, 9 Dana 403 1529
Frankfort & C. R. Co. v. Jackson, 153 Ky. 534 284, 502, 3214, 3327
Frankfurter v. Bryan, 12 Ill. App. 549 4629, 4634
Frankhouser v. Cannon, 50 Kan. 621 1357
Frankle v. Jackson, 33 Fed. 371 400
Franklin, The, [1901] Prob. 161 4992
Franklin v. Brown, 118 N. Y. 110 3139
v. Browne, 67 Ga. 272 4503
v. Butcher, 144 Mo. App. 671 1417
v. Fisher, 51 Mo. App. 345 1498
v. Ford, 13 Ga. App. 469 381
v. Frith, 3 Bro Ch. 433 1124
v. Greene, 2 Allen 579 4425
v. Gumersell, 9 Mo. App. 84 360, 362
v. Long, 7 Gill & J. 407 2391
v. McCorkle, 16 Lea 609 4959
v. Miller, 4 A. & E. 599 2018
v. National Ins. Co., 43 Mo. 491 3047
v. Schermerhorn, 8 Hun 112 60, 1289
v. Smith, 21 Wend. 624 15, 324, 2114
v. Southeastern R. Co., 3 H. & N. 213 4912, 4935
Franklin Bank v. Bruns, 84 Ohio 12 1053
Franklin C. Co. v. McMillan, 49 Md. 549 3791
Franklin County v. Layman, 145 Ill. 138 1014
Franklin County Nat. Bank v. Kimball, 152 Mass. 331 1623
Franklin F. Ins. Co. v. Chicago I. Co., 36 Md. 102 3021
v. Hamill, 5 Md. 170 3066
v. Sears, 21 Fed. 290 2916
v. Taylor, 52 Miss. 441 2999
Franklin Mfg. Co. v. Lamson & G. Mfg. Co., 189 Mass. 344 564, 2386
Franklin S. R. Co. v. The Earnwood, 83 Fed. 315 3435
Franks v. Matson, 211 Ill. 338 1668
Frantz v. Saylor, 12 Okla. 39 1497, 1734
Franz v. Bieler, 126 Cal. 176 835
Fraser v. Bentel, 161 Cal. 390 183, 2146, 2165, 2182, 2183
v. Berkeley, 7 C. & P. 621 465
v. Buffalo, 123 App. Div. (N. Y.) 159 4723
v. Echo M. & S. Co., 9 Tex. Civ. App. 210 254, 2361
v. Kennedy, 2 New Zeal. L. R. (Sup. Ct.) 173 2507
v. Little, 13 Mich. 195 799, 1038, 1563, 1569, 1571, 1656
v. Ross, 1 Pennew. 348 535, 2369
Fratini v. Caslini, 66 Vt. 273 4979, 4981
Fratt v. Hunt, 108 Cal. 288 3155
Fraves v. Worms, 19 C. B. (N. S.) 159 3035, 3036
Frazer v. Berkeley, 7 C. & P. 789 460, 4783
v. Bigelow C. Co., 141 Mass. 126 1005, 1107, 1137
v. Bunn, 8 C. & P. 704 705
v. Frazer L. Co., 18 Ill. App. 450 4488

[REFERENCES ARE TO PAGES]

Frazer v. London St. R. Co., 29 Ont. 411 1512
v. Supervisors, 74 Ill. 282 2055, 2060, 2076, 2083
Frazier v. Boggs, 37 Fla. 307 1953
v. Clark, 88 Ky. 260 2707
v. Cushman, 12 Mass. 277 785, 1230
v. Erie Bank, 8 W. & S. 18, 20 2396
v. Fredericks, 24 N. J. L. 162 4325, 4330
v. Hyland, 1 Har. & J. 98 739
v. Lanahan, 71 Md. 131 741, 743
v. Laughlin, 6 Ill. 347 1607
v. Lomax, 1 Cranch C. C. 328 1403
v. McCloskey, 60 N. Y. 337 4516
v. St. Louis S. & R. Co., 150 Mo. App. 419 4747
v. Warfield, 9 Sm. & M. 220 1147, 1148
v. Western U. Tel. Co., 45 Ore. 414 3559, 3607
Freakley v. Fox, 9 B. & C. 130 643
Frechett v. Illinois Cent. R. Co., 188 Ill. App. 377 4871
Fred v. Traylor, 115 Ky. 94 373, 4503
Fred E. Scammell, The, 133 Fed. 608 2726
Freddie L. Porter, The, 8 Fed. 170 4995
Fredenburg v. Empire United Rys., 168 N. Y. App. Div. 618 5205
Frederick v. Daniels, 74 Conn. 710 3235
v. Davis, 133 Iowa 362 2026
v. Gilbert, 8 Pa. 454 1357
v. Lookup, 4 Burr. 2018 1573
v. Moran, 90 Neb. 86 763
v. Morse, 88 Vt. 126 1471, 4974, 4977, 4981
v. Willoughby, 136 Mo. App. 244 2236, 2258
Frederick Mfg. Co. v. Devlin, 127 Fed. 71 569, 2373
Fredon v. Dickens, 161 Ala. 181 4586
Fredonia G. Co. v. Bailey, 77 Kan. 296 225, 285, 2695, 2714
v. Elwood S. Co., 71 Kan. 464 746
Free v. Stuart, 39 Neb. 220 3256
Freeborn v. Norcross, 49 Cal. 313 4316
Freecorn v. Perth G. Co., 6 West. Aust. L. R. 193 3766, 3770, 3772
Freedel v. North Carolina R. Co., 4 Jones 89 4110
Freehold L. Co. v. McLean, 8 Manitoba 116 967
Freeholders v. Wilson, 16 N. J. L. 110 1579, 1584
Freeland v. Brooklyn Heights R. Co., 54 App. Div. (N. Y.) 90 4699
v. Edwards, Mart. & Hayw. 207 1108, 1880, 1881
v. Pennsylvania R. Co., 197 Pa. 529 3995
Freelove v. Gould, 3 Kan. App. 750 3814
Freeman v. Aylor, 62 Mo. App. 613 2667
v. Baker, 5 B. & Ad. 797 2388
v. Benedict, 37 Conn. 559 4289
v. Clark, — Tex. Civ. App. —, 177 S. W. 1188 172
v. Cleary (Tex. Civ. App.), 136 S. W. 521 4793, 4819
v. Clute, 3 Barb 424 2361, 2390, 2626, 3216
v. Falconer, 201 Fed. 785 1997, 2011
v. Field (Tex. Civ. App.), 135 S. W. 1073 3893
v. Fleming, 5 Iowa 460 825, 1229, 1237
v. Fogg, 82 Me. 408 244, 2595
v. Freeman, 136 Mass. 260 285
v. Freeman, 142 Mass. 98 2219
v. Fuller (Tex. Civ. App.), 127 S. W. 1194 1504, 4735
Freeman v. Gerretts (Tex. Civ. App.), 153 S. W. 1163 4798
v. Grashel (Tex. Civ. App.), 145 S. W. 695 4795
v. Grieve (Tex. Civ. App.), 143 S. W. 730 4907
v. Harbaugh, 114 Minn. 283 1453, 4401
v. Johnson (Tex. Civ. App.), 136 S. W. 275 4662, 4801
v. McElroy (Tex. Civ. App.), 126 S. W. 657 4905
v. McElroy (Tex. Civ. App.), 149 S. W. 428 4799
v. Macon G. L. & W. Co., 126 Ga. 843 56, 1391
v. Mercantile Mut. A. Ass'n, 156 Mass. 351 3000
v. Miller, 9 Ohio N. P. (N. S.) 26 834
v. Missouri & K. Tel. Co., 160 Mo. App. 271 152, 1504
v. Morales (Tex. Civ. App.), 151 S. W. 644 4934
v. Powell, — Tex. Civ. App. —, 144 S. W. 1033 5034, 5035, 5061
v. Railroad, 107 Tenn. 340 4862
v. Strobehn, 122 Iowa 157 4182
v. Tinsley, 50 Ill. 497 468
v. Venner, 120 Mass. 424 4276, 4425
v. Western U. Tel. Co., 141 Iowa 32 3638
v. Wilson (Tex. Civ. App.), 149 S. W. 413 1505, 4681, 4786
Freeman W. & I. Co. v. Collins, 53 Ill. App. 29 4833
Freemansburg B. & L. Ass'n v. Watts, 199 Pa. 221 709
Freer v. Cowles, 44 Ala. 314 4240, 4300
Frees v. National Ben Franklin Fire Ins. Co., 163 App. Div. (N. Y.) 57 3051, 3060
Freese v. Brownell, 35 N. J. L. 285 1905
v. Crary, 29 Ind. 525 39
v. Tripp, 70 Ill. 496 1274, 1305, 1322, 3643, 4675
Freeth v. Burr, L. R. 9 C. P. 208 2232
Frei v. Vogel, 40 Mo. 149 1680, 4359
Freiberg v. Moffett, 91 Hun 17 814
v. South Side E. R. Co., 221 Ill. 508 4036
Freidenheit v. Edmundson, 36 Mo. 226 3822, 4179
Freifeld v. Sire, 96 App. Div. (N. Y.) 296 1716
Freisinger v. Moore, 65 N. J. L. 286 4504
Freittenberg v. Rubel, 123 Iowa 154 1824, 1826
Freligh v. Platt, 5 Cow. 494 1951
Fremont County v. Fremont County Bank, 138 Iowa 167 731, 1593, 2750
v. Fremont Co. Bank, 145 Iowa 8 621, 1238
Fremont F. & M. Co. v. Norton, 3 Neb. (Unof.) 804 757
Fremont, etc., R. Co. v. Bates, 40 Neb. 381 3970, 3981, 3989, 4103
v. Crum, 30 Neb. 70 3775, 3776, 3777
v. French, 48 Neb. 638 1503
v. Harlin, 50 Neb. 698 3897, 4003, 4145
v. Lamb, 11 Neb. 592 4027
v. Marley, 25 Neb. 138 1137, 1431, 1445
v. Root, 49 Neb. 914 1247
v. Whalen, 11 Neb. 585 3964, 3977, 4017, 4119

[REFERENCES ARE TO PAGES]

French v. Bates, 149 Mass. 73 939, 2765, 2814
v. Bent, 43 N. H. 448 39
v. Brookes, 6 Bing. 354 2546
v. Brooklyn Heights R. Co., 57 App. Div. (N. Y.) 204 1470
v. Buffalo, etc., R. Co., 4 Keyes 108 3386
v. Burlingame, 155 Mo. App. 548 2476
v. Connecticut River L. Co., 145 Mass. 261 265, 3741, 3815, 3904, 3909, 3918, 3922, 3933
v. Cunningham, 149 Ind. 632 2475, 2477, 2490, 2496, 2548
v. Deane, 19 Colo. 504 1273, 1301, 4964
v. French, 126 Mass. 360 1031, 1038
v. French (N. Y. Misc.), 125 N. Y. Supp. 1099 1418
v. Fuller, 23 Pick. 104 3734
v. Gifford, 31 Iowa 428 303
v. Goodnow, 175 Mass. 451 1359
v. Gordon, 10 Kan. 370 1826, 1827, 1853
v. Grindle, 15 Me. 163 2783
v. Guyot, 30 Colo. 222 4613, 4621, 4629
v. Hall, 9 N. H. 137 1145
v. Kennedy, 7 Barb. 452 1216, 1218
v. Macale, 2 Drury & W. 269 840
v. McCready (Tex. Civ. App.), 57 S. W. 894 1735
v. Marsh, 29 Wis. 649 2787
v. Merchants' & M.'s T. Co., 199 Mass. 433 139, 3332, 3333
v. Parish, 14 N. H. 496 295, 307, 2885
v. Piper, 43 N. H. 439 1439, 1453
v. Price, 24 Pick. 13 659, 661, 682
v. Richardson, 167 N. C. 41 703, 704
v. Shoemaker, 22 Wall. 86 1767
v. Snyder, 30 Ill. 339 1621
v. Vining, 102 Mass. 132 294, 312, 323, 2376, 2377, 2433
v. Willett, 10 Bosw. 566 1623
French P. & O. Co. v. Phelps, 47 Tex. Civ. App. 385 152, 1332, 3825
v. Porter, 134 Ala. 302 1715, 1725, 1729, 1730
Freon v. Carriage Co., 42 Ohio St. 30 4224, 4235
Frescoln v. Puget Sound Traction, L. & P. Co., 225 Fed. 441 5122
Fresh v. Cutter, 73 Md. 87 1291
Freshwater v. Nichols, 7 Jones 251 4284
Fretz v. Stover, 22 Wall. 198 611, 612
Freudenstein v. Heine, 6 Mo. App. 287 3846, 3850
Frey v. Demarest, 16 N. J. Eq. 236 361
v. Drahos, 7 Neb. 194 4233, 4342
v. Failes, 37 Okla. 297 2388, 2389
v. Middle Creek L. Co., 144 N. C. 759 4375
v. New York Cent. R. Co., 114 App. Div. (N. Y.) 747 3321, 3328, 3347, 3400
Freygang v. Vera Cruz & P. R. Co., 154 Fed. 640 1114, 1148
Friar v. Smith, 120 Mich. 411 2513
Frick v. Aurora, etc., R. Co., 154 Ill. App. 277 1415, 1473, 1494, 4778
v. Kansas City, 117 Mo. App. 488 1417, 1430, 3839, 3887, 3924
v. Larned, 50 Kan. 776 2913, 2926
v. St. Louis, etc., R. Co., 75 Mo. 542 4767
v. United Firemen's Ins. Co., 218 Pa. 409 3044
v. Washington W. P. Co., 72 Wash. 214 4680
Frick Co. v. Falk, 50 Kan. 644 317, 2421
Frick C. Co. v. Painter, 198 Pa. 468 4036, 4125
Fricker v. Americus Mfg. & I. Co., 124 Ga. 165 2902, 2907, 3706
Fried v. Royal Ins. Co., 47 Barb. 127 3026
Friedenstein v. United States, 35 Ct. of Cls. 1 41, 476, 2237, 2248
Friedgood v. Kline, 67 N. Y. Misc. 428 2417
Friedland v. McNeil, 33 Mich. 40 2627
v. Myers, 139 N. Y. 432 178, 287, 291, 3190, 3196, 3199
Friedlander v. Pugh, 43 Miss. 111 291, 2696
Friedley v. Schultz, 9 S. & R. 156 1358
Friedly v. Giddings, 119 Fed. 438 1349
Friedman v. Pulitzer P. Co., 102 Mo. App. 683 4510, 4540, 4589
Friel v. Plumer, 69 N. H. 498 4163, 4614
Friend v. Dunks, 37 Mich. 25 346, 4551
v. Engel, 43 Ill. App. 386 1047
v. Ingersoll, 39 Neb. 717 1477, 4730, 4732
v. Pittsburgh, 131 Pa. 305 622, 1112
v. Ralston, 35 Wash. 422 2893, 2898
v. United States, 30 Ct. of Cls. 94, 107 6
Friend & T. L. Co. v. Miller, 67 Cal. 464 2365
Frierson v. Hewitt, 2 Hill (S. C.) 499 4607
Fries v. American L. P. Co., 141 Cal. 610 4835
v. Mack, 33 Ohio St. 52 1523, 1525
v. Watson, 5 S. & R. 220 1062
Friesenhan v. Maines, 137 Mich. 10 4837, 4839
Frigstad v. Great Northern R. Co., 101 Minn. 40 1499
Frimble v. Texarkana, etc., R. Co., 199 Mo. 44 2464
Frink v. Green, 5 Barb. 455 773, 778, 781
v. Potter, 17 Ill. 406 148
v. Southern Exp. Co., 82 Ga. 33 1038, 1575
v. Tatman, 36 Ind. 259 2280, 2286
Frior v. Taylor, 116 Md. 69 4695
Frisbee v. Hoffnagle, 11 Johns. 50 518, 2193
v. Marshall, 122 N. C. 760 3741
Frisbie v. Fidelity C. Co., 133 Mo. App. 30 172, 3000
v. Larned, 21 Wend. 450 658, 761
v. Rosenberg, 11 Cal. App. 638 2241, 2244
Frith v. Barker, 2 Johns. 327 3288
v. Hollan, 133 Ala. 583 2374
Fritz v. Hobson, 14 Ch. Div. 542 3741, 3919, 3934
v. Pusey, 31 Minn. 368 2095, 2113, 2146, 2186
v. Tudor, 1 Bush 29 3717
v. Tudor, 1 Barb. 28 3717
v. Watertown, 21 S. D. 280 1363
Fritz's Est., 19 Phila. 95 946
Fritzinger v. Ahrens, 151 Ill. App. 396 3662
Frixione v. Tayliaferro, 34 Eng. L. & Eq. 27 2977
Frizzell v. Duffer, 58 Ark. 612 3740
Frobisher v. Fifth Ave. T. Co., 81 Hun 544 1375, 4705, 4710
Froherick v. Gammon, 28 Minn. 476 2436
Frohlich v. Independent G. Co., 144 Mich. 278 2274
Frohreich v. Gammon, 28 Minn. 476 172
Frohs v. Dubuque, 109 Iowa 219 4701
Frolich v. McKiernan, 84 Cal. 177 4503

[REFERENCES ARE TO PAGES]

Froman v. Sierra Nevada S. M. Co., 61 Cal. 629 4246
Froment v. Oltarsh, 60 N. Y. Misc. 89 1196
Fromm v. Ide, 68 Hun 310 3921
Fromme v. Jones, 13 Iowa 474 1525
Frontier Bank v. Morse, 22 Me. 88 595, 648, 649, 654
Frost v. Berkeley P. Co., 42 S. C. 402 3840
v. Earnest, 4 Whart. 86 2059
v. Farr, 53 Ind. 390 2469
v. Foote (Tex. Civ. App.), 44 S. W. 1071 833, 889
v. Frost, 11 Me. 235 2013
v. Holland, 75 Me. 108 4639
v. Jordan, 37 Minn. 544 1707
v. Knight, L. R. 5 Ex. 322 375, 409, 2231
v. Knight, L. R. 7 Ex. 111 312, 2255, 2257, 2289
v. Martin, 26 N. H. 422 637
v. Mixsell, 38 N. J. Eq. 586 736, 1583, 1597
v. Pinkerton, 61 App. Div. (N. Y.) 566 4775
v. Plumb, 40 Conn. 111 2493
v. Powell, 10 Ga. App. 95 1437, 2950, 2974
v. Rand, 51 Ill. App. 276 2683
v. Saratoga Mut. Ins. Co., 5 Denio 154 3019
v. Standard M. O. Co., 215 Ill. 240 2766
v. Tracy, 52 Mo. App. 308 2842, 2851
v. Washington County R. Co., 96 Me. 76, 86 12
v. Weathersbee, 23 S. C. 354, 368 705, 710
v. Winston, 32 Mo. 489 1123
v. Yonkers Sav. Bank, 70 N. Y. 558 809
Frostburg v. Dufty, 70 Md. 47 3856
v. Hitchins, 99 Md. 617 3750, 3813, 3826
Frothingham v. Everton, 12 N. H. 239 287, 2907, 2946, 2948
v. Prince, 3 Mass. 563 3025
v. Morse, 45 N. H. 545 4213
Frounfelker v. Delaware, etc., R. Co., 73 App. Div. (N. Y.) 350 1248
Froust v. Burton, 15 Mo. 619 1407
Fruhling v. Schroeder, 2 Bing. N. C. 79 1034
Fruin v. Crystal R. Co., 89 Mo. 397 834
Fruin-B. C. Co. v. Ft. Smith & W. R. Co., 140 Fed. 465 929, 2650, 2684
Fry, In re, 79 N. Y. Misc. 180 1122
Fry v. American Ins. Co., 155 Ill. App. 384 1411
v. Baxter, 10 Mo. 192 4277
v. Bennett, 1 Code Rep. (N. S.) 243, 5 Sandf. 54 4518
v. Bennett, 4 Duer 247 1306
v. Bennett, 28 N. Y. 324 4515, 4517, 4519
v. Dudley, 20 La. Ann. 368 1888
v. Fry, 119 Mo. App. 476 702
v. Hillan (Tex. Civ. App.), 37 S. W. 359 4733
v. McCord, 95 Tenn. 678 4553, 4555
v. Miles, 71 N. J. L. 293 2524
v. North Carolina R. Co., 159 N. C. 357 4751
v. Patterson, 49 N. J. L. 612 663
v. Radzinski, 219 Ill. 526 1715
Frye v. Eisenbiess, 56 Ind. App. 123 2821
v. Hinckley, 18 Me. 320 1409
v. Hubbell, 74 N. C. 358 752
Frye v. Lockwood, 4 Cow. 454 2993
v. Maine Cent. R. Co., 67 Me. 414 140, 252, 284, 3269
v. Milligan, 10 Ont. 509 2456
Fryer v. Kennersley, 15 C. B. (N. S.) 422 4522
Fryklund v. Great Northern R. Co., 101 Minn. 37 432
Fuccy v. Coal & Coke Ry. Co., — W. Va. —, 83 S. E. 301 2463, 2556
Fuchs v. Koerer, 107 N. Y. 529 2563
v. St. Louis T. Co., 111 Mo. App. 574 1376
Fuchs & L. Mfg. Co. v. Kittredge, 242 Ill. 88 2373, 2374
Fuentes v. Canon, 6 Philip. Isl. 117 1085
Fuess v. Kansas City, 191 Mo. 692 4108
Fugure v. Mutual Soc. of St. Joseph, 46 Vt. 362 416
Fuhrman v. Interior W. Co., 64 Wash. 159 429, 2443
v. Power, 43 Wash. 533 1019
Fulda v. Caldwell, 9 La. Ann. 358 4593
Fuldner v. Fieb (N. Y. Misc.), 127 Supp. 330 294
Fulghum v. Beck D. Co., 121 Ga. 273 41
Fulkerson v. Eads, 19 Mo. App. 623 35
v. George, 3 Abb. 75 4510
v. Murdock, 53 Mo. App. 151 4545
v. Western U. Tel. Co., 110 Ark. 144 3593
v. White, 22 Tex. 674 2960
Fullam v. Cummings, 16 Vt. 697 26
v. Stearns, 30 Vt. 443 43
Fullenwider v. McWilliams, 7 Bush 389 4606, 4627
Fuller v. Baltimore, etc., Ass'n, 67 Md. 433 25, 780
v. Bean, 30 N. H. 290 2221
v. Bean, 34 N. H. 290 2225
v. Boston Mut. F. Ins. Co., 4 Metc. (Mass.) 206 3040
v. Bowker, 11 Mich. 204 4707
v. Brown, 11 Metc. (Mass.) 440 2528, 2536
v. Chamberlain, 11 Metc. (Mass.) 503 1531
v. Chicopee Mfg. Co., 16 Gray 46 3971
v. Cousins, 167 Mich. 453 1065
v. Crittenden, 9 Conn. 401 667
v. Curtis, 100 Ind. 237 217, 419, 2423
v. Dean, 31 Ala. 654 4573, 7476
v. Dupont, 183 Mass. 596 1131
v. Edings, 11 Rich. 239 4020
v. Ell's, 39 Vt. 345 2922, 2975
v. Exchange Bank, 38 Ind. App. 570 683
v. Fenner, 16 Barb. 333 156, 4555
v. Fuller, 23 Fla. 236 3724
v. Holmes, 1 Aik. 111 1598
v. Hubbard, 6 Cow. 13 2013
v. Illinois Cent. R. Co., 158 Ill. App. 198 1510, 4723
v. Inman, 10 Ga. App. 680 4918
v. Kaminsky, 41 Tex. Civ. App. 549 2664
v. Kemp, 138 N. Y. 231 814
v. McLeod, 91 S. C. 328 4353
v. Manhattan C. Co., 44 N. Y. Misc. 219 697, 3260
v. Mount Vernon, 171 N. Y. 247 4107, 4108, 4111, 4118
v. Mulhollan, 40 Pa. Super. 257 1986, 1987, 1999
v. Naugatuck R. Co., 21 Conn. 557 4757
v. Reed, 38 Cal. 99 1981, 2007
v. Rice, 52 Mich. 435 2466
v. Robinson, 230 Mo. 22 4981, 4982
v. Ruby, 10 Gray 285 3127, 3128

[REFERENCES ARE TO PAGES]

Fuller v. Scott, 8 Kan. 25 2779
v. Smith, 107 Me. 161 745, 747
v. Sweet, 30 Mich. 237 2229
v. Tomlinson, 58 Iowa 111 2815
v. Wing, 17 Me. 222 1643
Fuller B. Co. v. Waldron, 112 App. Div. (N. Y.) 814 664
Fullerton, The, 92 C. C. A. 463, 167 Fed. 1 4808, 4993
Fullerton v. Fordyce, 144 Mo. 519 312, 323, 476, 477, 4657, 4677
v. Glens Falls G. & E. L. Co., 157 App. Div. (N. Y.) 191 1494
v. Hill, 48 Kan. 558 2781
v. Kelliher, 48 Mo. 542 1541
v. Miller, 22 Md. 1 1788, 1797
v. Young, 46 N. Y. Misc. 292 1399
Fullerton L. Co. v. Spencer, 81 Iowa 549 4171, 4314
Fullman v. Valentine, 11 Pick. 159 781
Fulmele v. Forrest (Del.), 86 Atl. 733 1498
Fulmer's App., 128 Pa. 24 365
Fulsome v. Concord, 46 Vt. 135 412, 413, 4751
Fulton v. Fletcher, 12 D. C. App. 1, 17 1788, 1796, 1801
v. Heffelfinger, 23 Ind. App. 104 2526
v. Matthews, 15 Johns. 433 2781
v. Metropolitan St. R. Co., 125 Mo. App. 239 1424
v. Short Route R. T. Co., 85 Ky. 640 3952
v. Spear, 13 Ohio N. P. (N. S.) 473 1313, 1341, 3820, 3826
Fulton B. & C. Mills v. Wilson, 89 Ga. 318 22
Fulton County v. Amorous, 89 Ga. 614 4086
Fultz v. Wycoff, 25 Ind. 321 66, 169, 267, 284
Fulweiler v. Baugher, 15 S. & R. 45 2094, 2130
Funck v. Metropolitan St. R. Co., 133 Mo. App. 419 4665
Funk v. Amor, 7 Ohio C. C. 419 4613
v. Buck, 91 Ill. 575 870, 871
v. Cresswell, 5 Iowa 62 2105, 2153
v. Funk, 35 Mo. App. 246 383
v. Hendr'cks, 24 Okla. 837 4218
v. House, — Tex. Civ. App. —, 168 S. W. 481 2598, 2669, 2681
v. Kerbaugh, 222 Pa. 18 1348
v. McKeoun, 4 J. J. Marsh. 169 2047
v. Voneida, 11 S. & R. 109 2137, 2149, 2153, 2154, 2157
Funk & Co. v. Coe, 4 G. Greene 55 1284
Funke v. Allen, 54 Neb. 407 2237
Funston v. Chicago, etc., R. Co., 61 Iowa 452 4803
v. Hoffman, 232 Ill. 360 3893, 3900
Funston D. F. & N. Co. v. Toledo, etc., R. Co., 163 Mo. App. 426 3410
Fuqua v. Gambill, 140 Ala. 464 4837
v. Massie, 95 Ky. 387, 393 2576
v. St. Louis, etc., R. Co., 82 Kan. 315 1373
Furbish v. County Com'rs, 93 Me. 117 4146
Furlong v. Cooney, 72 Cal. 322 3696, 3703, 3706
v. North British & M. Ins. Co., 136 Iowa 468 3053
v. Polleys, 30 Me. 491 1985, 2275, 2280, 2295, 2309
v. State, 58 Miss. 717 1604
Furman v. Elmore, 2 N. & McC. 189, 199 2110, 2200
v. Miller, 1 Brev. 536 2386
v. Parke, 21 N. J. L. 310 2541
Furman v. Van Sise, 56 Barb. 435 4960, 4962
Furman St., Matter of, 17 Wend. 649, 658 3957, 4033
Furnas v. Durgin, 119 Mass. 500 2115, 2154, 2768, 2893
Furnas County v. Evans, 90 Neb. 37 1133
v. Evans, 97 Neb. 54 1579
Furnish v. Missouri Pac. R. Co., 102 Mo. 669 4759
Furniss v. Ferguson, 34 N. Y. 485 2383
v. Gilchrist, 1 Sandf. 53 1855
v. Hudson River R. Co., 5 Sandf. 551 399, 3945, 4145
v. Williams, 11 Ill. 229 1828, 2055
Furstenbury v. Fawsett, 61 Md. 184 2603
Fury v. Stone, 2 Dall. 184 1520
Fusch v. Egan, 48 La. Ann. 60 4187
Fydell v. Clark, 1 Esp. 447 656
Fye v. Chapin, 121 Mich. 675 4, 1382
Fyfe v. Turtle Creek, 22 Pa. Super. Ct. 292 3951
Fynberg v. Cohen, 76 Tex. 416 1312

G

Gaar v. Fleshman, 38 Ind. App. 490 2214
v. Hurd, 92 Ill. 315 373
v. Lockridge, 9 Ind. 92 1956
v. Louisville B. Co., 11 Bush 180 1924, 1925
v. Taylor, 128 Iowa 636 623
Gaar, Scott & Co. v. Lyons, 99 Ky. 672 4317
Gaazue v. Ball, 65 Fla. 383 3774
Gabay v. Doane, 77 App. Div. (N. Y.) 413 459, 503
Gabbert v. Hackett, 135 Wis. 86 19
Gabler v. McChesney, 60 App. Div. (N. Y.) 583 3302, 3303
Gabriel v. Atkinsville P. B. Co., 57 Mo. App. 520 2697, 2708
v. Dresser, 15 C. B. 622 762
Gaddis v. Western U. Tel. Co., 33 Tex. Civ. App. 391 3633
Gadsden v. Bank, 5 Rich. L. 336 1741
v. Catawba W. P. Co., 71 S. C. 340 1386
v. Catawba P. Co., 80 S. C. 239 1343
v. Home F. & C. Co., 89 S. C. 483 1399, 2340
Gaertner v. Bues, 109 Wis. 165 3205, 3207, 3229
Gaff v. Hutchison, 38 Ind. 341 1523
Gaffey v. United S. Mach. Co., 202 Mass. 48 2696
Gaffney v. Chapman, 4 Robert. 275 761
v. Hayden, 110 Mass. 137 2465, 2540
v. Wood, 74 S. C. 323 1961
Gage v. Allen, 84 Wis. 323 4358
v. Carpenter, 107 Fed. 886 2371
v. Graffam, 11 Mass. 181 2934
v. Harvey, 66 Ark. 68 60
v. Lewis, 68 Ill. 604 659, 2189, 2768, 2783, 2894
v. Lowe (Tex. Civ. App.), 127 S. W. 1178 1221
v. McGregor, 61 N. H. 47 571
v. McSweeney, 74 Vt. 370 807, 954, 962, 1147, 1180
v. Melton, 1 Ark. 228 1824
v. Morse, 21 Allen 410 3303
v. Parmalle, 87 Ill. 330 1073
v. Punchard, 6 Daly 229 4289
v. Rogers, 20 Cal. 91 1355
v. Smyth M. Co., 160 Fed. 425 740
Gagnier v. Fargo, 12 N. D. 219 1379, 4662
Gagnon v. Klauber-W. D. Mach. Co., 174 Fed. 477 1510

[REFERENCES ARE TO PAGES]

Gagnon v. Molden, 15 Idaho 727 2274, 2289, 2618
v. Sperry, 206 Mass. 547 189, 254, 2344
Gahagen v. Aermotor Co., 67 Minn. 252 4817
Gahan v. Western U. Tel. Co., 59 Fed. 433 3644
Gaillard v. Ball, 1 N. & McC. 67 1147, 1179, 1878
Gails v. Hailman, 11 Pa. 515 3424
Gaines v. Belding, 56 Ark. 100 4502, 4545, 4549
v. Bryant, 4 Dana 395 1934, 2021, 2032
v. Gaines, 109 Ill. App. 226 4513, 4542
Gainesville, etc., R. Co. v. Hall, 78 Tex. 169 3984
v. Lacy, 86 Tex. 244 4718, 4719, 4759, 4760
Gains v. Western R. Co., 59 Ga. 426 3528
Gainsford v. Carroll, 2 B. & C. 624, 316, 2299. 2315
v. Griffith, 1 Williams' Saund. 58, n. 1 1656
Gaiser v. Chicago, etc., R. Co., 161 Ill. App. 90 3875
Gaither v. Bland, 7 Ky. L. Rep. 518 (Ky. Ct. of App.) 2260
v. Blowers, 11 Md. 536 461, 465, 4780
v. Brooks, 1 A. K. Marsh. 409 2130
v. Kansas City, etc., R. Co., 27 Fed. 544 4889
v. Wilmer, 71 Md. 361 1488
Gaitskill v. Greathead, 1 Dow. & Ry. 359 1850
Galbraith v. Carmode, 43 Wash. 456 1392, 4393
v. Chicago A. I. Works, 50 Ill. App. 246 2626, 2629
v. Fleming, 60 Mich. 403 463, 4784
v. O'Bannon, Sneed. 61 1557
v. Philadelphia Co., 2 Pa. Super. Ct. 359 3965
v. Starks, 117 Ky. 915 697
v. Townsend, 1 Tex. Civ. App. 447 2792
v. Whyte, 1 Hayw. 535 2386
Galbreath v. Carnes, 91 Mo. App. 512 313, 2421
v. Gray, 20 Ind. 290 3719
Gale v. Corey, 112 Ind. 39 1220
v. Dean, 20 Ill. 320 1995, 2009
v. Eastman, 7 Metc. (Mass.) 14 1179
v. Leckie, 2 Stark. 107 244, 255
v. New York, etc., R. Co., 13 Hun 1 4725, 4794
Galena Ins. Co. v. Kupfer, 28 Ill. 332 1890
Galena W. Co. v. Galena, 74 Kan. 644 1455
Galena, etc., R. Co. v. Appleby, 28 Ill. 283 1354
v. Ennor, 123 Ill. 505 4239
v. Rae, 18 Ill. 488 3314, 3321
Galesburg, etc., R. Co. v. Milroy, 181 Ill. 243 3964
Galigher v. Jones, 129 U. S. 192 2319, 2948, 2966, 2967, 4240, 4244, 4250
Galinski v. Thomas, 178 Mich. 589 2299
Gal'on v. Lauer, 55 Ohio St. 392 4779
Gall v. Comber, 7 Taunt. 558 2957
v. Gall, 27 App. Div. (N. Y.) 173 2470, 2479
Gallagher v. Baird, 54 App. Div. (N. Y.) 398 2221, 2284
v. Bowie, 66 Tex. 265 416
v. Brunel, 6 Cow. 347 4377, 4566
Gallagher v. Burke, 13 Pa. Super. Ct. 244 3182, 3193, 3206
v. Florida E. C. R. Co., 196 Fed. 1000 4954
v. Hirsh, 45 App. Div. (N. Y.) 467 2657, 2697
v. Kingston W. Co., 25 App. Div. (N. Y.) 82, aff'd 164 N. Y. 602 3989, 4132
v. Nichols, 16 Abb. Pr. (N. S.) 337 2666
v. Roberts, 2 Wash. C. C. 191 676
v. Silberstein, 182 Mass. 20 1399
v. Singer Sew. Mach. Co., 177 Ill. App. 198 4507, 4509, 4525
v. Waring, 9 Wend. 20 2379
v. Westmoreland, 31 N. B. 194 1349
Gallais v. Trinidad A. Mfg. Co., 127 Mo. App. 338 2644
Gallamore v. Olympia, 34 Wash. 379 4745, 4747
Gallarati v. Orser, 27 N. Y. 324 1683
Gallaway v. Burr, 32 Mich. 332 4643
Gallena v. Hot Springs R., 13 Fed. 116 3474, 3506
Gall'ano v. Pierre, 18 La. Ann. 10 602
Gallick v. Bordeaux, 31 Mont. 328 4311, 4329
Galligan v. Sun P. & P. Ass'n, 25 N. Y. Misc. 355 410
v. Woonsocket St. R. Co., 27 R. I. 363 4767
Gallo v. Brooklyn Sav. Bank, 129 App. Div. (N. Y.) 698 296
v. McAndrews, 29 Fed. 715 848, 867, 884
Gallon v. House of Good Shepherd, 158 Mich. 361 4843
Galloway v. Chicago, etc., R. Co., 56 Minn. 346 4818
v. Courtney, 10 Rich. 414 470, 4576, 4596
v. Courtney, 12 Utah 439 4596
v. Erie R. Co., 107 App. Div. (N. Y.) 210 3340
v. Finley, 12 Pet. 264 1957
v. Galloway, 24 Ky. L. Rep. 857 2473
v. Standard F. Ins. Co., 45 W. Va. 237 621, 622
v. Western & A. R. Co., 57 Ga. 512 22
Gallun v. Seymour, 76 Wis. 251 2234
Gallup v. Bernd, 132 N. Y. 370 2047
v. Miller, 25 Hun 298 175, 283
v. Robinson, 11 Gray 20 1621
Gallwey v. Marshall, 24 Eng. L. & Eq. 463 4503
Galser v. Cumiskey, 16 N. Y. Supp. 89 3109
Galsworthy v. Strutt, 1 Ex. 659 887, 914, 922
Galt v. Archer, 7 Gratt. 307 3288
v. Chicago, etc., R. Co., 157 Ill. 125 399, 3734
v. Provan, 131 Iowa 277 569
Galtis v. Kilgo, 128 N. C. 402 4509
Galucha v. Naso, 147 Iowa 309 1441, 2326
Galusha v. Sherman, 105 Wis. 263 758, 759
Galveston v. Barbour, 62 Tex. 172 4923
v. Posnainsky, 62 Tex. 118 4803
Galveston County v. Ducie, 91 Tex. 665 2548, 2557
v. Galveston G. Co., 72 Tex. 509 1065
Galveston E. Co. v. Dickey (Tex. Civ. App.), 138 S. W. 1093 4658
Galveston O. Mills v. Malin, 60 Tex. 651 4816
Galveston Tribune v. Johnson (Tex. Civ. App.), 141 S. W. 302 4506, 4541

[REFERENCES ARE TO PAGES]

Galveston W. Co. v. Gulf, etc., R. Co., 72 Tex. 454, 459 3104
Galveston, etc., R. Co. v. Averill (Tex. Civ. App.), 136 S. W. 98 50, 4662
v. Baudat, 21 Tex. Civ. App. 236 3900
v. Baumgarten, 31 Tex. Civ. App. 253 4763
v. Bean, 45 Tex. Civ. App. 52 3473, 3487, 3512
v. Bock, 63 Tex. 245 3976, 3979
v. Borsky, 2 Tex. Civ. App. 545 321, 389, 3801, 3810
v. Butshek, 34 Tex. Civ. App. 194 4675
v. Chittim, 31 Tex. Civ. App. 40 3749, 3751, 3794, 3897
v. Chojnacky, — Tex. Civ. App. —, 163 S. W. 1011 1463
v. Clark, 21 Tex. Civ. App. 167 4663
v. Cody, 20 Tex. Civ. App. 520 4885
v. Collins, 31 Tex. Civ. App. 70 4654
v. Cooper, 2 Tex. Civ. App. 42 4693, 4714, 4752, 4805
v. Crippen, — Tex. Civ. App. — 147. S. W. 361 3336, 3399, 3437
v. Donahoe, 56 Tex. 162 1339, 1340
v. Fales, 33 Tex. Civ. App. 457 3428, 3536
v. Fuller, 63 Tex. 467 4108
v. Garcia, 45 Tex. Civ. App. 229 4664
v. Giles (Tex. Civ. App.), 126 S. W. 282 3436, 3437
v. Greb (Tex. Civ. App.), 132 S. W. 489 4793
v. Gulf L. Co., 2 Tex. Civ. App. 326 3139
v. Hansen, 58 Tex. Civ. App. 584 4796
v. Hewitt, 67 Tex. 473 4814
v. Harper, 53 Tex. Civ. App. 614 1474
v. Harris (Tex. Civ. App.), 36 S. W. 776 4905
v. Hodnett (Tex. Civ. App.), 155 S. W. 678 478, 4676, 4737
v. Holliday, 65 Tex. 512 239, 3893, 3894
v. Horne, 69 Tex. 643 1137, 3806
v. Hynes, 21 Tex. Civ. App. 34 4807
v. Jackson, 31 Tex. Civ. App. 342 4700
v. Johnson, 24 Tex. Civ. App. 180 1478, 1501
v. Jones, 104 Tex. 92 3388
v. Kutac, 72 Tex. 643 418
v. Levy, 45 Tex. Civ. App. 373 4170
v. Levy, 59 Tex. 542 355
v. Lynch, 22 Tex. Civ. App. 336 4691
v. Mitchell, 48 Tex. Civ. App. 381 4905, 4907
v. Murphy, 52 Tex. Civ. App. 420 4800
v. Nations M. & S. Co. (Tex. Civ. App.), 136 S. W. 833 1806
v. Parish, 45 Tex. Civ. App. 493 4665
v. Parr, 8 Tex. Civ. App. 280 3894
v. Paschall, 41 Tex. Civ. App. 357 4745, 4751, 4753
v. Patterson (Tex. Civ. App.), 46 S. W. 484 3518
v. Patterson, — Tex. Civ. App. —, 173 S. W. 273 3434
v. Pennington, — Tex. Civ. App. —, 166 S. W. 464 4882, 4883, 4907
v. Pigott, 54 Tex. Civ. App. 367 23, 2891, 4920
v. Powers, 54 Tex. Civ. App. 168 3399
v. Powers, 101 Tex. 161 4745
Galveston, etc., R. Co. v. Puente, 30 Tex. Civ. App. 246 4895, 4900
v. Quilhot (Tex. Civ. App.), 134 S. W. 261 3413
v. Rubio (Tex. Civ. App.), 65 S. W. 1126 333
v. Salisbury (Tex. Civ. App.), 143 S. W. 252 75, 4858
v. Scott, 21 Tex. Civ. App. 24 4804
v. Scott, 34 Tex. Civ. App. 501 3464
v. Sparks, — Tex. Civ. App. —, 162 S. W. 943 3337, 4170, 4177
v. Vollrath, 40 Tex. Civ. App. 46 444
v. Walker, — Tex. Civ. App. —, 163 S. W. 1038 765, 766, 772
v. Wallace, 223 U. S. 481 3432
v. Wallis, 47 Tex. Civ. App. 120 1506
v. Ware, 74 Tex. 47 1722, 1723, 1734
v. Warnecke, 43 Tex. Civ. App. 83 3773
v. Wiseman (Tex. Civ. App.), 136 S. W. 793 3465
v. Zantzinger, 92 Tex. 365 149, 479
Galvin v. Gualala M. Co., 98 Cal. 268 3829
v. Mac M. & M. Co., 14 Mont. 508 1923
v. Starin, 132 App. Div. (N. Y.) 577 405, 1318
v. Tubbs, 17 N. D. 600 1280, 1320
Galyon v. Ketchen, 85 Tenn. 55 2607
Gamache v. Johnson T. F. & M. Co., 116 Mo. App. 596 4860, 4900
Gambetta, The, 74 Fed. 259 2728
Gambill v. Cargo, 151 Ala. 421 3339, 4839, 4843
v. Cooper, 159 Ala. 637 3106
Gamble v. Cummings, 2 Blackf. 235 691
v. Cuneo, 21 App. Div. (N. Y.) 413 2747, 2885
v. Cuneo, 162 N. Y. 634 2885
v. Grimes, 2 Ind. 392 1848
v. Hatton, Peck 130 1889, 1890
v. Mullin, 74 Iowa 99 1368
v. Wilson, 33 Neb. 270 4360
Gamble Robinson Comm. Co., v. Chicago, etc., R. Co., 168 Fed. 161, 14, 3286
v. Union Pac. R. Co., 262 Ill. 400 3338, 3432
v. Union Pac. R. Co., 180 Ill. App. 256 3432
Gambril v. Doe, 8 Blackf. 140 870, 998
v. Schmuck, 131 Ala. 321 4839, 4841
v. Schooley, 89 Md. 546 2458, 2463
v. Schooley, 93 Md. 48, 65 1311, 4544
v. Schooley, 95 Md. 260 4513, 4540, 4545
Gammel v. Paramore, 58 Ga. 54 2768, 2771
v. Skinner, 2 Gall. 45 1102, 1105
v. Granby, 49 Vt. 22 2375
Gammon v. Abrams, 53 Wis. 323 1069, 1097, 1100
v. Blaisdell, 45 Kan. 221 1955
v. Freeman, 31 Me. 243 3727
v. Howe, 14 Me. 250 854, 886
v. Plaisted, 51 N. H. 444 1850, 1852
v. Stone, 1 Ves. Sr. 339 1237
Gammons v. Gulbranson, 78 Minn. 21 2493
v. Honerud, 82 Minn. 264 2493
v. Johnson, 69 Minn. 488 2493
v. Johnson, 76 Minn. 76 2493
Gamus v. Tew, 163 Ala. 358 784
Ganard v. Rochester, etc., R. Co., 50 Hun 22 4742
Gandy v. Cowart, 163 Ala. 295 4292

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v. Orient Ins. Co., 52 S. C. 224 3050
Ganea v. Southern Pac. R. Co., 51 Cal. 140 4639, 4640
Gann v. Ball, 26 Okla. 26 833, 847
v. Chicago Great Western R. Co., 72 Mo. App. 34 3328
Gannett v. Blodgett, 39 N. H. 150 2801
Gannon v. Seehorn, 44 Wash. 87 3416
Gano v. Farmers' Bank, 103 Ky. 508 2792
v. Minneapolis, etc., R. Co., 114 Iowa 713 3960
Ganon v. Klauber-W. D. Mach. Co., 174 Fed. 477 4703
Ganong v. Brown, 88 Miss. 53 376
v. Green, 71 Mich. 1 4285
Gan's Will, In re (N. Y. App. Div.), 114 N. Y. Supp. 975 1082
Gans v. Renshaw, 2 Pa. 34 1954
Ganson v. Madigan, 13 Wis. 67 368, 2237
v. Tifft, 71 N. Y. 48 3242
Ganssly v. Perkins, 30 Mich. 492 1323
Ganster v. Metropolitan E. Co., 214 Pa. 628 3850, 3912
Ganter v. Atkinson, 35 Wis. 48 3745
Gantt v. American Cent. Ins. Co., 68 Mo. 503, 540 3092, 3093
v. Mackenzie, 3 Camp. 51 1108, 1880
Gantzer v. Schmeltz, 206 Ill. 560 2499
Garbaczewski v. Third Ave. R. Co., 5 App. Div. (N. Y.) 186 4654, 4682
Garber v. Commonwealth, 7 Pa. 265 1640
Garberino v. Roberts, 109 Cal. 125 2013
Garcia v. Gunn, 119 Cal. 315 4313
Gard v. Stevens, 12 Mich. 292 707, 742, 2749
Garden v. Houston, 163 Ala. 300 4271
Garden City S. Co. v. Southern Fire B. & C. Co., 177 Ill. App. 280 233
Gardere v. Blanton, 35 La. Ann. 811 3788
Gardiner v. Callender, 12 Pick. 374 629
v. McDermott, 12 R. I. 206 1654, 1662
v. New York Cent., etc., R. Co., 139 App. Div. (N. Y.) 17 3414
Gardner v. Armstrong, 31 Mo. 536 1947
v. Arnett, 21 Ky. L. Rep. 1 3683
v. Barnett, 36 Ark. 476 958
v. Barney, 24 How. Pr. 467 1783, 1785
v. Black, 98 Ala. 638 825
v. Brown, 22 Nev. 156 4311, 4312, 4328
v. Caylor, 24 Ind. App. 521 2237, 2258
v. Cleveland, 9 Pick. 336 2873
v. Cooper, 9 Kan. App. 587 2873
v. Deeds, 116 Tenn. 128 2260, 2702
v. Eldridge, 149 Mo. App. 210 2463
v. Field, 1 Gray 151 4178, 4226
v. Girtin, 69 Ill. App. 422 1849
v. Gorham, 1 Doug. (Mich.) 507 656
v. Granniss, 57 Ga. 539 3694, 3710
v. Head, 108 Ala. 619 4208
v. Hust, 2 Rich. 608 662
v. Keteltas, 3 Hill 330 3182, 3183
v. Lane, 9 Allen 498 2226
v. Leck, 52 Minn. 522 741
v. Letson, 8 Ohio Dec. 256 2173
v. Lovegren, 27 Wash. 356 3830
v. Minea, 47 Minn. 295 4166
v. Niles, 16 Me. 279 1555, 2189
v. Ninety-nine Gold Coins, 111 Fed. 552 2735
v. Roycrofters, The, 134 App. Div. (N. Y.) 45 2589, 2698
v. St. Louis, etc., R. Co., 117 Mo. App. 138 3502
v. Smith, 7 Mich. 410 316
Gardner v. Springfield G. & E. Co., 154 Mo. App. 666 226
v. Tatum, 81 Cal. 370 1512
v. Vidal, 6 Rand. 106 1636
v. Ward, 99 Ark. 588 758
v. Waterloo C. S. Co., 134 Iowa 6 152
v. Watson, 76 Tex. 25 2750
v. Welch, 21 S. D. 151 312
v. Winter, 117 Ky. 382 2373
Garfield v. Huls, 54 Ill. 427 537
v. Williams, 2 Vt. 327 2054, 2058
Garfield & P. Co. v. Rockland-R. L. Co., 184 Mass. 60 4186
v. Pennsylvania C. & C. Co., 199 Mass. 22 294, 2346, 3308
Garibaldi v. O'Connor, 210 Ill. 284 152
Garland v. Lane, 46 N. H. 245 2227
v. Salem Bank, 9 Mass. 408 2937
v. Wholeham, 26 Iowa 185 1306
Garland County v. Hot Spring County, 68 Ark. 83 1041
Garlick v. James, 12 Johns. 146 678, 4289
v. Mutual L. & B. Ass'n, 236 Ill. 232 991
v. Mutual L. & B. Ass'n, 129 Ill. App. 402 978
Garlington v. Copeland, 43 S. C. 389 1721, 1723, 1728
v. Ft. Worth, etc., R. Co., 34 Tex. Civ. App. 274 1449
Garlock v. Closs, 5 Cow. 143 2124
Garneau v. Omaha P. Co., 52 Neb. 383 1106
Garner v. Board, 27 Ind. 323 2465, 2540
v. Western U. Tel. Co., 87 S. C. 316 3547, 3618
Garnett v. Macon, 6 Call 308 780, 781, 782
Garnier v. Squires, 62 Kan. 321 4839
Garr v. Alden, 139 Mich. 440 4380
v. Mariet, 1 Hilt. 498 2484
v. Selden, 6 Barb. 416 4503
Garrard v. Dawson, 49 Ga. 434 1135
v. Dollar, 4 Jones 175 1407, 1936
Garrels v. Morton, 26 Ill. App. 433 688
Garret v. Messenger, L. R. 2 C. P. 583 1574
Garretson v. Becker, 52 Ill. App. 255 4957, 4960, 4964
v. Brown, 26 N. J. L. 425 4169
v. Clark, 111 U. S. 120, 15 Blatch. 70 4457, 4466
v. Purdy, 3 Dak. 178 1924
Garrett v. Carr, 1 Rob. (Va.) 196 1127
v. Grisham (Tex. Civ. App.), 156 S. W. 505 697
v. Herringdine, 7 Ga. App. 744 460
v. Logan, 19 Ala. 344 1556, 1670, 1727
v. Louisville & N. R. Co., 197 Fed. 715 (C. C. A.) 1394, 4853
v. Sewell, 108 Ala. 521 3734, 3737, 3739, 3808, 3828
v. Sparks, 61 Wash. 397 2983
v. Stuart, 1 McCord 514 2068
v. Wabash R. Co., 159 Mo. App. 63 149
v. Western U. Tel. Co., 83 Iowa 257 3548, 3553, 3571
v. Western U. Tel. Co., 92 Iowa 449 3572
v. Winterich, 44 Ind. App. 322 319, 1442
v. Wood, 57 App. Div. (N. Y.) 242 3850
v. Wood, 55 App. Div. (N. Y.) 281 3850
Garrett's App., 100 Pa. 597 741
Garretty v. Brazell, 34 Iowa 100 2607

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v. Jones, 2 Dowl. P. C. 157 587
Garrigan v. Kennedy, 19 S. D. 11 60
v. Thompson, 17 S. D. 132 1259
Garrigue v. Kellar, 164 Ind. 678 1904
Garrison v. Glass, 139 Ala. 512 932
v. Newark Call Printing & Publishing Co., 87 N. J. L. 217, 92 Atl. 590 4512
v. Robinson, 81 N. J. L. 497 4595
v. Sanford, 12 N. J. L. 261 2056, 2151, 2153, 2156
v. Sun P. & P. Ass'n, 207 N. Y. 1 166, 4561
Garrity v. Cripp, 4 Baxter 86 970
Garry v. Missouri Pac. R. Co., 36 Mo. App. 340 4628
Garseed v. Sternberger, 135 N. C. 501 18
Garst v. Harris, 177 Mass. 72 885
Garstang v. Skinner, 165 Cal. 721 4395
Garth v. Cooper, 12 Iowa 364 985
v. Garth, 139 Mo. 456 1087
Garthley v. Seattle E. Co., 49 Wash. 616 4654
Gartley v. People, 28 Colo. 227 1132
Gartman v. Jones, 24 Miss. 234 2212
Gartner v. Chicago, etc., R. Co., 71 Neb. 444 400, 3852, 3866
v. Richardson, 123 La. 194 2283
Garver v. Pontious, 66 Ind. 191 1918
Garves v. Battle Creek, 95 Mich. 266 1468
Garvey v. Metropolitan, etc., E. R. Co., 155 Ill. App. 601 1379, 1499, 4661
v. Revere, 187 Mass. 545 3991, 4104
v. Wayson, 42 Md. 178 4603, 4616, 4619
Garvick v. Burlington, etc., R. Co., 124 Iowa 691 1468
v. Burlington, etc., R. Co., 131 Iowa 415 3470, 3471, 3472
Garvin v. Garvin, 87 Kan. 97 4543
v. Linton, 62 Ark. 370 984
Garwood v. Corbett, 38 Mont. 364 1506
Gary v. Cannon, 3 Ired. Eq. 64 2790
v. Wells Fargo Exp. (Tex. Civ. App.), 40 S. W. 845 3424
Gas Belt T. Co. v. Ward, 43 Ind. App. 537 697
Gas L. Co. v. Memphis, 93 Tenn. 612 1044
Gascoigne v. Cary Brick Co., 217 Mass. 302 2374, 2403, 2415
Gascoyne v. Smith, McC. & Y. 338 557, 1830, 1835
Gaska v. American C. & F. Co., 127 Mo. App. 169 4856
Gaskell v. King, 11 East 165 1851
Gaskin v. Wales, 9 Up. Can. C. P. 314 888, 893
Gaskins v. Davis, 115 N. C. 85 3781, 3788, 4308
v. Gaskins, 17 S. & R. 390 1069, 1079
v. Runkle, 25 Ind. App. 584 78, 97
Gaslight Co. v. Colliday, 25 Md. 1 2449
v. Rome, etc., R. Co., 51 Hun 119 3694, 3695, 3703
Gass v. Stinson, 3 Sumn. 99 717, 721, 723
Gasse v. Development & F. Co., 135 N. Y. Supp. 732 3884
Gasser v. Wall, 111 Minn. 6 4400
Gassner v. Marquardt, 76 Wis. 579 4312
Gaston v. Barney, 11 Ohio St. 506 703, 704, 706, 741
v. Bates, 4 B. Mon. 366 3719
Gaston v. Bristol & E. R. Co., 1 B. & S. 112, 154 3280
Gate City C. Mills v. Rosenau H. Mills, 159 Ala. 414 2236
Gately v. Taylor, 211 Mass. 60 126, 4849
Gates v. Adams, 24 Vt. 71 572
v. Bekins, 44 Wash. 422 4269
v. Blincoe, 2 Dana 158 16
v. Bowers, 169 N. Y. 14 4209
v. Burkett, 44 Ark. 90 725
v. Comstock, 113 Mich. 127 3777, 3809, 3831
v. Davenport, 29 Barb. 160 2545
v. Fleischer, 67 Wis. 504 4677
v. Green, 4 Paige 355 3138
v. Little, 36 Pa. Super. Ct. 422 4533
v. McKee, 13 N. Y. 232 2745, 2746, 2749, 2750, 2752, 2765
v. Meredith, 7 Ind. 440 468
v. Northern Pac. R. Co., 64 Wis. 64 235, 3925
v. Parmly, 93 Wis. 294 862, 863, 1935, 1953, 1954, 1960, 2042, 2059, 2061
v. Parrott, 31 Neb. 581 4360
v. Rifle B. Co., 70 Mich. 309 363, 364, 4260, 4308
v. School Dist., 57 Ark. 370 2548, 2565, 2567
v. Shutts, 7 Mich. 127 758
v. Tebbetts, 83 Neb. 573 2823
v. Toledo, 57 Ohio St. 105 224
Gathe v. Broussard, 99 La. Ann. 312 2479
Gathercole v. Miall, 15 M. & W. 319 4515
v. Young, 61 N. H. 563 979
Gathwright v. Callaway, 10 Mo. 663 1559, 2607, 2611, 2624
Gatling v. Commissioners, 92 N. C. 536 521
Gato v. Warrington, 37 Fla. 542 2754
Gatta v. Philadelphia B. & W. R. Co., 2 Boyce (Del.) 551 4873
Gattis v. Kilgo, 128 N. C. 402 4504
Gatz v. Harris, 134 Ky. 550 4647
Gatzow v. Buening, 106 Wis. 1, 19 5, 80, 162, 333
Gauche v. London L. Ins. Co., 4 Woods 102, 10 Fed. 347 3018
v. Milbrath, 105 Wis. 355 587, 592
Gaudet v. Brown, L. R. 5 P. C. 134 3299
Gaugel v. Ainley, 83 Ill. App. 582 3256
Gaulden v. Shehee, 24 Ga. 438 4392, 4395
Gault v. Atchison, T. & S. F. R. Co., 92 Kan. 464 3346
Gaunt v. Ralston P. Co., 198 Fed. 60 2276, 2280
Gause v. Commonwealth T. Co., 111 App. Div. (N. Y.) 530 1353, 2924
Gausman v. Paff, 10 Ky. L. Rep. 240 (Ky. Super. Ct.) 2474
Gautier v. English, 29 Cal. 165 1355
Gavik v. Burlington, etc., R. Co., 131 Iowa 415 3528
Gavin v. Annan, 2 Cal. 494 761
v. Buckles, 41 Ind. 528 2066, 2069
Gavinzel v. Crump, 22 Wall. 308 611
Gaviray Davila v. American R. Co., 1 Porto Rico Fed. 81 149
Gay v. Berkey, 137 Mich. 658 947, 997
v. Botts, 13 Bush 299 2458
v. Dare, 103 Cal. 454 181, 2246
v. Gardiner, 54 Me. 447 4155
v. Gay, 10 Paige 369 585, 586
v. Haskins, 8 N. Y. Misc. 626 2684
v. Rooke, 151 Mass. 115 1017, 1881
v. Smith, 38 N. H. 171 1545

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v. Winter, 34 Cal. 153 4951
Gay Mfg. Co. v. Camp, 65 Fed. 794, 68 Fed. 67 844, 863
Gaylord v. Johnson, 5 McLean 448 1877, 1881
v. Karst, 17 N. Y. 720 2369
v. Nicholls, 9 Ex. 702 3916
v. Van Loan, 15 Wend. 308 1108, 1881
Gaylord Mfg. Co. v. Allen, 53 N. Y. 515 535, 2371, 2376, 2428
Gayton v. Day, 178 Fed. 249 3, 384, 2600
Gazelle, The, 2 Rob. Adm. 279 3308, 5003
Gazelle and Cargo, The, 128 U. S. 471, 487, 32 L. ed. 496, 499 3269
Gazette P. Co. v. Morss, 60 Ind. 153 2561
Gazley v. Price, 16 Johns. 267 2231
Gazzalo v. Chambers, 73 Ill. 75 3183
Gear v. Shaw, 1 Pin. 608 1719, 1744
Gearhart v. Clear Spring W. Co., 202 Pa. 292 4040
v. Olmstead, 7 Dana 445 695
Geary v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 441 4872, 4885, 4907, 4908
v. St. Louis, etc., R. Co., 173 Mo. App. 248 1310
Gebhardt v. St. Louis, etc., R. Co., 122 Mo. App. 503 3852, 3877, 3893
Geddings v. Atlantic C. L. R. Co., 91 S. C. 477 1386
Gedye v. Matson, 25 Beav. 310 2801
Gee v. Culver, 12 Ore. 228 4648
v. Lancashire & Y. R. Co., 6 H. & N. 211 196, 3371, 3375
v. Pack, 33 L. J. (Q. B.) 49 2807
Geer v. School Dist., 6 Vt. 76 421
Gehl v. Milwaukee P. Co., 105 Wis. 573 2237, 2241, 2244
v. Milwaukee P. Co., 116 Wis. 263 2238, 2241
Gehlert v. Quinn, 35 Mont. 451 406
Geib v. Cleveland, 2 Ohio Dec. 360 1362
Geiger v. Cawley, 146 Mich. 550 865, 887
v. Cook, 3 W. & S. 266 1829
v. Grand Trunk R. Co., 10 Ont. L. R. 511 78
v. Kiser, 47 Colo. 297 2504, 2509
v. Payne, 102 Iowa 581 3662, 3663, 3676
v. Western Maryland R. Co., 41 Md. 4 869
v. Worthen, 66 N. J. L. 576 4858
Geiselman v. Schmidt, 106 Md. 580 1471
v. Scott, 25 Ohio St. 86 4680, 4786
Geiser Mfg. Co. v. Halzer, 110 Minn. 138 2229
v. Krogman, 111 Iowa 503 20
Geiser T. M. Co. v. Farmer, 27 Minn. 428 379, 546, 558, 569
Geisey v. Railroad Co., 4 Ohio St. 308 4107
Geismer v. Lake Shore, etc. R. Co., 102 N. Y. 563 3329
Geiss v. Wyeth N. & Mfg. Co., 37 Kan. 130 2237, 2302
Geiszler v. De Graaf, 44 App. Div. (N. Y.) 178 2175
v. De Graaf, 166 N. Y. 339 2151, 2173, 2174
Gelatt v. Ridge, 117 Mo. 553 2502
Gell v. Burgess, 7 C. B. 16 1355
Gelpcke v. Dubuque, 1 Wall. 175 1210
Gelshenen v. Harris, 26 Fed. 680 523
Gelston v. Hoyt, 13 Johns. 561 505
Gem K. Mills v. Empire P. & B. Co., 3 Ga. App. 709 531, 534, 564
Gemkow v. Link, 225 Ill. 21 690, 1818
Gemmell v. Davis, 71 Md. 458 1400
Gemmill v. Brown, 25 Ind. App. 6 4965, 4969, 4971
Gempp v. Bassham, 60 Ill. App. 84 3905, 3906, 3941
Genau v. District of Columbia, 20 Ct. of Cls. 389 3165
Gendron v. St. Pierre, 73 N. H. 419 4537
General Accident Assur. Co. v. Noel, [1902] 1 K. B. 377 928
General E. Co. v. National C. Co., 178 N. Y. 369 2248
General L. & P. Co. v. Washington R. Co., 55 Wash. 461 2696, 2701
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General Proprietors of Eastern New Jersey v. Force, 72 N. J. Eq. 56, 127 4422, 4434
General Rucker, The, 35 Fed. 152 4669
General South American Co., In re, 7 Ch. Div. 637 1899
General Steam Nav. Co. v. Mann, 14 C. B. 127 161
General Supply & C. Co. v. Goelet, 149 App. Div. (N. Y.) 80 1093, 2626
General Underwriting Co. v. Stilwell, 139 App. Div. (N. Y.) 189 2152, 2154, 2211
Genet v. Delaware & H. C. Co., 14 App. Div. (N. Y.) 177 4256
v. Kissam, 53 N. Y. Sup. Ct. 43 947, 952
Geneva v. Burnett, 65 Neb. 464 1475
Geneva W. Co. v. Smith, 188 Mass. 202 4222
Gennaux v. Northwestern I. Co., 72 Wash. 268 4822
Gennings v. Norton, 35 Me. 308 2189, 2873
Genoa v. Woodruff, 92 U. S. 502 1209, 1210
Gens v. Western U. Tel. Co., 86 S. C. 242 1343, 3618
Gensburg v. Marshall Field & Co., 104 Iowa 599 4212, 4229, 4238, 4271
Gentle v. Western U. Tel. Co., 82 Ark. 96 3557
Gentles v. Finck, 23 N. Y. Misc. 153 184
Gentry v. Burnett, 6 T. B. Mon. 115 4336
v. McMinnis, 3 Dana 382 1461
v. Margolius, 110 Tenn. 669 2277
v. Richmond, etc., R. Co., 38 S. C. 284 3878, 3898
v. Wabash R. Co., 172 Mo. App. 638 4860, 4900, 4911
Gents v. Spring Valley C. Co., 155 Ill. App. 628 4816
Genung v. Baldwin, 77 App. Div. (N. Y.) 584 460, 464, 4782, 4783
Geoghegan v. Third Ave. R. Co., 51 App. Div. (N. Y.) 369 1381
v. Union El. R. Co., 266 Ill. 482 3989, 3992, 4133, 4140, 4143, 4154
George v. Arctic Bee, The, 232 2717
v. Bischoff, 68 Ill. 236 1767, 1792
v. Cahawba, etc., R. Co., 8 Ala. 234 2696
v. Concord, 45 N. H. 434 800
v. Fisk, 22 N. H. 32, 45 3742
v. Ford, 36 App. D. C. 315 2907
v. Hesse, 100 Tex. 44, 53 Tex. Civ. App. 344 4399, 4407

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George v. Haverhill, 110 Mass. 506 4714
v. Hewlett, 70 Miss. 1 1679
v. Lane, 80 Kan. 94 248, 1453, 2921
v. Murray, 87 Misc. (N. Y.) 175 531
v. Roberts, 186 Ala. 521 893
v. Skivington, L. R. 5 Ex. 1 99, 2448, 4413
v. Stockton, 1 Ala. 136 1956
v. Van Horn 9 Barb. 523 4961
George Dumois, The, 115 Fed. 65 3323, 3346, 3362
George Thompson & Son Co. v. Holtzer-Cabot Elec. Co., 184 Ill. App. 475 2598, 2668, 2681
George W. Roby, The, 111 Fed. 601 4991, 4995
George & Richard, The, L. R. 3 Ad. & Ecc. 466 4895, 4991
Georgetown Tel. Co. v. McCullough, 118 Ky. 182 144
Georgetown W., etc. Co. v. Neale, 137 Ky. 197 489
Georgi, Matter of, 21 N. Y. Misc. 419 715
Georgia v. Bond, 114 Mich. 196 4572
v. Kepford, 45 Iowa 48 4540
Georgia C. O. Co. v. Jackson, 112 Ga. 620 4698
Georgia, F. & A. Ry. Co. v. Blish Milling Co., 15 Ga. App. 142 481, 3420, 4212
Georgia Home Ins. Co. v. Goode, 95 Va. 751 1359
Georgia Ins., etc. Co. v. Dawson, 2 Gill 365 3000
Georgia L. & C. Co. v. Flint, 35 Ga. 226 874
Georgia Pac. R. Co. v. Freeman, 83 Ga. 583 4794
v. Fullerton, 79 Ala. 298 486, 1138, 1141, 4169
v. Fullerton, 43 Wis. 305 4189
Georgia R. v. Hayden, 71 Ga. 518 3455
v. Olds, 77 Ga. 673 3506, 3513
v. Pittman, 73 Ga. 325 4913
Georgia R. Co. v. Homer, 73 Ga. 251 1316
v. Jett, 95 Ga. 236 3473, 3482
v. Wright, 125 Ga. 589 1066
Georgia R. & B. Co. v. Benton, 117 Ga. 785 1316, 4779
v. Berry, 78 Ga. 744 3881
v. Decatur, 129 Ga. 502 4138
v. Gardner, 118 Ga. 723 3826
v. Garr, 57 Ga. 277 4884, 4891
v. Greer, 7 Ga. App. 292 3441, 3448, 3459
v. Jett, 95 Ga. 236 3521, 4834
v. Keating, 99 Ga. 308 4804
v. Smith, 83 Ga. 626 1116
v. Spinks, 111 Ga. 571 4918
v. Tice, 124 Ga. 459 4760, 4761
Georgia R. & E. Co. v. Baker, 1 Ga. App. 832 345, 3481
v. Baker, 125 Ga. 562 3451, 3484
v. Carroll, 143 Ga. 93 4711
v. Davis, 6 Ga. App. 645 1292, 1318
v. Gilleland, 133 Ga. 621 1424, 1471
v. McAllister, 126 Ga. 447 135
v. Tompkins, 138 Ga. 596 4735
v. Wallace, 122 Ga. 547 1439, 4186
Georgia Ref. Co. v. Augusta O. Co., 74 Ga. 497 2226, 2237
Georgia Southern R. Co. v. Neel, 68 Ga. 609 4709
Georgia Southern & F. R. Co. v. Johnson, 121 Ga. 231 3417, 4230
v. Jones, 90 Ga. 292 1494
v. Ransom, 5 Ga. App. 740 87, 3484
Georgia, etc., R. Co. v. Brown, 120 Ga. 380 3438
v. Jernigan, 128 Ga. 501 3904
v. Parsons, 12 Ga. App. 180 2556, 2561
v. Ransom, 8 Ga. App. 277 3527
v. Sasser, 4 Ga. App. 276 413, 4879
v. Sheppard, 3 Ga. App. 241 1399
v. Wright, 130 Ga. 696 4659, 4698
Georgian Bay L. Co. v. Thompson, 35 Up. Can. Q. B. 64 1835
Georgiana, The, 1 Low. 91 2735
Gerald v. Inter Ocean Pub. Co., 90 Ill. App. 205 4504, 4506
Gerard v. Baker, 1 Ch. Cas. 94 688
v. Dill, 96 Ind. 101 1655
v. Gateau, 15 Ill. App. 520 1728
v. Prouty, 34 Barb. 454 2410
Gerault v. Anderson, 2 Bibb 543 1989, 2029, 2047
Gerber v. Ackley, 37 Wis. 43 1601
Gerbert v. Trustees, 59 N. J. L. 160, 180 1982, 1986, 1993, 2000
Gerdes v. Christopher & S. A. I. & F. Co., 124 Mo. 347 4657, 4706
Gerding v. Adams, 65 Ga. 79 541
v. Haskin, 141 N. Y. 514 2503
Gere v. Council Bluffs Ins. Co., 67 Iowa 272 3051
Gergens v. McCullum, 27 Okla. 155 3100, 3747
Gerhab v. White, 40 N. J. L. 242 1525
Gerhard v. Bates, 2 El. & B. 476 101
v. Bates, 20 Eng. Law & Eq. 129 4377
Gerhardt v. Swaty, 57 Wis. 24 449
Geringer v. Novak, 117 Ill. App. 160 1315, 4524, 4569, 4571
Gerken v. Ruppert, 33 N. Y. Misc. 382 4619
Gerkins v. Kentucky S. Co., 23 Ky. L. Rep. 2415 4210
Gerlaugh v. Ryan, 127 Iowa 226 1659
Gerli v. Poidebard S. Mfg. Co., 57 N. J. L. 432 2230
Gerlinger v. Frank, 74 Ore. 517 3676, 3687
Germain v. Union School Dist., 158 Mich. 214 2596, 2668
Germain F. Co. v. Armsby, 153 Cal. 585 1369, 2403
Germaine v. Burton, 3 Stark. 32 517
German v. Ritchie, 9 Kan. 106 1910
German Am. Bank v. Denmire, 58 Iowa 137 2821
v. Martin, 129 Mo. App. 484 1229, 1920, 1922
German-Am. Ins. Co. v. Etherton, 25 Neb. 505 3017
German Am. Sav. Bank v. Fritz, 68 Wis. 390 2799
German-Am. State Bank v. Spokane, etc., R. Co., 49 Wash. 359 1452
German-Am. T. & T. Co. v. Citizens' T. & S. Co., 190 Pa. 247 2776
German F. Ins. Co. v. Gauten, 13 Ill. App. 593 3020
German Ins. Co. v. Eddy, 36 Neb. 461 3008, 3012, 3013
v. Everett, 18 Tex. Civ. App. 514 3043
v. Hazard Bank, 126 Ky. 730 3067
v. Jansen, 18 Tex. Civ. App. 190 3008
German M. Co., In re, 4 De G., M. & G. 35 1073
German Nat. Bank v. Foreman, 138 Pa. 474 2809
v. National Bank, 63 Neb. 246 1916
German Pioneer Verein v. Meyer, 70 N. J. Eq. 192 1087

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German Sav. Bank v. Citizens' Nat. Bank, 101 Iowa 530 1016
v. Dunn, 75 N. Y. Misc. 251 4157
v. Wulfekuhler, 19 Kan. 60 4369
German Sav. Inst. v. De La Vergne R. M. Co., 70 Fed. 146 2231
German State Bank v. Herron, 111 Iowa 25 3099
German Theological School v. Dubuque, 64 Iowa 736 1474
German Union B. & S. F. Ass'n v. Sendmeyer, 50 Pa. 67 2320, 2330
German, etc., Congregation v. Baltimore, 123 Md. 142 3982
Germania F. Ins. Co. v. Lange, 193 Mass. 67 2793
v. Curran, 8 Kan. 9 3018
v. Harraden, 90 Ill. App. 250 2916
v. Memphis, etc., R. Co., 72 N. Y. 90 3415
Germann v. Great Northern R. Co., 117 Minn. 310 3506
Germantown, etc., R. v. Fitler, 60 Pa. 124 874
Germolus v. Sausser, 83 Minn. 141 4775
Gerner v. Mosher, 58 Neb. 135 4369, 4384
Gernerd v. Gernerd, 185 Pa. 233 4980
Gerrish v. Black, 104 Mass. 400 991
v. Cummings, 4 Cush. 391 1503
v. Edson, 1 N. H. 82 1625
v. New Market Mfg. Co., 30 N. H. 478 3811, 3927, 3929
v. Smyth, 10 Allen 303 295
Gerry v. American Exp. Co., 100 Me. 519 3414
Gerst v. St. Louis, 185 Mo. 191 1142
Gerwig v. Johnston, 207 Pa. 585 3826
v. Sitterly, 56 N. Y. 214 646
Gerwitz v. Abraham, 171 Ill. App. 433 887
Gerzebek v. Lord, 33 N. J. L. 240 3242
Getchell v. Maney, 69 Me. 442 378
v. Mercantile & M's. Mut. F. Ins. Co., 109 Me. 274 3050
Getchell & M. L. & Mfg. Co. v. Peterson, 124 Iowa 599 1574
Gettwerth v. Teutonia Ins. Co., 29 La. Ann. 30 1090
Getty v. Devlin, 54 N. Y. 403 4368
v. Rountree, 2 Pin. 379 534, 535
v. Schantz, 101 Wis. 228 2787, 2788, 2792
Getz v. Philadelphia & R. R. Co., 105 Pa. 547 4012, 4086, 4149
Getzandaffer v. Cavlor, 38 Md. 280 3132
Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589 4662, 4714, 4730
Gheen v. Johnson, 90 Pa. 38 2946
Ghegan v. Young, 23 Pa. 18 3133
Ghen v. Rich, 8 Fed. 159 4208, 4211, 4260, 4309
Ghent v. Boyd, 18 Tex. Civ. App. 88 1056
Gholson v. Brown, 4 Yerg. 496 1798, 1927
Giaccomini v. Bulkeley, 51 Cal. 260 3808
Giachetti v. Speeding, 15 T. L. Rep. 401 3342, 3362, 3364
Giacona v. Bradstreet Co., 48 La. Ann. 1191 4556
Gibbens v. Bourland, — Tex. Civ. App. —, 145 S. W. 274 4372, 4383, 4433
Gibbes v. Chisolm, 2 N. & McC. 38 1206, 1212
Gibbes Mach. Co. v. Johnson, 81 S. C. 10 2237
Gibbon v. Chaytor, [1907] 1 Irish 65 1080
v. Featherstonhaugh, 1 Stark. 92 698
v. Paynton, 4 Burr 2298 3412
Gibboney v. Wayne, 141 Ala. 300 525, 2215
Gibbons v. Bente, 51 Minn. 499 2702
v. Missouri Pac. R. Co., 40 Mo. App. 146 4029
v. New York Cent. & H. River R. Co., 161 App. Div. (N. Y.) 201 3846, 3847
v. Rhode Island Co., 37 R. I. 89 4819
v. United States, 8 Wall. 269 2238
v. Woodward, 3 Walker (Pa. Sup. Ct.), 303 640
Gibbs v. Ames, 119 Mass. 60 4601, 4607
v. Bank, 4 New South Wales L. R. (law) 266 4389
v. Bartlett, 2 W. & S. 29 1654, 1656, 1657, 1660, 1664, 1666, 1667
v. Bryant, 1 Pick. 118 1019, 2861
v. Cannon, 9 S. & R. 201 671
v. Champion, 3 Ohio 335 1989, 4421
v. Cooper, 86 N. J. L. 226 917
v. Cruikshank, L. R. 8 C. P. 454 4323
v. Fremont, 9 Ex. 25 962, 965, 1151, 1179, 1879, 1882, 1905
v. Gildersleeve, 26 Up. Can Q. B. 471 3365
v. Grey, 2 H. & N. 22 3297
v. Hannibal, 82 Mo. 143 417
v. Jamison, 12 Ala. 820 1995, 2009
v. Meserve, 12 Ill. App. 613 4421
v. Poplar Bluff L. & P. Co., 142 Mo. App. 19 4670, 4732, 4734
v. Randlett, 58 N. H. 407 4838
Gibert v. Peteler, 38 N. Y. 195 2044
v. Wiman, 1 N. Y. 550 2894
Gibler v. Quincy, etc., R. Co., 129 Mo. App. 93 1472
Giblin v. McIntyre, 2 Utah 384 4662
Gibney v. Lewis, 68 Conn. 392 223, 334, 340, 1281, 3652
v. St. Louis T. Co., 204 Mo. 704 3528, 4739
v. Turner, 52 Ark. 117 2697
Giboney v. German Ins. Co., 48 Mo. App. 185 821
Gibson, Matter of, 24 Abb. N. C. 45 1083
Gibson, The, In re, 160 Fed. 230 2735
Gibson v. Brown, 44 Fed. 98 3288
v. Carlin, 13 Lea 440 538, 2616, 2646
v. Cincinnati Enquirer, 2 Flip. 88 1244
v. Cincinnati Enquirer, 2 Flip. 121 4517
v. City of Toronto, 28 Ont. L. R. 20 4041
v. Clark, 1 V. & B. 500 1026
v. Cranage, 39 Mich. 49 2235
v. East Tennessee, etc., R. Co., 30 Fed. 904 3500
v. Fields, 79 Kan. 38 3704, 3713
v. Fifth Ave. & High St. B. Co., 192 Pa. 55 4126
v. Gibson, 15 Mass. 106 452, 453, 781, 783
v. Gibson, 43 Wis. 23 4762
v. Governor, 11 Leigh 600 1607
v. Hibbard, 13 Mich. 214 1193
v. Holmes, 78 Vt. 110 437
v. Humphrey, 1 Cr. & M. 544 4302
v. Inman Packet Co., 111 Ark. 521 3366, 3378, 3387, 3433, 4170, 4179
v. Lewis, 27 Mo. 532 1523

[REFERENCES ARE TO PAGES]

Gibson v. Love, 2 Fla. 598 295
v. Lyon, 115 U. S. 439 807
v. Marquis, 29 Ala. 668 533, 2048
v. Martin, 7 Humph. 127 1598
v. Midland R. Co., 2 Ont. 659 418
v. Murray, 120 Ill. App. 396 390
v. Perry, 29 Mo. 245 3138, 3143
v. Reed, 54 Neb. 309 1719, 1720, 1721, 1758
v. Richart, 83 Ind. 313 2053
v. Shehan, 5 D. C. App. Cas. 391 2866
v. Stearns, 3 N. H. 185 994
v. Sturge, 10 Ex. 637 3289
v. Tobey, 46 N. Y. 637 656
v. Wheldon, 82 Vt. 175 2699
v. Whip Pub. Co., 28 Mo. App. 450 2514
v. Winter, 5 B. & Ad. 96 770
Gibson's Est., 228 Pa. 409 1104
Giddens v. Western U. Tel. Co., 111 Ga. 824 3642
Giddings v. Canfield, 4 Conn. 482 2094
v. Freedley, 128 Fed. 355 1349, 1362, 3816, 3826
v. Sears, 103 Mass. 311 2975
Gideon v. Dwyer, 87 Hun 246 4504
Giese v. Schultz, 53 Wis. 462 3663, 3665
v. Schultz, 69 Wis. 521 3677
v. Shultz, 65 Wis. 487 3665
Gieseke v. Johnson, 115 Ind. 308 2831, 2836
Giesy v. Cincinnati, etc., R. Co., 4 Ohio St. 308 3946, 4119, 4120
Giffen v. Barr, 60 Vt. 599 1272
v. Lewiston, 6 Idaho 231 4652, 4672
v. Selma F. Co., 5 Cal. App. 50 2379
Giffert v. West, 33 Wis. 617 303, 1870, 2384, 2429
Gifford, Ex parte, 6 Ves. 805 2823, 2868
Gifford v. Corrigan, 117 N. Y. 257 771
v. Thomas' Est., 62 Vt. 34 704
v. Waters, 67 N. Y. 80 287, 375, 410, 2516, 2551
Gift v. Reading, 3 Pa. Super. Ct. 359 3890
Gihon v. Fryatt, 2 Sandf. 638 591
v. Stanton, 9 N. Y. 476 2970, 2972
Gilbert v. Bamberger, 19 Ky. L. Rep. 1833 1789
v. Boak F. Co., 86 Minn. 365 379, 392
v. Bulkley, 5 Conn. 262 2056
v. Cherry, 57 Ga. 128 1431, 1947
v. Danforth, 6 N. Y. 585 2329
v. Duncan, 29 N. J. L. 133 1822, 1853
v. Emmons, 42 Ill. 143 449
v. Greeley, etc., R. Co., 13 Colo. 501 3935
v. Grubel, 82 Kan. 476 2514, 2549
v. Isham, 16 Conn. 525 1601
v. Kennedy, 22 Mich. 5 429, 430
v. Kennedy, 22 Mich. 117 267, 320, 1415, 3741, 3744, 3817, 3818, 3921, 4160
v. Loberg, 86 Wis. 661 3263
v. McCullough, 146 Iowa 333 2512
v. Peck, 162 Cal. 54 4271
v. Peck, 43 Mo. App. 577 4298
v. Peteler, 38 Barb. 488, 38 N. Y. 170 2000, 2027, 2043, 2065
v. Rushmer, 49 Kan. 632 2164
v. Taylor, 148 N. Y. 298 1080
v. Washington, etc., R. Co., 33 Gratt. 586 1209
v. Watts-De G. Co., 66 Ill. App. 625, 169 Ill. 129 1620
v. Welsch, 75 Ind. 557 1120
Gilbert v. Wiman, 1 N. Y. 550 2189, 2875, 2893, 2894
v. Yunk's Est., 214 Ill. 237 2754
Gilbert Co. v. Husted, 50 Wash. 61 553
Gilbertson v. Forty-second St., etc., R. Co., 14 App. Div. (N. Y.) 294 4833
v. Fuller, 40 Minn. 413 4648
v. Richardson, 5 C. B. 502 66
Gilbraith v. Stewart T. Co., 121 Fed. 540 2721
Gilbreth v. Grewell, 13 Ind. 484 2018
Gilchrist v. Lumberman's M. Co., 65 Fed. 1005 3272
v. Partridge, 73 Me. 214 531
v. Weil, 10 Ohio Dec. 687 3141, 3142, 3151
v. Weil, 52 Ohio St. 677 3142, 3151
Gilcrest L. Co. v. Wilson, 84 Neb. 583 2373
Gildersleeve v. Overstolz, 90 Mo. App. 518, 530 168, 1269, 1278, 3207, 3209, 3212, 3218, 3815
Gile v. Interstate Motor Car Co., 27 N. D. 108 886
v. Stevens, 13 Gray 146 3881, 3927, 3997
Giles v. Atchison, T. & S. F. R. Co., 92 Kan. 322 3421
v. Comstock, 4 N. Y. 270 3122, 3129
v. De Cow, 35 Colo. 135 1766
v. Diamond State I. Co., 7 Houst. 453, 459 4690
v. Dugro, 1 Duer 331, 2181, 2182, 3124
v. Eagle Ins. Co., 2 Metc. (Mass.) 140 3033
v. Hartis, 1 Ld. Raym. 254 820
v. Morrison, 50 Barb. 50 2300
v. O'Toole, 4 Barb. 261 242, 244, 1431, 3189, 3197, 3213, 3216, 3224
v. Spencer, 3 C. B. (N. S.) 244 780
v. Swift, 170 Mass. 461 2500
v. Vandiver, 91 Ga. 192 717
v. Williams, 3 Ala. 316 1954
Gilfillan v. McCrillis, 84 Mo. App. 507 1396
Gilhooly v. Washington, 4 N. Y. 217 3127
Gilipin v. Hord, 85 Ky. 213 1801
Gilkerson-S. C. Co. v. Yale, 47 La. Ann. 690 4190
Gilkeson v. Missouri Pac. R. Co., 222 Mo. 173 4846, 4854, 4859
Gilkey v. The Beta, 44 Fed. 389 4991
Gill v. Bradley, 21 Minn. 15 807
v. Brown, 12 Johns. 385 2981
v. Johnson-B. C. Co., 84 Mo. App. 456 2294, 2341
v. Lyon, 1 Johns. Ch. 447 571
v. Packard, 4 Woods 270 634
v. Rice, 13 Wis. 549 711, 721
v. Rochester, etc., R. Co., 37 Hun 107 4943
v. Ruggles, 95 S. C. 90 4510, 4577
v. Wells, 59 Md. 492 1953
v. Staylor, 93 Md. 453 2464
v. Staylor, 97 Md. 665 2482
v. United States, 160 U. S. 426 2549
Gill's App., 2 Pa. 221 1081, 1086
Gillam v. Hogue, 39 Pa. Super. Ct. 547 4187
Gillard v. Brittan, 8 M. & W. 575 4203, 4303
Gilleland v. Greason, 156 App. Div. (N. Y.) 46 1382
Gillen v. Minneapolis, etc., R. Co., 91 Wis. 633 3520, 3529

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Gillespie, In re, 16 Q. B. 702 1892, 1899, 1902, 1903
Gillespie v. Ambrose, — Tex. Civ. App. —, 161 S. W. 937 1502
v. Ashford, 125 Iowa 729 2558, 2560, 2576
v. Battle, 15 Ala. 276 1957
v. Brooklyn Heights R. Co., 178 N. Y. 347 96, 341, 3468, 3476, 3479
v. Creswell, 12 Gill & J. 36 2835, 2836
v. Darwin, 6 Heisk. 21 2816
v. Evans, 10 S. D. 234 4212
v. Fulton, 161 Ill. App. 248 1014
v. Louisville & N. R. Co., 144 Mo. App. 508 56
v. Mayor, 3 Edw. 512 940, 1199
v. Platt, 19 N. Y. Misc. 43 3414
v. South Omaha, 79 Neb. 441 3962, 4004, 4006, 4017
v. Stafford, 4 Neb. (Unof.) 873 4644, 4647
v. Thomas, 15 Wend. 464 3146
v. Torrance, 25 N. Y. 306 519, 522, 524, 2828
Gillet v. Maynard, 5 Johns. 85 2013, 2027
v. Van Rensselaer, 15 N. Y. 397 1019
Gillett v. Chicago T. & T. Co., 230 Ill. 373, 415 1223
v. Ellis, 11 Ill. 579 3036
v. Flanner-Steger Land & Lumber Co., 159 Wis. 578 4871, 4880
v. Gillett, 9 Wis. 194 636
v. Kinderhook, 77 Hun 604 3882
v. Mead, 7 Wend. 193 4967
v. Rippon, Moody & M. 406 298
v. Western R. Corp., 8 Allen 560 218, 225, 4186
Gillette v. Goodspeed, 69 Conn. 363 4173
Gillette's App., 82 Conn. 500 2471
Gilley v. Gilley, 79 Me. 292 3724
v. Williams (Tex. Civ. App.), 43 S. W. 1094 3706
Gillham v. Madison County R. Co., 49 Ill. 488 3948
Gilliam v. Alford, 69 Tex. 267 757
v. Brown, 43 Miss. 641 640
v. Globe T. Co., 152 Mo. App. 464 4169
v. McCormack, 85 Tenn. 597 574, 579
v. Moore, 4 Leigh 30 3727
Gillies v. Manhattan Beach I. Co., 147 N. Y. 420 2458
v. Manhattan Beach I. Co., 73 Hun 507 2458
v. Wofford, 26 Tex. 76 1136, 4312
Gilliespie v. Great Northern R. Co., 124 Minn. 1 4820
Gilligan v. New York & H. R. R. Co., 1 E. D. Smith 453 1354, 1396
v. Waterford, 91 Hun 21 2461
Gillilan v. Nixon, 26 Ill. 52 659
v. Rollins, 41 Neb. 540 858, 865
Gilliland v. Brantner, 145 Iowa 275 2492
Gillin v. Pence, 4 T. B. Mon. 304 423
Gillingham v. Boardman, 29 Me. 79 2787
v. Dempsey, 12 S. & R. 183 3389
Gillis v. Arringdale, 135 N. C. 295 2028
v. Cobe, 177 Mass. 584, 592 2666, 2676, 2677, 2682
v. Space, 63 Barb. 177 287, 314, 2561
Gillman v. Florida Cent. & P. R. Co., 53 S. C. 210 3447
Gillogly v. Dunham, 187 Mo. App. 551 4787
Gillum v. St. Louis, etc. R. Co., 4 Tex. Civ. App. 622 596
Gilly v. Hirsh, 122 La. 966 13
Gilman v. Andrews, 66 Iowa 116 2311
v. Brown, 115 Wis. 1 3767, 3779, 3827, 3829
v. Cary, 198 Mass. 318 748, 819
v. Dart H. Co., 42 Mont. 96 4934, 4937
v. Douglas County, 6 Nev. 27 631
v. Gilman, 111 N. Y. 265 3693
v. Hall, 11 Vt. 510 2666, 2680
v. Haven, 11 Cush. 330 2094
v. Holey, 7 Ill. App. 349 4786
v. Lewis, 15 Me. 452 2789
v. Lowell, 8 Wend. 573 469, 470, 4568, 4578, 4582
v. McClatchy, 111 Cal. 606 4507
v. Noyes, 57 N. H. 627 66, 112
v. Peck, 14 Vt. 516 645, 648
v. Postal Tel. Co., 48 N. Y. Misc. 372 3412
v. Stevens, 63 N. H. 342 663
v. Van Slyck, 7 Cow. 469 588
v. Vaughan, 44 Wis. 646 1073
Gilmer v. Eubank, 13 Ill. 271 4518
v. Lime Point, 19 Cal. 47 4046
v. Mobile & M. R. Co., 79 Ala. 569 1961
Gilmore v. American T. & S. Co., 79 Conn. 498 1471
v. Borders, 2 How. (Miss.) 824 4569
v. Bussey, 12 Me. 418 659
v. Driscoll, 122 Mass. 199 3762, 3915, 3916
v. Holt, 4 Pick. 258 802, 803, 818
v. Pittsburgh, etc., R. Co., 104 Pa. 275 4088, 4151
v. Reed, 76 Pa. 462 530, 565
v. Samuels, 135 Ky. 706 2540, 2543
v. Sexton, 1 Cal. Ind. Acc. Comm. Dec. (1914) 5 5173
v. Wright, 20 Ga. 198 1807
Gilmour v. Kerr, 18 Ky. L. Rep. 400 1071
v. Supple, 11 Moore P. C. 566 2225
Gilpatrick v. Cotting, 214 Mass. 426 4849
v. Ricker, 82 Me. 185 1411
Gilpins v. Consequa, Pet. C. C. 85, 3 Wash. C. C. 184 1107, 1449, 2275, 2410
Gilreath v. Allen, 10 Ired. 67 1269, 4543
Gilroy, Matter of, 85 Hun 424 4049
Gilson v. Cadillac, 134 Mich. 189 4737, 4738, 4762, 4764
v. Cascade L. Co., 54 Wash. 289 3840
v. Delaware, etc., C. Co., 36 Am. St. 821 162
v. Nesson, 198 Mass. 598 753
v. Wood, 20 Ill. 37 4169
Ginaca v. Atwood, 8 Cal. 446 1660
Gingles v. Caldwell, 21 Ala. 444 2421
Ginn v. Almy, 212 Mass. 486 4383, 4391
v. Hancock, 31 Me. 42 2148
v. Moultrie, etc., D. Dist. 188 Ill. 305 3946, 4119
Ginna v. Second Ave. R. Co., 8 Hun 494 139
Ginzler v. Birmingham, 6 Ala. 666 3849
Giovagnioli v. Ft. Orange Const. Co., 148 App. Div. (N. Y.) 489 4738
Giragosian v. Chutjian, 194 Mass. 504 42
Girard v. Moore, 86 Tex. 675 15, 1322
v. Taggart, 5 S. & R. 19 368, 1947, 2229, 2237
Girard F. & M. Ins. Co. v. Marr, 46 Pa. 504 674, 677
Girardeau v. Southern Exp. Co., 48 S. C. 421 3437

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Girot v. Graham, 41 La. Ann. 511 4633
Giselman v. Starr, 106 Cal. 651 1815
Gish v. Castner D. Dist., 137 Iowa 711 3962, 4107
v. Castner, etc., D. Dist. 136 Iowa 155 4100
Gisleson v. Minneapolis & St. L. R. Co., 85 Minn. 329 3443, 3446
Gist v. Alexander, 15 Rich. 50 606
v. Drakely, 2 Gill 330 2768
Given v. Charron, 15 Md. 502 2547
Givens v. Berkley, 108 Ky. 236, 21 Ky. L. Rep. 1653 1317
v. North Augusta E. & I. Co., 91 S. C. 417 171, 318, 1259
v. Studdiford, 4 Mo. App. 938, 86 Mo. 149 3886
v. Van Studdiford, 4 Mo. App. 498 3878, 3920, 3921, 3938
Givhan v. Dailey, 4 Ala. 336 2524
Gizler v. Witzel, 82 Ill 322 467, 4783
Glace v. Hummel, 10 Pa. Dist. 110 4613
Glacius v. Black, 50 N. Y. 145 2686
Glade v. Eastern Illinois M. Co., 129 Mo. App. 443 2503
Glade C. Co. v. Baltimore & O. R. Co., 10 Interstate Com. 226 3312
Gladfelter v. Walker, 40 Md. 3 212
Gladys City O. G. & Mfg Co v. Right of Way O. Co. (Tex. Civ. App.), 137 S. W. 171 3789
Glanders v. Graff, 25 Hun 553 4518
Glann v. White, 181 Mich. 320 2447
Glanvill v. Stacey, 6 B. & C. 543 43
Glascock v. Ashman, 52 Cal 493 1608
v. Hays, 4 Dana 58 4314, 4316, 4358
v. Lyons, 20 Ind. 1 693
Glaser v. Cumisky, 16 N. Y. Supp. 89 3258
Glasgow v. Altoona, 27 Pa. Super. Ct. 55 3840, 3890, 3904, 3908
v. Chartiers O. Co., 152 Pa. 48 3114
v. Hood (Tenn. Ch. App.), 57 S. W. 162 2547
v. Lipse, 117 U. S. 327, 6 Sup. Ct. 757 612
v. Metropolitan St. R. Co., 191 Mo. 347 311, 327
v. St. Louis, 15 Mo. App. 112, 87 Mo. 678 17
Glaspell v. Northern Pac. R. Co., 43 Fed. 900 4407
Glaspie v. Glassow, 28 Minn. 158 2697, 2701
Glaspy v. Cabot, 135 Mass. 435 4216, 4226, 4262
Glass v. Abbott, 6 Bush 622 605
v. Basin, etc., M. Co., 31 Mont. 21 4208
v. Baxter, 4 Desaus. 153 584
v. Garber, 55 Ind. 336 3227, 4194
v. Hope, 16 Grant (Up. Can. Ch.) 420 874
v. Pullen, 6 Bush 346 574
v. Reed, 2 Dana 168 2383
Glasscock v. Chicago, etc., R. Co., 86 Mo. App. 114 3353
v. Hamilton, 62 Tex. 143 2868, 2870, 2871
v. Rosengrant, 55 Ark. 376 41, 858
Glasscott v. Day, 5 Esp. 48 805, 809
Glasse v. Stewart, 32 Pa. Super. 385 2003, 2004
Glassell v. Glassell, 147 Cal. 510 1121
Glassey v. Dye, 83 Neb. 615. 461
v. Worcester Con. St. R. Co., 185 Mass. 315 129
Glassman v. Condon, 27 Utah 463 1953
Glassock v. Bridges, 15 La. Ann. 672 4645
Glaucus, The, 1 Low. 366 5004
Glawson v. Southern Bell Tel. & T. Co., 9 Ga. App. 450 3546, 3587, 4861
Glazebrook v. Woodrow, 8 T. R. 366 1936
Glazier v. Douglass, 32 Conn. 393 2815
Gleadell v. Thompson, 56 N. Y. 194 3340
Gleason v. Byrne C. Co., 178 Ill. App. 359 1505
v. Chester, 1 Day 152 1622
v. Clark, 9 Cow. 57 538, 1839, 2474
v. Gary, 4 Conn. 418 3921
v. Hudson Valley R. Co., 143 App. Div. (N. Y.) 884 4745
v. Moen, 2 Duer 639 551, 3260
v. Smith, 9 Cush. 484 356, 2666
Gleaton v. Fulton B. & C. Mills, 5 Ga. App. 420 835
Gledhill W. P. Co. v. Baltimore & O. R. Co., (Misc.) 119 N. Y. Supp., 623 3367
Gleeson's Est., In re, 192 Pa. 279 1772, 3712
Glen & H. M. Co. v. Hall, 61 N. Y. 226 552
Glendell v. Thomas, 56 N. Y. 194 3301
Glendenning v. Stahley, 173 Ind. 674 4107, 4125
Glengyle, The, [1898] Prob. 97 2727, 2729
Glenlyon Dye Works v. Interstate Exp. Co., 36 R. I. 558 3431
Glenn v. Atlantic Coast Line R. Co., 96 S. C. 357 3334
v. Burrows, 37 Hun 602 669
v. Glenn, 41 Ala. 571 644
v. Hill, 210 Mo. 291 3232
v. Hill, 11 Wash. 541 2766
v. Smith, 2 Gill & J. 493 666
v. Thistle, 23 Miss. 42 2197
v. Wallace, 4 Strobh. Eq. 150 1649
v. Western U. Tel. Co., 1 Ga. App. 821 40, 3612, 3642
v. Whipple, 12 N. J. Eq. 50 2211, 2212
Glenn's Est., 74 Cal. 567 1049
Glenochil, The, 128 Fed. 963 1250
Glenogle, The, 122 Fed. 503 4991
Glens Falls Ins. Co. v. Michael, 167 Ind. 659 3047
Glenwood L. Co. v. Phillips, [1904] App. Cas. 405 4347
Glenwood L. & G. Ass'n v. Williams, 71 S. C. 421 2484
Glenworth v. Luther, 21 Barb. 145 2506
Glidden v. Chamberlin, 167 Mass. 486 998, 1869, 1905
v. Pooler, 50 Ill. App. 36 233, 2415, 2453
Glidewell v. McGaughey, 2 Blackf. 357 1599
Globe Accident Ins. Co. v. Helwig, 13 Ind. App. 539 3082
Globe Ins. Co. v. Lansing, 5 Denio 380 632
v. Sherlock, 25 Ohio St. 50 3011, 3014
Globe M. & S. Co. v. Des Moines, 156 Iowa 267 3960
Globe R. Co. v. Landa C. O. Co., 190 U. S. 540 170, 1258, 2282, 2339, 2341

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Glore v. Akin, 131 Ga. 481 1535
Glos v. Ambler, 218 Ill. 269 1229
v. Stern, 213 Ill. 325 825
Gloster O. Works v. Buckeye C. O. Co., 87 Miss. 618 18
Gloucester v. Eschbach, 54 N. J. L. 150 1569
Glover, The, Fed. Cas. No. 5488 3306
Glover v. Atchison, etc., R. Co., 129 Mo. App. 563 3449, 3476, 3501
v. Austin, 6 Pick. 209 428
v. Central I. Co., 133 Ga. 62 806
v. Charleston & S. R. Co., 57 C. C. 228 1268, 1386
v. Henderson, 120 Mo. 367 2970
v. Hunnewell, 6 Pick. 222 422
v. London, etc., R. Co., 3 Q. B. 25 161
v. McGaffey, 56 Vt. 294 1737
v. O'Brien, 100 Me. 551 2152
v. Rochester German Ins. Co., 11 Wash. 142 1089
v. Wilson, 6 Pa. 290 3147
Gloystein v. Commonwealth, 17 Ky. L. Rep. 1187 3921
Gluck v. Mayor, etc., 81 Md. 315 3146, 3973, 4086, 4093
Glucose S. R. Co. v. Climax & C. & P. B. Co., 40 Ind. App. 182 2374, 2455
v. Flinn, 184 Ill. 123 2522
Glyn v. Hertel, 8 Taunt. 208 2749, 2755
v. Title G. & T. Co., 132 App. Div. (N. Y.) 859 3094
Glynn v. Moran, 174 Mass. 233 889
Gniadek v. Northwestern I. & B. Co., 73 Minn. 87 312
Go Fun v. Fidalgo Isl. C. Co., 37 Wash. 238 837
Gobble v. Linder, 76 Ill. 157 889, 2013
Gobernor v. Barr, 1 Dev. 65 1590
Gocio v. Day, 51 Ark. 46 547
Godby v. Bluefield, 61 W. Va. 604 3850, 4029
Goddard v. Barnard, 16 Gray 205 2599
v. Binney, 115 Mass. 450 2228, 2264
v. Bulow, 1 Nott & McCord 45 1134
v. Cox, 2 Str. 1194 703, 717
v. Enzler, 222 Ill. 462, aff'g 123 Ill. App. 108 4900, 4901
v. Foster, 17 Wall. 123 1181, 1184, 1881
v. Grand Trunk R., 57 Me. 202 340, 1306, 1330, 1332, 1341, 1348, 3466, 3501, 3507, 3526, 4662
v. Hill, 33 Me. 582 1866
v. Hodges, 1 Cr. & M. 33 722
v. Mallory, 52 Barb. 87 3425
v. O'Brien, 9 Q. B. Div. 37 753
v. Westcott, 82 Mich. 180 3661, 3667, 3669, 3674, 3683
Goddin v. Shipley, 7 B. Mon. 575 1878
v. Vaughn, 14 Gratt. 102 1953
Godeau v. Blood, 52 Vt. 251 4664
Godette v. Gaskill, 151 N. C. 52 17
Godfrey v. Crisler, 121 Ind. 203 646, 661, 698
v. India Wharf B. Co., 87 App. Div. (N. Y.) 123 3236, 3247
v. Olson, 68 Wash. 59 4380, 4383
v. White, 43 Mich. 171 1072
Godin v. London Assur. Co., 1 Burr. 492 3009
Godman v. Meixsel, 65 Ind. 32 2975
Godsall v. Boldero, 9 East 72 3069
Godwin v. Francis, L. R. 5 C. P. 295 306, 2008, 2009, 2989
Godwin v. McGehee, 19 Ala. 468 1224, 1241
Godwin's Est., 22 Pa. Super. 469 816, 1121
Goebel v. Chicago, etc., R. Co., 149 Ill. App. 649 3389
v. Hough, 26 Minn. 252 266, 2306, 3209, 4194
Goebeler v. Wilhelm, 17 Pa. Super. Ct. 432 4542
Goenen v. Schroeder, 18 Minn. 66 658
Goepel v. Hamburg Am. P. Co., 191 Fed. 744 3407
Goesling v. Gross, 15 N. M. 721 2947
Goetz v. Ambs, 27 Mo. 28 1277, 1282
v. Ambs, 22 Mo. 170 1499
v. Piel, 26 Mo. App. 634 736, 741
Goetzke v. Chicago, 174 Ill. App. 446 4815
Goff v. Eckert, 65 Ill. App. 616 1728
v. Goff, 123 Ky. 73 1120
v. Great Northern R. Co., 3 El. & E. 672 1332
v. Healey, 2 Cal. App. 95 1804
v. Hawks, 5 J. J. Marsh. 341 1399, 1986
v. Hurst, 135 Ky. 276 2503
v. Miller, 41 W. Va. 683 1823
v. Rehoboth, 2 Cush. 475 1102, 1106, 1232
v. United States, 22 App. D. C. 512 1038, 1569, 1574
Goffe v. Jones, 132 App. Div. (N. Y.) 864 763
Goggans v. Murick, 131 Ala. 286 3936
Goggin v. Kansas, etc., R. Co., 12 Kan. 416 3335
Gohres v. Illinois M. Co., 40 Ore. 516 1399, 1404
Goins v. Western R. Co., 59 Ga. 426 1495
Gold v. Bissell, 1 Wend. 210 4841
v. Campbell, 54 Tex. Civ. App. 269 1604, 4836, 4839, 4840, 4841, 4843
Gold Glen M., M. & T. Co. v. Dennis, 21 Colo. App. 284 1817
Goldbeck v. Kensington Nat. Bank, 147 Pa. 267 682
Goldberg v. Dobbertine, 46 La. Ann. 1303, 1308 4593
v. West End H. Co., 78 N. J. L. 70 1134
Goldberger v. Leibowitz, 42 Colo. 99 531
Goldberger I. Co. v. Cincinnati I. & S. Co., 153 Ky. 20 4222
Golden v. Herman C. Co., 100 Mo. App. 20 1454
v. McKim, — Nev. —, 141 Pac. 676 883
v. McKim, 37 Nev. 205 2585
v. Spokane, etc., R. Co., 20 Idaho 526 4924, 4927, 4931
Golden C. M. Co. v. Rapson C. M. Co., 188 Fed. 179 2255
Golden Gate, The, 57 Fed. 661 2724
Golden Gate L. Co. v. Sahrbacher, 105 Cal. 114 2665
Golden Gate M. & M. Co. v. Hendy M. Works, 82 Cal. 184 1530
Golden Reward M. Co. v. Buxton M. Co., 97 Fed. 413 4216, 4219, 4230, 4263
Goldenberg v. Zirinsky, 114 App. Div. (N. Y.) 827 1465
Golder v. Lund, 50 Neb. 867 4730, 4734, 4785
Goldey v. Pennsylvania R. Co., 30 Pa. 242 3335

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Goldhawk v. Duane, 2 Wash. C. C. 323 1561
Goldie v. Werner, 50 Ill. App. 297 1514
Goldman v. Gainey, 67 App. Div. (N. Y.) 330 1353
v. Goldman, 51 La. Ann. 761 833, 869
v. Wolff, 6 Mo. App. 490 252
Goldnamer v. O'Brien, 98 Ky. 569 501
Goldrich v. Ryan, 3 E. D. Smith 324 2377
Goldsboro v. Central R. Co., 60 N. N. J. L. 49 1474
v. Moffett, 49 Fed. 213 2592
Goldsborough v. Baker, 3 Cranch C. C. 48 918
v. Gable, 152 Ill. 594 3099
Goldschmid v. Mayor, 14 App. Div. (N. Y.) 135 3764, 3816
Goldsmith v. Brown, 35 Barb. 484 2786
v. Chicago, etc., R. Co., 176 Ill. App. 336 153
v. Coxe, 80 S. C. 341 2501
v. Hand, 26 Ohio St. 101 2650, 2655, 2658, 2663, 2669, 2682
v. Henderson, 50 Fed. 567 3346, 3349
v. Holland T. Co., 5 App. Div. (N. Y.) 104 282
v. Joy, 61 Vt. 488 466, 4775, 4783
v. Koopman, 140 Fed. 616 4374
v. Lichtenberg, 139 Mich. 163 748
v. Picard, 27 Ala. 142 1694
Goldstein v. Asen, 46 N. Y. Misc. 251 3189
v. East Fallowfield, 43 Pa. Super. 158 104, 4742
v. Godfrey, 61 N. Y. Misc. 64 2696, 2701
v. Miller, 93 Ill. App. 103 3829
v. Pullman Co., 161 App. Div. (N. Y.) 756 3539
Goldston v. Wade, 123 N. Y. Supp. 114 2343
Goldthorpe v. Hardman, 13 M. & W. 377 16
Golibart v. Sullivan, 30 Ind. App. 428 434, 4835, 4840
Goller v. Fett, 30 Cal. 481 364, 3703, 3790, 4259, 4346
Goltra v. Penland, 42 Ore. 18 4225
Gombert v. New York Cent., etc., R. Co., 195 N. Y. 273 4694
Gomer v. McPhee, 2 Colo. App. 287 553
Gomez v. Hawaiian Gazette P. Co., 10 Hawaii 108 4502, 4585
v. Scanlan, 155 Cal. 528 1608, 4840
Gompers v. Rochester, 56 Pa. 194 893
Gompertz v. Bartlett, 2 E. & B. 849 1870, 2385
v. Denton, 1 Cr. & M. 207 2390
Gonser v. State, 30 Ind. App. 508 1584
Gonzales v. De Funiak H. T. Co., 41 Fla. 471 1704, 1705, 1707
v. United States, 42 Ct. of Cls. 299 2722, 2728
Gonzales College v. McHugh, 21 Tex. 256 2609, 2670, 2682
Good v. Buckeye Ins. Co., 43 Ohio St. 394 3029, 3065, 3068
v. Cheesman, 2 B. & Ad. 328 628, 664, 754, 763, 2835
v. Grit P. Co., 36 Pa. Super. Ct. 238 4519, 4543, 4573, 4597
v. Mylin, 8 Pa. 51 1706, 1723, 3701, 4190, 4627
v. Von Hemert, 114 Minn. 393 3250
v. West M. Co., 154 Mo. App. 591 1414
Goodall v. Clarke, 21 Ont. L. R. 614 4252, 4254
v. Eldorado, etc., R. Co., 143 Ill. App. 328 1031
v. Norton, 88 Minn. 1 670
v. Skelton, 2 H. Black. 316 2225
v. Thurman, 1 Head 209 1310, 1495, 3663, 3677
v. Wentworth, 20 Me. 322 2854
Goodbar v. Lindsley, 51 Ark. 380 47, 1690, 1698, 1706
Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12 4574, 4593
Goode v. Towns, 56 Vt. 410 4895
Goodell v. Bluff City L. Co., 57 Ark. 203 2355
Gooden v. Moses, 99 Ala. 230 274, 476
Goodenow v. Snyder, 3 G. Greene 599 361
v. Tappan, 1 Ohio 38 4503
v. Tyler, 7 Mass. 36 659
v. Tyler, 1 Am. L. Cases 661 2959
Goodes v. Lansing S. T. Co., 150 Mich. 494 4878, 4907
Goodhall v. Richardson, 14 N. H. 567 677
Goodhart v. Pennsylvania R. Co., 177 Pa. 1 413, 4653, 4661, 4694, 4704, 4715, 4716, 4728, 4739, 4833
v. Rastert, 10 Ohio Dec. 40 1203
Goodhue v. Palmer, 13 Ind. 568 980
v. Western U. Tel. Co., 57 Tex. Civ. App. 297 3625
Goodin v. Southern R. Co., 125 Ga. 630 3319
Gooding v. Shea, 103 Mass. 360 3838
Goodisson v. Nunn, 4 T. R. 761 1936
Goodkind v. Rogan, 8 Ill. App. 413 2341
Goodland v. Blewith, 1 Camp. 477 794, 796
Goodlander M. Co. v. Standard O. Co., 63 Fed. 400 52
Goodloe v. Clay, 6 B. Mon. 236 1020, 2865
v. Empson P. Co., 145 Mo. App. 574 746
v. Metropolitan St. R. Co., 120 Mo. App. 194 1373, 4705
v. Rogers, 10 La. Ann. 631 191, 217
Goodman v. Carroll, 2 Humph. 490 1559
v. Floyd, 2 Humph. 59 4331
v. Harvey, 4 A. & E. 870 1824
v. Lehigh Valley R. Co., 82 N. J. L. 450 1454
v. Missouri, etc., R. Co., 71 Mo. App. 460 3393, 3403
v. Pocock, 15 Q. B. 576 2549
v. Simonds, 20 How. 343, 366 2818
v. Wolf, 95 App. Div. (N. Y.) 522 1990
Goodno v. Oshkosh, 28 Wis. 300 412, 1495, 3528, 3529, 4693, 4748, 4831
Goodnough v. Kinney, 205 Mass. 203 2501
Goodnow v. Litchfield, 63 Iowa 275 1016
v. Plumbe, 64 Iowa 672 1016
v. Smith, 18 Pick. 414 752, 781
v. Willard, 5 Met. 517 39
Goodpaster v. Porter, 11 Iowa 160 1937
Goodrich v. Burlington, etc., R. Co., 97 Iowa 521 4770
v. Cort (Del.), 77 Atl. 1049 4832
v. Dorset M. Co., 60 Vt. 280 3855
v. Foster, 131 Mass. 217 1738
v. Hubbard, 51 Mich. 62 2255, 2290, 2687, 2693
v. Starr, 18 Vt. 227 496, 1617
v. Thompson, 4 Robert. 75 2922, 2925
v. Tracy, 43 Vt. 314 644

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v. Western U. Tel. Co., 53 N. Y. Super. 46, 58 N. Y. Super. 26 232
Goodson v. Stewart, 154 Ala. 660 1325, 3781, 3828
Goodspeed v. East Haddam Bank, 22 Conn. 530 1332
v. Fuller, 46 Me. 141 2066
Goodtitle v. Tombs, 3 Wils. 118 3695, 3699, 3701
Goodwill v. Heim, 212 Pa. 595 1073
Goodwillie v. McCarthy, 45 Ill. 186 3037
Goodwin v. Appleton, 22 Me. 453 1485, 1489
v. Bath, 77 Me. 462 1211
v. Davis, 15 Ind. App. 120 2831
v. Dick, 220 Mass. 556 4394
v. Francis, L. R. 5 C. P. 295 2984
v. Henney, 49 Conn. 563 2212
v. Lyon, 4 Port. 297 2005
v. Massachusetts Mut. L. Ins. Co., 73 N. Y. 480, 497 3072
v. Morse, 9 Metc. (Mass.) 278 534, 537, 543, 556, 564
v. Nickerson, 51 Cal. 166 1841
v. Wilbur, 104 Ill. App. 45 4409
Goodwine v. Evans, 134 Ind. 262 1433, 4035, 4049, 4125
v. Kelley, 33 Ind. App. 57 1981
v. State, 81 Ind. 109 1587
Goodwyn v. Goodwyn, 20 Ga. 600 1461
Goodyear v. Watson, 14 Barb. 481 2799
v. Williams, 73 Kan. 192 686
Goodyear S. M. Co. v. Boston T. Co., 176 Mass. 115 3145
v. Selz, 157 Ill. 186 876, 881
Gookin v. Graham, 5 Humph. 480 2381
Goons v. McKees Rocks Borough, 243 Pa. 340 1359
Gorden v. Butts, 2 N. J. L. 334 209
Gorder v. Hilliboe, 17 N. D. 281 4291
Gordner v. Baldes L. Co., 144 N. C. 110 3734
Gordon v. Anthony, 16 Blatch. 234 4450
v. Atlantic C. L. R. Co., 7 Ga. 354 4209, 4225
v. Baxter, 74 N. C. 470 16
v. Brewster, 7 Wis. 355 312, 1258, 2550
v. Brown, 4 Ired. Eq. 399 840
v. Browne, 2 Johns. 150 3010
v. Bruner, 49 Mo. 570 541, 555
v. Buchannan, 5 Yerg. 71 2987
v. Calvert, 2 Sim. 253 2771
v. Clapp, 5 Vt. 129 1637
v. Constantine H. Co., 117 Mich. 620 294
v. Decker, 19 Wash. 188 1919
v. Ellenville & K. R. Co., 195 N. Y. 137 9
v. First Universalist Soc. of Marlborough, 217 Mass. 30 2512
v. George, 12 Ind. 408 3167
v. Goodwin, 2 N. & McC. 70 422
v. Grand Rapids, & I. R. Co., 103 Mich. 379 3781
v. Hobart, 2 Story 243 726, 742
v. Irvine, 105 Ga. 144 2383
v. Jenney, 16 Mass. 465 1665, 1666, 4335, 4343
v. Jones, 27 Tex. 620 3827
v. Kansas City S. R. Co., 222 Mo. 516 4826
v. Kennedy, 2 Bin. 287 1528
v. Mass. F. & M. Ins. Co., 2 Pick. 249 3014
v. Mead, 81 Vt. 36 1107, 2493
Gordon v. Moore, 44 Ark. 349, 355 749, 753, 2823
v. Norris, 49 N. H. 376 229, 2225, 2227, 2276
v. Northern Pac. R. Co., 39 Mont. 571 1380, 4705
v. Noxres, 49 N. H. 376 2261
v. Parker, 2 Sm. & M. 485 2329
v. Phelps, 7 J. J. Marsh. 619 962, 1184, 1879
v. Sanborn (Tex. Civ. App.), 35 S. W. 291 231
v. State, 11 Ark. 12 1636
v. Strange, 1 Ex. 477 623
v. Swan, 12 East 419 1033, 1034
v. Third Nat. Bank, 56 Fed. 790 1766
v. Wansey, 21 Cal. 77 636, 637
Gordon M. Co. v. Bartels B. Co., 206 N. Y. 528 655, 2260, 2276
Gore v. Brazier, 3 Mass. 523 2110, 3188, 3717
v. Buck, 1 B. Mon. 209 1109
v. Mallsby, 110 Ga. 893 2351
v. Marshall Field & Co., 184 Ill. App. 486 4840, 4841
v. Townsend, 105 N. C. 228 727
Gorgas, The, 10 Ben. 666 5003
Gorgas v. Philadelphia, etc., R. Co., 144 Pa. 1 3993, 3999, 4116
v. Philadelphia, etc., R. Co., 215 Pa. 501 4042, 4124, 4134
Gorham v. Dallas, etc., R. Co., 41 Tex. Civ. App. 615 2230, 2358
v. Kansas City & S. R. Co., 113 Mo. 408, 421 4732, 4748
v. New Haven, 79 Conn. 670 3880, 3885, 3912
v. Peyton, 3 Ill. 363 1865
v. St. Louis, etc., R. Co., 112 Mo. App. 205 1498
Goring v. Fitzgerald, 105 Iowa 507 4383, 4401
Gorman v. Budlong, 23 R. I. 169 30
v. Carr, 7 Pennew. (Del.) 292 2462, 2472
v. Chicago, etc., R. Co., 166 Mo. App. 320 3866, 3982
v. Miller, 27 Pa. Super. Ct. 62 3190
v. New York, etc., R. Co., 128 App. Div. (N. Y.) 414 4768
v. Park, 100 Fed. 553 1444
v. Southern Pac. Co., 97 Cal. 1 1338, 3450, 3472, 3475, 3502
v. Sutton, 32 Pa. 247 469, 4568
v. Wheeler, 10 Gray 362 2956
Gorsuth v. Butterfield, 2 Wis. 237 1852
Gorton v. Harmon, 152 Mich. 473 4891
Gosa v. Southern R. Co., 67 S. C. 347 1314, 1318, 1471
Gosdin v. Williams, 151 Ala. 592 1429, 3739, 3761, 3764
Goshen v. England, 119 Ind. 368 476, 3405, 4660, 4786, 4787
Goshorn v. Wheeling M. & F. Co., 65 W. Va. 250 1498
Goslin v. Hodson, 24 Vt. 140 538, 1411
Gosman, In re, 17 Ch. Div. 771 1040
Goss v. Bowen, 104 Ind. 207 820, 1917
v. Calkins, 164 Mass. 546 698
v. Dysant, 31 Tex. 186 1101, 2395
v. Ellison, 136 Mass. 503 755, 768, 773
v. Goss, 102 Minn. 346 326, 1502
v. Lester, 1 Wis. 43 574
v. Missouri Pac. R. Co., 50 Mo. App. 614 4832, 4893
v. Nugent, 5 B. & Ad. 58 764
v. Whitehead, 33 Miss. 213 1830, 1849

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Gossard v. Woods, 98 Ind. 195 2276
Gossett v. Southern R. Co., 115 Tenn. 376 3840, 3907, 3908
Gossler v. Eagle S. R., 103 Mass. 331 2376
Gott v. Pulsifer, 122 Mass. 235 4566
Gottbehuet v. Hubachek, 36 Wis. 515 4532
Gottheim v. Nassau E. R. Co., 60 N. Y. Misc. 69 4723
Gottlieb v. Coutant, 70 Misc. (N. Y.) 250 2562
v. Wolf Co., 75 Md. 126 376
Gottsberger v. Smith, 5 Duer 566 1640
Gottschalk v. Jennings, 1 La. Ann. 5 2507
v. Jungmann, 78 App. Div. (N. Y.) 171 2810
v. Meisenheimer, 62 Wash. 299 785, 820, 1953
Gottschall v. Kapp, 47 Pa. Super. 102 912
Goucher v. Jamieson, 124 Mich. 21 4663
Gougar v. Buffalo Specialty Co., 26 Colo. App. 8 841, 861, 917
Gouge v. Roberts, 53 N. Y. 616 1450
Gough v. Farr, 1 Y. & J. 477 3677
v. Findon, 7 Ex. 49 702
v. Goldsmith, 44 Wis. 262 4563
v. State, 32 Ind. App. 22 478, 4789
Gough & A., etc., W. Board, In re, [1904] 1 K. B. 417 4052
Gould, In re, 215 Mass. 480 5172
Gould v. Allen, 1 Wend. 182 1353
v. Banks, 8 Wend. 562 1233
v. Barnard, 3 Mass. 199 4348
v. Barratt, 2 Mood. & Rob. 171 306
v. Bishop Hill Colony, 35 Ill. 324 870, 943, 975, 998, 1003
v. Cayuga County Nat. Bank, 86 N. Y. 75 4382, 4416
v. Cayuga Nat. Bank, 99 N. Y. 333 4410, 4419
v. Emerson, 160 Mass. 438 1076
v. Erskine, 20 Ont. 347 4961
v. Fuller, 18 Me. 364 2862
v. Gould, 4 N. H. 173 779
v. Great Northern R. Co., 63 Minn. 37 77
v. Hammersley, 4 Taunt. 148 1398
v. Hudson River R. Co., 6 N. Y. 522 13
v. McCormick, 75 Wash. 61 2696
v. McKenna, 86 Pa. 297 3405, 3922, 4786
v. Merrill R. & L. Co., 139 Wis. 433 218, 4186
v. Murch, 70 Me. 288 2307
v. Oliver, 4 Bing. N. C. 134 3036
v. Scannell, 13 Cal. 430 4349
v. Stein, 149 Mass. 570 2371
v. Thompson, 4 Metc. (Mass.) 227 3096
v. United States, 1 Ct. of Cls. 183 2719
v. Weed, 12 Wend. 12 4594, 4598
v. Warner, 3 Wend. 54 1655, 1656
v. White, 54 Wash. 394 3711
v. White, 62 Wash. 406 1066
Goulds v. Brophy, 42 Minn. 109 2376
Goulds Mfg. Co. v. Cowing, 12 Blatch. 243, 14 Blatch. 315 4465, 4467
v. Cowing, 105 U. S. 253 4458, 4468, 4471
Goulet v. Asseler, 22 N. Y. 225 4176
Gourdier v. Cormack, 2 E. D. Smith 200 3743
Gourdin v. Trenholm, 25 S. C. 362, 377 2853, 2868
Gourley v. American Hardwood Lumber Co., 185 Mo. App. 360 170
v. Walker, 69 Iowa 80 526
Gouverneur v. Elmendorf, 5 Johns. Ch. 79 2211
v. Lynch, 2 Paige 300 571
Gove v. Blethen, 21 Minn. 80 4503
v. Island City M. & M. Co., 16 Ore. 93 2682
v. Watson, 61 N. H. 136 4299, 4300
Gov. Ames, The, 187 Fed. 40 5006
Governor, Opinion in Response to, 49 Mo. 216 605
Governor v. Allen, 8 Humph. 176 1559
v. Ball, Hempst. 541 418
v. Cobb, 2 Dev. 489 1583
v. Evans, 1 Dev. & Bat. 243 1607
v. Hicks, 12 Ga. 189 431
v. Matlock, 1 Hawks 425 1607
v. Matlock, 2 Hawks 366 1559
v. Pearce, 31 Ala. 465 1606
v. Perrine, 53 Ala. 807 1605
v. Robbins, 7 Ala. 79 1614
v. Wiley, 14 Ala. 172 1556
Govin v. De Miranda, 9 N. Y. Misc. 684, 79 Hun 329 1198
v. De Miranda, 140 N. Y. 474 4233
Govney v. State, 20 Ohio 20 2755
Gowen v. Gerrish, 15 Me. 273 854, 857
Gower v. Andrew, 59 Cal. 119 2902
v. Carter, 3 Iowa 244 870, 871, 985, 998, 1000
v. Saltmarsh, 11 Mo. 271 918
Gowling v. American Exp. Co., 102 Mo. App. 366 3419
Grabenheimer v. Blum, 63 Tex. 369 4420
Grable v. Margrave, 4 Ill. 372 1269, 4781, 4969
Grace v. Adams, 100 Mass. 343 3415
v. Dempsey, 75 Wis. 313 466, 4782, 4841, 4843
v. McArthur, 76 Wis. 641 4514, 4549
v. Park, 5 J. J. Marsh. 57 1399
v. Scarborough, 2 Spear 649 2186, 2188
Grace & H. Co. v. Strong, 224 Ill. 630 4870
Gracie v. Cheldon, 3 Barb. 232 1719
v. New York Ins. Co., 8 Johns. 237 3028, 3029
v. Stevens, 56 App. Div. (N. Y.) 203 2513
Grade Crossing Com'rs, In re, 152 App. Div. (N. Y.) 853 3981, 3989
In re, 201 N. Y. 32 12
Grade Crossing Com'rs, Matter of, 17 App. Div. (N. Y.) 54, aff'd 154 N. Y. 550 4006, 4095
Gradle v. Warner, 140 Ill. 123 791
Grandona v. Lovdal, 70 Cal. 161 3942
Grady v. Home F. & M. Ins. Co., 27 R. I. 435 3017
v. New York, 182 N. Y. 18 2484
v. O'Reilly, 116 Mo. 346 681, 683
v. St. Louis T. Co., 102 Mo. App. 212 1381, 4713
Graeber v. Derwin, 43 Cal. 495 4704
v. Sides, 151 N. C. 596 2844
Graeff's App., 79 Pa. 146 578
Graeme v. Adams, 23 Gratt. 234 970
v. Cullen, 23 Gratt. 266 1209
Graessle v. Carpenter, 70 Iowa 166 3769
Graeter v. De Wolf, 112 Ind. 1 1802, 2755
Graf v. Laev, 120 Wis. 177 2561, 2706
Graf & Case Realty Co. v. Lovell, 180 Mo. App. 706 2508

[REFERENCES ARE TO PAGES]

Graff v. Lemp B. Co., 130 Mo. App. 618 3251
v. Mayor, etc., 10 Md. 544 4147
Graffam v. Saco Grange, Patrons of Husbandry, No. 53, 112 Me. 508 4861, 4922, 4923, 4926, 4944
Graffenstein v. Epstein, 23 Kan. 443 4376
Grafflin v. State, 103 Md. 171 2872
Grafton v. St. Paul, etc., R. Co., 16 N. D. 313 4058, 4059
Grafton Bank v. Flanders, 4 N. H. 239 2986
v. White, 17 N. H. 389 1620
v. Woodward, 5 N. H. 99 764
Grafton-Stamps Drug Co. v. Williams, 105 Miss. 296 2380
Gragg v. Northwestern Nat. Ins. Co., 132 Mo. App. 405 3018
v. Northwestern Nat. Ins. Co., 140 Mo. App. 685 1091
Graham v. Adams, 5 Ark. 261 1887
v. Allen & Nelson Mill Co., 78 Wash. 589 4907, 4908
v. Allsopp, 3 Ex. 186 504
v. Atlantic C. L. R. Co., 98 S. C. 1 3506
v. Baker, 10 Up. Can. C. P. 426 2057, 2168
v. Bauland, 97 App. Div. (N. Y.) 141 1382
v. Baxley, 117 Ga. 42 1579
v. Bickham, 4 Dall. 148 1397, 1562
v. Bigelow, 46 Nova Scotia 116 2284, 2344, 2346, 2412
v. Burgiss, 78 S. C. 404 2214
v. Chandler, 12 Ala. 829 1599
v. Chicago, etc., R. Co., 53 Wis. 473 3281
v. Chrystal, 2 Abb. App. Dec. 263 1106
v. Connersville, etc., R. Co., 36 Ind. 463 4052, 4106
v. Consolidated T. Co., 62 N. J. L. 90 4797, 4929, 4938
v. Consolidated T. Co., 64 N. J. L. 10 4935, 4941
v. Cooper, 17 Ohio 605 712, 977
v. Cooper, 119 Md. 358 888, 2598
v. Davis, 4 Ohio St. 362 3386
v. Dillon, 144 Iowa 82 1446, 2485
v. Fitts, 53 Fla. 1046 1209
v. Frazier, 49 Neb. 90 803, 2275
v. Geneva, etc., Mfg. Co., 24 Fed. 642 4440
v. German-Am. Ins. Co., 75 Ohio 374 3017
v. Graham, 2 Keyes 21 1106
v. Graham, 34 Pa. 475 288, 2469
v. Hackwith, 1 A. K. Marsh. 423 1989
v. Ins. Co., 75 Ohio 374 3018
v. Jonesboro, etc., R. Co., 111 Ark. 598 2619
v. Lebanon, 240 Pa. 337 858
v. McCoy, 17 Wash. 63 282
v. Macon, etc., R. Co., 120 Ga. 757 2
v. Maitland, 1 Sweeny 149 2305
v. Maitland, 6 Abb. Pr. (N. S.) 327 1435, 1438
v. Maitland, 37 How. Pr. 307 2945
v. Mattoon City R. Co., 234 Ill. 483 4711, 4718
v. Merchant, 43 Ore. 294 959, 1019
v. Meyer, 4 Blatch. 129 449
v. O'Callaghan, 14 Ont. App. 477 4323
v. Pacific R. Co., 66 Mo. 536 1269, 1311, 3501, 3506, 3513
Graham v. Pittsburgh, etc., R. Co., 145 Pa. 504 4098, 4099, 4126
v. Plano Mfg. Co., 35 Fed. 597 1069, 4476
v. Plate, 40 Cal. 593 4485, 4496
v. President, etc., 46 Hun 386 75, 76
v. St. Louis, etc., R. Co., 69 Ark. 562, 66 Ark. 344 3700
v. Sly, 177 Mo. App. 348 1461
v. Smith, 1 Edm. Sel. Cas. 267 4972
v. Smith, 40 L. R. A. 503 1459
v. State, 66 Ind. 386 1567
v. Stone, 6 How. Pr. 15 4585, 4588
v. Swigert, 12 B. Mon. 522 1765, 1773
v. United States, 231 U. S. 474 2794
v. Wallace, 50 App. Div. (N. Y.) 101 4959
v. Western U. Tel. Co., 109 La. 1069 3621
v. Whitridge, 99 Md. 248 1079
v. Williams, 16 S. & R. 257 1107
v. Wilson, 6 Kan. 489 533
v. Woodson, 2 Call. 249 1068
Graham's Est., 14 Phila. 280 646, 665
Grain v. Aldrich, 38 Cal. 514 378
Grainger v. Hill, 4 Bing. N. C. 212 4366, 4606
v. Martin, 4 B. & S. 9 3014
Gram v. Cadwell, 5 Cow. 489 770, 772
Grambling-S. Co. v. Parker, 3 Ala. App. 325 1321, 4622
Gramer v. Joder, 65 Ill. 314 946
Granberry v. Hawpe, 30 Tex. 409 2395
v. Jordan, 3 Tenn. Cas. 267 (1879) 1088
Grand v. Pendergast, 58 Barb. 216 3314
Grand Ave. R. Co. v. Citizens' R. Co., 148 Mo. 665 4076
Grand Boulevard in City of New York, Matter of, 160 App. Div. (N. Y.) 80 31
Grand C. Co. v. Fitzsimmons, 1 Hudson & B. 449 3124
Grand Haven v. United States F. & G. Co., 128 Mich. 106 1582, 2755
Grand Island, etc., R. Co. v. Swinbank, 51 Neb. 521 4
Grand Junction R. & D. Co. v. County Com'rs, 14 Gray 553 4072
Grand Lodge v. Knox, 20 Mo. 433 541, 555
Grand Lodge A. O. U. W. v. Bagley, 60 Ill. App. 589 1089
v. Bagley, 164 Ill. 340 1089, 1238
v. Cleghorn, 20 Tex. Civ. App. 134 1569
Grand Lodge of L. F. v. Orrell, 206 Ill. 308, 109 Ill. App. 422 1089
Grand Rapids v. Bennett, 106 Mich. 528 4074
v. Grand Rapids & I. R. Co., 58 Mich. 641 1433, 4057
Grand Rapids, B. Co. v. Jarvis, 30 Mich. 308 3948
Grand Rapids Lumber Co. v. Blair, — Mich. —, 157 N. W. 29 5153
Grand Rapids S. F. Co. v. Robinson, 10 Ohio C. C. 93 2702
Grand Rapids Sav. Bank v. Warren, 52 Mich. 557 1077
Grand Rapids & I. R. Co. v. Diether, 10 Ind. App. 206 3286
v. Weiden, 70 Mich. 390 4007
Grand Rapids, etc., R. Co. v. Chesebro, 74 Mich. 466 3964, 3980
v. Horn, 41 Ind. 479 4133
v. Sanders, 17 Hun 552 1822
v. Van Dusen, 29 Mich. 431 415, 2693, 2710

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Grand Trunk R. Co. v. Beckett, 16 Can. Sup. Ct. 713, 13 Ont. App. 174 489
v. Central Vermont R. Co., 105 Fed. 411 1211
v. Cummings, 106 U. S. 700 433
v. Jennings, L. R. 13 App. Cas. (1888) 800 489, 4885, 4899
v. Vermont Cent. R. Co., 91 Fed. 569 1222
Grand Trunk Western R. Co. v. Lindsay, 201 Fed. 836 4753, 4808
v. Reddick, 160 Fed. 898 4909
Grand Valley I. Co. v. Fruita I. Co., 37 Colo. 483 380
Grandin v. Grandin, 49 N. J. L. 508 757, 758
Granding v. Reading, 10 N. J. Eq. 370 2469
Granger v. Collins, 6 M. & W. 458 3182
v. Kishi (Tex. Civ. App.), 139 S. W. 1002 888
v. Pierce, 112 Mass. 244 1200
v. Smyth, 70 Hun 9 1715
Grangers' Union v. Ashe, 12 Cal. App. 757 1107
Granite B. P. Co. v. Park View R. & I. Co., 168 Mo. App. 468 1048
Granite State, The, 3 Wall. 310 4998
Grannis v Chicago, etc., R. Co., 81 Iowa 444 4817
v. Linton, 30 Ga. 330 542
Grant v. Astle, 2 Doug. 723 1527
v. Button, 14 Johns. 377 519, 537, 566, 568
v. Edwards, 92 N. C. 447 1085
v. Edwards, 93 N. C. 488 1121
v. Elliot & K. Mut. F. Ins. Co., 76 Me. 514 3062
v. Frost, 80 Me. 202 767
v. Gallup, 111 Ill. 487 314
v. Grant, 3 Russ. 598, 3 Sim. 341 1563, 1573
v. Green, 41 Iowa 88 4756
v. Hardy, 33 Wis. 668 4366
v. Hathaway, 118 Mo. App. 604 4224
v. Healey, 3 Sumn. 523 616, 1153, 1155, 1902
v. Herald Co., 42 App. Div. (N. Y.) 354 4544
v. Humerick, 123 Iowa 571 685
v. Judlow, 8 Ohio St. 1 27
v. Kidwell, 30 Mo. 458 1823
v. King, 14 Vt. 367 4208, 4211
v. Lawrence, 79 Hun 565 2878
v. Louisville & N. R. Co. 129 Tenn. 398 1496, 1517
v. Ludlow, 8 Ohio St. 1 2941
v. McArthur, 153 Ky. 356 2094
v. Maslen, 151 Mich. 466 297
v. Munch, 54 Minn. 111 2013, 2014
v. Naylor, 4 Cranch 205 2753
v. New Departure Mfg. Co., 85 Conn. 421 2560
v. Pratt, 52 App. Div. (N. Y.) 540 923
v. Ridsdale, 2 Har. & J. 186 2748
v. St. Louis, etc., R. Co., 149 Mo. App. 306 8, 3887, 3902, 3923
v. Singer Mfg. Co., 190 Mass. 489 1332
v. Smith, 26 Mich. 201 363, 3784, 4256
v. Smith, 46 N. Y. 93 2755, 2767
v. Smith, 70 App. Div. (N. Y.) 301 1073
Grant v. Tallman, 20 N. Y. 191 2157, 2164
v. Townsend, 2 Hill 554 1826
v. Willey, 101 Mass. 356 3670
Grant Avenue, In re, 152 N. Y. Supp. 13 3954, 3961
Grant Boulevard, 212 N. Y. 538 4055
Grant County v. Lake County, 17 Ore. 453 1043
Grantier v. Austin, 66 Hun 157 2061, 2066
Granulator Soap Co. v. Haddow, 159 App. Div. (N. Y.) 563 1728
Grass Valley Quartz Mining Co. v. Stackhouse, 6 Cal. 413 1360
Grasselli v. Lowden, 11 Ohio St. 349 887, 889, 921
Grasselli C. Co. v. Davis, 166 Ala. 471 1382, 1471
Grasser & B. B. Co. v. Rogers, 112 Mich. 112 736, 2764
Gratiot v. Missouri Pac. R. Co., 116 Mo. 450 4826
Gratiot St. W. Co. v. Missouri, etc., R. Co., 124 Mo. App. 545 3329, 3341, 3415
Grau v. Grau, 37 Ind. App. 635 1353
Gravel v. Clough, 81 Iowa 272 4240
Graveley v. Graveley, 25 S. C. 1 599, 1084
Gravenstine's Est., 18 Phila. 9 1017
Graver v. Sholl, 42 Pa. 58 35
Graves v. Adams Exp. Co., 176 Mass. 280 3414, 3415
v. Baltimore, etc., R. Co., 76 N. J. L. 362 4183, 4184
v. Battle Creek, 95 Mich. 266 1466
v. Berdan, 26 N. Y. 498 547, 3142, 3143, 3182
v. Brownson (Tex. Civ. App.), 120 S. W. 560 3189, 3200, 3208
v. Cameron, 161 N. C. 549 1399, 1407
v. Clark, 6 Blackf. 183 1856
v. Dash, 12 Johns. 17 1903, 1907
v. Dawson, 130 Mass. 78 4602
v. Dawson, 133 Mass. 419 4602
v. Dill, 159 Mass. 74 2509
v. Dodson, 8 Yerg. 161 1358
v. Friend, 5 Sandf. 568 655
v. Glass, 86 Iowa 261 2692, 2701
v. Hardesty, 19 La. Ann. 186 790, 802
v. Harris, 63 Fla. 169 3734
v. Joice, 5 Cow. 261 3693
v. Kansas City, etc., R. Co., 69 Mo. App. 574 3887
v. Key, 3 B. & Ad. 313 749
v. Lake Shore R. Co., 137 Mass. 33 3412
v. Lebanon Nat. Bank, 10 Bush 23 2795, 4388
v. McFarlane, 2 Cold. 167 819
v. Neeves, 183 Ill. App. 235 1920
v. Porter, 11 Barb. 592 3133, 3137
v. Rivers, 123 Ga. 224 3662, 3666
v. Saline County, 104 Fed. 61 1041, 1199
v. Sanders, 125 Fed. 690 2486
v. Scott, 104 Va. 372 4602, 4603
v. Smith, 4 Tex. Civ. App. 537 2851
v. State, 9 Ala. 448 468
v. Waller, 19 Conn. 90 1529, 4598
v. Washington M. Ins. Co., 12 Allen 391 3010
v. Woodbury, 4 Hill. 559 587
Gray v. Ballard, 22 Minn. 278 1364
v. Barton, 62 Mich. 196 17
v. Bass, 42 Ga. 270 2946
v. Bennett, 3 Metc. (Mass.) 522 991
v. Boston Elevated Ry. Co., 215 Mass. 143 488

[REFERENCES ARE TO PAGES]

Gray v. Boston G. L. Co., 114 Mass. 149 2430
v. Bremer, 122 Iowa 110 1716
v. Briscoe, Noy, 142 2056, 2077, 2089, 2172
v. Briscoe, 6 Bush 687 . 958, 960
v. Brooklyn Union P. Co., 35 App. Div. (N. Y.) 286 4574
v. Brown, 1 Rich. 351 1642
v. Bullard, 22 Minn. 278 1368, 4315
v. Case, 51 Mo. 463 1941
v. Case School of Applied Science, 62 Ohio St. 1 1083, 1085
v. Central R. Co., 157 N. Y. 483 1094, 1097
v. Central R. Co., 82 Hun. 523 2237
v. Chicago, etc., R. Co., 153 Wis. 637 4681
v. Chicago, etc., R. Co., 160 Iowa 1 4947
v. Cincinnati S. R. Co., 11 Fed. 683 3522
v. Coffin, 9 Cush. 192, 206 452
v. Crocheron, 8 Port. 191 4300
v. Crosby, 18 Johns. 219 839, 871, 877, 926, 1002
v. Durland, 50 Barb. 100 4960
v. Durland, 51 N. Y. 424 4958, 4963
v. Elzroth, 10 Ind. App. 587 4502, 4508, 4576
v. Ft. Plain, 105 App. Div. (N. Y.) 215 3993, 4105
v. Goode, 72 Ill. App. 504 1827
v. Gray, 2 J. J. Marsh. 21 2007
v. Gray, 47 N. Y. 552 700
v. Haig, 20 Beav. 219 1414
v. Hall, 29 Kan. 704 2275
v. Handkinson, 1 Bay 278 2047, 2201
v. Hayburst, 157 Ill. App. 488 1089
v. Herman, 75 Wis. 453 679, 681
v. Hook, 4 N. Y. 449 1850, 1852
v. Howell, 205 Pa. 211 2004
v. Iowa Cent. R. Co., 129 Iowa 68 4124
v. Kaufman D. & I. C. Co., 9 App. Div. (N. Y.) 115 3111
v. Linton, 38 Colo. 175 303, 1301, 3195, 3196, 3206, 3208
v. Little, 126 N. C. 385 4892
v. McDonald, 104 Mo. 303 4865
v. McLeal, 17 Ill. 404 1711
v. Manhattan R. Co., 16 Daly 510 4112
v. Meek, 101 Ill. App 463 1936
v. Meek, 199 Ill. 136 1936, 1941, 1952
v. Merchants' Ins. Co., 125 Ill. App. 370 1089
v. Minnesota Tribune Co., 81 Minn. 333 4592
v. Missouri Pac. R. Co., 64 Mo. 47 3389
v. Mobile T. Co., 55 Ala. 387 3386
v. Murray, 3 Johns. Ch. 167 2534, 2914, 2923
v. New Paynesville, 89 Minn. 258 2663
v. Parker, 38 Mo. 160 361
v. Phillips, 54 Tex. Civ. App. 148 4874, 4900
v. Publishing Co., 89 N. Y. St. Rep. 35 4597
v. Reed, 65 Vt. 178 2590
v. Reeves, 69 Wash. 374 4380, 4394
v. Robertson, 174 Ill. 242 2499
v. Robinson, 95 Miss. 1 1828
v. St. Louis, etc., R. Co., 54 Mo. App. 666 3343, 3387, 3393
v. Salt Lake City, 44 Utah 204 3953, 3954
Gray v. Sampers, 35 App. Div. (N. Y.) 270 4544, 4545
v. Seckham, L. R. 7 Ch. 680 2807
v. Stevens, 28 Vt. 1 4169
v. Strickland, 163 Ala. 344 4839
v. Tanning, 73 Conn. 115 4624
v. Telegraph Co., 108 Tenn. 39 3557, 3612
v. Times N. Co., 74 Minn. 452 4592
v. Times N. Co., 78 Minn. 323 4549
v. Veirs, 33 Md. 159 1714
v. Waln, 2 S. & R. 229 3036, 3294
v. Washington W. P. Co., 30 Wash. 665 4652, 4672, 4673
v. Waterman, 40 Ill. 522 3832
v. Worden, 29 Up. Can. Q. B. 535 1888
Gray-M. P. B. Co. v. McNally, 138 Ky. 823 1499, 4815
Gray's Harbor C. Co. v. Continental Nat. Bank, 74 Mo. App. 633, 638 2929, 2931
Graybill v. De Young, 140 Cal. 323 4512, 4524, 4537
v. Warren, 4 Ga. 528 1200
Grayhek v. Stern, 154 Ill. App. 385 4930, 4934
Grays Harbor B. Co. v. Lownsdale, 54 Wash. 83 3959, 4002, 4036, 4040, 4049
v. Lownsdale, 104 Wash. 267 3959
Grays Harbor, etc., R. Co. v. Kauppinen, 53 Wash. 238 4101
v. Turnbull-J. L. Co., 163 Ill. App. 231 2237, 2307
Grayson v. Buchanan, 88 Va. 251 2203
v. Lilly, 7 T. B. Mon. 6 1544
v. Lynch, 163 U. S. 468 66
v. Marshall (Tex. Civ. App.), 145 S. W. 1034 866, 1032
v. St. Louis T. Co., 100 Mo. App. 60 3481, 4624, 4628
v. Wilkinson, 5 Sm. & M. 268 2943
Grayson's App., 108 Pa. 581 752
Graysonia-N. L. Co. v. Carroll, 102 Ark. 460 4890
Grear v. International S. Yards, 43 Tex. Civ. App. 370 889
v. Shaw, 1 Pin. 608 305
Greasly v. Codling, 2 Bing. 263 16
Great Falls Mfg. Co. v. United States, 18 Ct. of Cls. 160, 198 4033
Great Lakes E. Works v. Ice & C. S. Co., 6 Ohio N. P. (N. S.) 289 2638
Great Northern, The, 72 Fed. 678 2717, 2730
Great Northern R. Co. v. Akeley, 88 Minn. 237 307
v. McCord, 143 Wis. 589 3756
v. Quigg, 213 Fed. 873 3953
v. Shepherd, 8 Ex. 30 3534
Great Western Coal & Coke Co. v. Boyd, 43 Okla. 438 4871, 4872
v. Coffman, 43 Okla. 404 4871, 4872
v. St. Louis, etc., C. Co., 140 Ill. App. 368 2236
Great Western G. Co. v. Chambers, 155 Cal. 364, 153 Cal. 307 2927
Great Western Ins. Co. v. Rees, 29 Ill. 272 1830, 1853, 1859, 1861
v. Staaden, 26 Ill. 365 3020
Great Western Power Co. v. Pillsbury, 170 Cal. 180 5191, 5192, 5194
Great Western R. Co. v. Ackroyd, 44 Colo. 454 3958
v. Miller, 19 Mich. 314 3515
v. Redmayne, L. R. 1 C. P. 329 196, 3370

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Greaves v. Ashlin, 3 Camp. 426 2228
v. Newport, 41 Minn. 240 1707
Grebert-Borgnis v. Nugent, 15 Q. B. Div. 85 187, 198, 199, 2350
Greeley v. Stilson, 27 Mich. 153 364, 4260
v. Thurston, 4 Me. 479 788
Greeley I. Co. v. Von Trotha, 48 Colo. 12 1480, 1484
Greeley, etc., R. Co. v. Yeager, 11 Colo. 345 1301
v. Yount, 7 Colo. App. 189 3809
Greely v. Bartlett, 1 Me. 172 2955, 2970
v. Dow, 2 Metc. (Mass.) 176 2855, 2863
v. Hunt, 21 Me. 455 2937
v. Tremont Ins. Co., 9 Cush 415 3036
Green v. Ansley, 92 Ga. 647 1944
v. Atlantic C. L. R. Co., 83 S. C. 498 1281, 3322
v. Batson, 71 Wis. 54 536
v. Belchin, 1 Atk. 506 1083
v. Biddle, 8 Wheat. 1 2027, 2028, 3709
v. Blackwell, 32 N. J. Eq. 768 1081
v. Bliss, 12 How. Pr. 428 1486
v. Boston & L. R. Co., 128 Mass. 221 3398, 4181, 4235
v. Brookins, 23 Mich. 48 2885
v. Brown, 22 N. Y. Misc. 279 998
v. Burke, 23 Wend. 490 633
v. Button, 2 Cr., M. & R. 707 115, 159, 4564
v. Campbell, 2 Jones Eq. 446 2211
v. Catawba P. Co., 75 S. C. 102 4745
v. Chicago, 97 Ill. 370 3957
v. Chicago, etc., R. Co., 49 Fed. 907 1054
v. Chicago, etc., R. Co., 92 Fed. 873 767
v. Chicago, etc., R. Co., 156 Mo. App. 259 1417, 3312, 3430
v. Clark, 12 N. Y. 343 1680
v. Cole, 127 Mo. 587 2508
v. Craig, 47 Mo. 90 1269
v. Eales, 2 Q. B. 225 3150, 3154, 3162, 3254
v. Fall River, 113 Mass. 262 4108
v. Farmer, 4 Burr. 2214 457, 514
v. Farmers' Con. D. Co., 113 La. 869 32, 1259
v. Ford, 79 Ga. 130 709
v. Gilbert, 21 Wis. 395 2525, 2528, 2534
v. Green, 9 Cow. 46 2013
v. Green, 119 Ky. 103 1446, 2472
v. Gregory (Tex. Civ. App.), 142 S. W. 999 286, 1953
v. Haley, 5 R. I. 260 2663
v. Hall, 1 Houst. 506 4262
v. Hollenbeck, 66 Ore. 104 4305
v. Houston E. Co., 40 Tex. Civ. App. 260 3452
v. Hudson River R. Co., 28 Barb. 9 4763, 4846
v. Hudson River R. Co., 2 Keyes 294 4846
v. Hulett, 22 Vt. 188 2525
v. Irving, 54 Miss. 462 2096
v. Irvington, 76 N. J. L. 5 3990
v. Lancaster County, 61 Neb. 473 762
v. Langdon, 28 Mich. 221 642, 765
v. Lineville D. Co., 150 Ala. 112 2339
v. Lucas, 31 L. T. Rep. 731 2508
Green v. Lucas, 33 L. T. (N. S.) 584, 587 2501
v. McCracken, 64 Kan. 330 4226
v. Macy, 36 Ind. App. 560 40, 4223
v. Mann, 11 Ill. 613 210, 234, 316, 3236, 3243
v. Missouri, etc., R. Co., 121 Mo. App. 720 3471
v. Muskegon T. & L. Co., 171 Mich. 18 4738
v. Okanogan County, 60 Wash. 309 2465
v. Omnibus Co., 7 C. B. (N. S.) 290 1331, 1332
v. Plank, 48 N. Y. 669 1431
v. Price, 13 M. & W. 695 887, 912
v. Price, 16 M. & W. 346 912
v. Quisenberry, 133 Ky. 561 1721, 1727
v. Ramage, 18 Ohio 428 572
v. Russell, 132 Mass. 536 660
v. Shoemaker, 111 Md. 69 54, 87, 90, 345, 3484, 3906
v. Shurtliff, 19 Vt. 592 784, 1230
v. Sizer, 40 Miss. 530 2329
v. Southern Pac. Co., 122 Cal. 563 4862
v. Southern States L. Co., 163 Ala. 511 2512
v. Spencer, 3 Mo. 318 3663
v. Sperry, 16 Vt. 390 4301
v. Stacy, 90 Wis. 46 1074
v. State, 73 Cal. 29 4019
v. Stephens, 37 Mo. App. 641 4299
v. Stockwell, 87 Vt. 459 3807
v. Stone, 1 Har. & J. 405 1542
v. Sun Co., 32 Pa. Super. Ct. 521 3846, 3880
v. Telegraph Co., 136 N. C. 506 3631
v. Tennant, 2 Harr. 336 3718
v. Terminal R. Ass'n, 211 Mo. 18 1482
v. Tyler, 39 Pa. 361 706
v. Western U. Tel. Co., 36 N. C. 489 3629
v. Williams, 45 Ill. 206 234, 3185, 3191, 3196, 3216, 3231, 4194
v. Witte, 5 Ind. App. 343 2404, 2407
v. Wright, 8 M. & W. 360 1360
v. Wynn, L. R. 4 Ch. App. 204 2823
Green Bay L. Co. v. Independent School Dist., 125 Iowa 227 2592
Green Bay & M. C. Co. v. Kaukauna W. P. Co., 112 Wis. 323 2, 487, 1354, 3798
Green Co., B. S. v. Smith, 52 Ill. App. 158 2216
Green F. Co. v. Pate, 99 Ga. 60 1704, 1705
Green-W. S. Co. v. Chicago, etc., R. Co., 139 Iowa 123 140
Greenawalt v. Este, 40 Kan. 418 621
Greenbaum v. Austrian, 70 Ill. 591 3728
v. Martinez, 86 Cal. 459 4270
Greenberg v. People, 225 Ill. 174 1604
v. Western T. Ass'n, 140 Cal. 357 125, 1272, 1316
v. Whitcomb L. Co., 90 Wis. 225 2994, 2995
Greenblatt v. McCall & Co., 67 Fla. 165 863, 917, 1502
Greenby v. Brooks, 13 Ky. L. Rep. 298 (Ky. Super. Ct.) 2447
v. Wilcocks, 2 Johns. 1 2058, 2060
Greene v. Bateman, 2 W. & M. 359 2216
v. Caldwell, — Ky. —, 186 S. W. 648 5151
v. Creighton, 7 R. I. 1 2181, 2188
v. Goddard, 9 Metc. (Mass.) 212 228, 273

[REFERENCES ARE TO PAGES]

Greene v. Hallenback, 24 Hun 116 4380
v. Hatch, 12 Mass. 195 580, 584, 585
v. Hearne, 3 T. R. 301 1402
v. Hereford, 12 Ariz. 85 531
v. Johnson, 126 App. Div. (N. Y.) 33 1373
v. Lewis, 85 Ala. 221 2216
v. Linton, 7 Port. 133 2524, 2529
v. Louisville & N. R. Co., 163 Ala. 138 140, 3332
v. McAuley, 70 Kan. 601 1815, 1816
v. Nunnemacher, 36 Wis. 50 3839, 3933, 3936
v. Pacific Ins. Co., 9 Allen (Mass.) 217 3014
v. Tyler, 39 Pa. 361 721, 726
Greeney v. Pennsylvania W. Co., 29 Pa. Super. 136 1278, 1309, 1385, 1386, 3828
Greenfield v. Chicago & N. R. Co., 83 Iowa 270 3774, 3775
v. Wells Fargo & Co. (Misc.), 134 N. Y. Supp. 913 3423
v. Wilson, 13 Gray 384 1601
Greenfield Bank v. Leavitt, 17 Pick. 1 480, 481, 4190, 4197, 4299, 4307
Greenfield Sav. Bank v. Simons, 133 Mass. 415 2902, 2903
Greenhaw v. Holmes, 8 Ariz. 94 963
Greening v. Wilkinson, 1 C. & P. 625 4171
Greenish v. Standard S. Ref., 2 Low. 553 1221, 1227
Greenland v. Chaplin, 5 Ex. 243 161
Greenleaf v. Francis, 18 Pick. 117 7
v. Kellogg, 2 Mass. 568 1199, 1880
v. McColley, 14 N. H. 303 3668, 3673
v. Moody, 13 Allen 363 2925
v. Queen, 1 Pet. 138 2212
v. Stockton Combined H. & A. Works, 78 Cal. 606 882, 1429
Greenlee v. Southern R. Co., 122 N. C. 977 22
Greenly v. Hopkins, 10 Wend. 96 1134
Greenough v. Balch, 7 Me. 461 1850, 1852
v. Walker, 5 Mass. 214 625, 630
Greensboro v. McGibboney, 93 Ga. 672 32
Greensboro, etc., T. Co. v. Stratton, 120 Ind. 294 2468
Greentree v. Rosenstock, 61 N. Y. 583 2902, 2960
Greenup v. Stoker, 7 Ill. 688 3668
Greenvault v. Davis, 4 Hill 643 2068, 2094
Greenville v. Branch (Tex. Civ. App.) 152 S. W. 478 4683, 4706
v. Partlow, 14 Rich. 237 1269, 3831
Greenville, etc., R. Co. v. Partlow, 5 Rich. 428 3957, 4114
Greenwald v. Barrett, 199 N. Y. 170 3418
Greenwall T. C. Co. v. Markowitz, 97 Tex. 479 2547
Greenway v. Taylor County, 144 Iowa 332 4660, 4751, 4790
Greenwell v. Ross, 34 Fed. 656 3272, 3273
Greenwich Ins. Co. v. Columbia Mfg. Co., 73 Ill. App. 560 692
v. Memphis & C. P. Co., 4 Ohio Dec. 405 (Cincinnati Super. Ct.) 3532
v. Raab, 11 Ill. App. 636 3000
Greenwood v. Bishop of London, 5 Taunt. 727 1851
v. Colcock, 2 Bay 67 1558
v. Curtis, 6 Mass. 358 661
Greenwood v. Davis, 106 Mich. 230 2697, 2705
v. Greenwood, 28 Md. 369 4957, 4960
v. Hoyt, 41 Minn. 381 1958, 1996
v. King, 82 Neb. 17 4872, 4935, 4940
v. Ligon, 10 Sm. & M. 615 1953
v. Nall & Co., Ltd., J., [1915] 3 K. B. 97, 8 B. W. C. C. 503, 84 L. J. K. B. 1356 5208
v. Pierce, 58 Tex. 130 4375, 4407, 4408
Greenwood Union T. Co., 30 Pa. Super. 488 1287
Greer v. Burnam, 71 Ga. 31 717
v. Bush, 57 Miss. 575 2754
v. Fontaine, 71 Ark. 605 3710
v. George, 8 Ark. 133 1824
v. Hale, 95 Va. 533 978
v. International Stock Yards, 43 Tex. Civ. App. 370 1953
v. Laws, 56 Ark. 37 635
v. Louisville & N. R. Co., 94 Ky. 169 1477, 4657, 4663, 4715
v. Mayor, etc., 1 Abb. Pr. (N. S.) 206 3765
v. Newbill, 89 Ark. 509 15
v. People's Tel. & T. Co., 50 N. Y. Super. Ct. 517 2522
v. Reese, 14 Pa. Dist. 658 1506
v. Stewart, 48 Ark. 21 1719
v. Turner, 47 Ark. 17 709
v. Turner, 36 Ark. 17 827
v. Tweed, 13 Abb. Pr. (N. S.) 427 896
v. Union R. Co., 53 N. Y. Misc. 638 4835
v. Varnell, 27 Tex. Civ. App. 255 3211
v. Western U. Tel. Co., 96 S. C. 423 3657
v. White, 90 Ark. 117 4542
Greesman v. Morning Journal Ass'n, 197 N. Y. 474 4586
Gregg v. Bank, 72 S. C. 458 4218
v. Fitzhugh, 36 Tex. 127 368, 2311, 2337
v. Gregg, 37 Ind. App. 210 4978, 4979, 4980, 4981
v. Northern R., 67 N. H. 452 4144
v. Richardson, 25 Ga. 570 2137
v. Wyman, 4 Cush. 122 18
Greggs v. Greggs, 56 N. Y. 504 1134
Gregory v. Brooks, 35 Conn. 437 116, 126, 128
v. Chambers, 78 Mo. 294 223, 4623, 4649
v. Coleman, 3 Tex. Civ. App. 166 1311, 1327, 1358
v. Cotterell, 1 El. & B. 360 4161
v. Derby, 8 C. & P. 749 4608
v. Forrester, 1 McCord Ch. 318 742
v. Frothingham, 1 Nev. 253 1527
v. Hart, 7 Wis. 532, 540 697
v. Huslander, 227 Pa. 607 699
v. McDowel, 8 Wend. 435 1437, 2276, 2294, 2295
v. New York, etc., R. Co., 55 Hun 303 4704, 4749, 4751
v. Scott, 5 Ill. 392 1845
v. Slaughter, 124 Ky. 345 4720
v. Spieker, 110 Cal. 150 2325
v. Tomlinson, 68 Vt. 410 3118, 3258
v. Wells, 62 Ill. 232 784, 1229
v. Woodbery, 53 Fla. 566 4321, 4354
Gregory, D. S., & The George Washington, In re, 2 Bene. 226 4733, 4819
Gremillion v. Roy, 125 La. 524 1987
Gresham v. Harcourt, 33 Tex. Civ. App. 196 1449
v. Harcourt, 93 Tex. 149 1072

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v. Taylor, 51 Ala. 505 239, 3799
Gress v. Philadelphia & R. R. Co., 228 Pa. 482 109
Gress L. Co. v. Coody, 104 Ga. 611 3809
Gresselli v. Lowden, 11 Ohio St. 349 922
Grether v. McCormick 79 Mo. App. 325 2502
Greve v. First Division St. Paul & P. R. Co., 26 Minn. 66 4053
Grey v. Mobile T. Co., 55 Ala. 387 3385
Greymouth-Point Elizabeth R. & C. Co. v. McIvor, 16 New Zeal. L. R. 258 4857, 4886
Gribble v. Pioneer Press Co., 34 Minn. 342 4518
Grider v. Dent, 22 Mo. 490 4970
v. Tally, 77 Ala. 422 1594
Gridley v. Capen, 72 Ill. 11 2772
v. Starr, 1 Root, 281 416
v. Tucker, Freem. Ch. 209 2098
Griebel v. Rochester P. Co., 60 Hun 319 4502
Griel v. Lehman, 59 Ala. 419 979
Gries v. Zeck, 24 Ohio St. 329 4732
Griesemer v. Oley Valley R. Co., 13 Pa. Dist. 225 3986
Griffey v. Kennard, 24 Neb. 174 3700
Griffin v. Anderson, 3 S. C. 105 668
v. Brooklyn B. Club, 68 App. Div. (N. Y.) 566 2561, 2563
v. Collins, 125 Ga. 159 1130
v. Colver, 16 N. Y. 489 47, 187, 196, 207, 208, 234, 242, 244, 1366, 2339, 2360, 2441, 2624, 2626, 2628, 2632, 2920, 3224, 3252, 3349, 3558
v. Creppin, 60 Me. 270 3735
v. Erskine, 131 Iowa, 444 657
v. Fredonia B. Co., 90 Kan. 375 4936
v. Freeborn, 181 Mo. App. 203 3232
v. Gorman, 13 Ky. L. Rep. 879 (Ky. Super. Ct.) 2942
v. Harriman, 74 Iowa 436 822
v. Knisely, 75 Ill. 411 3099, 3101
v. Lancaster, 59 Miss. 340 4311
v. Larned, 111 Ill. 438 1487
v. Levee Com'rs, 71 Miss. 767 1578
v. Lumber Co., 140 N. C. 514 4374, 4381
v. Martel, 77 Vt. 19 1439, 1454, 3813, 3824
v. Miner, 54 N. Y. Super. 46 2657
v. Moore, 52 Ind. 295 549
v. Ogletree, 114 Ala. 343 2592
v. Petty, 101 N. C. 380 668
v. Regan, 79 Mo. 73 3717
v. Reynolds, 17 How. 609 2112
v. Shreveport & A. R. Co., 41 La. Ann. 808 3951
v. Sprague E. Co., 116 Fed. 749 291
v. Thomas, 128 N. C. 310 2094
v. Tyson, 17 Vt. 35 820
v. Underwood, 16 Ohio St. 389 1607
v. Wilcox, 21 Ind. 370 26
Griffin W. Co. v. Markus, 79 Ill. App. 82 4832
Griffing v. Winfield, 53 Fla. 589 407, 1098, 3163
Griffis v. Sellars, 2 Dev. & Batt. 492 4640
Griffith v. American Bridge Co., 163 App. Div. (N. Y.) 597 1509
v. Baltimore & O. R. Co., 44 Fed. 574 1244
v. Blackwater B. & L. Co., 55 W. Va. 604 313, 2701, 2702
v. Blake, 27 Ch. Div. 474 1714
v. Bogardus, 14 Cal. 410 361
v. Clay & Son, [1912] 2 Ch. 291, aff'g [1912] 1 Ch. 291 3885
Griffith v. Creighton, 61 Mo. App. 1 698, 747, 748
v. Furry, 30 Ill. 251 946
v. Grogan, 12 Cal. 317 669
v. Hodges, 1 C. & P. 419 807, 809
v. Maxfield, 63 Ark. 548 1953
v. Miller, 6 J. J. Marsh. 329 1541
v. New York L. Ins. Co., 101 Cal. 627 627
v. Reed, 21 Wend. 520 1867, 1868
v. Robertson, 73 Kan. 666 2470, 2473
v. Sitgreaves, 90 Pa. 161 2825
Griffith's Est., 21 Pa. Dist. 82 1081, 1085
Griffith's Est., 147 Pa. 274 1130, 1131
Griffiths v. Earl of Dudley, 9 Q. B. Div. 357 23
v. Gilbertsens & Co., Ltd., 8 B. W. C. C. 548 5209
v. Johnson, 3 New South Wales St. Rep. 107 40
v. Kellogg, 39 Wis. 290 1849
v. Lewis, 8 Q. B. 841 1529
v. Parry, 16 Wis. 218 1848
v. Perry, 1 E. & E. 680 2276, 2299
v. Powers, 216 Mass. 169 1199
v. Teetgen, 15 C. B. 344 4962
Grigby v. Oakes, 2 B. & P. 526 1884
Griggs v. Austin, 3 Pick. (Mass.) 20 3302
v. D. & M. R. Co., 10 Mich. 117 2198
v. Day, 136 N. Y. 152 4273, 4279
v. Day, 158 N. Y. 1 4223, 4244, 4283
v. Fleckenstein, 14 Minn. 81 154
v. Foote, 4 Allen, 195 12
v. Ganford, 50 Ill. App. 172 1100
v. Smith, 12 N. J. L. 22 3727
Grigsby v. Clear Lake W. Co., 40 Cal. 396 3933
v. Day, 9 S. D. 585 4273
v. Ford, 3 How. (Miss.) 184 1398
Grills v. Farah, 21 Ont. L. R. 457 531
Grim's Est., 147 Pa. 190 1116
Grimes v. Ballard, 8 B. Mon. 625 1953
v. Blake, 16 Ind. 160 1202
v. Blofield, Cro. Eliz. 541 680
v. Bowerman, 92 Mich. 258 153, 171, 333, 4619, 4625
v. Butler, 1 Bibb 192 1559
v. Doe, 8 Blackf. 371 1194
v. Greenblatt, 47 Colo. 495 156, 434, 4837
v. Hilliary, 150 Ill. 141 698, 700
v. Pennsylvania Co., 36 Fed. 72 137
v. Taylor, 93 Ill. App. 494 2858, 2891
v. Watkins, 59 Tex. 140 1135
Grimestad v. Lofgren, 105 Minn. 286 1267, 1321, 4646
Grimman v. Legge, 8 B. & C. 324 3130
Grinmelman v. Union Pac. R. Co., 101 Iowa 74 4908
Grimmett v. Ousley, 78 Ark. 304 763
Grimshaw v. Bender, 6 Mass. 157 1180, 1896, 1906, 1908
Grimsted v. Toronto R. Co., 21 Ont. App. 578 136
Grindle v. Eastern Exp. Co., 67 Me. 317 194, 476, 2918, 3379
Grindol v. Ruby, 14 Ill. App. 439 2815
Grindstaff v. Merchants' I. & T. Co., 61 Ore. 310 2501
Gring v. Lerch, 112 Pa. 244 3664, 3683, 3685
Grinnell v. Bebb, 126 Mich. 156 1399, 1404
v. Herbert, 5 A. & E. 436 1868
v. Phillips, 1 Mass. 530 1480, 1483
v. Spink, 128 Mass. 25 625
v. Stewart, 32 Barb. 544 4638

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Grinnell v. Taylor, 85 Hun 85 1416, 4693
v. Wells, 7 Man. & G. 1041 4771
v. Western U. Tel. Co., 113 Mass. 299 3549, 3554
v. Weston, 95 App. Div. (N. Y.) 454 4837, 4841
Grisard v. Hinson, 50 Ark. 229 2814, 2817
Grisell v. Noel Bros. F.-F. Co., 9 Ind. App. 251 2462, 2484
Griser v. Schoenborn, 109 Minn. 297 1267, 1317
Grisham v. Bodman, 111 Ala. 194 486, 515, 4201
Grissom v. Bank, 87 Tenn. 350 687
v. Sorrell, 8 Humph. 372 1989
Grist v. Hodges, 3 Dev. 203 1358, 2098
Griswold v. Davis, 31 Vt. 390 686
v. Griswold, 143 Cal. 617 4606, 4634, 4635, 4649
v. Haven, 25 N. Y. 595 1330
v. Illinois Cent. R. Co., 90 Iowa 265 20
v. New York Cent., etc., R. Co., 115 N. Y. 61 412, 1428
v. New York Ins. Co., 1 Johns. 205 3289
v. New York Ins. Co., 1 Johns. 205, 3 Johns. 321 3294
v. New York, etc., R. Co., 53 Conn. 371 21
v. Onondaga County Sav. Bank, 93 N. Y. 301 743
v. Sabin, 51 N. H. 167 1941, 1947
v. Wentworth, 85 Vt. 205 1004
Griveaud v. St. Louis C. & W. R. Co., 33 Mo. App. 458, 466 4692
Groat v. Detroit United R., 153 Mich. 165 1359, 1384
v. Gillespie, 25 Wend. 383 305, 1702, 1704
Grocers' Bank v. Kingman, 16 Gray 473 2770
Grocers' W. Co. v. Bostock, 22 Ont. L. R. 130 2378
Groeltz v. Armstrong, 125 Iowa 39 303, 2982, 2984
Groesbeck v. Harris, 82 Tex. 411 2134
Groff v. Ankenbrandt, 124 Ill. 51 3842
v. Groff, 209 Pa. 603 1876
v. Philadelphia, 150 Pa 594 3954
Grogan v. Broadway F. Co., 87 Mo. 321 4942
Groh v. South, — Md. —, 89 Atl. 321 1261, 1266, 1316
v. South, 119 Ind. 297 3922, 3923
v. South, 121 Md. 639 389
Grollman v. Montgomery Ward & Co., 181 Ill. App. 598 1014
Grommes v. St. Paul T. Co., 147 Ill. 634 3121
Gronan v. Kuckkuck, 59 Iowa 18 461, 1379, 4664, 4782
Grooms v. Neff H. Co., 79 Ark. 401 685
Groot v. Oregon S. L. R. Co., 34 Utah 152 432, 3321, 3383, 3430
Gropp v. Perkins, 148 Ky. 183 887
Grorud v. Lossl, 48 Mont 274 1379, 4613, 4614
Grose v. Hennessey, 13 Allen 389 2395, 2396
Gross v. Davis, 87 Tenn. 226, 2854, 2861, 2862, 2863, 2864, 2868
v. Electric T. Co., 180 Pa. 99 4884
v. Hays, 73 Tex. 515 4318
v. Heckert, 120 Wis. 314 206, 228, 235, 294, 1098, 1448, 1452, 3185, 3196, 3197, 3200
v. Hochstim, 72 N. Y. Misc. 343 532, 3661, 3686
Gross v. Kierski, 41 Cal. 111 2380, 2397
v. Leber, 47 Pa. 520 4378
v. Moore, 14 App. Div. (N. Y.) 353 2492
v. Partenheimer, 159 Pa. 556 947
v. Pennsylvania, etc., R. Co., 65 Hun 191 424
v. Rice, 71 Me. 241 4839
v. Saratoga European Hotel & Restaurant Co., 176 Ill. App. 160 1442, 4235, 4284
v. Scheel, 67 Neb. 223 4222
Gross C. Co. v. Rose, 126 Wis. 24 4506, 4508
Grossman v. Houston, etc., R. Co., 99 Tex. 641 3952
Grossman Bros. & Rosenbaum v. Phillips, 83 Misc. (N. Y.) 453 745
Grosso v. Delaware, etc., R. Co., 50 N. J. L. 317 4846
Grosvenor v. Cook, 1 Dick. 208 1564
v. Ellis, 44 Mich. 452 1143
Grosvenor H. Co. v. Hamilton, [1894] 2 Q. B. 836 2110, 3126, 3182, 3188, 3202
Grote v. New York, 117 App. Div. (N. Y.) 768 1199
v. New York, 190 N. Y. 235 1200
Grote St., In re, 150 App. Div. (N. Y.) 215 4150, 4151
Grotenkemper v. Harris, 25 Ohio St. 510 411, 4870, 4899
Grotius v. Ross, 24 Ind. App. 543 4516
Groton v. Dallheim, 6 Me. 476 2937
Grotton v. Glidden, 84 Me. 589 4655, 4782
Grout v. Townsend, 2 Hill 554 1828
Grove v. Bush, 86 Iowa 94 1737, 1758
v. Dubois, 1 T. R. 112 2957
v. Great Northern L. Co., 17 N. D. 352 981
v. Wallace, 11 Colo. App. 160 1737
v. Youell, 110 Mich. 285 3182, 3192
Grover v. Buck, 34 Mich. 519 409
v. Turner, 28 Md. 600 1527
Grover & B. S. M. Co. v. Bulkley, 48 Ill. 189 2522
Groves v. Groves, 1 Wash. (Va.) 1 1001
v. McNeil, 226 Pa. 345 4938
v. Rochester, 39 Hun 5 4823
v. Sentell, 66 Fed. 179 1253
v. Wimborne, [1898] 2 Q. B. 402 22
Groves, etc., R. Co. v. Herman, 206 Ill. 34 1480
Grow v. Garlock, 97 N. Y. 81 2804
Growall v. Pacific S. Co., 21 Cal. App. 185 2754, 2762
Growbarger v. Milstead, 33 Ky. L. Rep. 186 1608
v. United States F. & G. Co., 126 Ky. 118 1562, 1595, 1608
Grubb v. Burford, 98 Va. 553 3209, 3210
v. Stewart, 47 Wash. 103 979
Grubbe v. Grubbe, 26 Ore. 363 1070
Grubbs v. North Carolina Home Ins. Co., 108 N. C. 472 3044
v. Pence, 24 Ky. L. Rep. 2183 3667, 3675
Gruber v. Baker, 20 Nev. 453 4368
Grugan v. Philadelphia, 158 Pa. 337 3990, 4030
Gruman v. Smith, 81 N. Y. 25 2314, 2948, 2966, 4178, 4179, 4244, 4284
Grund v. Pendergast, 58 Barb. 216 606
v. Tucker, 5 Kan. 70 1077
v. Van Vleck, 69 Ill. 478 449, 1329, 1344, 3829, 4167

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Grundy v. McClure, 2 Jones 142 2231
Grutacup v. Woulluise, 2 McLean 581 617, 1902
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Guano Co. v. Marks, 135 N. C. 59 699
Guarantee Co. v. Mechanics' Sav. Bank & T. Co., 80 Fed. 766 1089
v. Mechanics' Sav. Bank & T. Co., 100 Fed. 559 2755, 2759
v. Mechanics' Sav. Bank & T. Co., 183 U. S. 402, 46 L. ed. 253 3094
Guarantee T. & S. D. Co. v. Farmers' & M.'s Nat. Bank, 202 Pa. 94, 100 395
Guard v. Risk, 11 Ind. 156 1480, 1495
v. Whiteside, 13 Ill. 7 453, 782
Guardianship of Hoare, 14 Hawaii 443 1122
Guckenheimer v. Angevine, 81 N. Y. 394 363, 4256
Guckenheimer & Bros. Co. A. v. Kann, 243 Pa. 75 2853
Gudtner v. Kilpatrick, 14 Neb. 347 1792
Guengerech v. Smith, 36 Iowa 587 1306, 1317
Guerand v. Dandelet, 32 Md. 562 420
Guerard v. Rivers, 1 Bay 265 2110
Guerin v. Stacy, 175 Mass. 595 832, 859, 885
Guernsey v. Carver, 8 Wend. 492 382
v. Davis, 67 Kan. 378 432, 2907
v. Phinizy, 113 Ga. 898 1247
v. Shellman, 59 Ga. 797 4191
Guerrieri v. Industrial Ins. Comm., 84 Wash. 266 5184
Guerry v. Kerton, 2 Rich. 507 4240
Guesdorf v. Gleason, 10 Iowa 495 1611
Guest v. Macpherson (Quebec), 3 Legal News 84 1305
v. Reynolds, 68 Ill. 478 3913
Guetzkow Bros. Co. v. Andrews, 92 Wis. 214 172, 188, 194, 196, 202, 2286, 2341, 2345, 2427
v. Breese, 96 Wis. 591 3179
Guffey P. Co. v. Hamill, 42 Tex. Civ. App. 196 1032
Gugel v. Isaacs, 21 App. Div. (N. Y.) 503, aff'd 162 N. Y. 636 3147
Guhl v. Whitcomb, 109 Wis. 69 1476
Guibert v. British Ship George Bell, 3 Fed. 581 4994
Guice v. Crenshaw, 60 Tex. 344 2294
Guichard v. Brande, 57 Wis. 534 646
Guignon v. Campbell, 80 Wash. 543 1497
v. First. Nat. Bank, 22 Mont. 140 1222
v. Union T. Co., 156 Ill. 135 1905
Guild v. Butler, 127 Mass. 386 2805, 2806, 2821
v. Guild, 2 Metc. (Mass.) 229 305, 306
v. Portland R., L. & P. Co., 64 Ore. 570 4785
v. Prentis, 82 Vt. 212 1536, 3830
Guilerette v. McKinley, 27 Hun 320 501
Guilford v. Cornell, 4 Abb. Pr. 220 1721, 1730
v. McKinley, 61 Ga. 230 4290
v. Western U. Tel. Co., 163 Ala. 1 3597
Guilfoyle v. National L. Ass'n, 36 App. Div. (N. Y.) 343 622
Guilhon v. Lindo, 9 Bosw. 605 4487
Guille v. Swan, 19 Johns. 381 152, 359, 435, 3815
Guillon v. Earnshaw, 169 Pa. 463 2237, 2249
Guillou v. Peterson, 89 Pa. 163 449
Guinard v. Knapp-S. & Co., 95 Wis. 482 4835
Guinn v. Eaves, 117 Tenn. 524 1741
v. Iowa, etc., R. Co., 131 Iowa 680 3976, 4142, 4155
v. Iowa, etc., R. Co., 125 Iowa 301 4003
v. Ohio River R. Co., 46 W. Va. 151 4110, 4112
v. Phoenix Ins. Co., 80 Iowa 346 3041
Guinotte v. Chouteau, 34 Mo. 154 2066
Guion v. Guion, 16 Mo. 48 1645
v. Knapp, 6 Paige 35 571, 574
Guirney v. St. Paul, etc. R. Co., 43 Minn. 496 2976
Guisti v. Galveston Tribune, 105 Tex. 497 4501, 4535
Guiterman v. Liverpool, etc., S. Co., 83 N. Y. 358 1453, 3436
Gulf C. Co. v. Abernathy, 54 Tex. Civ. App. 137 111, 4701
Gulf Coast Transp. Co. v. Dillard, — Tex. Civ. App. —, 163 S. W. 635 3385, 3387
Gulf Compress Co. v. Insurance Co. of Pennsylvania, 129 Tenn. 586 3045
Gulf Pipe Line Co. v. Brymer (Tex. Civ. App.) 124 S. W. 1007 3798, 3805, 3893
v. Brymer, 59 Tex. Civ. App. 40 3878
Gulf Stream, The, 12 C. C. A. 613, 58 Fed. 604 4987
Gulf, etc., R. Co. v. Bagby (Tex. Civ. App.) 127 S. W. 254 4786
v. Barber, — Tex. Civ. App. —, 127 S. W. 258 3349
v. Barber, — Tex. Civ. App. —, 129 S. W. 152 3322
v. Beall, 91 Tex. 310 4845
v. Beezley (Tex. Civ. App.), 153 S. W. 651 4871, 4905
v. Bell, 24 Tex. Civ. App. 579, 594 4724
v. Blue, 46 Tex. Civ. App. 239 1480, 3882, 3929
v. Boyce, 39 Tex. Civ. App. 195 143
v. Brown, 33 Tex. Civ. App. 269 4770
v. Brown, 61 Tex. Civ. App. 93 4676
v. Brugger, 24 Tex. Civ. App. 367 4000, 4101, 4110
v. Bunn, 41 Tex. Civ. App. 503 3450
v. Butler, 26 Tex. Civ. App. 494 3346
v. Chambers, — Tex. Civ. App. —, 149 S. W. 1182 3537, 3539
v. Cherry, — Tex. Civ. App. —, 129 S. W. 152 3322
v. Coulter, — Tex. Civ. App. —, 139 S. W. 16 3369, 3379
v. Craft (Tex. Civ. App.) 102 S. W. 170 1372
v. Cunningham, 51 Tex. Civ. App. 368 3428
v. Cusenberry, 5 Tex. Civ. App. 114 3761, 3806
v. Cushney, 95 Tex. 309 3430
v. Delaney, 22 Tex. Civ. App. 427 4893, 4895
v. Dickens, 54 Tex. Civ. App. 637 4672, 4689
v. Dunman, 6 Tex. Civ. App. 101 1093
v. Dunman, 74 Tex. 265 1964
v. Dunman, 85 Tex. 176 2301, 2305, 3098, 3104, 3105, 3107
v. Dyer, 43 Tex. Civ. App. 93 3441, 3466, 3499
v. Eddins, 7 Tex. Civ. App. 116 3336, 3390

[REFERENCES ARE TO PAGES]

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v. Farmer, 102 Tex. 235 4757, 4862
v. Felts (Tex. Civ. App.) 135 S. W. 719 3890
v. Gibbs, 33 Tex. Civ. App. 214 1463
v. Gilbert, 4 Tex. Civ. App. 366 3343
v. Gillespie, 54 Tex. Civ. App. 593 3388, 3391
v. Godair, 3 Tex. Civ. App. 514 3391
v. Gordon, 70 Tex. 80 763, 4698
v. Graves, 45 Tex. Civ. App. 375 3400
v. Halbrook, 12 Tex. Civ. App. 475 3441
v. Hall, 34 Tex. Civ. App. 535 4773
v. Harriett, 80 Tex. 73 759, 4747
v. Hartley, 88 Miss. 674 391
v. Hayter, 93 Tex. 239 52, 95
v. Head, 4 Tex. Civ. Cas. 313 3459
v. Head (Tex. Civ. App.) 15 S. W. 504 4832
v. Helsley, 62 Tex. 593 3881
v. Hodge, 10 Tex. Civ. App. 543 3404
v. Holzheuser (Tex. Civ. App.), 45 S. W. 188 4674
v. Hume, 87 Tex. 211 3311, 3320, 3347, 3353
v. Humphries, 4 Tex. Civ. App. 333 1185
v. Jackson, 29 Tex. Civ. App. 342 2549
v. James, 73 Tex. 12 1535, 4607, 4645
v. John, 9 Tex. Civ. App. 342 269
v. Johnson, 1 Tex. Civ. App. 103 4859, 4874
v. Johnson, 51 S. W. 531 69
v. Johnson, 54 Fed. 474 3736
v. Johnson, 71 Tex. 619 18, 19
v. Johnson, 91 Tex. 569 4700
v. Johnson, 99 Tex. 337 4780
v. Jones, 1 Tex. Civ. App. 372 3805, 3809
v. Keith, 74 Tex. 287 321, 4188
v. Levy, 59 Tex. 542 352, 3621
v. Looney, 51 Tex. Civ. App. 381 3403
v. Loonie, 82 Tex. 323 3566, 3604, 3606, 3613
v. Luther, 40 Tex. Civ. App. 517 90, 165, 1471, 3468, 3472, 3483
v. Lyons, 2 Willson (Tex.) App. Civ. Cas. 139 4104
v. McCormick, 45 Tex. Civ. App. 425 3460, 3464
v. McCorquodale, 71 Tex. 41 3317, 3346
v. McGowan, 73 Tex. 355 3801
v. McMurrough, 41 Tex. Civ. App. 216 3767, 3810
v. McWhirter, 77 Tex. 356 156
v. Mangham, 95 Tex. 413 4752
v. Martin (Tex. Civ. App.) 28 S. W. 576 3317
v. Matthews, 3 Tex. Civ. App. 493 3803
v. Minter, 42 Tex. Civ. App. 235 767
v. Moseley, 6 Ind. T. 369 1136, 3852, 3889, 4150
v. Nelson, — Tex. Civ. App. —, 139 S. W. 81 3341, 3367, 3375
v. Overton, 101 Tex. 583 3471, 3485, 3487
v. Patterson, 5 Tex. Civ. App. 523 1436
v. Pendery, 14 Tex. Civ. App. 60 1463
v. Pettit, 3 Tex. Civ. App. 588 3354
v. Pitts, 37 Tex. Civ. App. 212 3343, 3385
v. Pool, 70 Tex. 713 3893
Gulf, etc., R. Co. v. Redeker, 45 Tex. Civ. App. 312 3438, 3452, 3456, 3483
v. Richards, 11 Tex. Civ. App. 95 3754, 4000
v. Russell, 38 Tex. Civ. App. 291 3450, 3474, 3528
v. Saddler, 8 Tex. Civ. App. 300 3805
v. St. John, 13 Tex. Civ. App. 257 3528
v. Sauter, 46 Tex. Civ. App. 309 4663, 4724
v. Shepard, — Tex. Civ. App. —, 132 S. W. 90 3485, 3520
v. Simonton, 2 Tex. Civ. App. 558 312, 1357, 1444, 3810
v. Smith, 3 Tex. Civ. App. 483 3153, 3734, 3807
v. Sneed, 84 Miss. 252 144
v. Stanley, 89 Tex. 42 3347
v. Stewart, — Tex. Civ. App. —, 141 S. W. 1020 3345, 3351
v. Tait, 63 Tex. 223 3881
v. Trott, 86 Tex. 412 77, 94, 344, 4191
v. Tullis, 41 Tex. Civ. App. 219 147
v. Vancil, 2 Tex. Civ. App. 427 3537
v. Wallace, 14 Tex. Civ. App. 386 3807
v. Ware, 34 Tex. Civ. App. 455 3346
v. Warner, 22 Tex. Civ. App. 167 4691
v. Wilson, 69 Tex. 739 3553
v. Younger, 90 Tex. 387 4885, 4891, 4896
Gulf, etc., Ry. Co. v. Anderson (Tex. Civ. App.), 126 S. W. 928 4904
v. Boger, — Tex. Civ. App. —, 169 S. W. 1093 3334
v. Chinski, 53 Tex. Civ. App. 21 3326, 3331, 3350
v. Dickey, — Tex. Civ. App. —, 171 S. W. 1097 4768
v. Evansich, 63 Tex. 54 4700
v. Hicks, — Tex. Civ. App. —, 166 S. W. 1190 4921, 4927
v. Holliday, 65 Tex. 512 3923
v. King (Tex. Civ. App.), 174 S. W. 960 3437
v. McKinnell, — Tex. Civ. App. —, 173 S. W. 937 4698
v. McKinnell, — Tex. Civ. App. —, 171 S. W. 1091 4698
v. Stewart, — Tex. Civ. App. —, 164 S. W. 1059 1476, 4752
v. Sullivan, — Tex. Civ. App. —, 168 S. W. 473 1385
Gulf, etc., Ry. Co. of Texas v. Blalock, — Tex. Civ. App. —, 162 S. W. 1009 3347, 3378
Gulf, etc., Tel. Co. v. Richardson, 79 Tex. 649 3621, 3626, 3657
Guli v. West, 65 Hun 1 1941, 1944
Gulla v. Lehigh Valley C. Co., 28 Pa. Super. Ct. 11 4927
Gulliver v. Fowler, 64 Conn. 556 3240
Gully v. Grubbs, 1 J. J. Marsh. 387 765, 2068
v. Remy, 1 Blackf. 69 870, 971
Gulsby v. Louisville & N. R. Co., 167 Ala. 122 4609, 4636, 4649
Gumb v. Twenty-third St. R. Co., 114 N. Y. 411 1378
Gund v. Ballard, 73 Neb. 547 986
Gunder v. Tibbits, 153 Ind. 591 4968, 4969
Gundermann v. Buschner, 73 Ill. App. 180 4606
Gunderson v. Havana-C. M. Co., 22 N. D. 329 4391, 4424

[REFERENCES ARE TO PAGES]

Gunderson v. Northwestern E. Co., 47 Minn. 161 4935
Gundy v. Nye-S. F. Co., 89 Neb. 599 4871, 4882
Gunn v. Bolckow, L. R. 10 Ch. 500 668
v. Burghart, 47 N. Y. Super. Ct. 370 4229
v. Hardy, 130 Ala. 642 3097
v. Head, 21 Mo. 432 1202
Gunning's Est., In re, 234 Pa. 148 1080
Gunstone v. Chicago, M. & P. S. R. Co., 79 Wash. 629 4179, 4209
Gunter v. Astor, 4 Moore, 12 124, 266
v. Beard, 93 Ala. 227 2100, 2133, 2134
v. Merchant, — Tex. Civ. App. —, 172 S. W. 191 1920
Gunther v. Atwell, 19 Md. 157 2271
v. Lee, 45 Md. 60 424, 427, 773, 776
v. Taylor, 23 Ky. L. Rep. 536 2344
v. Ullrich, 82 Wis. 220 4380, 4384, 4392
Guptill v. Verback, 58 Iowa 98 3680
Gurley v. Dickason, 19 Tex. Civ. App. 203 2381
v. Hiteshue, 5 Gill. 217 748
v. MacLennan, 17 App. Cas. (D. C.) 170 2922
v. Missouri Pac. R. Co., 104 Mo. 211 1515
v. Missouri Pac. R. Co., 122 Mo. 141 4706
Gurney v. Atlantic, etc., R. Co., 58 N. Y. 358 535, 2379
v. Grand Trunk R. Co., 37 N. Y. St. 155, aff'd 138 N. Y. 638 3535
v. Tenney, 197 Mass. 457 4434
v. Womersley, 4 E. & B. 133, 28 Eng. L. & Eq. 256 1869
Gurr v. Western U. Tel. Co., 8 Ga. App. 556 34
Gusdorff v. Duncan, 94 Md. 160 3814, 3827
Gussow v. Beineson, 76 N. J. L. 209 886
Gustafson v. Rustemeyer, 70 Conn. 125 4375, 4382, 4392, 4395, 4410
v. Wind, 62 Iowa 281 1385
Gustin v. Embury-C. L. Co., 145 Mich. 101 4331, 4344
Guthat v. Gow, 95 Mich. 527 2683
Guthier v. Minneapolis & St. L. R. Co., 87 Minn. 355 3450
Guthman v. Castleberry, 49 Ga. 272 537, 547, 548, 549, 3257, 3258, 4361
Guthrie v. Bashline, 25 Pa. 80 691
v. Baton, 227 Pa. 339 1966
v. Biethan, 25 Idaho 706 1736
v. Pugsley, 12 Johns. 126 2056, 2077, 2089
v. Russell, 46 Iowa 269 2160, 2164
v. Wickliffe, 4 Bibb. 542 1059
Gutschenritter v. Whitmore, 158 Iowa 252 1594
Gutschnider v. Pirosnick (Misc.), 123 N. Y. Supp. 190 2580
Gutta Percha & R. Mfg. Co. v. Benedict, 37 N. Y. Sup. Ct. 430 2768, 2771
Gutteridge v. Munyard, 7 C. & P. 129 3151
Guttner v. Pacific S. W. Co., 96 Fed. 617 430
Gutzeit v. Strader, 158 Ky. 131 2324
Gutzwiller v. Crowe, 32 Minn. 70 1541
Guy v. Doak, 47 Kan. 370 4358
v. Franklin, 5 Cal. 416 962, 1060
v. Oakley, 13 Johns. 332 2946
Guyandot Valley R. Co. v. Buskirk, 57 W. Va. 417 3962, 4038, 4107, 4130, 4140
Guyer v. Davenport, etc., R. Co., 196 Ill. 370 4110, 4142, 4145
Guynet v. Mantel, 4 Duer 94 1953, 2051
Guyon v. Serrell, 1 Blatch. 244 4496
Guzman v. Herencia, 4 Porto Rico Fed. 105 1267
Gwaltney v. Provident S. L. Assur. Soc. 132 N. C. 925 3084
v. Scottish Carolina T. Co., 115 N. C. 579 3741, 3749, 3752
Gwathney v. McLane, 3 McLean, 371 709
Gwin v. Barton, 6 How. 7 1598, 1608
v. Calegaris, 139 Cal. 384 2018
v. McLean, 62 Miss. 121 743
Gwinn v. Whitaker, 1 Har. & J. 754 739, 743, 1051, 1214, 1216
Gwinnell v. Eamer, L. R. 10 C. P. 658 3843
Gwynn v. Citizens' Tel. Co., 69 S. C. 434 539, 1281, 3546
v. Duffield, 66 Iowa 708 449
Gwynne v. Barnes, 7 Cl. & F. 571 707
v. Edwards, 2 Russ. 289 577
Gyger v. Courtney, 59 Neb. 555 1715, 1733

H

H. B. Foster, The, 1 Abb. Adm. 235 2727
H. E. Runnels, The, 82 Fed. 755 2726
H. F. Dimock, The, 77 Fed. 226 4994, 5011
H. W. Johns-Manville Co. of Texas v. H. D. Applegate & Son, — Tex. Civ. App. —, 168 S. W. 4 2412, 2427
H. & T. C. R. Co. v. Leslie, 57 Tex. 83 4682
v. Rand, W. & W. (Tex.) 100 3450, 3474
v. Smith, 63 Tex. 322 3311, 3317, 3326
Haake v. Dulle M. Co., 168 Mo. App. 177 4732
Haas v. Chicago Soc., 20 Ill. 248 1048
v. Dudley, 30 Ore. 355 2189, 2190
v. Metz, 78 Ill. App. 46 4686
v. Powers, 130 Wis. 406 4647
v. St. Louis, etc., R. Co., 128 Mo. App. 79 4721
v. Tough, 67 Kan. 253 113, 4324
Haase v. Morton, 138 Iowa, 205 113, 449
v. Nonnemacher, 21 Minn. 486 2271
Habeler v. Rogers, 131 Fed. 43 2236
Habenicht v. Lissak, 77 Cal. 139 2226
Haber v. Southern Bell Tel. & T. Co., 118 Cal. 874 34
Haberman v. Gasser, 104 Wis. 98 1309
Haberzettle v. Trinity, etc., R. Co., 46 Tex. Civ. App. 527 3322, 3364
Habig v. Parker, 76 Neb. 102 397, 1391
Hablich v. University Park B. Co., 177 Ind. 193 3105
Hachl v. Wabash R. Co., 119 Mo. 325 157
Hack v. Dady, 134 App. Div. 253 80, 96
v. Dady, 142 App. Div. 510 77
v. Norris, 46 Mich. 587 1067
Hackenberry v. Shaw, 11 Ind. 392 949, 971, 1876
Hacker v. Blake, 17 Ind. 97 2060, 2076
v. Hainey, 111 Wis. 313 4511, 4513, 4538
v. Johnson, 66 Me. 21 1676
v. Storer, 8 Me. 228 2055, 2058, 2060

[REFERENCES ARE TO PAGES]

Hackett v. Boston C. & M. R. Co., 35 N. H. 390 1422, 3349
v. Boulton, 3 C. P. 407 2168
v. Brown, 2 Heisk, 264 4595
v. Chicago, etc. R. Co., 170 Ill. App. 140 147, 4806, 4831
v. Harmon, 155 Ill. App. 55 3807
v. Louisville, etc., R. Co., 95 Ky. 236 5120
v. Northern Pac. R. Co., 140 Fed. 717 420
v. Pratt, 52 Ill. App. 346 1494
v. Railroad, 35 N. H. 390, 400 3343
v. Richards, 13 N. Y. 138 3113
v. Schad, 3 Bush 353 1835
v. Smelsley, 77 Ill. 109 60
v. Van Dusen, 132 Wis. 204 796
v. Watts, 138 Mo. 502, 517 2800
v. Wisconsin Cent. R. Co., 141 Wis. 464 1477, 4919, 4940
Hackettstown Bank v. Rea, 6 Lans. 455 1878
Hackley v. Sprague, 10 Wend. 113 1189
Hackley Nat. Bank v. Barry, 139 Wis. 96 1905
Hackley State Bank v. Magee, 128 La. 1008 1806
Hackney v. Delaware & A. Tel. Co., 69 N. J. L. 335 4862, 4871
v. Missouri, etc., Ry. Co., 96 Kan. 30 5078
v. Perry, 152 Ala. 636 427
Hadcock v. Osmer, 153 N. Y. 604 4373, 4385, 4387
Haddam G. Co. v. Brooklyn Heights R. Co., 186 N. Y. 247 2236
Hadden v. Southern M. Service, 135 Ga. 372 34, 1258, 3559
Haddock v. Taylor, 74 Tex. 216 4418
Haddow v. Duke Co., 18 Vict. L. R. (law) 155 4212, 4255
Haddrick v. Heslop, 12 Q. B. 267 4635
v. Phillips, 21 La. Ann. 517 728
v. Swepston, 64 Ark. 477 1644
Hadji, The, 18 Fed. 459 3421
Hadley v. Ayres, 12 Abb. Pr. (N. S.) 240 1108
v. Baxendale, 9 Ex. 341 50, 172, 175, 186, 196, 198, 206, 284, 965, 2339, 2431, 2603, 2631, 2639, 3079, 3329, 3352, 3356, 3370, 3371, 3372, 3375, 3558
v. Baxendale, 26 Eng. L. & Eq. 398 2451
v. Clarke, 8 T. R. 259 3291
v. Freeholders, 73 N. J. L. 197 3988, 4135
v. Heywood, 121 Mass. 236 4976
v. Insurance Co., 55 N. H. 110 3023
v. Western U. Tel. Co., 115 Ind. 191 3578, 3604, 3611
Hadwell v. Righton, (1907) 2 K. B. 245 118
Hadwen v. Mendizabel, 10 Moore 477 670
Haehl v. Wabash R. Co., 119 Mo. 325 1340, 1343, 3502, 3507, 3513
Haeseig v. Brown, 34 Mich. 503 686
Haeussler v. Duross, 14 Mo. App. 103 825
Haff v. Pilling, 134 Fed. 294 2277, 2280
Haffey v. Lynch, 143 N. Y. 241 2047
v. Lynch, 193 N. Y. 67 2037
Haffke v. Coffin, 89 Neb. 134 883, 1440
Hafner v. Herron, 165 Ill. 242 2511
Hafner Mfg. Co. v. Lieber L. & S. Co., 127 La. 348 1452, 2274
Hagaman v. Moore, 84 Ind. 496 1433, 1444, 4111, 4114, 4138
Hagan v. Continental Nat. Bank, 182 Mo. 319 1450
v. Nashville T. Co., 124 Tenn. 93 243, 409, 2501, 2510
v. Providence, etc. R. Co., 3 R. I. 88 1338, 1339, 3513
v. Rawle, 143 Ill. App. 543 2343
v. Riley, 13 Gray 515 39, 389, 403
Hagar v. Donaldson, 154 Pa. 242 2500
v. New England, etc., Ins. Co., 59 Me. 460 3022, 3032, 3033
v. Norton, 188 Mass. 47 27
Hagedorn v. St. Louis Ins. Co., 2 La. Ann. 1005 3302
Hagen v. Townsend, 27 S. D. 457 748
Hagener v. Pulitzer Pub. Co., 172 Mo. App. 436 4550, 4587
Hager v. Blake, 16 Neb. 12 962
v. McDonald, 65 Fed. 200 773
Hagerman I. Co. v. McMurray, 16 N. M. 172 1311, 3826
Hagerty v. Nashua L. Co., 62 N. H. 576 2466
Hagey v. Hill, 75 Pa. 108 2823
Hagg v. Augusta, etc., Ins. Co., 7 How, 597 3022
v. Augusta Ins. & B. Co., Taney 159 1107
Haggard v. Atlee, 1 G. Greene 44 985
v. Independent School Dist., 113 Iowa 486 3965, 3984, 4021, 4120, 4125
v. Seattle, 61 Wash. 499 4652
Haggart v. Morgan, 4 Sandf. 198 1552
Haggerty v. Lash, 34 Mont. 517 4315
v. Montana O. P. Co., 38 Mont. 69 2995
v. St. Louis I. Mfg. & S. Co., 143 Mo. 238 18
v. Scranton, 23 Pa. Super. Ct. 279 4015
Hagins v. Spencer, 147 Ky. 184 1353
Hagood v. Aikin, 57 Tex. 511 1191
v. Blythe, 37 Fed. 249 1598, 2814
Hague v. Aherns, 53 Fed. 58 3170
v. Cooper, 84 Wis. 629 4963
Hahl v. Brooks, 213 Ill. 134 4390
v. Kellogg, 42 Tex. Civ. App. 636 2511
v. Southland I. Ass'n, 53 Tex. Civ. App. 592 2521
v. West, (Tex. Civ. App.) 129 S. W. 876 1986
v. Wickes, 44 Tex. Civ. App. 76 2507
Hahn v. Bettingen, 81 Minn. 91 3672, 3675, 3682
v. Bettingen, 84 Minn. 512 3676, 3677
v. Concordia Soc., 42 Md. 460 838
v. Cotton, 136 Mo. 216, 919 2
v. Doolittle, 18 Wis. 196 2388
v. Geiger, 96 Ill. App. 104 709
v. Horstman, 12 Bush (Ky.) 249 858, 918
v. Lumpa, 158 Iowa 560 4524
v. Mackay, 63 Ore. 100 1309, 1505
v. St. Louis, etc., R. Co., 141 Mo. App. 453 3345, 3366
v. Schmidt, 64 Cal. 284 4648
Haier v. McDonald, 21 Okla. 470 868
Haigh v. Brooks, 10 A. & E. 309 759, 2749
Haight v. Haight, 46 Misc. (N. Y.) 501 2958, 2967
v. Hayt, 19 N. Y. 464 4382
v. Holcomb, 16 How. Pr. 163 591
v. Hoyt, 50 Conn. 583 1480, 1495
v. Pine, 10 App. Div. (N. Y.) 470 1032, 1085

[REFERENCES ARE TO PAGES]

Haight v. Turner, 44 Tex. Civ. App. 595 1312, 4176
v. Vermont Cent. R. Co., 27 Vt. 700 2684, 2686
Haile v. Texas & P. R. Co., 60 Fed. 557 77, 137, 4686
Hain v. Kalbach, 14 S. & R. 159 1865
Hainer v. Lee, 12 Neb. 452 4312
Haines v. Downey, 86 Ill. App. 373 3260
v. Dunlap, 33 New Bruns. 556 41
v. Haines, 104 Md. 208 3738
v. Hay, 169 Ill. 93 1057, 1121
v. Pearson, 107 Mo. App. 481 4873
v. Schultz, 50 N. J. L. 481 1338, 4547
v. Tucker, 50 N. H. 307 229, 2256
v. Welling, 7 Ohio 253 4586, 4600
v. Young, 13 Pa. Super. 303 2374, 2599, 2646
Hair v. Barnes, 26 Ill. App. 580 239, 258
v. Little, 28 Ala. 236 1532, 4234
Hair Co. v. Daily, 161 Ill. 379 2902
Hairston v. Medley, 1 Gratt. 98 2956
Haish v. Pollock, 79 Kan. 624 3694, 3695
Haist v. Bell, 24 App. Div. (N. Y.) 252 2664
Hake v. Coach, 114 Mich. 558 1073
Halberstadt v. New York L. Ins. Co., 194 N. Y. 1 4602, 4603
Halbert v. Louisville & N. R. Co., 183 Ill. App. 483 4921
v. Rosenbalm, 49 Neb. 498 4273, 4275
v. State, 22 Ind. 128 1578
Halcomb v. Stubblefield, 76 Tex. 310 4179
Haldeman v. Berry, 74 Mich. 424 532
v. Jennings, 14 Ark. 329 876
v. Schub, 109 Ill. App. 259 4395
Halden v. Crafts, 4 E. D. Smith 490 2960
Hale v. Bonner, 82 Tex. 33 329, 3381, 3651
v. Cove, 1 Str. 642 1481
v. Gale, 14 Wis. 54 2209
v. Hale, 1 Cold. 233 1202
v. Hale, Prec. Ch. 50 29
v. Hess, 30 Neb. 42, 58 291
v. Holmes, 8 Mich. 37 756
v. James, 6 Johns. Ch. 258 3717
v. Meegan, 39 Mo. 272 1734
v. Milliken, 5 Cal. App. 344 207, 2627
v. Munn, 4 Gray 132 3727
v. New Jersey S. N. Co., 15 Conn. 539 3383
v. New Orleans, 13 La. Ann. 499 1028
v. Patton, 60 N. Y. 233 807
v. Philbrick, 42 Iowa 81 4381
v. San Bernardino Valley T. Co., 156 Cal. 713 4860, 4873
v. Sheehan, 36 Neb. 439 2568
v. Smith, 6 Me. 416 2380
v. Spaulding, 145 Mass. 482 772
v. Thomas, 1 Vernon 349 1564
v. Thomas, 1 Vern. 509 1552
v. Trout, 35 Cal. 229 368, 2238, 2260, 2696
v. Wall, 22 Gratt. 224 612, 2945
Hales v. London, etc., R. Co., 4 B. & S. 56 196, 3342, 3344
Halestrap v. Gregory, [1895] 1 Q. B. 561 111
Haley, succession of, 50 La. Ann. 840 2463, 2477
Haley v. Dorchester Ins. Co., 1 Allen 536 3026
Haley v. Lane, 2 Atk. 182 1818
v. Mobile O. & R. Co., 7 Baxter 243 1344
v. Supreme Court of Honor, 139 Ill. App. 478 1238
v. St. Louis T. Co., 179 M. 30 113
Half v. O'Connor, 14 Tex. Civ. App. 191 862
Halff Co. v. Jones —Tex. Civ. App. —, 169 S. W. 906 2393
Haliday v. United States, 33 Ct. of Cls. 453 858, 861
Hall v. Allen Mfg. Co., 133 La. 1079 774
v. Austin, 20 Tex. Civ. App. 59 3878
v. Austin, 73 Minn. 134 1414, 1424
v. Betty, 4 M. & G. 410 1953
v. Bramel, 87 Mo. App. 285 4358
v. Brooks, 8 Vt. 485 1620
v. Burgess, 5 B. & C. 332 3121
v. Cadillac, 114 Mich. 99 4677, 4683, 4684
v. Campbell, 5 Ky. L. Rep. 246 2205
v. Carter (Tex. Civ. App.), 157 S. W. 461 3905
v. Cedar Rapids, etc., R. Co., 115 Iowa 18 4744
v. Chicago, etc., R. Co., 46 Minn. 439 4824
v. Chicago, etc., R. Co., 145 Iowa 291 1498
v. Clagett, 2 Md. Ch. 151 376
v. Clark, 21 Mo. 415 533
v. Clement, 41 N. H. 166 723, 1852
v. Conder, 2 C. B. (N. S.) 22 2382
v. Constant, 2 Hall, 185 703
v. Corcoran, 107 Mass. 251 2493
v. Crandall, 29 Cal. 567 2987, 2992
v. Creswell, 12 G. & J. 36 2862, 2873
v. Crowley, 5 Allen, 304 888, 928
v. Cunningham, 1 Munf. 310 2048
v. Cushing, 9 Pick. 404 1558
v. Cushman, 16 N. H. 462 2868
v. Dairy Co., 15 Wash. 542 4529
v. Dean, 13 Johns. 105 2151, 2153, 2156
v. Delaplaine, 5 Wis. 206 3021
v. Emmons, 11 Abb. Pr. (N. S.) 435 1542
v. Farmers' & Citizens' Bank, 55 Iowa 612 1242
v. Finch, 29 Wis. 278 2472, 2474
v. Fond du Lac, 42 Wis. 274 4725
v. Forman, 82 Ky. 505 1701
v. Gale, 14 Wis. 54 555
v. Gale, 20 Wis. 292 2056, 2058, 2059, 2061, 2182
v. Galveston, etc., R. Co., 39 Fed. 18 4935, 4939
v. Gambrill, 92 Fed. 32 2511
v. Getman, 121 Mo. App. 630 2470
v. Gleason, 158 Ky. 789 2852
v. Gould, 13 N. Y. 127 3175
v. Grace, 179 Mass. 400 2504
v. Gramham, 112 Va. 560 1116
v. Gray, 54 Me. 230 421, 771
v. Green, 14 Ohio, 499 674
v. Gunter, 157 Ala. 375 2547
v. Hall, 10 Humph. 352 2834
v. Hall, 8 Vt. 156 1061
v. Hall, 42 Ind. 585 1357, 1493, 2836
v. Hargadine-McK. D. G. Co., 23 Tex. Civ. App. 149 362
v. Hollander, 7 Dowl. & R. 133 3515, 4767
v. Hollender, 4 B. & C. 660 1318
v. Holmes, 4 Pa. 251 627
v. Horton, 79 Iowa 352 3201
v. Huckins, 41 Me. 574 1102

[REFERENCES ARE TO PAGES]

Hall v. Huffhines, 47 Tex. Civ. App. 276 1986
v. Jackson, 24 Colo. App. 225 96, 98
v. Johnston, 6 Tex. Civ. App. 110 722
v. Kansas City, etc. E. R. Co., 89 Kan. 70 4130, 4143
v. Kennedy, Sneed 124 1806
v. Kimball, 58 Ill. 58 1179, 1184, 1879
v. Lafayette County, 69 Miss. 529 1590, 1591
v. Lauderdale, 46 N. Y. 70 2983
v. Leigh, 8 Cranch 50 416
v. Louisville, etc., R. Co., 157 Fed. 464, aff'd 174 Fed. 1021 5126
v. Luckman, 133 Iowa 518 2469
v. Manson, 90 Iowa 585 4667, 4701
v. Manson, 99 Iowa 698 1468
v. Manufacturers' Coal & Coke Co., 260 Mo. 351 1364
v. Marston, 17 Mass. 575 703, 709, 711
v. Mayhew, 15 Md. 551 2048
v. Memphis & C. R. Co., 15 Fed. 57 3499, 3500
v. Middleby, 197 Mass. 485 3123, 3125
v. Nash, 10 Mich. 303 2835, 2875, 2894
v. Newcomb, 7 Hill 416 2778
v. Nix, 156 Ala. 423 703, 4223, 4285
v. North Pacific Coast R. Co., 134 Fed. 309 4900, 4907
v. Northwest L. Co., 61 Wash. 351 4800
v. Norwalk F. Ins. Co., 57 Conn. 105 819, 3046
v. O'Brien, 160 App. Div. (N. Y.) 851 698
v. Ocean Ins. Co., 37 Fed. 371 3010
v. Ocean Ins. Co., 21 Pick. 472 3032
v. O'Connell, 52 Ore. 164 1019
v. Ody, 2 B. & P. 29 589
v. O'Hanlan, 1 Brev. 471 2238, 2242, 2248
v. Parsons, 105 Minn. 96 543
v. Perkins, 5 Ill. 548 1841
v. Philadelphia Co., 74 W. Va. 172 1413, 1504, 1515, 2646
v. Pierce, 4 W. Va. 107 2238
v. Pratt, 103 Ga. 255 1920
v. Priest, 6 Bush 12 2212
v. Ray, 40 Vt. 576 4201
v. Ripley, 10 Pa. 231 2662
v. Rising, 141 Ala. 431 9
v. Scott, 90 Ky. 340 1206
v. Smith, 3 Kan. App. 685 686
v. Smith, 10 Iowa, 45 762, 1655, 1661, 1663
v. South Carolina R. Co., 28 S. C. 261 3507
v. Southern R. Co., 146 N. C. 345 5132
v. Southland I. Ass'n, 53 Tex. Civ. App. 592 2463, 2481
v. State, 72 App. Div. (N. Y.) 360 4039
v. Stevens, 116 N. Y. 201 668, 656
v. Stevenson, 19 Ore. 153 574
v. Storrs, 7 Wis. 253 2956
v. Sundstrom, 138 App. Div. (N. Y.) 548 3738, 3766, 3772, 3810
v. Suydam, 6 Barb. 83 4635
v. Thompson, 9 Up. Can. C. P. 257 2823
v. Tillman, 110 N. C. 220 1668, 1669, 1671, 4325, 4329, 4357
v. Tillman, 115 N. C. 500 1679
Hall v. Vandalia R. Co., 169 Ill. App. 12 5067
v. Wabash R. Co., 133 Iowa 714 1447, 3960
v. Western T. Co., 34 N. Y. 284 3103
v. Western U. Tel. Co., 59 Fla. 275 3569
v. Western U. Tel. Co., 139 N. C. 369 3591
v. White, 27 Conn. 488 1810
v. White, 106 Mass. 599 4311
v. Wiles, 2 Blatch. 194 4446
v. Williamson, 9 Ohio St. 23 1788
v. Woodson, 13 Mo. 462 1155, 1184, 1879
v. Wright, El. B. & E. 746 3065, 3687, 3688
v. Wright, 96 Eng. C. L. 745 3683, 3684
v. York, 22 Tex. 641 1987
v. Younts, 87 N. C. 285 449
Hall C. Co. v. Crook, 87 Miss. 445 2404
Hall G. Co. v. Louisville & N. R. Co., 148 Mo. App. 308 2578
Hallack v. Johnson, 12 Colo. 244 4795, 4803
Hallack L. & Mfg. Co. v. Gray, 19 Colo. 149 4289
Hallam v. Telleren, 55 Neb. 255 870, 962, 1145, 1149, 1184, 1202, 1923
v. Todhunter, 24 Iowa 166 2066, 2098, 4396, 4397, 4400, 4407
Halleck v. Mixer, 16 Cal. 574 362
Hallett v. Novion, 14 Johns. 273 480, 4201, 4226
v. Taylor, 177 Mass. 6 1940, 1981
v. Wylie, 3 Johns. 44 3138
Halley v. Gregg, 74 Iowa 563 4519
v. Gregg, 82 Iowa 622 4522, 4531, 4572
v. Winchester D. Lodge, 97 Ky. 438 2002
Hallgren v. Cowles, 184 Ill. App. 87 2606, 2634
Halliday v. Doggett, 6 Pick. 359 422
Halliday M. Co. v. Louisiana & N. R. Co., 80 Ark. 536 2478
Hallidie Mach. Co. v. Hayden-C. A. I. Co., 56 Wash. 11 1807
Halligan v. Wade, 21 Ill. 470 3122, 3125, 3257
Halliman v. Carroll, 27 Tex. 23 1600
Hallock v. Belcher, 42 Barb. 199 1364, 2876, 2880
v. Commercial Ins. Co., 26 N. J. L. 268 3039
v. Franklin County, 2 Metc. (Mass.) 559 4146
v. Ins. Co., 26 N. J. L. 268 3040
v. Miller, 2 Barb. 630 156, 4552, 4556
v. Slater, 9 Iowa 599 918
v. Young, 72 N. H. 416 1826
Halloran v. New York, etc., R. Co., 211 Mass. 132 1361, 4715
Halloway v. Lacy, 4 Humph. 468 2524
Hallowell v. Guntle, 82 Ind. 554 4530, 4573
Hallowell & A. Bank v. Howard, 13 Mass. 235 790, 802
Hallum v. Dickinson, 47 Ark. 120 1538
v. Omro, 122 Wis. 337 4742, 4748
Hallwood C. R. Co. v. Prouty, 196 Mass. 313 1441
Halness v. Anderson, 110 Minn. 204 1496, 3676
Halpin v. Phenix Ins. Co., 118 N. Y. 165 809, 813, 815, 820, 821
Halsey v. Adams, 63 N. J. L. 330 2917
v. Adams, 64 N. J. L. 724 2917
v. Bird, 99 Fed. 525 4295

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v. Fairbanks, 4 Mason 206 770
v. Fink, 15 Abb. Pr. 367 1251
v. Flint, 15 Abb. Pr. 367 828
v. Lehigh Valley R. Co., 45 N. J. L. 26 3930
v. Mobile & O. R. Co., 7 Baxter 239 1271
v. Murray, 112 Ala. 185 2852
v. Reed, 9 Paige 446 2895
v. Woodruff, 9 Pick. 555 1531, 1532
Halstead v. Nelson, 24 Hun 395 4516
v. Sigler, 35 Ind. App. 419 3776
v. Vandalia R. Co., 48 Ind. App. 96 4034, 4044, 4139, 4140
Halstead L. Co. v. Sutton, 46 Kan. 192 2369, 2415
Halsted v. Griefen, 173 Ill. App. 551 706, 722
v. Postal Tel.-C. Co., 193 N. Y. 293 3550
Halthouse v. Rynd, 155 Pa. 43 2004
Halverson v. Seattle E. Co., 35 Wash. 600 4873, 4907
v. Cole, 1 Spear 321 3287
Ham v. Goodrich, 37 N. H. 185 2517
v. Wisconsin, etc., R. Co., 61 Iowa 716 3984, 4125
Hamaker v. Coons, 117 Ala. 603 1980
v. Eberley, 2 Binn. 510 782
Haman v. Dimmick, 14 Ind. 105 1235
v. Omaha Horse R. Co., 35 Neb. 74 3476, 4782
Hamann v. Milwaukee B. Co., 136 Wis. 39 4858, 4882
Hambleton v. Veere, 2 Saund. 170 411
Hambly v. Delaware, etc., R. Co., 21 Fed. 541 2697
Hambrick v. Wilkins, 65 Miss. 631 2415
Hambro v. Casey, 110 U. S. 216 1893
Hamburg Bank v. George, 92 Ark. 472 4212, 4239, 4285
Hamburg-B. F. Ins. Co. v. Garlington, 66 Tex. 103 3012, 3065
Hamburger, In re, 165 App. Div. (N. Y.) 526 3994
Hamburger Co. v. Glover, 157 Ill. 521 1805
Hamby v. Samson, 105 Iowa 112 1459
Hamden v. New Haven, etc., Co., 27 Conn. 158 2891
v. Rice, 24 Conn. 350 3742
Hamer v. Hathaway, 33 Cal. 117 369, 1135, 4226, 4232, 4245
v. Kirkwood, 25 Miss. 95 941
v. McFalin, 4 Denio 509 471, 4573
v. Rigby, 65 Miss. 41 963
v. White, 110 Ga. 300 1494
Hamerlynck v. Banfield, 36 Ore. 36 1268
Hamersley v. New York, 56 N. Y. 533 4145, 4149
v. Mayor, 56 N. Y. 533 1063
Hamill's App., 88 Pa. 363 1070
Hamilton, The, 95 Fed. 844 4996
Hamilton, The, 146 Fed. 724, aff'd 207 U. S. 398 432, 4848
Hamilton v. Baltimore & O. R. Co., 11 Ohio N. P. (N. S.) 437 1253, 1783
v. Bark Kate Irving, 5 Fed. 630 3436
v. Benbury, Mart. & Hayw. 586 703
v. Billingsley, 37 Mich. 107 4383, 4392
v. Chicago, etc., R. Co., 145 Iowa 431 26
v. Coons, 5 Dana, 317 695
v. Cunningham, 2 Brock. 367 2929
v. Cutts, 4 Mass. 349 2094, 2130
v. Des Moines, etc., R. Co., 84 Iowa 131 3804, 3806
Hamilton v. Dismukes, 53 Tex. Civ. App. 129 558
v. Elliot, 4 N. H. 182 2075
v. Eno, 81 N. Y. 116 468, 1291
v. Feary, 8 Ind. App. 615 3243, 3250
v. Finnegan, 117 Iowa 623 2215, 2225, 2236
v. Fowler, 99 Fed. 18 988
v. Ganyard, 34 Barb. 204 1101, 2309, 2371, 2376
v. Great Falls St. R. Co., 17 Mont. 334 411, 412, 4657, 4667, 4702, 4705, 4727, 4748, 4828
v. Hamilton, 29 Ind. App. 114 2462
v. Hamilton, 162 Ind. 430 2885
v. Holmes, 48 Ore. 453 2485, 2489, 2490, 2495
v. Jefferson, 12 Ohio 421 1788
v. Johnson, 82 Ill. 39 2856
v. Kirby, 199 Pa. 466 2284, 2285, 2287
v. Lau, 24 Neb. 59 4174
v. Lomax, 26 Barb. 615 4959, 4960
v. Long, 36 Irish L. R. Rep. 189, [1903] 2 Irish 407 4961
v. Love, 152 Ind. 641 2551, 2561
v. McGill, 12 L. R. Ire. 186, 201 171, 194, 204, 2232, 2343, 2423
v. McKenna, 95 Kan. 20 318
v. McPherson, 28 N. Y. 72 312, 3243, 3403
v. Maxwell, 119 Ala. 23 1699, 1704
v. Mayor, etc., 52 Ga. 435 16
v. Michigan Cent. R. Co., 135 Mich. 95 4752
v. Moore, 33 Up. Can. Q. B. 100 888, 893
v. Morgan's L. & T. R. & S. Co., 42 La. Ann. 824 33, 1281, 4851
v. Oil Co., 8 Ohio Dec. 372 3114, 3115
v. Overton, 6 Blackf. 206 858
v. Pacific Drug Co., 78 Wash. 689 1498, 4794
v. Phillips, 120 Ala. 177 4177
v. Pittsburg, etc., R. Co., 104 Ill. App. 207 4715
v. Pittsburg, etc., R. Co., 190 Pa. 51 3977, 4006, 4036, 4040, 4110
v. Seaboard A. L. R. Co., 150 N. C. 193 1440
v. Smith, 39 Mich. 222 4612, 4644
v. Stewart, 105 Ga. 300 814
v. Third Ave. R. Co., 53 N. Y. 25 334, 1281, 1308, 3474, 3478, 3503, 3506, 3511, 3827, 4663
v. Thirston, 93 Md. 213 2465
v. Van Rensselaer, 43 Barb. 117, 28 How. Pr. 192, 43 N. Y. 244 940, 945, 2755, 2764, 2765, 2768
v. Vere, 2 Saund. 171b 1528
v. Ward, 4 Tex. 356 1620
v. Western N. C. R. Co., 96 N. C. 398 3317, 3349
v. Western U. Tel. Co., 96 S. C. 398 1537
v. Wilson, 4 Johns. 72 2058
v. Windolf, 36 Md. 301 500, 509
Hamilton County v. Cunningham, 87 Neb. 650 1579
v. Grand Trunk R. Co., 19 Ont. App. 252 837
v. Rape, 101 Tenn. 222 3982
Hamilton County A. Soc. v. Helmann, 14 Ohio C. C. (N. S.) 522 1373
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Hamlett v. Tallman, 30 Ark. 505 828
Hamlin v. Great Northern R. Co., 1 H. & N. 408 219, 225, 324, 327, 476, 3444, 3449, 3456
v. Piser, 163 Ill. App. 51 2768, 2771
v. Race, 78 Ill. 422 2545
v. Spaulding, 27 Wis. 360 4842
Hamlin's Est., In re, 133 Wis. 140, 2152, 2174
Hamlyn v. Talisker D. Co., [1894] App. Cas. 202 1145
Hamm v. Culvey, 84 Ill. 56 1491
Hammar P. Co. v. Glover, 47 Kan. 15 2392, 2423
Hammatt v. Emerson, 27 Me. 308 533, 554, 1838, 1848
v. Russ, 16 Me. 171 3752, 3815
v. Wyman, 9 Mass. 138 637
Hammer v. Breidenbach, 31 Mo. 49 918
v. Janowitz, 131 Iowa 20 4947, 4949
v. Nevill, Wright, 169 739
v. Schoenfelder, 47 Wis. 455 189, 191, 205, 2343
v. Wilsey, 17 Wend. 91 4196
Hammerslough v. Hackett, 48 Kan. 700 2080, 2082
v. Kansas City B., L. & S. Ass'n, 79 Mo. 80 1721
Hammett v. Dudley, 62 Md. 154 735
Hammill v. Pennsylvania R. Co., 87 N. J. L. 388 5039
Hammock v. Baker, 3 Bush 208 2857
Hammon v. Cotle, 6 S. & R. 290 2945
Hammond v. American Exp. Co., 107 Md. 295 1905
v. Beeson, 112 Mo. 190 2697, 2699, 2700
v. Bookwalter, 12 Ind. App. 177 2512
v. Bussey, 20 Q. B. Div. 79 52, 194, 304, 306, 310, 2350, 2402, 2416
v. Christie, 5 Robert. 160 757, 2905
v. Darlington, 109 Mo. App. 333 4291
v. Hammond, 2 Bland's Ch. 306 1061
v. Hannin, 21 Mich. 374 355, 1987, 1995, 2009
v. Holiday, 1 C. & P. 384 2511
v. Hopping, 13 Wend. 505 984, 1178
v. Lewiston, etc., St. R. Co., 106 Me. 209 417
v. Lusk, 150 Ma. 487 1441
v. Mukwa, 40 Wis. 35 1495, 3527, 4725
v. Sandwich Mfg. Co., 146 Wis. 485 2404, 2427, 2438
v. Schiff, 100 N. C. 161 488, 3808
v. Starr, 79 Cal. 556 1710
v. Sullivan, 112 App. Div. (N. Y.) 788 4158, 4169
v. Terry, 3 Lans. 186 570
Hammond O. & D. Co. v. Feitel, 115 La. 132 2594
Hampe v. Sage, 87 Kan. 536 1970
Hampel v. Detroit, etc., R. Co., 138 Mich. 1 108
Hampshire Manuf's Bank v. Billings, 17 Pick. 89 798
Hampton v. Barr, 3 Dana 578 1358
v. Brown, 13 Ired. 18 4284
v. Dean, 4 Tex. 455 739
v. Eigleberger, 2 Bailey 520 1965
v. Eubank, 4 J. J. Marsh. 169 2047
v. Jones, 58 Iowa, 317 74, 97, 4615
v. Kansas City, 74 Mo. 129 4156
Hampton v. Levy, 1 McCord Eq. 107 2816
v. Phipps, 108 U. S. 260 2866, 2867, 2868
v. Specknagle, 9 S. & R. 212 2983
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Hampton & B. R. & L. Co. v. Sizer, 35 N. Y. Misc. 391 4321, 4322
Hanauer v. Doane, 12 Wall. 342 1850
v. Woodruff, 15 Wall. 448 611
Hanaw v. Bailey, 83 Mich. 24 3171
Hanby v. Henritze, 85 Va. 177 2859
Hanchett v. Chiatovich, 101 Fed. 742 4504
v. Gardner, 138 Ill. 571 1674
Hancock v. Board of Education, 140 Cal. 554 2561
v. Bryant, 2 Yerg. 476 2820
v. Franklin Ins. Co., 114 Mass. 155 605, 606
v. Gomez, 50 N. Y. 668 368, 2923
v. Haywood, 3 T. R. 433 1527
v. Hazzard, 12 Cush. 112 1576, 1578, 1588
v. Hubbell, 71 Cal. 537 35, 1363
v. Telegraph, 137 N. C. 497 3620
v. Western U. Tel. Co., 142 N. C. 163 3633
v. White Hall T. W. Co., 102 Va. 239 376, 379, 389, 391
v. Yunker, 83 Ill. 208 2979
Hand v. Armstrong, 18 Iowa 324 958, 962, 963
v. Baynes, 4 Whart. 204 1414, 2925, 3400
v. Church, 39 Hun 303 1104
v. Elvira, The, Gilp. 60 2723, 2729, 2737
v. Gas E. & P. Co., 167 N. Y. 142 630
v. Scodeletti, 128 Cal. 674 4212
v. Winton, 37 N. J. L. 122 4506
Hand L. Co. v. Hall, 147 Ala. 561 759
Hander v. Baade, 16 Tex. Civ. App. 119 697
Handforth v. Maynard, 154 Mass. 414 3765, 3797
Handy v. Bliss, 204 Mass. 513 2676, 2679
v. Draper, 89 N. Y. 334 1077
v. Roberts, — Tex. Civ. App. —, 165 S. W. 37 4371
v. Waldron, 19 R. I. 618 4379, 4380
Hanes v. Idaho I. Co., 21 Idaho 512 206, 294
Hanewacker v. Ferman, 152 Ill. 321 1322
Haney v. Mason City, etc., R. Co., 129 Iowa 465 3873
v. Pinckney, 155 Mich. 656 1477
Hanf v. Ford, 37 Ark. 544 4326
Hanford v. Howard, 1 New Bruns. Eq. 241 961, 1048
Hanger v. Little Rock J. R., 52 Ark. 61 13
Hankey v. Philadelphia Co., 5 Pa. Super. Ct. 148 3759
Hanks v. Evans, Hardin 45 1403
v. Naglee, 54 Cal. 52 3680
v. Pickett, 27 Tex. 97 1560
Hanley v. Banks, 6 Okla. 79 3127, 3182, 3261
v. Kansas City S. R. Co., 187 U. S. 617 5040, 5053
v. Southerland, 74 Me. 212 1400
Hanlin v. Walters, 3 Colo. App. 519 624
Hanlish v. Boller, 72 App. Div. (N. Y.) 559 4775
Hanlon v. O'Keefe, 55 Mo. App. 528 4212
Hanly v. Davis, 166 Mass. 1 4284
v. Potts, 52 W. Va. 263 2472

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Hanna v. Chicago, etc., R. Co., 89 Kan. 503 275, 3589
v. Drovers' Nat. Bank, 92 Ill. App. 611 276
v. Grand Trunk R. Co., 41 Ill. App. 116 4952
v. Holton, 78 Pa. 334 676
v. International P. Co., 23 Ohio St. 622 1679, 1680
v. McKenzie, 5 B. Mon. 314 1759
v. Mills, 21 Wend. 90 2229
v. Ratekin, 43 Ill. 462 803
v. Sweeney, 78 Conn. 492 1303
Hanna-B. Co. v. Holley-M. Mfg. Co., 160 Mo. App. 437 2374, 2404, 2422
Hannah v. Henderson, 4 Ind. 174 2094
v. Lankford, 43 Ala. 163 691
Hannan v. Connett, 10 Colo. App. 171 4229
Hannen v. Ewalt, 18 Pa. 9 3133, 3134
Hanner v. Hanner, 3 Head 398 643
Hannibal B. Co. v. Schaubacher, 57 Mo. 582 3980, 4030, 4125
Hannibal, etc., R. Co. v. Martin, 111 Ill. 219 3474
v. Swift, 12 Wall. 262 3532, 3529
Hannicker v. Lepper, 20 S. D. 371 6
Hannon v. O'Dell, 71 Conn. 698 1675
Hannover v. Doane, 12 Wall. 342 1824
Hannum v. Day, 105 Mass. 33 1653
v. Richardson, 48 Vt. 508 1870
Hanover v. Bartels, 2 Colo. 514 4314
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Hanover F. Ins. Co. v. Lewis, 23 Fla. 193 1399, 1402
v. Lewis, 28 Fla. 209 1089, 3046
Hanover R. Co. v. Coyle, 55 Pa. 396 161, 267, 4695
Hanover W. Co. v. Ashland I. Co., 84 Pa. 279 414, 2305, 3761
Hanrick v. Andrews, 9 Port. 9 1147, 1152, 1168, 1878
v. Farmers' Bank, 8 Port. 539 1399, 1897
Hansard v. Robinson, 7 B. & C. 90 811, 4277
Hansbrough v. Peck, 5 Wall. 497 985, 1936, 2662
v. Stinnett, 25 Gratt. 495 4513, 4515
v. Utz, 75 Va. 959 609
Hanscombe v. Standing, Cro. Jac. 187 2825
Hansel v. Morris, 1 Blackf. 307 422
Hansell v. Erickson, 28 Ill. 257 2525, 2544
Hansell-E. F. Co. v. Clark, 214 Ill. 399 4708
Hanselman v. Kegel, 60 Mich. 540 4312, 4316, 4325, 4330, 4352
Hansen v. Gaar, 63 Minn. 94 2389, 2405
v. Rounsavell, 74 Ill. 238 704, 709, 736
Hansford v. Payne, 11 Bush 380 4850, 5120
v. Perrin, 6 B. Mon. 595 1709
Hansley v. Jamesville & W. R. Co., 115 N. C. 602 3439, 3443, 3448, 3453, 3488, 3503
Hanson v. Atchison, etc., R. Co., 88 Kan. 313 3403
v. Buckner, 4 Dana 251 2068, 2093, 2098
v. Edgerly, 29 N. H. 343 4363
v. European, etc., R. Co., 62 Me. 84 1330, 1342
v. Fowle, 1 Sawyer 539 4662
Hanson v. Great Northern R. Co., 18 N. D. 324 3334, 3418, 3419
v. Hartse, 70 Minn. 282 2378
v. Herrick, 100 Mass. 323 482, 4204
v. Innis, 211 Mass. 301 287, 412
v. Johnson, 141 Wis. 550 1504, 3665, 3670, 3676
v. Lawson, 19 Kan. 201 1437, 2296
v. Manley, 72 Iowa 48 726
v. Meyer, 6 East 614 2225
v. Todd, 95 Ala. 328 825
v. Urbana & C. E. St. R. Co., 75 Ill. App. 474 3468, 3470, 4782, 4791, 4796
v. Weber I. Co., 173 Ill. App. 293 1668
v. Western U. Tel. Co., 164 Iowa 639 3566
v. Wittenberg, 205 Mass. 319 2404, 2415, 2427
Hanson L. Co. v. Mestayer, 130 La. 688 1721, 1728
Hanun v. Williams, 2 Hawaii 323 2525
Hany v. Great Northern R. Co., 8 N. D. 23 3457
Hapgood v. Batcheller, 4 Metc. (Mass.) 573 2959, 2960
Happel-Bossi's Est., In re, 133 Wis. 119 2462
Happy v. Prichard, 111 Mo. App. 6 1267, 4668
v. Prickett, 24 Wash. 290 1030
Haralson v. Walker, 23 Ark. 415 1560, 1709
Harbeck v. Craft, 4 Duer 122 671
v. Vanderbilt, 20 N. Y. 395 636, 637
Harbert's Case, 3 Co. 12 572
Harbin v. Green, Hob. 189 388
Harbison v. Hammons, 113 Ark. 120 958
v. Shook, 41 Ill. 141 4521
Harby v. Florida E. C. Hotel Co., 59 Fla. 280 1493
v. Southern R., 75 S. C. 321 3417
Harcourt v. Harrison, 1 Hall 474 4540
v. Redmon, 149 Ky. 612 4794
Hard v. Palmer, 21 Up. Can. Q. B. 49 1880
Hardacre v. Stewart, 5 Esp. 103 2993
Hardaker v. Idle Dist. Council, 1 Q. B. 335 55, 67
Hardaway-W. Co. v. Bradley, 163 Ala. 596 284, 291, 1430, 2599, 2699, 2701
Hardee v. Howard, 33 Ga. 533 875
Hardell v. Carroll, 90 Wis. 350 2853
Hardeman v. Turner, 112 Fed. 41 3706, 3707
v. Williams, 157 Ala. 422 1492
Harden v. Hesketh, 4 H. & N. 175 1416
v. Lang, 110 Ga. 392 4288
v. Major, 4 Bibb. 104 1059
v. Wolf, 2 Ind. 31 962
Harder v. Harder, 26 Barb. 409 1403, 3836, 3837
v. Woodward, 75 Pa. 479 2047
Hardey v. Coe, 5 Gill 189 749
Hardie-T. F. & Mach. Co. v. Glen Allen O. Co., 84 Miss. 259 847, 888
Hardie-T. Mfg. Co. v. Easton C. O. Co., 150 N. C. 150 2404, 2408, 2409, 2410
Hardiman v. Mayor, 21 App. Div. (N. Y.) 614 2689
Hardin v. Carico, 3 Met. (Ky.) 289 1606
v. Hodges, 33 Tex. Civ. App. 155 467, 507
v. Kennedy, 2 McCord 277 2808
v. Ledbetter, 103 N. C. 90 478
v. Moline, 179 Ill. App. 101 4779
v. Olson, 14 Fed. 705 1924
v. Trimmer, 27 S. C. 110 1194

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Harding v. Brooks, 5 Pick. 244 4529
v. Carter, Park on Insurance, 5 4280
v. Carter, 11 Petersdorff's Abr. 400 2906
v. Davies, 2 C. & P. 77 793, 803, 804
v. Harding, 132 Ky. 133 2486
v. Harding, 180 Ill. 592, aff'g 79 Ill. App. 621 1049
v. Handy, 11 Wheat. 103 1216
v. Kuessner, 172 Ill. 125 1801
v. Larkin, 41 Ill. 413 303, 309, 1028, 2098, 2130, 2133, 2137, 2143, 2144, 3196
v. Ostrander R. & T. Co., 64 Wash. 224 373, 4682
v. Tifft, 75 N. Y. 461 726
v. Townshend, 43 Vt. 536 489, 490, 4885
v. Waters, 6 Lea 324 2779, 2781
v. York K. Mills, 142 Fed. 228 1104
Hardingham v. Allen, 5 C. B. 793 798
Hardison v. Reel, 154 N. C. 273 5, 18
Hardman v. Belhouse, 9 M. & W. 596 747
v. Montana Union R. Co., 83 Fed. 88 137
v. Willcock, 9 Bing. 382 2905
Hardrop v. Gallagher, 2 E. D. Smith 523 3743
Hardt v. Schulting, 24 Hun 345 581
Hardway v. Lilly, Tenn. Ct. of Ch. App. 1194
Hardwick v. American C. Co., 113 Tenn. 657 2227, 2240, 2242, 2244, 2249
v. Wabash R. Co., 181 Mo. App. 156 5035, 5049, 5072
Hardwood Interior Co. v. Bull, 24 Cal. App. 129 1004
Hardwood L. Co. v. Adam, 134 Ga. 81 2281, 2284
Hardwood Mfg. Co. v. Wooten, 126 Ga. 55 3809
Hardy v. Bach, 173 Ill. App. 123 4977
v. Bern, 5 T. R. 636 1553
v. Brodus, 35 Tex. 666 1532
v. Cathcart, 1 Marsh. 180 1360
v. Chicago, etc., R. Co., 149 Iowa 41 1510
v. Hohl, 11 Wash. 1 1920
v. Lancashire Ins. Co., 166 Mass. 210 1089
v. Martin, 1 Cox 64 1556
v. Merrill, 56 N. H. 227 1422, 1424
v. Milwaukee St. R. Co., 89 Wis. 183 4744
v. Minneapolis, etc., R. Co., 36 Fed. 657 336
v. Nelson, 27 Me. 525 1985, 2093, 2110, 2130, 3188, 3196
v. Pecot, 113 La. 350 2093
v. Stoppel, 162 Mich. 676 2404
v. Thomas, 23 Miss. 544 1534
Hare v. Bailey, 73 Minn. 409 656
v. Bedell, 98 Pa. 485 1945
v. Grant, 77 N. C. 203 2826
v. Marsh, 61 Wis. 435 4780
v. Parkersburg, 24 W. Va. 554 2236, 2239
v. Pittsburg, etc., R. Co., 10 Pa. Super. Ct. 647 3878
v. Stegall, 60 Ill. 380 741
Harfield v. Lasher, 81 N. Y. 246 4587
v. St. Paul & D. R. Co., 33 Minn. 130 1470
Hargee v. Wilson, 63 Barb. 237 1818
Harger v. Edmonds, 4 Barb. 256 529, 1431
Hargis v. Mayes, 20 Ky. L. Rep. 1965 1780, 1795
Hargous v. Ablon, 3 Denio 406 210, 2279
v. Ablon, 5 Hill 472 2424, 2426
v. Lahens, 3 Sandf. 213 794, 795, 1903
v. Stone, 5 N. Y. 73 2371, 2379
Hargrave v. Conroy, 19 N. J. Eq. 281 2496
v. Dusenbury, 2 Hawks. 326 644
v. Le Breton, 4 Burr. 2422 4557
v. Penrod, 1 Ill. 401 1354
Hargraves Mills v. Gordon, 137 App. Div. (N. Y.) 695 2270
Hargreave v. Smee, 6 Bing. 244 2746, 2748
Hargreaves v. Hutchinson, 2 Ad. & E. 12 4225
v. Kimberly, 26 W. Va. 787 1431, 3853
Hargroves v. Cooke, 15 Ga. 321 703, 707, 722, 728
v. Hartopp, [1905] 1 K. B. 472 3233
Hariston v. Sale, 6 Sm. & M. 634 2539
Harker v. Dement, 9 Gill. 7 3741, 4173, 4174, 4176, 4205
v. Irick, 10 N. J. Eq. 269 1122, 1640
v. Orr, 10 Watts 245 1527
Harkins v. Pullman P. C. Co., 52 Fed. 724 4872, 4880
Harkless v. Chicago, etc., R. Co., 151 Mo. App. 463 3485, 3501
Harkruder v. Moore, 44 Cal. 144 4634
Harlan v. Ely, 68 Cal. 522 2956
v. Jones, 16 Ind. App. 398 4608
Harlan County v. Hogsett, 60 Neb. 362 3990, 4103
Harland v. Lilienthal, 53 N. Y. 438 2494
Harland's Accounts, Matter of, 5 Rawle 523 1122
Harless v. Southwest Missouri E. R. Co., 123 Mo. App. 22 346
Harley v. Four Hundred Sixty-seven Bars of R. Iron, 1 Sawyer 1 2719
v. Gawley, 2 Sawyer 7, 11 2738
v. Merrill B. Co., 83 Iowa 73 3933, 3937
v. Platts, 6 Rich. 318 4218, 4240
v. Stapleton, 24 Mo. 248 2826
v. Thornton, 2 Hill (S. C.) 509n 595, 648
Harloe v. Foster, 53 N. Y. 385 2383
Harlow v. Boswell, 15 Ill. 56 1853, 1856
v. Haines, 63 N. Y. Misc. 98 1458
v. Thomas, 15 Pick. 66 2066, 2068, 2152, 2156, 2181, 2182
Harm v. McCormick, 4 N. J. L. 109 1543
Harman v. Bannon, 71 Md. 429 541
v. Bluefield, 70 W. Va. 129 3956, 4107
v. Cundiff, 82 Va. 239 4513, 4523, 4525
v. Harman, 54 S. C. 100 3710
v. Sanderson, 6 Sm. & M. 41 515, 534
v. Washington F. Co., 228 Ill. 298 42
Harmening v. Howland, 25 N. D. 38 1386, 4433
Harmer v. Cornelius, 5 C. B. (N. S.) 235 2526
v. Childress, 3 Yerg. 327 1539
v. Collins, 2 Penne. 36 1673
v. Dedrick, 3 Barb. 192 1556
v. Frye, 103 Ark. 584 227, 3209, 3216
v. Harmon, 61 Me. 233 1279, 4514
v. Old Colony R. Co., 165 Mass. 100 4702
v. Old Colony R. Co., 168 Mass. 377 4722
v. Omaha, 17 Neb. 548 3953
v. Payton, 68 Kan. 67 3118

[REFERENCES ARE TO PAGES]

Harmer v. Railroad, 87 Tenn. 614 3759, 3876, 3881
v. Sanderson, 6 Sm. & M. 41 2456
v. Thompson, 119 Ky. 528 1941, 1970
Harmon and Himrod Streets, In re, 146 N. Y. 297 4013
Harmonides, The, [1903] Prob. Div. 1 1457, 4994
Harmont v. Sullivan, 128 Iowa 309 504, 3182, 3258
Harmony v. Bingham, 1 Duer 209 3328
v. Bingham, 12 N. Y. 99 888, 895, 1561, 2874
Harmony Co. v. Rauch, 62 Ill. App. 97 547
Harms v. Proehl, 104 Minn. 303 4580
Harndon v. Stultz, 124 Iowa 734 1353
Harness v. Kentucky F. S. Co., 149 Ky. 65 2696, 2706
v. Steele, 159 Ind. 286 4836, 4841
Harney v. Owen, 4 Blackf. 337 2540
Harnickell v. Parrot S. & C. Co., 117 N. Y. 644 2505
Harnish v. Miles, 111 Ill. App. 105 1030
Harold, The, 84 Fed. 698 5012
Harold v. New York, etc., R. Co., 13 Daly 378 4658, 4797
Harowitz v. Concordia Fire Ins. Co., 129 Tenn. 691 3016, 3017, 3046
Harpending v. Shoemaker, 37 Barb. 270 1420
Harper v. Archer, 4 Sm. & M. 99 29
v. Archer, 28 Miss. 212 3725
v. Atlantic C. L. R. Co., 161 N. C. 451 1138
v. Bell, 2 Bibb. 221 1059
v. Columbus Factory, 35 Ala. 127 541
v. Concrete Pub. Co., 166 Mich. 429 717
v. Dotson, 43 Iowa 232 2403
v. Gaynor, 19 Vict. L. R. 675 3255
v. Graham, 20 Ohio 105 748, 749, 752, 754, 755
v. Hampton, 1 H. & J. 453, 622 1145
v. Harvey, 4 W. Va. 539 612, 683
v. Jeffries, 5 Whart. 26 2115
v. Lenoir, 152 N. C. 723 400, 1432, 3760, 3763, 4028
v. McVeigh, 82 Va. 851 2843
v. Middle States L., B. & C. Co., 55 W. Va. 149 979, 995
v. Miller, 27 Ind. 277 183
v. Missouri, etc., R. Co., 70 Mo. App. 604 1368
v. Moffat C. Co., 151 Ill. 84, 100 521
v. Ray, 27 Miss. 622 2575
v. Rosenberger, 56 Mo. App. 388 2797, 2800
v. Tidholm, 155 Ill. 370 832
v. Weeks, 89 Ala. 577 244
v. Western U. Tel. Co., 111 Mo. App. 269 3593
Harper F. Co. v. Southern Exp. Co., 148 N. C. 87 187, 189, 254, 3367, 3373
Harper Mach. Co. v. Ryan-U. Co., 85 Conn. 359 1364
Harpham v. Whitney, 77 Ill. 32 4634
Harr v. Ward, 73 Ark. 437 4605, 4608, 4623, 4632, 4637, 4647
Harrah v. Doherty, 111 Mich. 175 2860
Harralson v. Stein, 50 Ala. 347 564
Harrell v. Citizens' B. Co., 111 Ga. 846 539
v. Hill, 19 Ark. 102 2047, 2048
v. Neil, 56 Ind. App. 547 524, 531, 1934
Harrelson v. Oro Grande Lime & Stone Co., 23 Cal. App. 479 4092
v. Western U. Tel. Co., 90 S. C. 132 3633, 3655
Harrick v. Carman, 12 Mass. 159 2769
Harries v. Edmonds, 1 C. & K. 686 3272, 3273
Harrigan v. Gilchrist, 121 Wis. 127 1019, 1542, 1543
Harrill v. South Carolina, etc., R. Co., 132 N. C. 655 4952
v. Railroad Co., 135 N. C. 601 444
Harriman v. Harriman, 12 Gray 341 625
v. Meyer, 45 Ark. 37 791
v. New Nonpariel Co., 132 Iowa 616 1430
v. Queen Ins. Co., 49 Wis. 71 3012, 3021
Harrington v. Atlantic & P. Tel. Co., 143 Fed. 329 4450
v. Bean, 89 Me. 470 2059, 2060, 2093, 2097, 2113, 2151, 2182, 2186, 2188, 2189
v. Bean, 94 Me. 208 2212
v. Butte, etc., R. Co., 36 Mont. 478 1485
v. Butte, etc., R. Co., 39 Mont. 22 1511
v. Clark, 56 Kan. 644 2096
v. County Com'rs, 22 Pick. 267 4146
v. Coxe, 3 Ir. C. L. 87 1553
v. Fall River I. W. Co., 119 Mass. 82 2529, 2534, 2536
v. Gies, 45 Mich. 374 2564
v. Glenn, 1 Hill (S. C.) 53 1051
v. Hoggart, 1 B. & Ad. 577 1034
v. Macmorris, 5 Taunt. 228 594
v. Murphy, 109 Mass. 299 210, 2155
v. St. Paul, etc., R. Co., 17 Minn. 215 402, 3876
v. Stratton, 22 Pick. 510 533, 534, 536, 547, 556, 1838
v. Tibbet, 143 Cal. 78 4603
v. Wabash R. Co., 108 Minn. 257 3412
v. Wells, 12 Vt. 505 2336
v. Witherow, 2 Blackf. 37 1398
Harrington-W. Co. v. Blomstrom Mfg. Co., 166 Mich. 276 318, 503, 2707
Harriott v. Plimpton, 166 Mass. 585 57
Harris v. Arnott, 26 L. R. Ir. 55 4549
v. Balk, 198 U. S. 215 692
v. Benson, 2 Str. 910 1017
v. Bressler, 119 Ill. 467 977
v. Brooks, 21 Pick. 195 2805, 2807
v. Brown's Bay L. Co., 57 Wash. 8 4745
v. Cameron, 81 Wis. 239 70
v. Cannady, 149 N. C. 81 2387
v. Carmody, 131 Mass. 51 2825
v. Clap, 1 Mass. 308 1038, 1570
v. Cleghorn, 121 Ga. 314 342, 3203
v. Close, 2 Johns. 448 748
v. Columbia W. & L. Co., 114 Tenn. 328 171, 2356
v. Crawley, 161 Mich. 383 4700, 4738
v. Davis, 13 Ky. L. Rep. 736 4194
v. Delaware, etc., R. Co., 77 N. J. L. 278 340, 3484
v. Eagle Ins. Co., 5 Johns. 368 3006, 3007, 3029, 3048
v. Eldred, 42 Vt. 39 215, 4190
v. Fargo (Misc.) 113 N. Y. Supp. 577 3322
v. Faris-K. C. Co., 13 Idaho 211 291, 2688, 2692, 2693, 2694, 2699, 2704
v. Ferguson, 2 Bailey 397 2859, 2864
v. Finberg, 46 Tex. 79 4299, 4269
v. Goslin, 3 Harr. 338 3151
v. Grant, 96 Ga. 211 4286
v. Great Western R. Co., 1 Q. B. Div. 515 3415
v. Harris, 69 Ind. 181 1860

[REFERENCES ARE TO PAGES]

Harris v. Harris, 70 Pa. 170 2003
v. Hobart Iron Co., 127 Minn. 399 5178
v. Jacobs, 15 Q. B. Div. 247 3307
v. Jaffray, 3 Harr. & J. 543 1358
v. Jex, 55 N. Y. 421 790, 797
v. Jex, 66 Barb. 232 573, 826
v. Johnston, 3 Cranch 311 664, 673
v. Jones, 1 M. & R. 173 3151
v. Kansas E. Co., 66 Kan. 372 1765
v. Kentucky L. Co. (Ky.), 74 S. W. 94 4847
v. Kerr, 37 Minn. 537 41
v. Ligget, 1 W. & S. 301 376
v. Lincoln, etc., R. Co., 91 Neb. 755 3877
v. Louisville, etc., R. Co., 35 Fed. 116 1496, 4840, 4842,
v. Lumpkin, 136 Ga. 47 2601
v. Lyon, 16 Ariz. 35 5034
v. McClintic-M. C. Co., 168 Mo. App. 724 1507, 4911
v. McLaughlin, 39 Colo. 459 1523
v. McReynolds, 10 Colo. App. 532 4838
v. Mercur, 202 Pa. 318 1019
v. Metropolitan St. R. Co., 168 Mo. App. 336 1512
v. Miller, 6 Sawyer 319 862, 889
v. Mobbs, 3 Ex. Div. 268 91
v. Moody, 30 N. Y. 266 3036
v. Moss, 12 Ga. 95 2515, 2550
v. Mulock, 9 How. Pr. 402 802, 806
v. Murfree, 54 Ala. 161 495, 1621
v. Newell, 8 Mass. 262 2076
v. Newell, 42 Wis. 687 2814, 2820, 2841
v. Ohio O. Co., 57 Ohio St. 118 3114, 3115
v. Osborn, 2 Cr. & M. 629 2541
v. Packwood, 3 Taunt. 264 3279
v. Palmer, 5 Barb. 105 580, 581
v. Panama R. Co., 3 Bosw. 7 1421
v. Panama R. Co., 5 Bosw. 312 3389
v. Panama R. Co., 6 Bosw. 312 3429
v. Panama R. Co., 58 N. Y. 660 1419, 1437, 2295
v. Pate, 7 Ind. Ty. 493 1835, 1920
v. Philadelphia, 155 Pa. 76 3878, 3882
v. Powers, 129 Ga. 74 1920
v. Rand, 4 N. H. 259, 261 3287, 3294, 3295
v. Rathbun, 2 Keyes 312 542, 564
v. Rivers, 53 Ind. 216 2828
v. Rodgers, 6 Heisk. 626 2275, 2294
v. Roof, 10 Barb. 489 2494
v. Root, 28 Mont. 159 2525, 2539
v. Rosenberg, 43 Conn. 227 1415
v. Rupel, 14 Ind. 209 1495
v. Ryding, 5 M. & W. 60 3917
v. Scher, 63 N. Y. Misc. 288 1500
v. Schuylkill, etc., R. Co., 141 Pa. 242 4033
v. Scaramanga, L. R. 7 C. P. 481 3034
v. Smith, 3 S. & R. 20 4284
v. Smith, 132 Cal. 316 4311, 4322
v. Snyder, 55 N. Y. Misc. 306 842, 888
v. Story, 2 E. D. Smith 363 759
v. Taylor, 150 Mo. App. 291 2793, 2834
v. Theus, 149 Ala. 133 832, 887, 929
v. Thomas, 140 Mich. 462 4613, 4623
v. Tumbridge, 83 N. Y. 99 4244
v. Warner, 13 Wend. 400 2856
v. Western U. Tel. Co., 121 Ala. 519 3551
Harris County v. Campbell, 68 Tex. 22 2667
Harris L. Co. v. Morris, 80 Ark. 260 1280
Harrisburg, The, 119 U. S. 199 4846, 4848
Harrisburg Bank v. Meyer, 6 S. & R. 537 1825
Harrisburg E. L. Co. v. Goodman, 129 Pa. 206 4324
Harrisburg S. & L. Ass'n v. Yost, 197 Pa. 177 1596, 2756
Harrisburg, etc., R. Co. v. Cumberland County, 225 Pa. 467 4008, 4034, 4038, 4077
Harrison v. Adamson, 86 Iowa 693 208, 3794, 3806
v. Berkley, 1 Strobh. 525 129
v. Brega, 20 Up. Can. Q. B. 324 487, 491, 2928, 2960
v. Brown, 1 Swan 272 1598
v. Cage, Carthew 467 3676
v. Cage, 1 Ld. Raym. 386, 1 Salk. 24 3661
v. Charlton, 37 Iowa 134 2276, 2300, 2311
v. Clark, 87 N. Y. 572 1639
v. Clarke, 78 N. J. L. 236 2689
v. Close, 2 Johns. 448 753, 764, 778, 781
v. Coleman, 171 Mo. App. 633 1364, 3189
v. Conlan, 10 Allen 85 1102
v. Craven, 188 Mo. 590 2512, 2924
v. Dayries, 23 La. Ann. 216 720
v. Denny, 113 Md. 509 1080
v. Denver City T. Co., 54 Colo. 593 13, 3952
v. Ely, 120 Ill. 83 1268, 4774
v. Glover, 72 N. Y. 451 1451, 2303, 2304, 2949
v. Great Northern R. Co., 3 H. & C. 231 161
v. Handley, 1 Bibb 443 1009
v. Hanson, 11 Me. 241 1600
v. Harrison, 1 C. & P. 412 2316, 4249, 4251, 4252
v. Harrison, 20 Ala. 629 1182
v. Harrison, 75 Hun 191 1728
v. Harrison, 129 Ga. 284 2473
v. Henderson, 67 Kan. 194 746
v. Henderson, 7 Heisk. 315 644, 1081
v. Hicks, 1 Port. 423 681, 754
v. Hughes, 119 Fed. 997 5012
v. Iowa, etc., R. Co., 36 Iowa 323 1433, 3964
v. Johnston, 27 Ala. 445 736, 737
v. Kirk, 8 Ky. L. Rep. 779, (Ky. Super. Ct.) 2863
v. Kiser, 79 Ga. 588 3767
v. Lake, 14 M. & W. 139 2673
v. Lane, 5 Leigh 414 2858
v. Legore, 109 Iowa 618 656, 687
v. Long, 4 Desaus 111 1119
v. McGehee (Tex. Civ. App.), 139 S. W. 613 4232, 4238
v. McLaughlin, 108 Md. 427 2655
v. Missouri Pac. R. Co., 88 Mo. 625 486, 4169, 4189
v. Montstephen, 2 Dow. & Ry. 343 1655
v. Pacific Ry. & Nav. Co., 72 Ore. 553 3961, 3995
v. Pearce, 1 F. & F. 567 4599
v. Pennsylvania R. Co., 118 N. Y. Supp. 1022 341, 3476
v. Perea, 168 U. S. 311 4232
v. Phillips, 46 Mo. 520 2868
v. Pike, 48 Miss. 46 1149
v. Prentice, 28 Ont. App. 140, 24 Ont. App. 677 4959
v. Redden, 53 Kan. 265 118
v. Sterett, 4 Har. & McH. 540 3935

[REFERENCES ARE TO PAGES]

Harrison v. Sutter St. R. Co., 116 Cal. 156 1477, 4872, 4874, 4877
v. Swift, 13 Allen 144 3662, 3675
v. Taylor, 11 Jur. (N. S.) 408 4488
v. Watkins, 127 Ga. 314 1084
v. Weir, 71 App. Div. (N. Y.) 248 162
v. Western U. Tel. Co., 3 Tex. Civ. Cas. 67 3616
v. Western U. Tel. Co., 71 S. C. 386 3557
v. Western U. Tel. Co., 143 N. C. 147 3635, 3642, 3654
v. Wood, 1 Dev. & B. Eq. 437 3716
v. Woodle, 5 B. & Ad. 146 1655
v. Wright, 13 East 343 860
v. Young, 9 Ga. 359 4039
Harrison County v. Byrne, 67 Ind. 21 2656
Harrison W. Co. v. Hall & W. H. Co., 97 Mo. 289 2299
Harrod v. Bisson, 48 Ind. App. 549 4674
Harrold v. New York E. R. Co., 24 Hun 184 4814
Harrold Bros. v. City of Americus, 142 Ga. 686 4056
Harrolson v. Stein, 50 Ala. 347 553, 2276
Harron v. Wilson, 4 Cal. App. 488 531, 1371
Harrow v. Ryan, 31 Iowa 156 1675
Harrow Spring Co. v. Whipple H. Co., 90 Mich. 147 2297, 2345, 2456
Harsant v. Blaine, 56 L. J. Q. B. 511 1119
Harshman v. Northern Pac. R. Co., 14 N. D. 69 4846
v. Rose, 50 Neb. 113 1384
Harsin v. Oman, 68 Wash. 281 2151, 2153, 2157
Harstad v. Olson, 57 Wash. 264 378, 509
Hart v. Alexander, 2 M. & W. 484 754
v. Allen, 2 Watts 114 141
v. Atlantic C. L. R. Co., 144 N. C. 91 4170
v. Blum, 76 Tex. 113 4215
v. Boller, 15 S. & R. 162 655, 658
v. Brand, 1 A. K. Marsh. 159 1219
v. Brierley, 189 Mass. 598 4293
v. Carsley Mfg. Co., 221 Ill. 444 2683
v. Cascade T. Co., 39 Wash. 270 4827
v. Chicago & N. R. Co., 83 Neb. 652 1432, 3776, 3777
v. Crawford, 41 Ind. 197 696
v. De Lord, 17 Johns. 270 1530
v. Direct United States C. Co., 86 N. Y. 633 3560
v. Dorman, 2 Fla. 445 739
v. Evans, 8 Pa. 13 1364, 1369, 1372
v. Flynn, 8 Dana 190 792, 801, 809, 811
v. Georgia R. Co., 101 Ga. 188 208
v. Gerretson Co., 91 Kan. 569 1510
v. Goldsmith, 1 Allen 145 991
v. Gould, 62 Mich. 262 767
v. Guardians of the Poor, 81 Pa. 466 1582
v. Hart, 22 Barb. 606 2235
v. Hopson, 52 Mo. App. 177 2502
v. Knapp, 76 Conn. 135 4978
v. Lanman, 29 Barb. 410 2329, 2664
v. Maloney, 101 App. Div. (N. Y.) 37 2464, 2478
v. Metropolitan St. R. Co., 121 App. Div. (N. Y.) 732 1374
v. National Masonic Acc. Ass'n, 105 Iowa 717 3076, 3081
v. Norton, 1 McCord 22 2650
Hart v. Pennsylvania R. Co., 112 U. S. 331 832, 3283, 3412, 3414, 3417
v. Porter, 5 S. & R. 201 2006
v. Railroad Co., 33 S. C. 427 1343, 4730
v. Skinner, 16 Vt. 138 4301, 4302
v. Smith, 2 A. K. Marsh. 301 548
v. Spalding, 1 Cal. 213 3389
v. Stone, 30 Conn. 94 418
v. Stribling, 21 Fla. 136 1653
v. Strong, 183 Ill. 348 748
v. Ten Eyck, 2 Johns. Ch. 62 360, 1415, 4422
v. Tremont L. Co., 131 La. 847 2696
v. Tyler, 15 Pick. 171 2225
v. United States, 95 U. S. 316 1591
v. Vidal, 6 Cal. 56 1446
v. Wabash S. R. Co., 143 Ill. App. 503 3760
v. Waitt, 3 Allen 532 1358
v. Western R. Co., 13 Metc. (Mass.) 99 68, 4678
v. Western U. Tel. Co., 53 Tex. Civ. App. 275 3626
v. Western U. Tel. Co., 66 Cal. 579 3547, 3550, 3551, 3554
v. Windsor, 13 M. & W. 85 3122
v. Windsor, 12 M. & W. 68 3127, 3138, 3139, 3151, 3152
v. Wright, 17 Wend. 267 2371, 2377
Harten v. Loffler, 29 App. D. C. 490 2008
v. Loffler, 212 U. S. 397 1989
Harter v. Charleston, etc., R. Co., 85 S. C. 192 3400
v. Whitebread, 38 Pa. Super. Ct. 10 4598
Harter, Dr., M. Co. v. Hopkins, 83 Wis. 309 254, 2456
Hartford v. Franey, 47 Conn. 76 1574, 1583, 1586, 1597
v. Hills, 72 Conn. 599 1066
v. McGillicuddy, 103 Me. 224 2501
v. Poindexter, 84 Conn. 121 1065
Hartford D. Co. v. Calkins, 109 Ill. App. 579 319, 1417
v. Calkins, 186 Ill. 104 312, 1508
Hartford F. Ins. Co. v. Bourbon County Court, 115 Ky. 109 3008
v. Cannon, 19 Tex. Civ. App. 305 3044, 3057
v. Peebles H. Co., 82 Fed. 546 3029, 3050, 3068
v. Pires, — Tex. Civ. App. —, 165 S. W. 565 3059
v. Reynolds, 36 Mich. 502 2914
Hartford Ins. Co. v. Enoch, 79 Ark. 475 1089
v. Haas, 87 Ky. 531 3064
v. Hope, 40 Ind. App. 354 1305, 4372, 4386, 4389, 4433
Hartford L. S. Ins. Co. v. Matthews, 102 Mass. 221 4385
Hartford P. Co. v. Hartford D. & P. Co., 146 Fed. 332 4482
Hartford & S. O. Co. v. Miller, 41 Conn. 112 2060, 2087
Hartgraves v. Duval, 6 Ark. 506 4348
Hartgrove v. Southern C. O. Co., 72 Ark. 31 311, 369, 2414, 2433, 2434
Hartigan v. Dickson, 81 Minn. 284 773, 774
Hartings v. Thorley, 8 C. & P. 573 807
Hartland v. General Exch. Bank, 14 L. T. (N. S.) 863 375, 2551
Hartle v. Stahl, 27 Md. 157 756
Hartlep v. Cole, 120 Ind. 247 1789
Hartley v. Herring, 8 T. R. 130 4503, 4554, 4556, 4557, 4558

[REFERENCES ARE TO PAGES]

Hartley v. McAnalty, 4 Yeates 95 2068
v. Tatham, 1 Robert. 246, 1 Keyes 222 826
Hartley Estate Bank v. McCorkell, 91 Iowa 660 4329
Hartman v. Danner, 74 Pa. 33 747
v. Dobar, 80 N. J. L. 250 1448
v. Hollowell, 126 Iowa 643 2986
v. Pittsburgh I. Co., 159 Pa. 442 266
v. Pittsburg I. P. Co., 23 Pa. Super. Ct. 360 3850
v. Rogers, 69 Cal. 643 2545, 2547, 2581
v. Ruby, 16 D. C. App. Cas. 45 1960
v. Tully P. L. Co., 71 Hun 367 3769
v. Warner, 75 Conn. 197 47, 2509
Hartman, Matter of, 13 N. Y. Misc. 486 1093
Hartmann v. Burtis, 65 App. Div. (N. Y.) 481 41, 4300
Hartnett v. Baker, 4 Penne. 431 2274
v. United Rys. Co. of St. Louis, 162 Mo. App. 554 4882
Hartpence v. Rogers, 143 Mo. 623 4979, 4981, 4982, 4983
Hartranft v. Hesser, 34 Pa. 117 4520
Hartridge v. McDaniel, 20 Ga. 398 1805
Harts v. Fowler, 53 Ill. App. 245 941, 943
v. Wendell, 26 Ill. App. 274 1675
Hartsell v. Masterson, 132 Ala. 275 2554, 2556
Hartshorn v. Byrne, 147 Ill. 418 1032
v. Chaddock, 135 N. Y. 116 3890
v. Cleveland, 52 N. J. L. 473 2156, 2158
v. Illinois Valley R. Co., 216 Ill. 392 4033
v. Smith, 104 Ga. 235 4601, 4602
v. Worcester, 113 Mass. 111 4030
Hartsock v. Mort, 76 Md. 281 1986, 1995
Hartwell v. Becker, 181 Mo. App. 408 2521
v. Jewett, 9 N. H. 249 2539
v. Smith, 15 Ohio St. 200 2857
v. Young, 67 Hun 472 2518
Hartwell & R. Co. v. Moss, 22 R. I. 583 2750
Harty v. Smith, 74 Ill. App. 194 2743
Hartz v. Commonwealth, 1 Grant's Cas. 359 1598
v. St. Paul, etc., R. Co., 21 Minn. 358 3850, 3876
Hartzell v. Crumb, 90 Mo. 629 1981, 1989, 2008
Hartzler v. Metropolitan St. R. Co., 140 Mo. App. 665 112
Harvard v. Crouch, 47 Neb. 133 3953, 3964
Harvard B. Co. v. Sperber, 90 App. Div. (N. Y.) 417 2747
Harvey v. Alexander, 1 Rand. 219 2068
v. Atlantic C. L. R. Co., 153 N. C. 567 3460, 3485
v. Baldwin, 124 Ind. 59 1917, 1918
v. Boswell, 65 Ga. 550 1480
v. Buchanan, 121 Ga. 384 123
v. Connecticut, etc., R. Co., 124 Mass. 421 3318, 3319
v. Denver, etc., R. Co., 44 Colo. 258 697, 760, 770
v. Denver, etc., R. Co., 56 Colo. 570 1104
v. Detroit F. & M. Ins. Co., 120 Mich. 601 3014
v. English, 2 Rawle 308 1123
v. Georgia, etc., R. Co., 90 Ga. 66 3919, 3929
v. Grand Trunk R. Co., 2 Hask. 124, 250 3318
v. Hackley, 6 Watts 264 820
Harvey v. Hamilton, 54 Ill. App. 507 1094
v. Harvey, 2 P. Wms. 21 1083
v. Harvey, 3 Ind. 473 456, 780
v. Harvey, 75 Neb. 557 4982, 4983
v. Harvey, 124 La. 595 460
v. Hewitt, 8 Dowl. P. C. 598 1482
v. Ivory, 35 Wash. 397 4347
v. Laurie, 13 Ill. App. 400 2755
v. Mason City, etc., R. Co., 129 Iowa 465 42, 3846, 3847, 3860, 3866, 3875, 3881, 3887
v. Morris, 63 Mo. 475 1943
v. Morse, 69 N. H. 475 4285
v. Pettaway, 156 N. C. 375 2277
v. Pocock, 11 M. & W. 740 4204
v. Rickett, 15 Johns. 87 1480
v. Susquehanna C. Co., 201 Pa. 63, 88 Pa. 800 3880
v. Turner, 4 Rawle 223 2907, 2958, 2959
v. United States, 8 Ct. of Cls. 501 2709
v. Wiens, 16 Manitoba 230 2028
v. Woodhouse, Select Cas. in Ch. 80 573
Harwood v. Bloomington, 124 Ill. 152 4119
v. Keech, 4 Hun 389 4518, 4520, 4521
v. Lee, 85 Iowa 622 41, 2151, 2163
v. Lowell, 4 Cush. 130 4762
v. Tappan, 2 Spear 536 2682
v. West Randolph, 64 Vt. 41 4033
Hary v. Speer, 120 Mo. App. 556 1485
Harz v. Gowland, 126 La. 674 1605, 1609
v. Gowland, 133 La. 27 1609
Hasbrouck v. Milwaukee, 21 Wis. 217 2650
v. New York Cent., etc., R. Co., 64 N. Y. Misc. 478 3533
v. Tappen, 15 Johns. 200 889
v. Western U. Tel. Co., 107 Iowa 160 3586
v. Winkler, 48 N. J. L. 431 429
Hascall v. Whitmore, 19 Me. 102 1818
Hasell v. Bagot, 13 Anst. Com. L. R. 374 2284
Haseltine v. Central Bank, 183 U. S. 132 978
v. Guild, 11 N. H. 390 1853, 2874
Hasie v. Alabama & V. R. Co., 79 Miss. 581 1493
Haskel v. Hunter, 23 Mich. 305 229
Haskell v. Bartlett, 34 Cal. 281 1064
v. Brewer, 11 Me. 258 797, 819, 1237
v. Hartrick (Tex. Civ. App.), 135 S. W. 1057 3905, 3933
v. Hunter, 23 Mich. 305 2280, 2288, 4227
v. McHenry, 4 Cal. 411 2238
v. Mitchell, 53 Me. 468 1442, 2305
v. Northern Adirondack Co., 71 Hun 380 3780
v. Osborn, 33 App. Div. (N. Y.) 127 2579
v. Smith (Misc.), 86 N. Y. Supp. 779 2463
v. Smith (Misc.), 90 N. Y. Supp. 353 2493
Haskell County Bank v. Bank, 51 Kan. 39 389
Haskell & B. C. Co. v. Przezdziankowski, 170 Ind. 1 52, 157
Haskett v. Chicago, etc., R. Co., 170 Ill. App. 140 4698
Haskins v. Alcott, 13 Ohio St. 210 1058
v. Andrews, 12 Wyo. 458 3747
v. Bank, 100 Ga. 216 731
v. Dern, 19 Utah 89 624
v. Duperoy, 9 East 498 2229

[REFERENCES ARE TO PAGES]

Haskins v. Everett, 4 Sneed 531 4347
v. Jordan, 123 Cal. 157 581
v. Lumsden, 10 Wis. 359 4529
Haslam v. Galena, etc., R. Co., 64 Ill. 353 3964, 4036
Hasler v. Griffing Florida O. Co., 133 Ill. App. 635 1448
Hasli v. Yokel, 57 Mo. App. 622 3803
Hass v. Kansas City, etc., R. Co., 81 Ga. 792 3329
v. Prescott, 38 Wis. 146 4359
v. St. Louis, etc., R. Co., 128 Mo. App. 79 4698
Hassam v. Safford L. Co., 82 Vt. 444 4216, 4217, 4225
Hassard v. May (Tex. Civ. App.), 152 S. W. 665 2190
Hassard-Short v. Hardison, 114 N. C. 482 317
Hassell v. Long, 2 M. & S. 363 1596
v. Nutt, 14 Tex. 260 2552
Hassell I. Works Co. v. Cohen, 36 Colo. 353 2236
Hassett v. Carroll, 85 Conn. 23 1303, 4503, 4507
Hassler v. Gulf, etc., R. Co. (Tex. Civ. App.), 142 S. W. 629 192, 3323
Hastay v. Bonness, 84 Minn. 120 4257
Hastie v. Burrage, 69 Kan. 560 700
v. Courturier, 9 Ex. 102 1828
v. De Peyster, 3 Cai. 190 1019
Hastings v. Dickinson, 7 Mass. 153 456, 780, 783
v. Johnson, 1 Nev. 613 1050
v. Lovejoy, 140 Mass. 261 763, 764
v. Lovering, 2 Pick. 219 2379
v. Palmer, 20 Wend. 225 4562
v. Pepper, 11 Pick. 41 3425
v. Stetson, 126 Mass. 329 157, 4563
v. Stetson, 130 Mass. 76 4514, 4598
v. Westchester F. Ins. Co., 73 N. Y. 141 1089
v. Whitley, 2 Ex. 611 420
v. Wiswall, 8 Mass. 455 1108, 1199, 1205, 1880
Haswell v. Parsons, 15 Cal. 266 15
Hat v. Williams, 8 Ky. L. Rep. 434 (Ky. Super. Ct.) 182
Hatch v. Attleborough, 97 Mass. 533 1598
v. Attrill, 118 N. Y. 383 1489
v. Cincinnati, etc., R. Co., 18 Ohio St. 92 3976, 4021
v. Cohen, 84 N. C. 602 4602
v. Dwight, 17 Mass. 289 3882
v. First Nat. Bank, 94 Me. 348 1891
v. Fowler, 28 Mich. 205 2226
v. Fuller, 131 Mass. 574 1472, 4964
v. Hart, 2 Mich. 289 4190
v. Hutchinson, 64 Ark. 119 635
v. Luckman, 118 N. Y. Supp. 689 4214
v. Terry, 153 App. Div. (N. Y.) 230 4822
v. Van Dervoort, 54 N. J. Eq. 511 3100
v. Vermont Cent. R. Co., 28 Vt. 142 16, 3935
Hatcher v. Andrews, 5 Bush 561 1953, 2147, 2211
v. Briggs, 6 Ore. 31 3709, 3710
v. Comer, 73 Ga. 418 709
v. National Annuity Ass'n, 177 Mo. App. 278 3080
v. Pelham, 31 Tex. 201 4211, 4240
v. Quincy Horse Railway & Carrying Co., 181 Ill. App. 30 1417, 1427, 4691, 4730, 4747
v. Range, 98 Tex. 85 4505
Hatchett v. Gibson, 13 Ala. 587 538, 549, 555
v. Pegram, 21 La. Ann. 722 2834
Hatfield v. Central R. Co., 33 N. J. L. 251 3881, 3885
v. Fullerton, 24 Ill. 278 548, 3263, 4361
v. Graham, 73 W. Va. 759 2513
v. Lasher, 81 N. Y. 246 471, 4574, 4580, 4596
v. St. Paul & D. R. Co., 33 Minn. 130 1468
Hatfield's Est., 50 Pa. Super. Ct. 450 702, 2473
Hathaway v. Davis, 33 Cal. 161 2814
v. Lynn, 75 Wis. 186 840, 891, 919, 922
v. Meads, 11 Ore. 66 1203
v. National L. Ins. Co., 48 Vt. 355 1424
v. O'Gorman, 26 R. I. 476 2220
v. Osborne, 25 R. I. 249 3814
Hathorn v. Natural C. G. Co., 194 N. Y. 326 7
v. Richmond, 48 Vt. 557 312
Hathorne v. Stinson, 12 Me. 183 35, 39
v. Wheelwright, 99 Me. 351 1837
Hatt v. Evening News Ass'n, 94 Mich. 114 4548
v. Evening News Ass'n, 97 Mich. 119 4540
Hatten v. Turman, 123 Ky. 844 227, 285
Hatterman v. Thompson, 83 Ill. App. 217 1014
Hattersly v. Waterville, 4 Ohio C. C. (N. S.) 242 866
v. Waterville, 26 Ohio C. C. 226 835, 888
Hattiesburg C. Co. v. Johnson, 81 Miss. 731 4213
Hattiesburg Lumber Co. v. Herrick, 212 Fed. 834 225, 294
Hattin v. Chase, 88 Me. 237 538, 2576
Hatton v. Board of Com'rs, 55 Ind. 194 1461
v. Cook, 166 App. Div. (N. Y.) 257 4393
Hauck v. Tidewater P. L. Co., 153 Pa. 366 3840
Hauer's Est., 140 Pa. 420 1070
Haueter v. Marty, 156 Wis. 208 2255, 2256
Haufler v. Public Service R. Co., 79 N. J. L. 404 4675
Haug v. Great Northern R. Co., 8 N. D. 23 1394, 1395
Haughan v. Grimes, 62 Kan. 258 1795, 1797
Haughton v. Newberry, 69 N. C. 456 4311
Hauk v. Brownell, 120 Ill. 161 4375, 4417
Haumueller v. Ackerman, 130 Mo. App. 387 1538
Haun v. Wilson, 28 Ind. 296 4531
Haunroth v. Peters, 50 Ill. App. 366 2685, 2687
Haupt v. Swenson, 125 Iowa 694 339
Hauser v. Griffith, 102 Iowa 215 1305
v. King, 76 Va. 731 1646
Hautala v. Dover, 176 Mich. 336 4210
Hauxhurst v. Hovey, 26 Vt. 544 1118
Havemeyer v. Cunningham, 35 Barb. 515 2299, 2301
v. Havemeyer, 43 N. Y. Super. 506 286
v. Paul, 45 Neb. 373 971, 998, 1060
Haven v. Baldwin, 5 Iowa 403 1241
v. Foley, 19 Mo. 636 658
v. Manufacturing Co., 40 Mich. 286 41

[REFERENCES ARE TO PAGES]

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Havener v. Western U. Tel. Co., 117 N. C. 540 3621
Havens v. Germania F. Ins. Co., 123 Mo. 403 3008, 3009, 3012
v. Hartford, etc., R. Co., 28 Conn. 69 1400, 1403, 1404, 1408
v. Ins. Co., 123 Mo. 403 3013
v. Lathene, 75 N. C. 505 1581
v. Patterson, 43 N. Y. 218 921
Haver v. Central R. Co., 64 N. J. L. 312 1338
Haverly v. Elliott, 39 Neb. 201 1809, 4267, 4285
Haverstick v. Gas Co., 29 Pa. 254 1706
Havilah, The, 1 C. C. A. 519, 50 Fed. 331 4998
Haviland v. Chase, 116 Mich. 214 1300, 1301
v. Parker, 11 Mich. 103 4198, 4349
v. Price, 6 N. Y. Misc. 372 2513
Havre De Grace v. Fahey, 108 Md. 533 1132
v. Fletcher, 112 Md. 562 3910
Haward v. Rowsell & Matthews [1914] W. C. & Ins. Rep. 314, 7 B. W. C. C. 552 5203
Hawes v. Birkholz (Misc.), 114 N. Y. Supp. 765 307, 2913, 2968
v. Kansas City S. Y. Co., 103 Mo. 10 4832
v. Knowles, 114 Mass. 518 164, 340, 1296, 1337, 3512
v. Marchant, 1 Curt. 136 2825
v. Woolcock, 30 Wis. 213 697
v. Woolcock, 26 Wis. 629 615
Hawk v. Anderson, 3 N. J. L. 319 1358
v. Geddis, 16 S. & R. 28 696
v. Pine L. Co., 149 N. C. 10 2705
v. Ridgway, 33 Ill. 473 1309
Hawkes v. Carter, 1 Law Reporter (London) 192 4599
v. Dodge County Mut. Ins. Co., 11 Wis. 183 629
Hawkesworth v. Thompson, 98 Mass. 77 3840
Hawkey v. Ketchum, 39 Colo. 353 56, 66
Hawkins v. Berry, 10 Ill. 36 2388
v. Bouic, 121 Md. 147 716
v. Chandler, 8 Houst. 434 2508
v. Citizens' Inv. Co., 38 Ore. 544 1032
v. Collins, 5 Ala. App. 522 4623, 4633, 4634
v. Coulthurst, 5 B. & S. 343 3078
v. Front St. C. R. Co., 3 Wash. 592 30, 4684, 4760, 4763
v. Gilbert, 19 Ala. 54 2667
v. Globe P. Co., 10 Mo. App. 174, 4573, 4581, 4587
v. Great Western R. Co., 17 Mich. 57 3335
v. Hoffman, 6 Hill 586 3532
v. House, 65 N. C. 614 1527
v. Hubbell, 127 Tenn. 312 207, 4631
v. Kansas City H. P. B. Co., 63 Mo. App. 64 4232
v. Kemp, 3 East 410 1936
v. Merritt, 109 Ala. 261 2025, 2044
v. Mims, 36 Ark. 145 2814
v. Minor, 5 Call 118 1119
v. Missouri Pac. R. Co., 182 Mo. 323 4863
v. Mitchell, 34 Fla. 405 1040
v. Pemberton, 51 N. Y. 198 2380, 2387
v. Potter (Tex. Civ. App.), 130 S. W. 643 2162
Hawkins v. St. Louis, etc., R. Co., 189 Mo. App. 201 5034, 5082
v. Stark, 19 Johns. 305 637
v. Watkins, 5 Ark. 481 1887, 1890
v. Wood, 60 S. C. 521 2143
Hawkins F. Co. v. Morris, 143 Ky. 738 432, 4210, 4232
Hawks, In re, 204 Fed. 309 735, 1103
Hawks v. Crofton, 2 Burr. 698 1491
v. Hinchcliff, 17 Barb. 492 674, 678
v. Smith, 141 Ga. 422 3713, 3714
Hawley v. Barker, 5 Colo. 118 1247
v. Belden, 1 Conn. 93 2604
v. Bradford, 9 Paige 200 3729
v. Corey, 9 Utah 175 2697, 2699, 2701
v. Dodge, 7 Vt. 237 210
v. Florsheim, 44 Ill. App. 320 1418, 2606, 2607, 2630
v. Foote, 19 Wend. 516 658
v. Kansas & T. C. Co., 48 Kan. 593 2519
v. McCall, 4 Ky. L. Rep. 626 2007
v. Sloo, 12 La. Ann. 815 1147, 1878
v. Smith, 45 Ind. 183 2508
v. Warner, 12 Iowa 42 1657, 1674
Hawley Down-Draft F. Co. v. Diamond State S. Co., 13 Pa. Dist. 61 2430
Hawman v. McLean, 139 Mo. App. 429 4395
Haws v. Stanford, 1 Tenn. Cas. 80 4592
v. Victoria C. M. Co., 160 U. S. 303 3736
Hawthorne v. City Bank, 34 Minn. 382 2158
v. Coursen, 18 N. Y. Misc. 447 3123
v. McArthur, 8 Ky. L. Rep. 526 (Ky. Super. Ct.) 1736
v. Siegel, 88 Cal. 159 3206, 3822
v. State (Tex. Civ. App.), 87 S. W. 841 1039
v. State, 39 Tex. Civ. App. 122 1567
Hawver v. Bell, 141 N. Y. 140 4228
Hax v. Quincy, etc., R. Co., 123 Mo. App. 172 4186
Haxby, The, 83 Fed. 715 2726, 2730
Haxton v. Kansas City, 190 Mo. 53 4656
Hay v. Bennett, 153 Ill. 271 1544
v. Cohoes Co., 2 N. Y. 159 6, 3913
v. Cohoes Co., 3 Barb. 48 3933
v. Collins, 118 Ga. 243 1532
v. Commonwealth, 183 Mass. 294 4152
v. Green, 12 Cush. 282 422
v. Hawkins, 120 Ill. App. 483 1444
v. Long, 78 Wash. 616 323, 476, 2902, 3810
v. Meridian Life & Trust Co., 57 Ind. App. 536 3075, 3085
v. Reid, 85 Mich. 296, 4576, 4582
v. Riddle, 1 Sandf. 248 4289
v. Short, 49 Mo. 139 559
v. Walker, 65 Mo. 17 2466
Haycock v. Rand, 5 Cush. 26 1838, 1848
Haycraft v. Creasy, 2 East 92 4374
Haycroft v. Walden, 14 Ky. L. Rep. 892 (Ky. Super. Ct.) 2439
Hayden v. Albee, 20 Minn. 159 389, 391, 414, 3860, 3900
v. Anderson, 17 Iowa 158 1657, 1674, 1676, 4360
v. Aurora, 57 Colo. 389 5034
v. Bradley, 6 Gray 425 3243
v. Cabot, 17 Mass. 169 178, 210, 298, 323, 476, 2849, 2885
v. Davis, 9 Cal. 573 2396
v. Demets, 53 N. Y. 426 230, 2235
v. Dick, 5 F. 150, 40 Sc. L. R. 95 5173
v. Fair Haven & W. R. Co., 76 Conn. 355 1280

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Hayden v. Florence S. M. Co., 54 N. Y. 221 1499, 3213
v. Hefferan, 99 Mich. 262 1056
v. Hill, 52 Vt. 259 2753, 2885
v. Keith, 32 Minn. 277 1713
v. Lauffenburger, 157 Mo. 88 636
v. McDermott, 9 Abb. Pr. 14 590
v. Madison, 7 Me. 76 2661, 2666
v. Mentzer, 10 S. & R. 329 2068
v. Missouri, etc., R. Co., 84 Kan. 376 3805
v. Patterson, 39 Colo. 15 2053, 2056, 2095
v. Shed, 11 Mass. 500 4605
v. Thrasher, 18 Fla. 795 2841, 2856
v. Weldon, 43 N. J. L. 128 2780, 2781
Hayes v. Atlanta, 1 Ga. App. 25 4005, 4011
v. Brandt, 80 Ark. 592 1392
v. Chicago, etc., R. Co., 45 Minn. 17 3774
v. Chicago, etc., R. Co., 64 Iowa 753 940, 1063
v. Chicago, etc., R. Co., 131 Wis. 399 4935
v. Cooper, 14 Ill. App. 490 2827
v. Elmsley, 23 Can. Sup. Ct. 623 1970, 2026
v. Greer, 4 Bin. 80 1578, 1579
v. Gross, 9 App. Div. (N. Y.) 12, aff'd 162 N. Y. 610 2608, 2611
v. Hutchinson & Shields, 81 Wash. 394 4835
v. Hyde Park, 153 Mass. 514 107
v. Josephi, 26 Cal. 535 828, 2807
v. Little, 52 Ga. 555 2816
v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626 749, 4279
v. Miller, 150 Ala. 621 122, 435, 475
v. Morrison, 38 N. H. 90 2855, 2860, 2862, 2863
v. Morse, 8 Vt. 313 701
v. Ottawa, etc., R. Co., 54 Ill. 373 4002, 4115, 4119
v. Porter, 22 Me. 371, 376 1594
v. Railroad, 141 N. C. 195 1280, 1311, 1330
v. St. Louis & S. F. R. Co., 177 Mo. App. 201 391
v. Sease, 51 S. C. 534 4783
v. Southern Home B. & L. Ass'n, 124 Ala. 663 1161, 1164
v. Toledo R. & T. Co., 6 Ohio C. C. (N. S.) 281, aff'd 70 Ohio 425 2975
v. Toledo R. & T. Co., 26 Ohio C. C. 395 3976
v. Wabash R. Co., 163 Mich. 174 3456
v. Wagner, 220 Ill. 256 2696
v. Ward, 4 Johns. Ch. 132 574, 2790, 2813, 2814
v. Wells, Fargo & Co., 23 Cal. 185 3412
v. Williams, 17 Colo. 465 4872
Hayes Pump & Planter Co. v. Assurance Co. of America, 182 Ill. App. 380 3050
Haymaker v. Adams, 61 Mo. App. 581 1432
v. Schroers, 49 Mo. 406 899
Hayman v. Hallam, 79 Ky. 389 1710
Haymond v. Saucer, 84 Ind. 3 3671
Hayne v. Prothro, 10 Rich. 218 558
Hayner v. Cowden, 27 Ohio St. 292 1316, 4503
v. Smith, 63 Ill. 430 3122, 3125, 4762
Haynes v. Aldrich, 133 N. Y. 287 3099
v. Chicago, etc., R. Co., 131 Wis. 399 4927
Haynes v. Clinton P. Co., 169 Mass. 512 4506
v. Dixon, [1899] 2 Ch. 561 961
v. Dixon [1900] 2 Ch. 561 1554
v. Halverton, 51 Tex. Civ. App. 228 1921
v. Harper, 25 Ark. 541 532, 554
v. Hart, 42 Barb. 58 2013
v. Leland, 20 Me. 233 4599, 4586
v. Maine Cent. R. Co., 108 Me. 243 1511, 4653
v. Massachusetts Mut. L. Ins. Co., 125 Ill. 626 4273
v. Nice, 100 Mass. 327 703, 711, 720, 722, 1852
v. Nye, 185 Mass. 507 2588
v. Plano Mfg. Co., 36 Tex. Civ. App. 567 2392
v. Sinclair, 23 Vt. 108 4968, 4969
v. Stevens, 11 N. H. 28 2137
v. Thom, 28 N. H. 386 817, 825
v. Trenton, 108 Mo. 123 1463
v. Waite, 14 Cal. 446 714
v. Waterville & O. St. R., 101 Me. 335 4652, 4752
Haynie v. American T. I. Co. (Tenn. Ch. App.), 39 S. W. 865 2061
Haynor Mfg. Co. v. Davis, 147 N. C. 267 2370, 2417
Hays v. Blizzard, 30 Ind. 457 4602
v. Borders, 6 Ill. 46 313
v. Creary, 60 Tex. 445 4836
v. Fidelity & D. Co., 112 Fed. 872 1737, 1760, 1763
v. Griffith, 85 Ky. 375 1544, 1545
v. H. & G. N. R. Co., 46 Tex. 280 1338
v. Hogan, 180 Mo. App. 237 4910
v. Houston, etc., R. Co., 46 Tex. 272 341, 3645
v. Millar, 77 Pa. 238 1330, 3386
v. Miller, 12 Ind. 187 990
v. Moynihan, 60 Ill. 409 2168, 3162
v. Riddle, 1 Sandf. 248 4285
v. South Easton Borough, 10 Pa. Super. Ct. 390 4048
v. Stone, 7 Hill 128 2960
v. United Rys. Co. of St. Louis, 183 Mo. App. 608 4792, 4818
v. Western U. Tel. Co., 70 S. C. 16 226, 3566
v. Wilstach, 101 Ind. 100 1793
v. Windsor, 130 Cal. 230 4321, 4322
v. Younglove, 7 B. Mon. 545 4601
Hayselden v. Staff, 5 A. & E. 153 2474
Haysler v. Owen, 61 Mo. 270 315, 316, 328, 2616, 2635, 2646
Hayt v. Bentel, 164 Cal. 680 2026
Hayter v. Moat, 2 M. & W. 56 1529
Hayward v. Cain, 105 Mass. 213 488
v. Ellis, 13 Pick. 272 1023
v. Fullerton, 75 Iowa 371 2821
v. Hague, 4 Esp. 93 817, 818
v. Leeson, 176 Mass. 310 4223, 4365, 4370
v. Leonard, 7 Pick. 181 356, 542, 2609, 2667, 2676
v. Maroney, 86 Conn. 261 4512
v. Metropolitan West Side El. R. Co., 174 Ill. App. 408 4680
v. Munger, 14 Iowa 516 795, 803, 819, 825, 1229
v. Seaward, 1 Moore & S. 459 4301
v. West Leigh Colliery, Ltd., [1915] A. C. 540, W. C. & Ins. Rep. 233, rev'g [1914] W. C. & Ins. Rep. 21 5201
Haywood v. Dering C. Co., 161 Ill. App. 544 4797
v. Foster, 16 Ohio 88 470, 472, 4581, 4584

[REFERENCES ARE TO PAGES]

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v. Haywood, 42 Me. 229 2333, 2309, 2337
v. Kuhn, 168 Mo. App. 56 4733
v. Miller, 14 Wash. 660 1877
Hayworth v. Haldeman, 14 Ky. L. Rep. 202 (Ky. Super. Ct.) 2548, 2571
Hazard v. Cole, 1 Idaho 276 1909
v. Durant, 14 R. I. 25 1127
v. Griswold, 21 Fed. 178 2825
v. Irwin, 18 Pick. 105 4374
v. Israel, 1 Bin. 240 1349
v. Loring, 10 Cush. 267 803
v. Volger, 7 C. C. A. 130, 58 Fed. 152 1512, 4739
Hazelet v. Holt County, 51 Neb. 716 1032
Hazelett v. Woodruff, 150 Mo. 534 2066, 2100, 2136, 2144
Hazelrig v. Hutson, 18 Ind. 481 2046, 2181
Hazelrigg v. Donaldson, 2 Met. (Ky.) 445 1712
Hazeltine v. Case, 46 Wis. 301 391
Hazelton v. Carolus, 132 Ill. App. 512 1441, 4403
v. Manhattan F. Ins. Co., 11 Biss. 210, 12 Fed. 159 3035
v. Sheckells, 202 U. S. 71 1847
v. Valentine, 113 Mass. 472 2834, 2844
Hazelton C. Co. v. Buck Mt. C. Co., 57 Pa. 301 2296, 2639
Hazen v. Durling, 2 N. J. Eq. 133 1636
v. Reed, 30 Mich. 331 638
Hazzard v. Flury, 120 N. Y. 223 4646
Head v. Becklenberg, 116 Ill. App. 576 4235
v. Breen, 5 Biss. 311 2772
v. Georgia, etc., R. Co., 79 Ga. 358 134, 3439, 3500, 3506, 3513
v. Green, 5 Biss. 311 2772
v. Hargrave, 105 U. S. 45 1447, 2142, 2480
v. Levy, 52 Neb. 456 34
v. Pacific Exp. Co., — Tex. Civ. App. —, 126 S. W. 682 3412
v. Porter, 70 Fed. 498 4453
v. Providence Ins. Co., 2 Cranch 127 3039
v. Ward, 1 J. J. Marsh. 280 1195
Headley v. Hackley, 50 Mich. 43 757
Heal v. Richmond County Sav. Bank, 127 App. Div. (N. Y.) 428 1229
Heald v. Cooper, 8 Me. 32 2222
v. Davis, 11 Cush. 319 699
v. MacGowan, 5 N. Y. Supp. 450 4238
v. MacGowan, 15 Daly 233, aff'd 117 N. Y. 643 4235
v. Sargeant, 15 Vt. 506 4204
Healdsburg v. Mulligan, 113 Cal. 205 1581
Healey v. Ballentine, 66 N. J. L. 339 4764
v. Gorman, 15 N. J. L. 328 1147, 1179, 1878
v. Kelley, 21 R. I. 489 3943
Health v. Haile, 45 S. C. 642 3837, 3838
v. Fallon, 69 Conn. 228 1016, 1032, 1099
v. Hutchinson, 66 N. H. 316 4224
v. McManus, 23 How. Pr. 238 3129
v. Newton, 96 Mich. 228 1558, 1765, 1766, 1802
v. Protection Mut. F. Ins. Co., 213 Ill. 99 817, 1051, 1056, 1447
Heaney v. Heeney, 2 Denio 625 3921
Heap v. Barton, 74 Eng. C. L. 273 3255
Heard v. Bowers, 23 Pick. 455 889
v. Dooly County, 101 Ga. 619 2650
v. Dubuque County Bank, 8 Neb. 10 1924
v. Hicks, 101 Ala. 102 1670, 1679
v. Holman, 19 C. B. (N. S.) 1 234, 267
v. James, 49 Miss. 236 363, 364, 3792, 4260, 4263, 4264, 4318, 4330, 4346
v. Pulaski, 80 Ala. 502 725
Hearle v. Greenbank, 3 Atk. 716 1083
Hearn v. Ayres, 77 Ark. 497 1132, 1624
v. Cutberth, 10 Tex. 216 739
v. Kiefe, 38 Pa. 147 762
v. McDonald, 69 W. Va. 435 3752, 3767
Hearne v. De Young, 119 Cal. 670 4517, 4520, 4546, 4582
v. Keath, 63 Mo. 84 2831, 2835, 2843, 2844, 2936
v. Lewis, 78 Tex. 276 3131
Hearsey v. Pruyn, 7 Johns. 179 2993
Hearst v. New Yorker Staats Zeitung, 71 N. Y. Misc. 7 4538, 4586, 4587
v. St. Louis, etc., R. Co., 188 Mo. App. 36 5043, 5131
Heart v. Bryan, 2 Dev. Eq. 147 2797
Heartt v. Rhodes, 66 Ill. 351 670, 2940
Heasley v. Nichols, 38 Wash. 485 3676, 3688
Heast v. Sybert, Cheeves, 177 1829
Heaston v. Colgrove, 3 Ind. 265 537
Heater v. Delaware, etc., R. Co., 90 App. Div. (N. Y.) 495 4733, 4737
v. Pearce, 595 Neb. 583 43
Heath v. Derry Bank, 44 N. H. 174 2795
v. Franklin Ins. Co., 1 Cush. 257 3019, 3021
v. Grenell, 61 Barb. 190 720
v. Guy, 10 Mass. 371 1112
v. Haile, 15 Colo. App. 289 3838
v. Heape, 1 H. & M. 478 4634
v. Lent, 1 Cal. 410 1694, 1695, 4194, 4606
v. Minneapolis, St. P. & S. S. M. R. Co., 126 Minn. 470 1502, 3771
v. Newman, 11 Sm. & M. 201 2197
v. Perry, 3 Atk. 101 1083
v. Postal Tel. C. Co., 87 S. C. 219 3568, 3612, 3613
v. Potlatch L. Co., 18 Idaho 42 757
v. Seattle T. Co., 73 Wash. 177 489
v. Whidden, 24 Me. 383 2058
v. White, 3 Utah 474 663
Heath D. G. Co. v. Hurd, 193 N. Y. 255 2374, 2387
Heaton v. Angier, 7 N. H. 397 629, 763
v. Clark, 122 Iowa 716 2501
v. Timmons, 15 Ky. L. Rep. 62 (Ky. Super. Ct.) 2205
v. Wright, 10 How. Pr. 79 4585
Heaton Button-F. Co. v. Macdonald, 57 Fed. 648 4470
Heatwole v. Gorrell, 35 Kan. 692 860, 919, 922
Heaver v. Lanahan, 74 Md. 493 2700, 2702
Heavilon v. Kramer, 31 Ind. 241 314
Hebb v. Welsh, 185 Mass. 335 2598
Heber v. Heber, 139 Wis. 472 700
Hebert v. Lee, 118 Tenn. 133 2796
v. Lege, 29 La. Ann. 511 3745
Hebner v. Palatine Ins. Co., 157 Ill. 144 3051
Hebron Mfg. Co. v. Powell K. Co., 171 Fed. 817 2280

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v. Metzler, 14 Utah 408 4372, 4375, 4392
v. Ohio & M. R. Co., 132 Ind. 507 4854, 5118
Heck v. Shener, 4 S. & R. 249 538
Hecklin v. Ess, 16 Minn. 51 4328
Heckman v. Manning, 4 Colo. 543 424
v. Pinkney, 81 N. Y. 211 2674
v. Swartz, 55 Wis. 173 552
Hecksher v. McCrea, 24 Wend. 300 312, 1938, 2558, 3272
Heckt v. Heerwagen, 14 N. Y. Misc. 529 3145
Heela P. Co. v. Sigua I. Co., 157 N. Y. 437 180
Hedden v. Griffin, 136 Mass. 229 3084, 4418
v. Schnebin, 126 Mo. App. 478 189, 282
Hedderich v. Smith, 103 Ind. 203 3255, 3256
Heddles v. Chicago & N. R. Co., 77 Wis. 228 4670, 4673, 4807
Hedekin v. Gillespie, 33 Ind. App. 650 37
Hedge v. Holmes, 10 Pick. 381 632
v. St. Louis, etc., R. Co., 164 Mo. App. 291 3506
Hedgepeth v. Robertson, 18 Tex. 858 3831
Hedger v. Union Ins. Co., 17 Fed. 498 3051
Hedges v. Gray, 1 Blackf. 216 2329, 2330
v. Kerr, 4 B. Mon 526 1953
Hedin v. Minneapolis, M. & S. Inst., 62 Minn. 146 4379
Hedrick v. Firke, 169 Mich. 549 889, 926
v. Hwaco R. & N. Co., 4 Wash. 400 4851, 4923, 4929
v. Smith, — Tex. Civ. App. —, 146 S. W. 305 3211
Hedworth v. Primate, Hardress, 318 1188
Heebner v. Eagle Ins. Co., 10 Gray 131 1014, 3022, 3023
Heedstrom v. Baker, 13 Ill. App. 104 564
Heeg v. Licht, 80 N. Y. 579 3840
Heenan v. Evans, 3 M. & G. 398 1628
v. Redman, 101 Ill. App. 603 2415, 2421
Heer v. Warren-S. A. P. Co., 118 Wis. 57 4694
Heermans v. Ellsworth, 64 N. Y. 115 691
Heery v. Reed, 80 Kan. 380 2470
Hefferlin v. Karlman, 29 Mont. 139 1102
Heffield v. Meadows, L. R. 4 C. P. 595 2749
Heffrod v. Alger, 1 Taunt. 218. 1572, 1656
Heffron v. Brown, 155 Ill. 322 2462, 2471, 2473
Hefley v. Baker, 19 Kan. 9 1269, 1322
Heflin v. Campbell, 5 Tex. Civ. App. 106 690
Hefner v. Haynes, 89 Iowa 616 2392
v. Hesse, 29 La. Ann. 149 1758
Hegar v. DeGroat, 3 N. D. 354 3698, 3707
Hegberg v. St. Louis, etc. R. Co., 164 Mo. App. 514 4934, 4938, 4945
Hege v. Newsom, 96 Ind. 426 2371, 2373, 2405, 2410
Hegeman v. McArthur, 1 E. D. Smith 147 3122, 3123
v. Western R. Co., 16 Barb. 353, 13 N. Y. 9 1512, 3529
Hegerich v. Keddie, 99 N. Y. 258 267, 4954
Heiberger v. Missouri & K. Tel. Co., 133 Mo. App. 452 88, 96, 345, 1471, 4667
Heidecamp v. Jersey City, etc., R. Co., 69 N. J. L. 284 5100
Heidemann v. Martinez, — Tex. Civ. App. —, 183 S. W. 1166 4621
Heidenheimer v. Ellis, 67 Tex. 426 1102
v. Johnson, 76 Tex. 200 1253
v. Schlett, 63 Tex. 394 4178, 4179
v. Sides, 67 Tex. 32 4164
Heidiman-B. S. Co. v. Schott, 59 Neb. 29 4311
Heidt v. Minor, 89 Cal. 115 1609
Heiferman v. Greenhut Cloak Co., 83 Misc. (N. Y.) 435 2564
Heil v. Glanding, 42 Pa. 493 1309
v. St. Louis, etc., R. Co., 16 Mo. App. 363 3387
Heilbron v. Bissell, Bailey's Eq. 430 714, 742
Heilbroner v. Doughlas, 45 Tex. 402 4240
v. Hancock, 33 Tex. 714 314, 3269
Heilman v. Lebanon & A. St. R. Co., 175 Pa. 188 4028
v. Pruyn, 12 Mich. 301 2440, 2444
v. Westchester F. Ins. Co., 75 N. Y. 7 3065
Heilman & Clark v. Chicago & N. W. R. Co., 167 Iowa 313 3338
Heim B. Co. v. Jordan, 110 Mo. App. 286 2797
Heiman v. Schroeder, 74 Ill. 158 940, 1241
Hein v. Holdridge, 78 Minn. 468 4966, 4973
Heine v. Meyer, 61 N. Y. 171 2663, 2687, 2696
v. Treadwell, 72 Cal. 217 815
Heinemann v. Heard, 50 N. Y. 27 368, 2920
Heinlen v. Beans, 71 Cal. 295 1801
Heinlich v. Tabor, 123 Wis. 565 1516
Heinmiller v. Winston, 131 Iowa 32 1511
Heinrich v. Missouri & I. C. Co., 102 Mo. App. 29 423
v. St. Louis, 125 Mo. 424 3954
Heintz v. Bochmer, 6 Ohio Dec. 362 2502
v. Cahn, 29 Ill. 308 717, 722
v. Caldwell, 16 Ohio C. C. 630 4664
Heinz v. Roberts, 135 Iowa 748 928
Heirn v. McCaughan, 32 Miss. 17 222, 449, 3446, 3456
Heise v. Bumpass, 40 Ark. 545 2779
Heisen v. Westfall, 86 Ill. App. 576 869
Heiser v. Hatch, 86 N. Y. 614 308
v. Loomis, 47 Mich. 16 1374, 4708, 4782
v. Mears, 120 N. C. 443 2237, 2262, 2268, 2702
v. Withers, 15 Pa. Dist. 871 3166
Heiserman v. Burlington, etc., R. Co., 63 Iowa 732 3281
Heissler v. Stose, 131 Ill. 393 1067
Heite v. Cowgill, — Del. —, 91 Atl. 652 520, 522, 559
Hekla, The, 62 Fed. 941 2717
Helberg v. Hosmer, 143 Wis. 620 432, 4383
v. Nichol, 149 Ill. 249 2902
Helbig v. Grays Harbor E. Co., 37 Wash. 130 1466
Helbling v. Allegheny C. Co., 201 Pa. 171 3880
Helbner v. Townsend, 8 Abb. Pr. 234 1786
Helburn v. Mofford, 7 Bush 169 3138, 3143
Heldt v. Webster, 60 Tex. 207 4640
Helen F. Robbins, The, 55 Fed. 1014 2732

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Helena G. Co. v. Rogers, 98 Ark. 413 4861
v. Rogers, 104 Ark. 59 55, 143, 4873, 4949
Helena P. T. Co. v. McLean, 38 Mont. 388 3976, 4134
Helene v. Corn Exch. Bank, 96 App. Div. (N. Y.) 392 1031
Helfferich v. Sherman, 28 S. D. 627 2552
Helfs v. Winterbotton, 2 B. & Ad. 431 668
Helgoland, The, 79 Fed. 123 5000
Hellams v. Abercrombie, 15 S. C. 110 2841
v. Western U. Tel. Co., 70 S. C. 83 3618
Helland v. Bridenstine, 55 Wash. 470 1511, 4668, 4793
Hellen v. Ardley, 3 C. & P. 12 1038, 1568
Heller, In re, 3 Paige 199 57
Heller v. Cohen, 154 N. Y. 299 1953
v. Royal Ins. Co., 177 Pa. 262 3051
Helling v. Darby, 71 Kan. 107 2503
v. United Order of Honor, 29 Mo. App. 309 749
Hellings v. Heydenfeldt, 107 Cal. 577 1937
Hellman v. Merz, 112 Cal. 661 1030
v. Spielman, 19 Neb. 152 1621
Helm v. Commonwealth, 79 Ky. 67 735
v. Gridley, Walk. (Miss.) 511 1620
Helme v. Philadelphia L. Ins. Co., 61 Pa. 107 3084
Helmer v. Colorado, etc., R. Co., 122 La. 141 3972, 3985
Helmick v. Carter, 171 Ill. App. 25 977
Helmkampf v. Wood, 85 Mo. App. 227 1720, 1721
Helms v. Appleton, 43 Ind. App. 482 1361, 2893
v. Holton, 152 N. C. 587 4380, 4389
v. Munro, 16 Vict. L. R. 591 3806
v. Western U. Tel. Co., 143 N. C. 386 3613
Helmstetter v. Pittsburgh Rys. Co., 243 Pa. 422 1413, 4698
Helphenstine v. Downey, 7 D. C. App. Cas. 343 2323
Helphrey v. Chicago, etc., R. Co., 29 Iowa 480 796
Helppie v. Northwestern Drainage Co., 127 Minn. 360 3830
Helsel v. Traction Co., 14 Pa. Super. Ct. 420 4764
Helton v. Alabama Midland R. Co., 97 Ala. 275 4718
v. Asher, 135 Ky. 751 312, 2150, 2156, 2163, 2164, 2182
Helvenstein v. Higgason, 35 Ala. 259 556, 2196
Helwig v. Beckner, 149 Ind. 131 4633, 4634, 4640
Heman v. Compton Hill I. Co., 58 Mo. App. 480 2670, 2671
Hemenway v. Washington W. P. Co., 49 Wash. 338 1504
Hemmenway v. Fisher, 20 How. 255 1804, 5014
Hemmer v. Cooper, 8 Allen 334 4375
Hemmick v. Baltimore & O. S. W. R. Co., 263 Ill. 241 765, 771
Hemming v. Hale, 7 C. B. (N. S.) 487 496
Hemminger v. Western Assur. Co., 95 Mich. 335 2688
Hemmingway Mfg. Co. v. Council Bluffs C. Co., 62 Fed. 897 2268
Hempfield R. Co. v. Thornburg, 1 W. Va. 261 741
Hemphill v. Flynn, 2 Pa. 144 3099
v. Moody, 64 Ala. 468 683
v. Watson, 60 Tex. 679 983
Hempstead v. Des Moines, 63 Iowa 36 382
v. Salt Lake City, 32 Utah 261 4107, 4150
Hempsted v. Cargill, 46 Minn. 118 4101
Hemstead v. Colburn, 5 Cranch. C. C. 655 4353
Hemsteger v. Nelson, 181 Ill. App. 377 1262, 1288, 1309, 4165
Henay v. Hand, 36 Ore. 492 306
Hench v. Pennsylvania R. Co., 246 Pa. 1 5042, 5051
Hencke v. Johnson, 62 Iowa 555 2074
Henckley v. Hendrickson, 5 McLean 170 2218
Henderhen v. Cook, 66 Barb. 21 2469, 2524
Hendershott v. Western U. Tel. Co., 106 Iowa 529 3573, 3604
Henderson v. Agon, 148 Mich. 252 340
v. Bank, 25 Ont. 641 273, 276
v. Broomhead, 4 H. & N. 569 11
v. Brown, 16 Tex. Civ. App. 464 1669
v. Canada Atlantic R. Co., 25 Ont. App. 437 78
v. Cansler, 65 N. C. 542 918
v. Chaires, 35 Fla. 423 3720
v. Clayton, 22 Ky. L. Rep. 283 125
v. Coleman, 19 Wyo. 183 389, 1279, 1348, 1367, 1368, 1502, 3814, 3816, 3829
v. Coover, 4 Nev. 429 1590
v. Crescent Ins. Co., 48 La. Ann. 1176 3067
v. Dade C. Co., 100 Ga. 568 132
v. Desha, Hemp. C. C. 231 962, 1059
v. Detroit, 61 Mich. 378 3097
v. Eckern, 115 Minn. 410 2976
v. Fox, 83 Ga. 233 4510, 4568, 4569
v. Hall, 87 Ark. 1 2462, 2477
v. Hamilton, 1 Hall 314 1202
v. Henderson, 13 Mo. 151 2066, 2067, 2147, 2157
v. Herrod, 10 Sm. & M. 631 733
v. Hollind, 1 Ala. App. 400 4240
v. Jackson, 9 Abb. Pr. (N. S.) 393 4605
v. Jennings, 228 Pa. 188 2214, 2226
v. Kansas City, 177 Mo. 477 4808
v. Lexington, 33 Ky. L. Rep. 703 3974
v. Lexington, 132 Ky. 390 3963, 4006, 4033
v. Louisville, R. Co., 24 Ky. L. Rep. 394 1495
v. McClain, 19 Ky. L. Rep. 1450 3951
v. McClain, 102 Ky. 402 3953
v. McDuffee, 5 N. H. 38 2863
v. McGruder, 49 Ind. App. 682 1267, 1273
v. McGruder (Ind. App.), 94 N. E. 580 4620
v. McPike, 35 Mo. 255 1541
v. McRae, 148 Mich. 324 763
v. Mace, 64 Mo. App. 393 2459
v. Maid of Orleans, 12 La. Ann. 352 3387
v. Maryland Cas. Co., 29 Pa. Super. 398 1091
v. Montgomery, 18 La. Ann. 211 1807
v. Murphree, 109 Ala. 556 884, 885
v. New York Cent. R. Co., 78 N. Y. 423 401, 3972
v. O'Haloran, 114 Ky. 186 111, 125
v. San Antonio, etc., R. Co., 17 Tex. 580 4375

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Henderson v. Squire, L. R. 4 Q. B. 170 306, 3101
v. Staintor, Hardin 118 1357
v. Stevenson, L. R. 2 H. of L., Scotch App. 470 3416
v. Stiles, 14 Ga. 135 2525
v. Stobart, 5 Ex. 99 753
v. Sun Mut. Ins. Co., 48 La. Ann. 1031 3066
v. Thorn, [1893] 2 Q. B. 164 3155, 3162, 3164
v. Vinceny, 84 Ala. 99 2512
v. Wabash R. Co., 126 Mo. App. 610 1436
v. Weidman, 88 Neb. 813 343, 4191, 4196
v. Western M. & F. Ins. Co., 10 Rob. 164 3053
v. Williams, [1895] 1 Q. B. 521 4212, 4283
Henderson-A. L. Co. v. Shillito Co., 64 Ohio St. 236 2873
Henderson B. Co. v. Commonwealth, 120 Ky. 690 1066
v. O'Connor, 88 Ky. 303 929, 2701
Henderson-B. L. Co. v. Cook, 149 Ala. 226 842, 2655
Henderson C. Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668 939, 944, 1103
Henderson, City of, v. Herron, 152 Ky. 341 3853, 3854, 3880
v. Robinson, 152 Ky. 245 3853, 3854, 3880, 3937
Henderson E. Co. v. North Georgia M. Co., 126 Ga. 279 2241, 2404, 2409
Henderson & N. R. Co. v. Dickerson, 17 B. Mon. 178 3966, 4122
Hendrick v. Biggar, 151 App. Div. (N. Y.) 522 4974
v. Lowe, 85 Conn. 635 1996
v. Thomas, 106 Pa. 327 752
v. Walton, 69 Tex. 192 1602
Hendricks v. American Exp. Co., 138 Ky. 704 3383, 4849
v. Banning, 7 Minn. 32 2768
v. Butcher, 144 Mo. App. 671 1497
v. Carson, 97 Ind. 245 1798
v. Decker, 35 Barb. 298 4174
v. Evans, 46 Mo. App. 313 4221, 4257
v. Fowler, 16 Ohio C. C. 597 4774, 4775, 4781
v. Franklin, 4 Johns. 119 1903, 1907
v. Ireland, 162 N. C. 523 4321, 4324, 4334
v. Jefferson County Sav. Bank, 153 Ala. 636 2938
v. Middlebrooks Co., 118 Ga. 131 436
v. Shoemaker, 3 Gratt. 197 1599
v. Spring Valley M. & S. Co., 58 Cal. 190 3764
v. St. Louis T. Co., 124 Mo. App. 157 4702
v. Western U. Tel. Co., 126 N. C. 304 3552
Hendrickson v. Anderson, 5 Jones 246 2556
v. Back, 74 Minn. 90 2380, 2395
v. Kingsbury, 21 Iowa 379 1282, 1306, 1480
Hendrie & B. Mfg. Co. v. Parry, 37 Colo. 359 4612
Hendrix v. Wabash R. Co., 107 Mo. App. 127 244
Hendry v. Benlisa, 37 Fla. 609 612
v. Squier, 126 Ind. 19 3243
Hendryx v. Evans, 120 Iowa 310 2793
Hening v. Punnett, 4 Daly 545 2000
v. United States Ins. Co., 2 Dill. 26 2999
Henke v. Deere & M. Co., 175 Ill. App. 240 4715
Henkel v. Schaub, 94 Mich. 542 4531
Henkle v. Allstadt, 4 Gratt. 284 572
v. Davenport, 38 Iowa 35 4596
v. Smith, 21 Ill. 238 1452
Henly v. Neal, 2 Humph. 551 66
Henn v. Conisby, 1 Ch. Cas. 93 688
v. Douglass, 147 App. Div. (N. Y.) 473 4380
v. Horn, 56 Ohio St. 442, 448 4586
Henne v. Summers, 23 Cal. App. 763 2743
Hennepin County v. Jones, 18 Minn. 199 1578
Hennes v. Hebard, 169 Mich. 670 4229, 4261
Hennessey v. Brooklyn City R. Co., 6 App. Div. (N. Y.) 206 108
v. Farrell, 4 Cush. 267 906, 2525, 2667, 2683
v. Fleming, 40 Colo. 27 2654
v. Walsh, 142 Ill. App. 237 952
Hennessy v. Bavarian B. Co., 145 Mo. 104 4852
v. Metzger, 152 Ill. 505 840, 861, 862, 869, 2683
v. Sheldon, 12 Wall. 440 1256
v. Wilmerding-L. Co., 103 Fed. 90 4488, 4494, 4498
v. Wine Growers' Ass'n, 212 Fed. 308 4490
Hennies v. Vogel, 66 Ill. 401 4762
Henniker v. Turner, 4 B. & C. 157 2124
Henning v. Bartz, 25 Ohio C. C. 15 1494
v. Kieper, 37 Pa. Super. 488 1392, 1536
v. Vanhook, 8 Humph. 678 2456
v. Van Tyne, 19 Wend. 101 1243
v. Western U. Tel. Co., 41 Fed. 864 1344
v. Withers, 3 Brev. 458 2060
Hennington's Case, Cro. Jac. 432 1112
Henrie v. Buck, 39 Kan. 381 1781, 1788
v. Sweasey, 5 Blackf. 273 1354
Henry, The, 2 Eng. L. & Eq. 564 2719
Henry v. Ætna Ind. Co., 36 Wash. 553 2898
v. Central R. & B. Co., 89 Ga. 815 3385, 3410
v. Davis, 123 Mass. 345 223, 860, 861, 1812
v. Davis, 149 Ala. 359 3693, 3734
v. Dennis, 95 Me. 24 4387
v. Dubuque, etc., R. Co., 10 Iowa 540 4097
v. Dufilho, 14 La. 48 10
v. Elliot, 6 Jones' Eq. 175 2212
v. Ferguson, 55 Mich. 399 1676
v. Flagg, 13 Metc. (Mass.) 64 1205
v. Hand, 36 Ore. 492 2873, 2878, 2885
v. Heldmaier, 226 Ill. 152 297
v. Hobbs, 165 Mich. 183 2340, 2404
v. Klopper, 147 Pa. 178 4757
v. Mason City, etc., R. Co., 140 Iowa 201 4056
v. Moberly, 6 Ind. App. 490, 23 Ind. App. 305 4509
v. Mt. Pleasant, 70 Mo. 500 692
v. North American R. C. Co., 158 Fed. 79 1458, 2298, 2330
v. Norwood, 4 Watts 347 4572
v. Omaha P. Co., 81 Neb. 237 4743
v. Prendergast, 51 Ind. App. 43 4944
v. Risk, 1 Dall. 265 1107
v. Sioux City & P. R. Co., 75 Iowa 84 4803

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v. State Bank, 131 Iowa 97 1828, 1847
v. Thompson, Minor 209 955
v. Ward, 4 Ark. 151 1607
v. Western U. Tel. Co., 73 Wash. 260 1437, 3569
Henry Bill Pub. Co. v. Utley, 155 Mass. 366 722
Henry Buck, The, 39 Fed. 211 3370, 3403
Henry County v. Salmon, 201 Mo. 136 1588, 1595
Henry Ewbank, The, 1 Sunn. 400 2735
Henry Maurer, The, 215 Fed. 238 2716, 2717
Henry Oil Co. v. Head, — Tex. Civ. App. —, 163 S. W. 311 2586
Henry R. Tilton, The, 214 Fed. 165 2726, 2736
Hensen v. Beebe, 111 Iowa 534 2593, 2616
Henshaw v. Bank, 10 Gray 568 4221
v. Marine Ins. Co., 2 Caines 274 3025
v. Robins, 9 Metc. (Mass.) 83 2379, 2380, 2388
Hensley v. Orendorff, 152 Ala. 599 1449, 4325
v. Rose, 76 Ala. 373 1698
Henson v. King, 3 Jones 419 2388
v. Taylor, 108 Ga. 567 4159
v. Veatch, 1 Blackf. 369 469, 471, 4576
Henson-H. S. Co. v. Minnesota B. Co., 55 Minn. 530 47
Hentig v. Collins, 1 Kan. App. 173 1793
Henty v. Wray, 19 Ch. Div. 492, rev'd 21 Ch. Div. 332 2109
Henwood v. Cheeseman, 3 S. & R. 500 3097
v. Oliver, 1 G. & D. 25, 1 Q. B. 409 807
Hepburn v. Auld, 1 Cranch. 321 807, 813
v. Dunlap, 1 Wheat. 179, 3 Wheat. 231 1025, 2032
v. Griswold, 8 Wall. 603 797
v. Sewell, 5 Harr. & J. 211 480, 1135, 4201, 4209, 4296
Heppe v. Johnson, 73 Cal. 265 1587
Heralson v. Mason, 53 Mo. 211 2788
Herbener v. Crossan, 4 Pennew. (Del.) 38 4603, 4614
Herberger v. Orr, 62 Wash. 526 875
Herbert v. Dewey, 191 Mass. 403 2683, 2684
v. Dey, 15 Abb. N. C. (N. Y.) 172 530
v. Easton, 43 Ala. 547 2329
v. Ford, 29 Me. 546 515, 534, 554, 1837, 2198
v. Hallett, 3 Johns. Cas. 93 3294
v. Hardenberg, 10 N. J. L. 222 1357, 1358
v. Hillman, 50 Wash. 83 1990
v. Rainey, 162 Pa. 525 3839, 3882, 3887
v. Salisbury, etc., R. Co., L. R. 2 Eq. 221 870
Hercules I. Works v. Elgin, etc., R. Co., 141 Ill. 491 3977, 3981, 4033, 4049
v. Hummer, 4 Ill. App. 598 662, 664
Hercules W. Co. v. Fernandez, 5 Cal. App. 726 3963
Herd v. Thompson, 149 Pa. 434 2242
Herder v. Bloomer, 7 N. Y. Misc. 687 3254
Herdic v. Young, 55 Pa. 176 363, 1668, 3788, 4261, 4344, 4346
Herdlicka v. Evans, 165 Iowa 207 1957
Herdt v. Koenig, 137 Mo. App. 589 147, 3233
Herefordshire B. Co., In re, L. R. 4 Eq. 250 1115
Hereth v. Merchants' Nat. Bank, 34 Ind. 380 1818
Herfort v. Cramer, 7 Colo. 483 4392, 4410
Hergert v. Union R. Co., 25 App. Div. (N. Y.) 218 1382
Herler v. Pierce, 50 Pa. Super. Ct. 568 4502
Herman v. Brookerhoff, 8 Watts 240 4605
v. Pierce, 105 App. Div. (N. Y.) 16 261, 2574
v. Youngstown Car Mfg. Co., 216 Fed. 604 4465
Hermann v. Allen (Tex. Civ. App.), 128 S. W. 115 1735
v. St. Joseph R., L. H. & P. Co., 144 Mo. App. 147 1320
Hermann F. & P's. C. W. v. German Exch. Bank (N. Y. Misc.) 87 N. Y. Supp. 462 665
Hernandez v. Montgomery, 14 Martin 422 1598
Herndon v. Harrison, 34 Miss. 486 2088
v. St. Louis, etc. R. Co., 37 Okla. 256 30
v. Venable, 7 Dana 371 1986
Herning v. Holt L. Co., 153 Wis. 101 4928
Hernsheim v. Newport News. & M. V. Co., 18 Ky. L. Rep. 227 3332
Herpolsheimer v. Christopher, 76 Nev. 352 3183, 3189, 3200
v. Funke, 1 Neb. (Unof.) 471 3182, 3183, 3208, 3210
Herr v. Board of Education, 82 N. J. L. 610 4129
Herreshoff v. Tripp, 15 R. I. 92 3697
Herrick v. Bean, 20 Me. 51 580
v. Belknap, 27 Vt. 673 2657
v. Borst, 4 Hill 650 2820
v. Humphrey H. Co., 73 Neb. 809 4207, 4222
v. Lapham, 10 Johns. 281 4512, 4552
v. Minneapolis, etc. R. Co., 31 Minn. 11 4952, 4953
v. Moore, 19 Me. 313 2153
v. Newell, 49 Minn. 198 2003
v. Orange County Bank, 27 Vt. 584 2815
v. Whitney, 15 Johns. 240 2383
v. Wixom, 121 Mich. 384 4789
Herrin v. McEntyre, 1 Hawks 410 2092, 2129
Herrin, etc. R. Co. v. Nolte, 243 Ill. 594 4004, 4112, 4142
Herring v. American Ins. Co., 123 Iowa, 533 626
v. Armwood, 130 N. C. 177 181, 2349
v. Chesapeake & W. R. Co., 101 Va. 778 139
v. Gage, 15 Blatch. 124 4454, 4460
v. Hoppock, 15 N. Y. 409 437
v. Jester, 2 Houst. 66 4958, 4964, 4967, 4969
v. Pollard, 4 Humph. 362 2005, 2028
v. Skaggs, 62 Ala. 180 161, 2436
Herrington v. Macon, 125 Ga. 58 109
v. Pouley, 26 Ill. 94 675
Herriter v. Porter, 23 Cal. 385 376, 383, 412
Herrman v. East St. Louis, 58 Ill. App. 166 4109
v. Leland, 163 App. Div. (N. Y.) 515 1093, 1502

[REFERENCES ARE TO PAGES]

Herrman v. Leland, 84 Misc. (N. Y.) 82 2976, 2977
Herrmann v. Curiel, 3 App. Div. (N. Y.) 511 3098, 3103
v. East St. Louis, 58 Ill. App. 166 4108
Herron v. De Bard, 24 Tex. 181 2204
v. Laughlin, 23 Pa. Super. Ct. 226 3809, 3822
v. Raupp, 156 Mich. 162 226, 245
v. Western U. Tel. Co., 90 Iowa 129 3555, 3564, 3570, 3604, 3607
Hersberg v. Sachse, 60 Md. 426 4312
Hersey v. Bennett, 28 Minn. 86 735, 737
v. Hutchins, 71 N. H. 458 3698
v. Ins. Co., 27 N. H. 149 2670
v. Merrimack County Mut. F. Ins. Co., 27 N. H. 149 1451
v. Turbett, 27 Pa. 424 2208
v. Wa'sh, 38 Minn. 521 4273
Hersh v. Ringwalt, 3 Yeates 508 4552, 4599
Hershey's Est., 213 Pa. 601 1965
Hersperger v. Pacific L. Co., 4 Cal. App. 460 4793
Hertzberg v. Beisenbach, 64 Tex. 262 3183
v. Pittsburgh Taxicab Co., 243 Pa. 540 1493, 4758
v. Witte, 22 Tex. Civ. App. 320 3256
Hertzler's Est., 192 Pa. 531 1122
Hertzog v. Hertzog, 34 Pa. 418 1987, 2000, 2003, 2006, 2548, 3188
Hesketh v. Fawcett, 11 M. & W. 356 1234
Heslop v. Chapman, 23 L. J. (Q. B.) 49 4635
Hespen v. Union Pac. R. Co., 82 Neb. 495 1443, 4169
Hesper, The, 18 Fed. 692 2725, 2727
Hess v. Buffalo, etc. R. Co., 29 Barb. 391 3936
v. Dille, 23 W. Va. 90 663, 669
v. Gansz, 90 Mo. App. 439 4576
v. Hayes, 146 Iowa 620 2509
v. New York Press Co., 26 App. Div. (N. Y.) 73 4588
v. Oregon B. Co., 31 Ore. 503 4639, 4647
v. South Dakota Cent. R. Co., 30 S. D. 538 3389
v. Webb, 53 Ill. App. 53 4635
v. Werts, 3 S. & R. 361 1193
v. Zimmer, 152 Wis. 193 3662, 3676
Hess Co. v. Dawson, 149 Ill. 138 521, 2231
Hess' App., 112 Pa. 168 700
Hess' Est., 69 Pa. 272 578, 2869
Hesse v. Imperial E. Co., 160 Mo. App. 431 1363, 1364
Hessee v. Columbus, etc. R. Co., 58 Ohio St. 167 269
Hesseltine v. Stockwell, 30 Me. 237 360, 4262
Hessey v. Quinn, 21 Ont. L. R. 519 32
Hestai, The [1895] Prob. Div. 193 2720
Hester v. Hunnicutt, 104 Ala. 282 2096
Hetfield v. Dow, 27 N. J. L. 540 2860
Hethcoate v. Crookshanks, 2 T. R. 24 754
Hetherington v. Firth Co., 210 Mass. 8 172, 295, 2908, 2911, 2928
v. Northeastern R. Co., 9 Q. B. Div. 160 4911
Hetland v. Bilstad, 140 Iowa 411 1489
Hetrick v. Smith, 67 Wash. 664 4224, 4239, 4273
Hetten v. Lane, 43 Tex. 279 1585, 1586, 1587
Hettling & M's. Contract, [1893] 2 Ch. 269 1970
Hetzel v. Baltimore & O. R. Co., 169 U. S. 26 3941
Heubach v. Rother, 2 Duer 227 2958
Heucke v. Milwaukee City R. Co., 69 Wis. 401 4659
Hewell v. Hogin, 3 Cal. App 249 1211
Hewes v. Germain F. Co., 106 Cal. 441 2240, 2244
Hewett v. Chadwick, 8 App. Div. (N. Y.) 23 951
v. Chicago, etc., R. Co., 63 Iowa 611 3353
v. Morris, 1 Turn. & Russ. 241 1200
v. State, 6 Harr. & J. 95 1614
Hewins v. London Assur. Co., 184 Mass. 177 3066
Hewit v. Mason, 24 How. Pr. 366 4557
v. Prime, 21 Wend. 79 4958, 4960, 4966
Hewitt, In re, 25 N. J. Eq. 210 2797
Hewitt v. East Jordan L. Co., 136 Mich. 110 4884
v. Lichty Mfg. Co., 147 Iowa 270 2905
v. Miller, 61 Barb. 567 2238
v. Newburger, 66 Hun 230 4839
v. Pennsylvania R. Co., 228 Pa. 397 4750, 4759
v. Pioneer Press Co., 23 Minn. 178 4576, 4596
v. Pittsburg, etc., R. Co., 19 Pa. Super. Ct. 304 3975, 4131, 4133, 4134, 4151
v. Young, 82 Iowa 224 2902
Hewlett v. Brooklyn Heights R. Co., 63 App. Div. (N. Y.) 423 4694
v. George, 68 Miss. 703 4836
Hewson v. Peterman Mfg. Co., 86 Wash. 600 41
Hewson-H. S. Co. v. Minnesota B. Co., 55 Minn. 530 313, 314, 2275, 2277, 2280, 2298
Hext v. Gill, L. R. 7 Ch. App. 699 3917
Hexter v. Knox, 39 N. Y. Super. 109 3236
v. Knox, 63 N. Y. 561 193, 284, 316, 547, 549, 565, 2626, 2630, 3162, 3205, 3209, 3238, 3239, 3243, 3246, 3247
Hey v. Hawkins, 120 Ill. App. 483 312, 4185
v. Philadelphia, 81 Pa. 44 105
v. Wyche, 12 L. J. (Q. B.) 83 3178
Heydle v. Hazelhurst, 4 Bibb 19 1060
Heydon and Smith's Case, 13 Coke 69 4173
Heydon's Case, 11 Coke 5a 1533, 1534
Heyer v. Carr, 6 R. I. 45 4308
v. Cunningham P. Co., 6 Pa. Super. Ct. 504 2548, 2561, 2568
v. Salsbury, 7 Ill. App. 93 4898
Heyler v. Hall, Palm 325 1482
Heylyn v. Adamson, 2 Burr. 674 1151, 2937
Heyman v. Landers, 12 Cal. 107 1741
Heyn v. Philips, 37 Cal. 529 2698
Heyne v. Blair, 62 N. Y. 19 4634, 4637, 4643
Heys v. Tindall, 1 B. & S. 296 2963
Heyward v. Cuthbert, 1 McCord 386 3719
v. Cuthbert, 4 McCord, 354 4602
v. Lomax, 1 Vern. 24 738
v. Sanner, 86 Md. 19 1399, 1406
Heywood v. Hartshorn, 55 N. H. 476 1220, 1232
v. Heywood, 42 Me. 229 624
Hialey v. Hialey, 157 Mich. 45 2472, 2478

[REFERENCES ARE TO PAGES]

Hibbard v. Foster, 24 Vt. 542 3741
v. New York & E. R. Co., 15 N. Y. 455 1330, 3509
v. Thompson, 109 Mass. 288 3405
v. Western U. Tel. Co., 33 Wis. 558 35, 41, 1521
Hibernia Bank & T. Co. v. Smity, 89 Miss. 298 1229
Hibernia F. E. Co. v. Commonwealth, 93 Pa. 264 2563
Hibernia Ins. Co. v. O'Connor, 29 Mich. 241 3021
Hibernia Mut. F. Ins. Co. v. Meyer, 39 N. J. L. 482 3021
Hibernia Nat. Bank v. Lacombe, 84 N. Y. 367 1146
Hibernian Banking Ass'n v. Bell & Zoller Coal Co., 181 Ill. App. 581 2368
Hibert v. Lang, 165 Pa. 439 2867
Hicenbothem v. Lowenbein, 6 Robert, 557 383
Hick v. Raymond [1893] App. Cas. 22 3306
v. Rodocanachi, [1891] 2 A. B. 626 3306
Hickam v. Hickam, 46 Mo. App. 496 2465
v. Hollingsworth, 17 Mo. 475 2821
Hickborn v. Fletcher, 66 Me. 209 2853
Hickerson v. Insurance Cos., 96 Tenn. 193 3017, 3044
Hickey v. Baird, 9 Mich. 32 39, 40
v. Booth, 29 R. I. 466 1267, 1504, 4795, 4835
v. Brinkley, 88 Neb. 356 929
v. Kimball, 109 Me. 433 3664, 3666, 3675, 3676
v. New York Cent., etc., R. Co., 8 App. Div. (N. Y.) 123 4693
v. Parrot S. & C. Co., 32 Mont. 143 2472, 2479
v. Welch, 91 Mo. App. 4 86, 90, 168, 4689, 4738, 4748
Hickins v. Peoples Ins. Co., 31 N. H. 238 3055
Hickley v. Pittsburgh B. S. Co., 121 U. S. 264 2260
Hickman v. City of Kansas, 120 Mo. 110 3953
v. Dill, 32 Mo. App. 509 4359
v. Haynes, L. R. 10 C. P. 598 2293
v. McCurdy, 5 J. J. Marsh. 558 2869
v. Richardson, 92 Kan. 716 2392
Hickok v. Adams, 18 S. D. 14 2692, 2709
v. Farmers' Bank, 35 Vt. 476 2820
v. Hoyt, 33 Conn. 553 2247
Hicks v. Bailey, 16 Tex. 229 2835
v. Barnes, 132 N. C. 146 2474
v. Bingham, 11 Mass. 300 709
v. Blakeman, 74 Miss. 459 2010, 3706, 3710
v. Brantley, 102 Ga. 264 4634, 4646
v. Brown, 12 Johns 142 1151
v. Commercial Bank, 5 Vict. L. R. 228 4254
v. Cram, 17 Vt. 449 424
v. Deemer, 187 Ill. 164 4410, 4411
v. Drew, 117 Cal. 305 3849, 3926
v. Elwell, 129 Ill. App. 561 1003
v. Empire F. Ins. Co., 6 Mo. App. 254 3021
v. Faulkner, 8 Q. B. Div. 167 4633, 4636, 4644
v. Foster, 13 Barb. 663 4627
v. Gregory, 6 West Aust. L. R. 100 4552
v. Hannibal, etc., R. Co., 68 Mo. App. 329 3513
v. Herring, 16 Cal. 566 389
Hicks v. McBride, 3 Phila. 377 1672
v. Mareco, 5 C. & P. 498 1034
v. Monarch C. Mfg. Co., 176 N. Y. 111 865, 1454
v. Murphy, — Tex. Civ. App. —, 172 S. W. 1135 4611
v. National S. Co., 169 Mo. App. 479 229, 271
v. Newport, etc., R. Co., 4 B. & S. 403n 490, 4886
v. Shield, 7 El. & B. 633 3301
v. Swift Creek M. Co., 133 Ala. 411 3827
v. Wabash R. Co., 131 Iowa 295 3531
Hickson v. Lingold, 47 Ala. 449 2196
Hidden v. German S. & L. Soc., 48 Wash. 384 820
v. Waldo, 55 N. Y. 294 2970, 2972
Hide, In re, L. R. 7 Ch. 28 3110
Hide v. Thornborough, 2 C. & K. 250 3767
Hieber v. City of Spokane, 81 Wash. 589 3973
Hier v. Anheuser-B. B. Ass'n, 60 Neb. 320 1543
Hieronymus v. New York Nat. B. & L. Ass'n, 101 Fed. 12 1164
Hiersche v. Scott, 1 Neb. (Unof.) 48 4643
Hiett v. Davis, 88 Ind. 372 1797
Hifford v. Alger, 1 Taunt. 218 1561
Highee v. Hopkins, 1 Wash. C. C. 230 1929
Highie v. Farr, 28 Minn. 439 864, 918
v. Rust, 211 Ill. 333 530
Higby v. Kirksey, Tex. Civ. App. 163 S. W. 315 3193
Higdon v. Fields, 6 Ala. App. 281 1559, 1608
v. Garrett, 163 Ala. 285 4285
v. Thomas, 1 Harr. & G. 139 2068
v. Western U. Tel. Co., 132 N. C. 726 3633
Higginbotham v. Clayton, 80 Ala. 194 1498
Higgins v. Bear River & A. W. & M. Co., 27 Cal. 153 600, 607
v. Breen, 9 Mo. 497 2465
v. California P. & A. Co., 109 Cal. 304 3132
v. Central New England & W. R. Co., 155 Mass. 176 1272
v. Deering H. Co., 181 Mo. 300 2795
v. Dewey, 107 Mass. 494 54, 68, 72, 140
v. Halligan, 46 Ill. 173 816, 3102
v. Hopkins, 3 Ex. 166 2469
v. Illinois T. & S. Bank, 193 Ill. 394 aff'g 96 Ill. App. 29 1051, 2382
v. J. I. Case Threshing Mach. Co., 95 Neb. 3 1238, 1808, 2742
v. Lee, 16 Ill. 495 543
v. Los Angeles G. & E. Co., 159 Cal. 651 1429, 3770
v. Louisville, etc., R. Co., 64 Miss. 80 3507, 3524
v. Mansfield, 62 Ala. 267 1705, 4194
v. Moore, 34 N. Y. 417 685
v. Murray, 4 Hare 565 2228
v. New York, etc., R. Co., 78 Hun 567 3762, 3810
v. Sargent, 2 B. & C. 348 962, 1008, 1033, 1034, 1078
v. Steamship Co., 3 Blatch. 282 3306
v. Street, 19 Okla. 45 3110
v. United States, Exp. Co., 83 N. J. L. 398 3329, 3370, 3381, 3414
v. Watervliet I. & R. Co., 46 N. Y. 23 1332, 1347, 3511

[REFERENCES ARE TO PAGES]

Higgins v. Whitney, 24 Wend. 379 483, 486, 4202
Higgins Mfg. Co. v. Pearson, 146 Ala. 528 2674
Higginson v. Weld, 14 Gray 165 919
High v. Berret, 148 Pa. 261 4384, 4408
v. Johnson, 28 Wis. 72 1521
v. State Board of Education, 66 Fla. 175 4209
High Bridge L. Co. v. United States, 69 Fed. 320 3950
Higham v. Baddely, Gow, 213 809
v. Vanosdol, 101 Ind. 160 4979
Highbarger v. Milford, 71 Kan. 340 12
Highby v. Williams, 16 Johns. 214 3739
Highland Ave., etc., R. Co. v. Matthews, 99 Ala. 24 3756, 3759
v. Robinson, 125 Ala. 483 1268, 1343
Highland Bank v. Dubois, 5 Denio, 558 634
Highland T. Co. v. McKean, 11 Johns. 98 1527
Hight v. Naylor, 86 Ill. App. 508 4839, 4842
Hightower v. Hawthorne, Hempst. 42 1404
Highway Com'rs v. Chambers, 265 Ill. 113 3986, 3987
v. Ely, 54 Mich. 173 5
Highway Com'rs of Saline Tp. v. Klaus, 186 Ill. App. 431 3994
Higley v. First Nat. Bank, 26 Ohio St. 75 1038
v. Newell, 28 Iowa 516 946
Hihn v. Fleckner, 106 Cal. 95 3695
Hikes v. Crawford, 4 Bush 19 2832, 2833
Hilbard v. Ryan, 46 Ill. App. 313 4606
Hilbourne v. Suffolk, 120 Mass. 393 4108, 4114, 4124
Hilbrant v. Donaldson, 69 Mo. App. 92, 97 4601
v. Simmons, 18 Ohio C. C. 123 4574
Hilburn v. Mercantile Nat. Bank, 39 Colo. 189 1005
v. Phoenix Ins. Co., 140 Mo. App. 355 3008
Hildebrand v. American F. A. Co., 109 Wis. 171, 180 2523, 2526, 2539, 2545
Hilden v. Great Lakes Coal & Dock Co., 156 Wis. 205 4829
Hilder, Ex parte, 24 Ch. Div. 339 2982
Hildreth v. Hancock, 55 Ill. App. 572 1311, 1318
v. Jones, 13 Mass. 525 3728
v. Thompson, 16 Mass. 191 3716
v. Western U. Tel. Co., 56 Fla. 387 3591, 3654
Hildrup v. Brentano, 16 Ill. App. 443 1762
Hile v. Davison, 20 N. J. Eq. 228 2212
Hilfrich v. Meyer, 11 Wash. 186 1322, 1699, 1700, 1707
Hill v. Adams Exp. Co., 78 N. J. L. 333, rev'g S. C. 77 N. J. L. 19 3415
v. Adams Exp. Co., 80 N. J. L. 604 3417
v. Alabama & V. R. Co., 79 Miss. 587 1493
v. Alliance B. Co., 6 S. D. 160 978
v. Austin, 19 Ark. 230 569
v. Ball, 2 H. & N. 299 2447
v. Barclay, 16 Ves. 402 3155
v. Beach, 12 N. J. Eq. 31 1072
v. Beebe, 13 N. Y. 556 671
v. Blake, 97 N. Y. 216 2232
v. Bloomer, 1 Pin. 463 4348
v. Boston, etc., R. Co., 144 Mass. 284 3412
v. Bourcier, 29 La. Ann. 841 2791
Hill v. Buchanan, 71 N. J. L. 301 698
v. Canfield, 56 Pa. 454 1437, 2294
v. Chipman, 59 Wis. 211 2232
v. Durand, 58 Wis. 160 767
v. Ely, 5 S. & R. 363 1867
v. Enders, 19 Ill. 163 1858
v. Featherstonehaugh, 7 Bing. 569 538, 2511
v. Fleming, 128 Ky. 201 2803
v. Forkner, 76 Ind. 115 32, 33
v. George, 5 Tex. 87 1879
v. Gibbs, 5 Hill 56 428
v. Golden, 16 B. Mon. 551 2122
v. Goodchild, 5 Burr. 2790 1532
v. Grange, 1 Plowd. 178 787
v. Gray, 1 Stark 434 3685
v. Hanan (Tex. Civ. App.), 131 S. W. 245 2454
v. Hayes, 199 Mass. 411 3842
v. Hill, 1 N. J. L. 261 2218
v. Hobart, 16 Me. 164 1981, 1984, 2240
v. Hooper, 1 Gray 131 2517
v. Hunt, 17 Mass. 145 2945
v. Idle, 4 Camp. 327 3305
v. Kimball, 76 Tex. 210 94, 346
v. King, 48 Ohio St. 75 2797
v. Leadbetter, 42 Me. 572 3301
v. Lowry, Tappan 149 1607
v. McKay, 94 Cal. 5 2238, 2249
v. McLaughlin, 158 Mass. 307 731
v. Maupin, 3 Mo. 323 3663
v. Mayor, 193 Mass. 569 2563
v. Merl, 10 La. 108 1712
v. Montgomery, 84 Ill. App. 300 1270
v. Mudd, 9 Ky. L. Rep. 59 (Ky. Super. Ct.) 2881
v. New Orleans, etc., R. Co., 11 La. Ann. 292 1338
v. Newman, 47 Ind. 187 1520
v. Ninth Ave. R. Co., 109 N. Y. 239 435
v. North, 34 Vt. 604 2389, 2390
v. Northern Pac. R. Co., 33 Wash. 697 3417
v. Parsons, 110 Ill. 107 562, 2344, 2624
v. Place, 36 How. Pr. 26 634
v. Place, 5 Abb. Pr. (N. S.) 18, 7 Robert, 389 802, 806
v. Ragland, 24 Ky. L. Rep. 1053 1600
v. Reno, 112 Ill. 154 3132
v. Robbins, 22 Mich. 475 719
v. Sedalia, 64 Mo. App. 494 4738
v. Smith, 34 Vt. 433 2293, 2276, 2310
v. South Staffordshire R. Co., L. R. 18 Eq. 154 1114
v. Southerland, 1 Wash. (Va.) 128 714
v. Southwick, 9 R. I. 299 537
v. Spear, 50 N. H. 253 1829
v. Syracuse, etc., R. Co., 73 N. Y. 351 3415
v. Thomas, 19 S. C. 230 1728, 1741
v. Union R. Co., 25 R. I. 565 1500
v. Waight, 140 Iowa 584 698
v. Ward, 13 Ala. 310 4566
v. Wertheimer-S. S. Co., 150 Mo. 483 883
v. Wilson, 8 N. D. 309 4316
v. Wilson, 8 Blackf. 123 4965, 4971
v. Winsor, 118 Mass. 251 111, 4678, 4693
Hill Co., T. E. v. United States Fidelity & Guaranty Co., 184 Ill. App. 528 1787
Hill Mfg. Co., B. B. Co. v. Stewart, 116 Fed. 927 4437
Hill's Est., 67 Cal. 238 2835

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Hillebrand v. Standard B. Co., 139 Cal. 233 4932, 4934
Hiller v. Sharon Springs, 28 Hun 344 1468
Hillestad v. Industrial Ins. Comm. of Washington, 80 Wash. 426 5181
v. Lee, 91 Minn. 335 759
Hilley v. Western U. Tel. Co., 85 Miss. 67 312
Hillhouse v. Davis, 1 M. & S. 169 1034
Hilliard, In re, 83 Cal. 423 1121
Hilliard v. Chicago City R. Co., 163 Ill. App. 282 4675
v. King, 134 Ga. 817 2596
v. Noyes, 58 N. H. 312 814
Hilliard F. Co. v. Woods, 1 Wyo. 396 4240, 4261
Hillier v. Allegheny County Mut. F. Ins. Co., 3 Pa. 470 3048
Hilligas v. Kuns, 86 Neb. 68 143, 1990
Hillgoss v. Missouri, etc., R. Co., 84 Kan. 372 3767, 3798
Hilliker v. Loop, 5 Vt. 116 422
Hillman v. Halliday, 1 Woolw. 365 3534
v. Luzon Cafe Co., 49 Mont. 180 520
v. Newington, 56 Cal. 37 441, 442
v. Shannahan, 4 Ore. 163 420
v. Stanley, 56 Wash. 320 1870, 1920
v. Wilcox, 30 Me. 170 2388
Hillquit v. Sun P. & P. Ass'n, 49 N. Y. Misc. 630 303
Hills v. Bannister, 8 Cow. 31 2992
v. Blair, 182 Mich. 20 5188, 5198
v. Mesnard, 10 O. B. 266 629
v. Peycke Co., 14 Cal. App. 32 2230
v. Place, 48 N. Y. 520 687
Hillsboro O. Co. v. Citizens' Nat. Bank, 32 Tex. Civ. App. 610 1206
Hillsdale C. & C. Co. v. Pennsylvania R. Co., 229 Pa. 61 171, 266, 3312
Hillyard v. Banchor, 85 Kan. 516 2013
v. Crabtree, 11 Tex. 264 356, 2609, 2682
Hilsendegen v. Scheich, 55 Mich. 468 3171
Hilton v. Burley, 2 N. H. 193 1852
v. Jesup B. Co., 128 Ga. 30 279
v. Phoenix Assur. Co., 92 Me. 272 3041, 3046
v. St. Louis, 99 Mo. 199 1063
v. State, 60 Neb. 421 1247
v. Vanderbilt, 82 N. Y. 591 2950
v. Woods, L. R. 4 Eq. 433 365
Hilty v. Saltsburg Coal Min. Co., 55 Pa. Super. Ct. 104 3791, 3794, 3795
Hilyard's Est., 5 W. & S. 30 1200
Himes v. Kiehl, 154 Pa. 190 2405, 2409
v. Pittsburg, 213 Pa. 362 4112
Himely v. Rose, 5 Cranch 313 1053, 1256
Himmelberger-H. L. Co. v. Dallas, 165 Mo. App. 49 781, 782
Himmelman v. Des Moines Ins. Co., 132 Iowa 668 4208
v. Oliver, 34 Cal. 246 1064
Himmelmann v. Fitzpatrick, 50 Cal. 650 827
Himrod v. Baugh, 85 Ill. 435 2827
Hinchey v. Koch, 42 Mo. App. 230 4327, 4351
v. Starrett, 92 Kan 661 4399
Hinchliffe v. Koontz, 121 Ind. 422 2561
Hinchman v. Johnson, 108 Md. 661 531, 536
v. Paterson R. Co., 17 N. J. Eq. 75 421
v. Stiles, 9 N. J. Eq. 361 3727
Hinckler v. County Court, 27 Ill. 39 1606
Hinckley v. Arey, 27 Me. 362 748
v. Beckwith, 13 Wis. 31 193, 213, 252, 3243, 3246
v. Beckwith, 13 Wis. 31, 17 Wis. 413 3252
v. Colvin, 233 Ill. 139 2797, 2902
v. Kersting, 21 Ill. 247 2373
v. Kreitz, 58 N. Y. 583 1784, 1786
v. Merchants' Nat. Bank, 131 Mass. 147 686
v. New York Cent. R. Co., 56 N. Y. 429 3425
v. Pittsburgh B. S. Co., 121 U. S. 264 2253, 2263, 2697, 2707
v. Union Pac. R. Co., 129 Mass. 52 686
v. West, 9 Ill. 136 1556
Hinde v. Liddell, L. R. 10 Q. B. 265 194, 199, 317, 327, 2284, 2288, 2350, 2418, 2427
v. Liddell, 32 L. T. (N. S.) 449 2275
v. Madansky, 161 Ill. App. 216 3110, 3111
v. Smith, 6 Lans. 464 2946, 2947
v. Whitehouse, 7 East 558 2225
Hindle v. Birch, 1 Moore 455 1482
v. O'Brien, 1 Taunt. 413 979
Hindman v. First Nat. Bank, 86 Fed. 1013 4388
v. First Nat. Bank, 50 C. C. A. 623 4386, 4392, 4401
Hindry v. The Priscilla, Bee 1 2733
Hinds v. Barton, 25 N. Y. 544 1136
v. Chamberlin, 6 N. H. 225 1850
v. Hinds, 85 Ind. 312 1638
v. Parker, 11 App. Div. (N. Y.) 327 4601
Hinds County v. National L. Ins. Co., 104 Miss. 104 1018
Hine v. New York E. R. Co., 36 Hun 293 1434
Hiner v. Richter, 51 Ill. 299 4392, 4407
v. Whitlow, 66 Ark. 121 928
Hines v. Brode, 168 Cal. 507 4406
v. Imperial N. S. Co., 101 Miss. 802 1272, 3781, 3782
v. Miller, 126 Cal. 683 1032
v. Rocky Mount, 162 N. C. 409 3908, 3909
v. Royce, 127 Mo. App. 718 1489, 4380
v. Sinclair, 23 Vt. 108 4967
Hines L. Co. v. Alley, 73 Fed. 603 2255
Hingham v. United States, 161 Fed. 295 4150, 4151
Hink v. Sherman, 164 Mich. 352 1301
Hinkle v. Davenport, 38 Iowa 355 4513, 4514, 4576
v. Holmes, 85 Ind. 405 1778
v. Minneapolis, etc., R. Co., 31 Minn. 434 745, 814
v. North River Ins. Co., 70 W. Va. 681 3012, 3018
Hinkley v. Champaign Nat. Bank, 216 Ill. 559 2384
v. Sac O. & P. L. Co., 132 Iowa 396 2466
Hinkson v. Morrison, 47 Iowa 167 4339
Hinman v. Goodyear, 56 Conn. 210 1191, 1193
v. Heyderstadt, 32 Minn. 250 3788
Hinrichs v. Brady, 23 S. D. 250 739, 2907
v. New Orleans, 50 La. Ann. 1214 3146
Hinsdale v. New York, etc., R. Co., 81 App. Div. (N. Y.) 617 4905, 4911

[REFERENCES ARE TO PAGES]

Hinsdale v. White, 6 Hill 507 3129
Hinsdell v. Weed, 5 Denio 172 527, 540, 3301
Hinson v. Hampton, 32 Mo. 408 2524
v. Smith, 118 N. C. 503 4270
Hinton v. Cream City R. Co., 65 Wis. 323 4803
v. Perry County, 84 Miss. 536 1721
v. Scott, Dudley 245 1835
v. Sparkes, L. R. 3 C. P. 160 836, 919, 921
v. Stanton, 112 Ark. 207 2793
Hintz v. Graupner, 138 Ill. 158 4519, 4521, 4524, 4544
v. Wagner, 25 N. D. 110 4713
Hintze v. Thomas, 7 Md. 346 3133, 3167
Hiort v. London, etc., R. Co., 4 Ex. Div. 188, 195 4301
Hipp v. Spencer, 48 Colo. 433 2480
Hippler v. Quandt, 145 Wis. 221 4647
Hipwell v. National S. Co., 130 Iowa 656 2627, 2633
Hirabelli v. Daniels, 40 Utah 513 1386, 1497, 1498, 1500
Hirachand Punanchand v. Temple, [1911] 2 K. B. 330 753
Hires v. St. Louis R. Co., 157 Mo. App. 46 76
Hirsch v. Caler, 21 Cal. 71 695
v. Chicago Con. T. Co., 146 Ill. App. 501 1498, 1504, 1806
v. Feeney, 83 Ill. 550 4647
v. Georgia I. & C. Co., 169 Fed. 578 2299
v. Leatherbee L. Co., 69 N. J. L. 509 2216
v. Meldrim, 124 Ga. 717 2754
v. Press Pub., 141 App. Div. (N. Y.) 357 2694, 2695
Hirschfield v. Waldron, 54 Mich. 649 684
Hirschhorn v. Bradley, 117 Iowa 130 194, 248, 252, 259, 260, 261, 2572, 3216
Hirschkovitz v. Pennsylvania R. Co., 138 Fed. 438 4856, 4919, 4934, 4940
Hirt v. Hahn, 61 Mo. 496 328, 2602
Hise v. Foster, 17 Iowa 23 624
v. Western U. Tel. Co., 137 Iowa 329 3567, 3595
Hisler v. Carr, 34 Cal. 641 4325
Historical Pub. Co. v. La Vaque, 64 Minn. 282 2749
Hitch v. Riggin, 3 Boyce (Del.) 84 4348
Hitchcock v. Anthony, 83 Fed. 779 231
v. Bank, 57 App. Div. (N. Y.) 458 2930, 2944
v. Coker, 6 Ad. & El. 438 887
v. Gothenburg W. P. & I. Co., 4 Neb. (Unof.) 620 4383
v. Harrington, 6 Johns. 290 3719, 3723
v. Humfrey, 6 Scott N. R. 540 2749
v. Humphry, 5 M. & G. 560 2749
v. Hunt, 28 Conn. 343 318, 534, 554, 556, 564, 2429
v. Kelley, 18 Ohio C. C. 808 686
v. Libby, 70 N. H. 399 3788, 3792
v. Moore, 70 Mich. 112 4529
v. North, 5 Rob. (La.) 328 4643
v. Supreme Tent, 100 Mich. 40 237, 245, 259, 264
v. Tremain, 9 Blatch. 325 2219
v. Turnbull, 44 Minn. 475 561
v. Watson, 18 Ill. 289 2903
Hitchings v. Maryville, 134 Mo. App. 712 4705
Hitchkiss v. Platt, 8 Hun 46 1750
Hitchler v. Voelker, 8 Mo. App. 492 4784
Hitchman v. Whitney, 9 Hun 512 4968
Hitchner v. Ehlers, 44 Iowa 40 448
Hite v. Long, 6 Rand 437 4161
Hitt v. Allen, 13 Ill. 596 1014
Hitz v. Pittsburgh & B. St. Ry. Co., 245 Pa. 7 4820
Hiveley v. Golnick, 123 Minn 498 3661, 3667, 3671, 3672, 3674
Hix v. Edison E. L. Co., 10 App. Div. (N. Y.) 75 2520
Hixon v. Cupp, 5 Okla. 545 1600, 1601, 1608
v. Hixon, 7 Humph. 33 625, 1890, 2329
Hlubek v. Pinske, 84 Minn. 363 4619, 4649
Hoadley v. International P. Co., 72 Vt. 79 4900
v. Northern T. Co., 115 Mass 304 54, 139, 3332
v. Savings Bank, 71 Conn. 599 2501
v. Watson, 45 Vt. 289 1269, 1276, 1305, 4776
Hoadly v. House, 32 Vt. 179 2390
v. McLaine, 10 Bing. 482 2216
Hoag v. Breman, 3 Mich. 160 4349
v. Hatch, 23 Conn. 585 4502
v. Lake Shore, etc., R. Co., 85 Pa. 293 69
v. McGinnis, 22 Wend. 163 857, 919
Hoagland v. Forest Park H. A. Co., 170 Mo. 335 1322
v. Moore, 2 Blackf. 167 2662
v. Schenck, 16 N. J. L. 370 1079, 1085
v. Segur, 38 N. J. L. 230 910, 918, 925, 1106, 1108
Hoar v. Barge "Cecil Rhodes," 5 B. W. C. C. 49 5176
Hoard v. Garner, Sandf. 179 2937, 2941
v. Peck, 56 Barb. 202 2355
v. Railroad Co., 59 W. Va. 91 1965
Hoare v. Graham, 3 Camp. 57 1853, 1857
v. Hindley, 49 Cal. 274 1484
v. Rennie, 5 H. & N. 19 2232
Hoback v. Kilgore, 26 Gratt. 442 2047, 2049
Hobart v. Butler, 9 Ir. C. L. (N. S.) 157 2488
v. Dovell, 38 N. J. Eq. 553 2777
v. Drogan, 10 Pet. 108 2722, 2723, 2726
v. Hilliard, 11 Pick. 143 1764
v. Milwaukee City R. Co., 27 Wis. 194 3758
v. Sherburne, 66 Minn. 171 2511
v. Stewart, 99 Minn. 394 2510
v. Stone, 10 Pick. 215 779
Hobbs v. Davis, 30 Ga. 423 65, 216
v. Duff, 23 Cal. 596 524
v. Great Northern Ry. Co., 80 Wash. 678 5078
v. Harvey, 16 Me. 80 3717
v. London & S. R., L. R. 10 Q. B. 111 52, 133, 134, 183, 197, 219, 329, 3449, 3461, 3471, 4680
v. Marion, 123 Iowa 726 1417, 4794
v. Middleton, 1 J. J. Marsh. 176 1636
v. Smith, 27 Okla. 830 1270, 2421, 2447
Hobein v. Drewell, 20 Mo. 450 547
Hobel v. Mahoning & S. R. & L. Co., 229 Pa. 507 4722, 4723
Hoblit v. Bloomington, 71 Ill. App. 204 273, 274
v. Bloomington, 87 Ill. App. 479 1044

[REFERENCES ARE TO PAGES]

Hoboken P. & P. Co. v. Kahn, 58 N. J. L. 359 4576
v. Kahn, 59 N. J. L. 218 4548
Hobson v. Bass, L. R. 6 Ch. 792 2807
v. Hall, 13 Ky. L. Rep. 109 1710
v. Lord, 92 U. S. 397 3036
v. Philadelphia, 150 Pa. 595 3951
v. Thellusson, 8 B. & S. 476 1629
v. Todd, 4 T. R. 71 32
v. Trevor, 2 P. Wms. 191 839, 1552
Hoch v. Braxmar, 109 App. Div. (N. Y.) 209 278
Hochmark v. Richler, 16 Colo. 263 1202
Hochstein v. Vanderveer Crossings, 150 App. Div. (N. Y.) 118 1997
Hochster v. De la Tour, 2 El. & B. 678 312, 377, 390, 409, 2255
Hockenhammer v. Lexington & E. R. Co., 24 Ky. L. Rep. 2383 3486
Hocker v. Western U. Tel. Co. 45 Fla. 313 3565
Hockersmith v. Hanley, 29 Ore. 27 204, 2296, 2297
Hocking v. Hamilton, 158 Pa. 107 2255
v. Windsor S. Co., 131 Wis. 532 4652
Hockley v. Grand Trunk R. Co., 10 Ont. L. R. 363 1519
Hocksprung v. Young, 27 N. D. 322 871
Hocutt v. Western U. Tel. Co., 147 N. C. 186 311
Hodapp v. Sharp, 40 Cal. 69 1508
Hodgdon v. Hodgdon, 2 N. H. 169 1051, 1215
Hodge v. Bennington, 43 Vt. 451 106
v. Eastern R. Co., 70 Minn 193 4208
v. Quiry, 9 Ky. L. Rep. 650 1121
v. Rutland R. Co., 112 App. Div. (N. Y.) 142 4854
v. Shaw, 85 Iowa, 137 379
v. Tufts, 115 Ala. 366 2271, 2390, 2393, 2415, 2456
Hodgendorn v. Daniel, 202 Fed. 431 2013
Hodges, Ex parte, 24 Ark. 197 884
Hodges v. Causey, 77 Miss. 353 1460
v. Connor, 1 Spear 120 2204
v. Earl of Litchfield, 1 Bing. N. C. 492 1998, 2000, 2001
v. Earl of Litchfield, 1 Scott 443 2010
v. Fox, 36 Vt. 74 660
v. Fries, 34 Fla. 62 3189, 3216, 3231
v. Hodges, 9 R. I. 32 1017
v. Hodges, 5 Met. 205 1503
v. Holeman, 2 Dana 396 1112, 1804
v. Hosford, 17 Vt. 614 1013
v. King, 7 Metc. (Mass.) 583 860, 881, 884
v. Nall, 66 Ark. 135 4324
v. Parker, 17 Vt. 242 1073
v. Phelps, 65 Vt. 303 1080
v. Phinney, 106 Mich. 537 3728
v. Pine Product Co., 135 Ga. 134 3846, 3877, 3880, 3892, 3943
v. Raymond, 9 Mass. 316 1491
v. Rutland & B. R. Co. 29 Vt. 220 2467
v. Smith, Cro. Eliz. 623 780
v. Smith, 159 N. C. 525 2420, 4379
v. Suffelt, 2 Johns. Cas. 406 1553, 1556
v. Tennessee I. Co., 123 Ala. 572 635
v. Thayer, 110 Mass. 286 2060, 2066, 2069, 2070, 2102
v. Truax, 19 Ind. App. 651 748, 814
v. Wilkinson, 111 N. C. 56 2380, 2397
Hodges's Est., In re, 66 Vt. 70 1121, 1128
Hodgins v. Hodgins, 13 Up. Can. C. P. 146 2107, 2123, 2139
Hodgkins v. Dunham, 10 Cal. App. 690 2387, 2415, 2441
v. Mead, 119 N. Y. 166 1488
v. Moulton, 100 Mass. 309 534, 536, 1837, 1866
v. Price, 141 Mass. 162 1069, 1205, 3707, 3708
Hodgman, Matter of, 140 N. Y. 421 1080, 1087
Hodgman v. State Line & S. R. Co., 45 Ill. App. 395 2390, 2406, 2407, 2415
Hodgson v. Bell, 7 T. R. 97 2192, 2894
v. Hodgson, 2 Keen 704 2823
v. Kynoch, 15 Rep. of Pat. Cas. 465 4490
v. Milward, 3 Grant's Cas. 406 1310
v. Robins, Hay, Waters & Hay, [1914] W. C. & Ins. Rep. 65, 7 B. W. C. C. 232 5202
v. Wood, 2 H. & C. 649 283
Hodkinson v. McNeal M. Co., 161 Mo. App. 87 4321
v. Wyatt, 1 Dowl. & L. 668 1553
Hodsoll v. Stallebrass, 11 A. & E. 301 410, 411, 4757
v. Taylor, L. R. 9 Q. B. 79 4969
v. Union Pac. R. Co., 14 Utah 402 1503
v. Wilkins, 7 Me. 113 496
Hoe v. Sanborn, 3 Abb. Pr. (N. S.) 189 534, 2456
v. Sanborn, 21 N. Y. 552 2370, 2375
v. Sanborn, 35 How Pr. 197 2405
Hoeg v. Pine, 143 Iowa 243 1560
Hoehle v. Allegheny H. Co., 5 Pa. Super. 21 67
Hoenig v. Industrial Comm. of Wisconsin, 159 Wis. 646 5186, 5195
Hoerner v. Giles, 53 Ill. App. 540 536, 570
Hoertz v. Marrett, 5 Ky. L. Rep. 698 2205
Hoes v. Van Hoesen, 1 Barb. Ch. 379 767
Hoeser v. Kraeka, 29 Tex. 450 4331
Hoey v. Candage, 61 Me. 257 1489
v. Felton, 11 C. B. (N. S.) 142 115
v. Fletcher, 39 Fla. 325 4596
v. Metropolitan St. R. Co., 70 App. Div. (N. Y.) 60 4853
Hof v. St. Louis T. Co., 213 Mo. 445 405
Hoff v. Baum, 21 Cal. 120 3099, 3100
v. Hutchinson, 14 How. 486 1358
v. Parmelee, 140 Ill. App. 458 1929
Hoffeditz v. Railroad Co., 129 Pa. 264 769
Hoffman v. Ætna Ins. Co., 1 Robert. 501 3052
v. Bank, 12 Wall. 181 1818, 1824
v. Bosch, 18 Nev. 360 2097, 2098, 2137
v. Brown, 6 N. J. L. 429 781
v. Chamberlain, 40 N. J. Eq. 663 2395, 2396
v. Chicago, etc., R. Co., 91 Neb. 783 4871, 4872
v. Delihanty, 13 Abb. Pr. 388 3103
v. Dickinson, 31 W. Va. 142 1355, 1391
v. Dixon, 105 Wis. 315 2372, 2388
v. Dunlop, 1 Barb. 185 773
v. Edison E. I. Co., 87 App. Div. (N. Y.) 371 3882, 3889
v. Farmers' Co-op. S. Ass'n, 78 Kan. 561 2968
v. Flint, etc., R. Co., 114 Mich. 316 3882
v. Gill, 102 Mo. App. 320 4433
v. Habighorst, 49 Ore. 379 2793

[REFERENCES ARE TO PAGES]

Hoffman v. Insurance Cos., 88 Tenn. 735 3049, 3056
v. Johnson, 1 Bland Ch. 103 677
v. Kermerer, 44 Pa. 452 4971
v. King, 160 N. Y. 618 69
v. Metropolitan St. R. Co., 51 Mo. App. 273 4169, 4186, 4188
v. Mill Creek C. Co., 16 Pa. Super. 631 396
v. Noble, 6 Metc. (Mass.) 74 4294
v. Northern Pac. R. Co., 45 Minn. 53 1276, 3451, 3483, 3503
v. Shartle, 113 Va. 262 1493, 1501
v. Union F. Co., 68 N. Y. 385 225, 325, 5007
v. Van Diemen, 62 Wis. 362 819
Hoffman's Est., 3 Pa. Dist. 663 1078
Hoffmaster v. Black, 78 Ohio 1 686
Hoffmire v. Rice, 22 Kan. 749 3694
Hofford v. New York Cent., etc., R. Co., 43 Pa. Super. Ct. 303 3536
Hofnagle v. New York, etc., R., 55 N. Y. 608 210
Hofreiter v. Schwabland, 72 Wash. 314 4212
Hogan v. Atlantic E. Co., 66 Minn. 344 4221
v. Calvert, 21 Ala. 199 2189
v. Central Pac. R. Co., 71 Cal. 83 3935
v. Cregan, 6 Robert. 138 4966, 4971
v. Delaware Ins. Co., 1 Wash. C. C. 419 3009
v. Kirkland, 64 N. C. 250 529
v. Peterson, 8 Wyo. 549 33
v. Shuart, 11 Mont. 498 2405
v. Stophlet, 179 Ill. 150 2541
v. Thorington, 8 Port. 428 2421
v. Titlow, 14 Cal. 255 2524
Hoge v. Norton, 22 Kan. 374 231, 1687, 1697
Hoger v. Hart, 159 Iowa 234 1504
Hogg v. Cardwell, 4 Sneed 151 533
v. Dorrah, 2 Port. 212 4503, 4532
v. Frazier, 24 Ky. L. Rep. 930 4318
v. Hensley, 100 Ky. 719 3717, 3718, 3723
v. Pinckney, 16 S. C. 387 4606, 4607
v. Zanesville C. & Mfg. Co., 5 Ohio 410 1135, 1136
Hoggan v. Cahoon, 26 Utah 444 2977
Hoggins v. Coad, 58 Ill. App. 58 4978
Hogle v. Franklin Mfg. Co., 128 App. Div. (N. Y.) 403 1330
v. Meyering, 161 Mich. 472 2902
v. New York, etc., R. Co., 28 Hun 363 314
Hoglund v. Sortedahl, 101 Minn. 359 2675
Hogsett v. Ellis, 17 Mich. 351, 371 3096
Hogue v. Williamson, 85 Tex. 553 1889, 1891
Hohenthal v. Watson, 28 Mo. 360 4348
Hohl v. Meyer, 7 La. Ann. 18 1806
Hohn v. Interstate Cas. Co. 115 Mich. 79 3079
Hohorst v. Hamburg-Am. P. Co., 91 Fed. 655 4447
Hoidale v. Wood, 93 Minn. 190 748
Hoit v. Molony, 2 N. H. 322 1358
v. Stratton Mills, 54 N. H. 109 3814
Hoitt v. Moulton, 21 N. H. 586 1442, 2306
Holbrook v. Bliss, 9 Allen, 69 2212
v. Connor, 60 Me. 578 4375
v. Finney, 4 Mass. 566 3727
v. Griffis, 127 Iowa 505 3881, 3925
v. Hyde, 1 Vt. 286 361
v. Norcross, 121 Ga. 319 324
v. Receivers, 6 Paige 220 457
Holbrook v. Sims, 39 Minn. 122 968
v. Tobey, 66 Me. 410 862, 887
v. Vibbard, 3 Ill. 465 1151
v. Weatherbee, 12 Me. 502 2115
v. Young, 108 Mass. 83 547, 3122, 3259
Holcomb v. Noble, 69 Mich. 396 4383
v. Rice, 119 N. Y. 598 1732, 1759
v. Stafford, 102 Minn. 233 2506
v. Wyckoff, 35 N. J. L. 35 1822
Holcombe v. Holcombe, 74 N. J. L. 257 1214
Holden v. Clancy, 41 How. Pr. 1 2376
v. Dakin, 4 Johns. 421 2373
v. Lake Co., 53 N. H. 552 268, 284, 3815, 3893
v. Liverpool G. Co., 3 C. B. 1 161
v. Lyons, 175 Mo. App. 165 2501
v. Missouri R. Co., 108 Mo. App. 665 4744
v. Phoenix Rattan Co., 168 Mass. 570 1826
v. Rutland R. Co., 72 Vt. 156 3439, 3469
v. Starks, 159 Mass. 503 2501
v. Trust Co., 100 U. S. 72 959
Holden L. & L. S. Co. v. Interstate T. Co., 87 Kan. 221 997
Holder v. Railroad, 92 Tenn. 141 762
Holderman v. Hood, 70 Kan. 267 435
Holdgate v. Clark, 10 Wend. 215 295, 2885
Holdich's Cas, 14 Eq. Cas. 72 3085
Holdip v. Otway, 2 Saund. 107 1397, 1566
Holdridge v. Mendenhall, 108 Wis. 1 4780
Holdsworth v. DeBelaunzaran, 106 N. Y. 119 623
Hole v. Chard Union, (1894) 1 Ch. 293 3852
Holeman v. Coleman, 1 A. K. Marsh 297 1520
Holeran v. School Dist., 10 Neb. 406 1589
Holford v. Adams, 2 Duer 471 3279
Holiday v. Cohen, 34 Ark. 707 4194
Holihan v. New York, 33 N. Y. Misc. 249 1112
Holladay v. Holladay, 13 Ore. 523 820
Holland v. Brown, 35 Fed. 43 4852, 4914, 4947
v. Closs (Tex. Civ. App.) 146 S. W. 671 337, 1318, 4868, 4875
v. Flick, 212 Pa. 201 4503
v. Hall, 1 B. & Ald. 53 1849
v. Hardy, 3 New South Wales, 450 2008, 2009
v. Johnson, 51 Ind. 346 2804
v. McRae O. & F. Co., 134 Ga. 678 4724
v. Mutual F. Co., 8 Ga. App. 714 665, 790, 1918
v. Phillips, 6 Esp. 46 800
v. Rea, 48 Mich. 218 532
v. Rongey, 168 Mo. 16 664
v. Seven Hundred, etc., Tons of Coal, 36 Fed. 784 3282, 3292, 3378
v. Turner, 10 Conn. 308 2937
v. Weld, 4 Me. 255 771
v. Williams, 3 Ga. App. 636 1492
Holland B. Co. v. See, 146 Mo. App. 269 2798
Holland T. B. Co. v. Nixon, 61 N. Y. Misc. 469 930, 931
Hollcomb v. Harris, 166 N. Y. 257 4761
Holledge v. Duncan, 199 Mass. 121 54
Holleman v. Harward, 199 N. C. 150 3, 2355

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Hollenback v. Stone W. E. Co., 46 Mont. 559 4929, 4934
Hollenbeck v. Berkshire R. Co., 9 Cush. (Mass.) 478 5108
v. Johnson, 79 Hun 499 66
v. Marion, 116 Iowa 69 3882
v. Missouri Pac. R. Co., 141 Mo. 97 4804
v. Ristine, 114 Iowa 358 4531
v. Ristine, 105 Iowa 488 4553, 4556
Hollenberg v. Lane, 47 Ark. 394 698
Hollenberg M. Co. v. Barron, 100 Ark. 403 2225
Holler v. Coleson, 23 Ill. App. 324 1675
v. Western U. Tel. Co., 149 N. C. 336 3654
Holleran v. Bagnell, 6 L. R. Ire. 333 4912
Hollerbach & M. C. Co., v Wilkins. 130 Ky. 51 323, 2236, 2243, 2707
Holley v. Burgess, 9 Ala. 728 4531
v. Hardeman, 76 Ga. 328 705
Holliday v. Atkinson, 5 B. & C. 501 1824
v. Cohen, 34 Ark. 707 1694
v. Griffity, 32 Iowa 409 3677
v. Highland I. & S. Co., 43 Ind. App. 342 230, 625, 2262, 2269, 2274, 2276, 2278, 2279, 2301, 2306
v. Holliday, 123 Cal. 26 4638, 4645
v. Parker, 23 Hun 71, 4861, 4957
v. Sterling, 62 Mo. 321 4606
Hollidaysburg M. & F. S. Co. v. Gray, 45 Pa. Super. Ct. 426 3232, 3247
Hollidge v. Duncan, 199 Mass. 121 152
Hollinger v. York R. Co., 225 Pa. 419 1498, 1501
Hollingshed v. Yazoo, etc., R. Co., 99 Miss. 464 4662
Hollingsworth v. Davis-D. Estates C. Co., 38 Mont. 143 4895, 4902
v. Detroit, 3 McLean, 472 1210
v. Fort Dodge, 125 Iowa 627 1383
v. Funkhouser, 85 Va. 448 3712
v. Mexia, 14 Tex. Civ. App. 363 2127, 2131
v. Shaw, 19 Ohio St. 430 4502
v. Spectator Co., 49 App. Div. (N. Y.) 16 4506
v. Western U. Tel. Co., 82 Kan. 472 1267, 3618
Hollinsbee v. Ritchey, 49 Ind. 261 2834, 2852
Hollinsead v. Mactier, 13 Wend. 275 542, 2650, 2655
v. Stuart, 8 N. D. 35 686, 688
Hollis v. Chapman, 36 Tex. 1 2608
v. Covenant B. & L. Ass'n, 104 Ga. 318 1155
v. Western U. Tel. Co., 91 Ga. Ga. 801 3565, 3578
v. Weston, 156 Mass. 357 2510
Hollister v. Davis, 54 Pa. 508 736, 2827
v. Donahoe, 16 S. D. 206 1244
v. Nowlen, 19 Wend. 238 3279, 3283, 3412, 3415, 3534
v. Ruddy, 66 N. J. L. 68 3828
v. Union Co., 9 Conn. 436 14
Hollond v. Teed, 7 Hare 50 2755, 2767
Holloway v. Griffith. 32 Iowa 409, 332, 2255, 3662, 3676, 3677, 3688
v. Holloway, 103 Mo. 274 1727, 1728, 1742
v. Jacoby, 120 Pa. 583 2371
v. Miller, 84 Miss. 76 2096, 2120
v. Talbot, 70 Ala. 389 2556, 2563
v. Turner, 6 Q. B. 928 306
Holloway v. White-D. S. Co., 151 Fed. 216 721, 2340
Holloway S. Co. v. City Nat. Bank, 92 Tex. 187 360
Hollweg v. Schaefer B. Co., 197 Fed. 689, 117 C. C. A. 83 227, 259
Holly v. Boston G. Co., 8 Gray 123 151
v. Flournoy, 54 Ala. 99 4325, 4333
v. Mix, 3 Wend. 350 1534
v. Neodesha, 88 Kan. 102 477
v. Southern R. Co., 119 Ga. 767 3341
Holm v. Jamieson, 173 Ill. 295 2783
Holman v. Bayley, 3 Metc. (Mass.) 55 827
v. De Lin, 30 Ore. 428 3170
v. Hobson, 8 Hump. 127 1820
v. Ketchum, 153 Ala. 360 4208
v. Maupin, 3 T. B. Mon. 380 1957
v. Mineral Point Z. Co., 135 Wis. 132 3840
v. Union St. R. Co., 114 Mich. 208 1428
Holmberg v. Lake Shore & M. S. Ry. Co., — Mich. —, 155 N. W. 504 5066, 5083
Holme v. Brunskill, 3 Q. B. Div. 495 2756
Holmes v. A. J. Schwab & Sons, 141 Ga. 44 2771
v. Blogg, 8 Taunt. 508 2540
v. Board of Trade, 81 Mo. 137 2464
v. Boydston, 1 Neb. 346 2429
v. Briggs, 131 Pa. 233 663, 667, 671
v. Broket, Cro. Jac. 434 639
v. Carolina Cent. R. Co., 94 N. C. 318 1268, 1270, 1281, 3499, 3503
v. Clisby, 121 Ga. 241 37, 4501, 4508
v. Clisby, 118 Ga. 820 4503
v. Corthell, 80 Me. 31 3933, 3942
v. Davis, 19 N. Y. 488, rev'g 21 Barb. 265 3707, 3714
v. Dewey, 66 Kan. 441 997
v. Dung, 2 Cox's Ch. 1 1124
v. Fuller, 68 Vt. 207 146
v. Gregg, 66 N. H. 621 2271, 2272
v. Guion, 44 Mo. 164 3122
v. Guppy, 3 M. & W. 387 931
v. Halde, 74 Me. 28 4710
v. Holmes, 9 N. Y. 525 819
v. Holmes, 12 Barb. 137 790, 802, 803, 832
v. Holmes, etc., Mfg. Co., 37 Conn. 278 4487
v. Jones, 121 N. Y. 461 1290, 1512, 4544, 4570
v. Jones, 147 N. Y. 59 4508, 4544, 4549, 4582, 4587
v. Jones, 4 Aust. Com. L. R. 1692 4391
v. Joseph C. Griggs and Cargo, The, 1 Bene. 81 2736
v. Langston, 110 Ga. 861 1558, 1675, 4288, 4289
v. Laraway, 64 Vt. 175 658
v. LeFors, 36 Okla. 729 4841, 4844
v. Loud, 149 Mich. 410 27
v. McKennan, 120 Ill. App. 320 558, 561
v. Neafie, 151 Pa. 392 2502
v. North German Lloyd S. Co., 184 N. Y. 280 3417, 3535
v. Oregon, etc., R. Co., 6 Sawyer 262, 5 Fed. 75 4874, 4906
v. Oregon, etc., R. Co., 6 Sawyer 293, 5 Fed. 528 4947
v. Pratt, 34 Ga. 558 703, 717
v. Remsen, 4 Johns. Ch. 460, 20 Johns. 229 692

[REFERENCES ARE TO PAGES]

Holmes v. Rhodes, 1 B. & P. 638 2192, 2874, 2894
v. Rivers, 145 Iowa 702 1459, 4380, 4395, 4399
v. Robinson, 4 Ohio 90 580, 5[illegible]8
v. Royal Fraternal Union, 222 Mo. 556 4509
v. Seaman, 72 Neb. 300 1959, 2069, 2102
v. Seely, 19 Wend. 507 3733, 3734
v. Sinnickson, 15 N. J. L. 313 303, 2098, 2137, 2143
v. Standard O. Co., 183 Ill. 70, 82 Ill. App. 476 2742
v. Stummel, 24 Ill. 370 2524
v. Stummel, 17 Ill. 454 2648
v. Truman, 67 Fed. 542 4446, 4470
v. Weaver, 52 Ala. 516 306
v. Weed, 24 Barb. 546 297, 307, 322, 2848
v. Williams, 177 Ill. 386 2805
v. Wilson, 10 A. & E. 503 391, 397, 398, 402, 414, 3845, 3858, 3860
Holsapple v. Rome, etc., R. Co., 86 N. Y. 275 3336
Holser v. Skae, 169 Mich. 484 389, 543
Holsman v. Boiling Spring B. Co., 14 N. J. Eq. 335 38
Holst v. Stewart, 154 Mass. 445 4385
Holt v. Ashby, 150 Ky. 612 4539
v. Hannibal, etc., R. Co., 174 Mo. 524 3[illegible]9
v. Hayes, 110 Tenn. 42 4257
v. Manier, 1 Lea 488 2805
v. Penacook Sav. Bank, 62 N. H. 557 2867
v. Pie, 120 Pa. 425 2271
v. Sargent, 15 Gray 97 3761
v. Scholefield, 6 T. R. 691 1527
v. Silver, 169 Mass. 435, 456 321
v. Spokane & P. R. Co., 3 Idaho 703 4832
v. Strain, 2 Tenn. Cas. 166 2798
v. United Security L. Ins. Co., 76 N. J. L. 585 275, 294, 2701
v. United States, 29 Ct. of Cls. 56 691
v. Van Eps, 1 Dak. 198 1268, 4273
Holt Mfg. Co. v. Thornton, 136 Cal. 232 2636, 2642
Holten v. Board, etc., 55 Ind. 194 2305
Holtham v. Scranton R. Co., 15 Pa. Dist. 401 1141
Holthaus v. Hart, 9 Mo. App. 1 1727
Holton v. Andrews, 151 N. C. 340 3110
v. Brown, 18 Vt. 224 807, 808, 809, 811
v. Daly, 106 Ill. 131 rev'g 4 Ill. App. 25 4849, 4850, 4852, 4854, 4862, 4889, 4944, 5118
v. Hicks, 9 Kan. App. 179, 186 4701
v. Noble, 83 Cal. 7 533, 763, 4363
v. Smith, 7 N. H. 446 4294
Holtz v. Dick, 42 Ohio St. 23 358
Holway v. Sanborn, 145 Wis. 151 701
Holyoke v. Grand Trunk R. Co., 48 N. Y. 541 334, 3487
v. Hadley W. P. Co., 174 Mass. 424 2430
v. Jackson, 3 Wash. Ty. 235 1995
Holyoke E. Co. v. United States E. Co., 186 Mass. 498 2046
Holzworth v. Koch, 26 Ohio St. 33 537, 1857
Homan v. Franklin County, 90 Iowa 185 1374, 1375
v. Thompson, 6 C. & P. 717 1853
Homans v. Boston E. R. Co., 180 Mass. 456 79, 88, 4688
Home F. Ins. Co. v. Barber, 67 Neb. 644 2522, 2523
v. Bredehoft, 49 Neb. 152 760
v. Fitch, 52 Neb. 88 998
Home Ins. Co. v. Adler, 71 Ala. 516 1089, 2999, 3046, 3050, 3056
v. Baltimore W. Co., 93 U. S. 527, 23 L. ed. 868 3021, 3049, 3059
v. Continental Ins. Co., 180 N. Y. 389 3093
v. Gibson, 72 Miss. 58 3047, 3064
v. Koob, 113 Ky. 360 3049
v. Lindsey, 26 Ohio St. 348 3018, 3021
v. Peoria, etc., R. Co., 78 Ill. App. 137 2444
v. Schiffs, 103 Md. 648 1089
v. Watson, 59 N. Y. 390 2886
Home L. & C. Co. v. McNamara, 111 Fed. 822 868
Home L. Ins. Co. v. Sherman, 46 N. Y. 370 3121, 3127
Home Mut. F. Ins. Co. v. Garfield, 60 Ill. 124 3065, 3067
Home O. & G. Co. v. Dabney, 79 Kan. 820 52, 117
Home Pattern Co. v. W. W. Mertz Co., 88 Conn. 22 2236, 2250
Home Sav. Bank v. Hosie, 119 Mich. 116 2750
v. Morris, 141 Iowa, 560 1065
v. Oterbach, 135 Iowa 157 776
v. Shallenberger, 95 Neb. 593 2769
v. Trabue, 75 Mo. 199 2756
Home Tel. Co. v. Fields, 150 Ala. 306 53, 778
Homer v. Duluth, 70 Minn. 378 4108
v. Hathaway, 33 Cal. 117 4211
v. Kirkwood, 25 Miss. 96 1051
v. Perkins, 124 Mass. 431 4374, 4375
v. Purser, 20 Ala. 573 2196
v. Shaw, 177 Mass. 1 2666
Homes v. Langston, 110 Ga. 861 1710
v. Smith, 16 Me. 181 659
Homestead Co. v. Valley, R. 17 Wall. 153 3708
Homire v. Halfman, 156 Ind. 470 59, 60, 61
Honaker v. Vesey, 57 Neb. 413 4312
Honce v. Schram, 73 Kan. 368 2852
Hone v. Mutual Safety Ins. Co., Sandf. 137, 2 N. Y. 235 3091
Honea v. St. Louis, etc., R. Co., 245 Mo. 621 4880
Honegger v. Wettstein, 47 N. Y. Super. Ct. 125 778
Honesdale I. Co. v. Lake Lodore I. Co., 232 Pa. 293 2275, 2277
Honeycutt v. St. Louis, etc., R. Co., 40 Mo. App. 374 4795
Honnemyer v. Fischer, 27 Ohio C. C. 8 3248
Honnett v. Williams, 66 Ark. 148 1109
Honore v. Lamar F. Ins. Co., 51 Ill. 409 3061
v. Murray, 3 Dana 31 1067, 3147
Honsee v. Hammond, 39 Barb. 89 3745, 3761
Hoober v. New Holland W. Co., 43 Pa. Super. 262 267, 3854, 3890, 3925
Hoock v. Bowman, 42 Neb. 80 4380, 4392
Hood v. American P. S. Co., 191 Mass. 27 3414
v. Blotch, 29 W. Va. 244 2226
v. Finch, 8 Wis. 381 4093
v. Hayward, 48 Hun 330 2822

[REFERENCES ARE TO PAGES]

Hood v. Mathis, 21 Mo. 308 2767, 3097
v. Palm, 8 Pa. 237 1353
v. Raines, 19 Tex. 400 2662, 2709
v. Smiley, 5 Wyo. 70 2656
v. Sudderth, 111 N. C. 215 4963
Hoodley v. Watson, 45 Vt. 289 467
Hooe v. O'Callaghan, 10 Cal. App. 567 1997
Hook v. Crowe, 100 Me. 399 636
v. Stovall, 30 Ga. 418 2405, 2409
Hooker v. Boston & M. R., 209 Mass. 598 3417
v. Groom (Steuben Co. Ct., N. Y.), 141 N. Y. Supp. 268 519
v. Hammill, 7 Neb. 231 4349, 4350
v. Hubbard, 97 Mass, 175 661
v. Keay, 1 Q. B. Div. 178 738
v. Newton, 24 Wis. 292 1310
v. Phillippe, 26 Ind. App. 501 3677
Hookey v. Oakdale, 5 Pa. Super. 404 148
Hooks v. Bank, 8 Ala. 580 2814
v. Evans, 68 Iowa 52 1643
v. Fitzenrieter, 76 Tex. 277 1259
v. Pafford, 34 Tex. Civ. App. 516 1611
v. Smith, 18 Ala. 338 4300
v. Vet, 192 Fed. 314 1532
Hooks S. Co. v. Planters' C. Co., 72 Ark. 275 170, 196, 201, 2592, 2614, 2623, 3323
Hoole v. Dorroh, 75 Miss. 257 4
Hooley, In re, [1899] 2 Q. B. 579 2254
Hooper v. Armstrong, 69 Ala. 343 524, 570, 1365
v. Bacon, 101 Me. 533 4787
v. Bromley C. Co., 11 Pa. Super. 634 2237, 2248
v. Herald, 154 Mich. 529 3734
v. Hooper, 26 Mich. 435 758
v. Hooper, 81 Md. 155 1203, 2741, 2743, 2745, 2769, 2771
v. Sac County Bank, 72 Iowa 280 2080, 2082
v. Savannah & M. R. Co., 69 Ala. 529 919, 3964
v. Smith (Tex. Civ. App.), 53 S. W. 65 3773
v. Story, 155 N. Y. 171 2392, 2405, 2438
v. Winston, 24 Ill. 353 1121
Hoopes v. Brinton, 8 Watts 73 1245
v. East, 19 Tex. Civ. App. 53 181
v. Meyer, 1 Nev. 433 537, 3124
Hoot v. Spade, 20 Ind. 326 2112
Hooten v. Barnard, 137 Mass. 36 38
Hootman v. Shriner, 15 Ohio St. 43, 495, 1617
Hooven v. Wirtz, 15 N. D. 477 2376, 2387
Hooven & A. Co. v. Wirtz, 15 N. D. 477 2455
Hoover v. Baltimore, etc., R. Co., 158 Ill. App. 292 1447, 4180, 4185
v. Calhoun, 16 Gratt. 109 2027
v. Mowrer, 84 Iowa 43 2861, 2865, 2866
v. Pennsylvania R. Co., 156 Pa. 220 3285, 3286
v. Peters, 18 Mich. 51 534, 2377
Hoover Commercial Co. v. Humphrey, — Miss. —, 66 So. 214 514, 519
Hope, The, 5 Fed. 822 4995, 5004
Hope v. Evered, 17 Q. B. Div. 338 4648
v. The Dido, 2 Paine 243 2722
v. Troy & L. R. Co., 40 Hun 438, aff'd 110 N. Y. 643 221, 327, 4682
Hopedale E. Co. v. Electric S. B. Co., 184 N. Y. 356 2221
Hopewell v. Cumberland Bank, 10 Leigh 206 2866, 2867
v. McGrew, 50 Neb. 789 1688
v. Price, 2 Har. & G. 275 4347
Hopf v. Myers, 42 Barb. 270 376
Hopkins v. American P. S. Co., 194 Mass. 582 3762, 3768
v. Atlantic, etc., R. Co., 36 N. H. 9 1277, 1331, 1344, 3506, 3507, 3516, 4732
v. Burney, 2 Fla. 42 4348
v. Butte & M. C. Co., 16 Mont. 356 3897
v. Chicago City R. Co., 178 Ill. App. 656 4692
v. Clark, 90 Hun 4 2470, 2479
v. Contra Costa County, 106 Cal. 556 1041
v. Crittenden, 10 Tex. 189 962, 963
v. Drowne, 21 R. I. 80 584, 4566, 4567
v. Gilman, 47 Wis. 581 3257
v. Gooderham, 10 Brit. Col. 250 2551, 2552
v. Grazebrook, 6 B. & C. 31 1972, 1973, 1974, 1979, 2009
v. Halliburton, 6 Tex. Civ. App. 451 1926
v. Kenworthy, 3 Johns. Cas. 436 1904
v. Ladd, 35 Ill. 178 1400, 1664, 1672, 4352
v. Lane, 81 N. Y. 501 524
v. Lee, 6 Wheat. 109 1981, 1985, 1989
v. Orr, 124 U. S. 510 1518, 1538
v. Oxley S. Co., 83 Fed. 912 434
v. Railroad, 36 N. H. 9 1264
v. Ratliff, 115 Ind. 213 3233, 3243
v. Shepard, 129 Mass. 600 1051, 1055
v. Stephenson, 1 J. J. Marsh. 341 1411
v. Tanqueray, 15 C. B. 130 2388
v. Westcott, 6 Blatch. 64 3531
v. Western Pac. R. Co., 50 Cal. 190 3850
v. Yowell, 5 Yerg. 305 1981, 2008
Hopkinson v. Knapp, 92 Iowa 328 4929
Hopkinsville M. Co. v. Gwin, 179 Ala. 472 2239
Hopmeyer v. Frederick, 74 Ill. App. 301 1829
Hoppe & S. B. Co. v. Sacks, 11 Ohio C. C. 3 796
Hopper v. Adee, 3 Duer 235 2471
v. Chicago, etc., R. Co., 91 Iowa 639 1037
v. Denver, etc., R. Co., 84 C. C. A. 21, 155 Fed. 273 4934
v. Haines, 71 Md. 64 4211
v. Hopper, 61 S. C. 124, 137 721
v. Hopper, 22 N. J. L. 715 3719, 3723
v. Richmond, 1 Stark. 507 1874
Hoppes v. Check, 21 Ark. 588 2211
Hopping v. Quinn, 12 Wend. 517 538, 2484
Hoppins v. Miller, 17 N. J. L. 185 1179, 1878
Hopple v. Higbee, 23 N. J. L. 342 4161, 4306
Hopson v. Fountain, 5 Humph. 140 1230, 1889, 2329
v. Louisville, etc., R. Co., 71 Miss. 503 3965
Horan v. Byrnes, 72 N. H. 93 14
Horberg v. May, 153 Pa. 216 3127
Hord v. Holston River R. Co., 122 Tenn. 399 3764, 3768, 3769

[REFERENCES ARE TO PAGES]

Horgan v. Boston E. R. Co., 208 Mass. 287 424
v. Mayor, 160 N. Y. 516 2655
Hormel v. American B. Co., 112 Minn. 288 2757, 2796
Horn v. Batchelder, 41 N. H. 86 356, 2230, 2667, 2682
v. Bayard, 11 Rob. (La.) 259 1692
v. Boise City C. Co., 7 Idaho 640 4656
v. Hansen, 56 Minn. 43 1881
v. Kennit, 4 E. D. Smith 454 3531
v. Nash, 1 Iowa 204 1876
v. Phillips, 167 Iowa 169 2052
v. Southern R., 78 S. C. 67 3506
v. Western L. Ass'n, 22 Minn. 233 2497, 2556
v. Whittier, 6 N. H. 88 1559
Hornbeck v. Gilmer, 110 La. 500 2458
Hornby v. Cramer, 12 How. Pr. 490 794, 802
v. Lacy, 6 M. & S. 566 2957
Horne v. Bodwell, 5 Gray 457 2806
v. Consolidated R., L. & P. Co., 144 N. C. 375 56
v. Midland R. Co., L. R. 8 C. P. 131 196, 198
v. Midland R. Co., L. R. 7 C. P. 583, L. R. 8 C. P. 136 197, 2341
v. Planters' Bank, 32 Ga. 1 736
v. Walton, 117 Ill. 130 2060, 4366
Horner v. Beasley, 105 Md. 193 1443, 1451, 1986, 1990
v. Flintoff, 9 M. & W. 678 851, 864, 887, 900, 911
v. Guiser Mfg. Co., 74 Ga. 790 4285
v. Lawrence, 37 N. J. L. 46 1329, 2993
v. Lyman, 2 Abb. App. Dec. 399, 4 Keyes 237 1784
v. Missouri Pac. R. Co., 70 Mo. App. 285 4232
v. Savings Bank, 7 Conn. 478 673
v. Schinstock, 80 Kan. 136 17
v. Wood, 16 Barb. 389 176, 182
Horney v. Nixon, 213 Pa. 20 342
Hornketh v. Barr, 8 S. R. 36 4964
Hornsby v. Fielding, 10 Heisk. 367 2946
Hornstein v. Atlantic, etc., R. Co., 51 Pa. 87 4098, 4111
v. Cifunio, 86 Neb. 103 1874
Horowitz v. Hamburg-Am. P. Co., 18 N. Y. Misc. 24 4743
Horr v. Howard Co., 126 Wis. 160 4882
Horres v. Berkeley C. Co., 57 S. C. 189 3895
Horsford v. Wright, Kirby 3 2076, 2110, 3188
Horsley v. Style, 9 T. L. Rep. 605 4646
Horst v. Lewis, 71 Neb. 365 448, 1477, 4887
v. Roehm, 84 Fed. 565 47, 377, 2252, 2255
Horstman v. Covington & L. R. Co., 18 B. Mon. 218 3913
Horton v. Cooley, 135 Mass. 589 3104
v. Cope, 6 Lea 155 1763
v. Dow, 10 N. Y. St. Rep. 139 2830
v. McMurtry, 5 H. & N. 667 2526
v. Manning, 37 Tex. 23 2779
v. Miller, 84 Ala. 537 547
v. Newell, 17 R. I. 571 4607
v. Seattle, 53 Wash. 316 1362, 1383
Horton's App., 94 App. 62 1646
Horttman v. Illinois State T. Co., 173 Ill. App. 234 4292, 4296
Hosack v. Rogers, 8 Paige 229 422, 780
v. Rogers, 6 Paige 415 644
Hoseth v. Preston M. Co., 49 Wash. 682 4682
Hosford v. Nichols, 1 Paige 220 1147, 1158, 1881
Hosher v. Kansas City, etc., R. Co., 60 Mo. 329 4097, 4110
Hosiery Co. v. Cotton Mills, 140 N. C. 452 2277
Hoskins v. Johnson, 5 Sneed, 470 684
v. Paddock, 153 Ky. 728 4209
v. Scott, 52 Ore. 271 171, 226, 1363, 2339, 2351
Hosler v. Hursh, 151 Pa. 415 746
Hosley v. Brooks, 20 Ill. 115 4522
Hosli v. Yokel, 57 Mo. App. 622 3788, 3789
Hosmer v. Campbell, 98 Ill. 572 1741
v. True, 19 Barb. 106 831
v. Wilson, 7 Mich. 294 293, 2260, 2262
Hossfeld v. Hossfeld, 110 C. C. A. 131, 188 Fed. 61 4980
Hossler v. Trump, 62 Ohio St. 139 2481
Hostler v. Scott, 2 Haywood, 179 482
Hostetter v. Vowinkle, 1 Dill. 329 4488
Hosty v. Moulton W. Co., 39 Mont. 310 4672
Hot Springs R. Co. v. Deloney, 65 Ark. 177 3450, 3476, 3480
v. Tyler, 36 Ark. 205 3755
v. Williamson, 45 Ark. 429 3953, 3982
Hotchkiss v. Auburn, etc., R. Co., 36 Barb. 600 3694
v. Hunt, 49 Me. 213 2226
v. Lathrop, 1 Johns. 286 4594
v. Oliphant, 2 Hill 510 4590, 4600
v. Patterson, 5 Kan. App. 358 3119
v. Platt, 8 Hun 46 1725, 1746, 1749
Hotham v. Berry, 82 Kan. 412 2853
Hottel v. Poudre Valley R. Co., 41 Colo. 370 2589, 2654
Hottell v. Farmers' P. Ass'n, 25 Colo. 67 2086
Houbie v. Volkening, 49 How. Pr. 169 803, 806
Houck v. Graham, 106 Ind. 195 2834, 2855, 2871
v. Muller, 7 Q. B. Div. 92 2232
v. Southern Pac. R. Co., 38 Fed. 226 3498, 3505, 3524
Houfe v. Fulton, 29 Wis. 296 104
Hough v. Ætna L. Ins. Co., 57 Ill. 318 683
v. Bowe, 51 N. Y. Super. Ct. 207 4299, 4307
v. Cook, 69 Ill. 581 1446
v. Dickinson, 58 Mich. 89 4184
v. Hunt, 1 Ohio 504 1929
v. Illinois Cent. R. Co., 169 Iowa 224 4947, 4948
v. People's F. Ins. Co., 36 Md. 398 3059
v. Rawson, 17 Ill. 588 2231
Houghkirk v. Delaware & H. C. Co., 92 N. Y. 219 4894, 4939
Houghtaling v. Kilderhouse, 1 N. Y. 530 4529, 4530
Houghton v. Adams, 18 Barb. 545 648
v. Carpenter, 40 Vt. 588 2371, 2405, 2410
v. Furbush, 185 Mass. 251 229
v. Kittleman, 7 Kan. App. 207 2460
v. Lyford, 39 Me. 267 1811
v. Meyer, 208 U. S. 149 1714, 1737, 1749, 1751
v. Oakley, 21 New South Wales L. R. (law) 26 4608
v. Page, 2 N. H. 42 940, 1145, 1146, 1878
v. Pattee, 58 N. H. 326 863

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House v. Fort, 4 Blackf. 293 2388
v. House, 10 Paige 158 1029
v. Marshall, 18 Mo. 369 533
v. Planters' Bank, 57 Ga. 95 1178
v. Schnadig, 235 Ill. 301 1765
v. Tennessee F. College, 7 Heisk. 128 1206
House of Lords in Livingstone v. Raywards C. Co., 5 App. Cas. 25 3747
Housel v. Thrall, 18 Neb. 484 2956
Houseman v. Girard B. & L. Ass'n, 81 Pa. 256 1595
v. Merchants' D. T. Co., 104 Mich. 300 3346, 3352
Houser v. Carmody, 173 Mich. 121 3662, 3667, 3676, 3682
v. Pearce, 13 Kan. 104 176, 2591, 2599, 2635, 2641
v. United States, 39 Ct. of Cls. 508 302, 303, 306, 309, 2398, 2399
Houser & H. Mfg. Co. v. McKay, 53 Wash. 337 2273, 2436
Houston v. Chicago, etc., R. Co., 118 Mo. App. 464 1468
v. Crutcher, 31 Miss. 51 1214
v. Darling, 16 Me. 413 773
v. Fellows, 27 Vt. 634 2843
v. Gilbert, 3 Brev. 216 2386
v. Gran, 38 Neb. 687 4887
v. Jamison, 4 Harr. 330 1086
v. Lubbock, 35 Tex. Civ. App. 106 1238
v. Merkel (Tex. Civ. App.), 153 S. W. 385 3847, 3867, 3879, 3925, 3928
v. Potts, 64 N. C. 33 1163
v. Quinn, 168 Ill. App. 593 4905
v. Shindler, 11 Barb. 36 767
v. Wagner, 28 Okla. 367 763
v. Wendnagel, 135 Ill. App. 95 2274
v. Williams (Tex. Civ. App.), 153 S. W. 387 3925
v. Young, 7 Ind. 200 522
Houston B. & T. Ry. Co. v. Barger, — Tex. Civ. App. —, 176 S. W. 870 5079, 5137
v. O'Leary (Tex. Civ. App.), 136 S. W. 601 100, 143
v. Wilson, — Tex. Civ. App. —, 165 S. W. 560 3992
Houston C. Co. v. United States, 38 Ct. of Cls. 724 2701
Houston C. O. Co. v. Trammell (Tex. Civ. App.), 72 S. W. 244 2376, 2377, 2434,
Houston Chronicle P. Co. v. McDavid (Tex. Civ. App.), 157 S. W. 224 4507, 4508, 4540, 4542
Houston City St. R. Co. v. Sciacca, 80 Tex. 350 4935, 4941
Houston E. Co. v. Green, 48 Tex. Civ. App. 242 4675, 4732
v. McDade, 34 Tex. Civ. App. 497 1382
Houston East, etc., R. Co., v. Reasonover, 36 Tex. Civ. App. 274 3905
Houston I. & B. Co. v. Tiemer (Tex. Civ. App.), 139 S. W. 992 2280, 2285
Houston L. & L. Co. v. Texas Co. (Tex. Civ. App.), 140 S. W. 818 3878, 3911
Houston P. Co. v. Dement, 18 Tex. Civ. App. 30 4537
v. Moulden, 15 Tex. Civ. App. 574 4506, 4528, 4537
Houston R. Co. v. Malloy, 64 Tex. 607 2619
Houston T. & C. Co. v. Whitcomb, — Tex. Civ. App. —, 147 S. W. 358 3536
Houston W.-W. Co. v. Kennedy, 70 Tex. 233 3846
Houston, etc., R. Co., v. Adams, 63 Tex. 200 459, 3747, 3751, 3799, 3808
v. Adams, 44 Tex. Civ. App. 288 1377, 1392
v. Batchler, 37 Tex. Civ. App. 116 461, 462, 463, 507, 3468
v. Bath, 40 Tex. Civ. App. 270 3388, 3393, 3400, 3423
v. Boehm, 57 Tex. 152 4656, 4698
v. Brown, 33 Tex. Civ. App. 237 3323
v. Buchanan, 38 Tex. Civ. App. 165 3430
v. Burke, 55 Tex. 323 1431, 3398
v. Cowser, 57 Tex. 293 1339, 4868, 4878, 4918, 4919
v. Darwin, 47 Tex. Civ. App. 219 3894
v. Davenport, 102 Tex. 369 4900
v. Davis, 11 Tex. Civ. App. 24 3336
v. East, 98 Tex. 146 7
v. Fanning, 40 Tex. Civ. App. 422 4718
v. Ford, 53 Tex. 364 3522
v. Gee, 27 Tex. Civ. App. 414 4722
v. Gerald (Tex. Civ. App.), 128 S. W. 166 146, 1383, 4733, 4739
v. Gray (Tex. Div. App.) 137 S. W. 729 4733
v. Hanks, 58 Tex. Civ. App. 298 4681
v. Hill, 70 Tex. 51 254, 3317
v. Hill, 63 Tex. 381 183, 3317, 3319
v. Jackson, 62 Tex. 209 1137, 3323, 3400, 3408
v. Johansen (Tex. Civ. App.), 143 S. W. 1186 488
v. Kelley, 13 Tex. Civ. App. 1 4804
v. Knapp, 51 Tex. 592 2620
v. Lackey, 12 Tex. Civ. App. 229 3942
v. Lee, (Tex. Civ. App.), 123 S. W. 154 3523
v. Lee, 69 Tex. 556 4828
v. Lemair, 55 Tex. Civ. App. 237 4885
v. Lindsey, 51 Tex. Civ. App. 67 4664, 4708
v. Loeffler (Tex. Civ. App.) 51 S. W. 536 4860
v. McCarty, 94 Tex. 298 768
v. McCarty, 40 Tex. Civ. App. 364 1502
v. McCullough, 22 Tex. Civ. App. 208 4729
v. McMillan, 37 Tex. Civ. App. 483 1140
v. McNeel, 33 Tex. Civ. App. 153 3450, 3474
v. Menefee, —Tex. Civ. App.—, 162 S. W. 1038 4805
v. Mitchell, 38 Tex. 85 2236, 2682
v. Molloy, 64 Tex. 607 244, 254, 2605
v. Perkins, 21 Tex. Civ. App. 508 3467, 3482
v. Phillip (Tex.) 69 S. W. 994 3470
v. Powell, (Tex. Civ. App.) 125 S. W. 330 12
v. Randall, 50 Tex. 254 3646
v. Red Cross Stock Farm, 22 Tex. Civ. App. 114 1458
v. Roberts, —Tex. Civ. App.—, 126 S. W. 890 3397
v. Rogers, 16 Tex. Civ. App. 19 3456, 3459
v. Rowell, 92 Tex. 147 4730
v. Rutland, 45 Tex. Civ. App. 621 1493, 4860, 4862

[REFERENCES ARE TO PAGES]

Houston, etc., R. Co. v. Shafer, 54 Tex. 641 1472, 4680
v. Shapard, 54 Tex. Civ. App. 596 1475, 4801
v. Shirley, 54 Tex. 125 335, 1260
v. Stern, 74 Fed. 636 4439, 4440, 4444
v. Turner, 34 Tex. Civ. App. 397 4880
v. Walker, —Tex.—, 173 S. W. 208 [rev'g 167 S. W. 199] 4861, 4893, 5094
v. White, 23 Tex. Civ. App. 280 4920, 4921
v. Williams (Tex. Civ. App.), 31 S. W. 556 3387, 3390, 3404, 3433
v. Willie, 53 Tex. 318 4729, 4751
v. Wilson, —Tex. Civ. App.—, 165 S. W. 560 3962, 3963
Houston, etc., R. Tel. Co. v. Davison, 15 Tex. Civ. App. 334 3562, 3563, 3567
Houtz v. Union Pac. R. Co., 33 Utah 175 3334
Hove v. Mason, 1 Wash. (Va.) 264 3294
Hover v. Barkhoof, 44 N. Y. 113 1594
v. Pennsylvania Co., 25 Ohio St. 667 4954
Hovey v. Coy, 17 Me. 266 1660
v. Edmison, 3 Dak. 449 962, 1201
v. Mayo, 43 Me. 322 12
v. Morrill, 61 N. H. 9 580, 586
v. New England N. Co., 83 Conn. 278 1510, 4907
v. Newton, 11 Pick. 421 385
v. Rubber T. P. Co., 50 N. Y. 335 305, 1719, 1722, 1728, 1731, 1762
v. Rubber T. P. Co., 14 Abb. Pr. (N. S.) 66 590, 591
How v. How, 48 Me. 428 3725
Howard, In re, 218 Mass. 404 5174, 5181
Howard v. Adkins, 167 Ind. 184 833, 868
v. Bank, 115 App. Div. (N. Y.) 326 1496
v. Behn, 27 Ga. 174 1020
v. Beldenville L. Co., 129 Wis. 98 4745, 4808
v. Black, 42 Vt. 258 1390
v. Branner, 23 La. Ann. 369 1147
v. Brown, —Iowa—, 148 N. W. 987 243, 319, 1504, 2594, 2687
v. Buffalo (Misc.), 122 N. Y. Supp. 1095 3881, 3937, 3938
v. Central R. Co., 9 Ga. App. 617, 170, 3439
v. Cobb, 3 Day 309 1483
v. Cooper, 45 N. H. 339 486
v. Daly, 61 N. Y. 362 314, 375, 381, 409, 476, 2255, 2556, 2558, 2561, 2568
v. Dayton C. & I. Co., 94 Ga. 416 436, 3737
v. Delaware & H. R. C. Co., 40 Fed. 195 4870, 4945
v. Emerson, 110 Mass. 320 2377
v. Fall River I. Works Co., 203 Mass. 273 1510
v. Farley, 3 Robert. 308, 18 Abb. Pr. 260, 19 Abb. Pr. 126 1101, 1556
v. Francis, 30 N. J. Eq. 444 1083
v. Gobel, 62 Ill. App. 497 2462
v. Grover, 28 Me. 97 1503
v. Gunnison, 12 Ohio Dec. 684 1357
v. Haas, 131 Mo. App. 499 2455
v. Haas, 139 Mo. App. 591 2274, 2277, 4321
Howard v. Hoey, 23 Wend. 350 2220, 2370, 2371, 2376
v. Hopkyns, 2 Atk. 371 839, 840
v. Hurst, 156 Mo. App. 205 2102, 2104, 2105
v. Illinois Cent. R. Co., 148 Fed. 997 5020
v. Keech, 4 Hun 389 4522
v. Lincoln, 13 Me. 122 429
v. Lovegrove, L. R., 6 Ex. 43 295, 298, 2882
v. McCabe, 79 Neb. 42 4724
v. McCall, 21 Gratt. 205 736
v. Manderfield, 31 Minn. 337 3812, 4306
v. North Bridgewater, 16 Pick. 189 161
v. Norton, 65 Barb. 161 747, 761
v. Rugland, 35 Minn. 388 4328
v. Schwartz, 22 Tex. Civ. App. 400 709
v. Sexton, 4 N. Y. 157 4515, 4517
v. Stiles, 54 Neb. 26 4683
v. Stillwell & B. Mfg. Co., 139 U. S. 199 2621, 2624, 2627
v. Straight Creek C. Co., 140 Ky. 700 758, 760
v. Taylor, 90 Ala. 241 2325
v. Taylor, 99 Ala. 450 2327
v. United States, 184 U. S. 676 1600, 1605
v. Vaughan-M. S. Co., 82 Mo. App. 405 2564
v. Western U. Tel. Co., 119 Ky. 625 3557
v. Western U. Tel. Co., 106 Ark. 559 42, 3612, 3628
v. Witham, 2 Me. 390 1952
Howard College v. Turner, 71 Ala. 429 372, 415, 419, 611, 2302
Howard County v. Hill, 88 Md. 111 2748, 2755
Howard Dustless Duster Co. v. Carleton, 219 Fed. 913 4486
Howard Ins. Co. v. Halsey, 4 Sandf. 565 572, 574
Howard O. Co. v. Davis, 76 Tex. 630 4698, 4810
Howard P. Co. v. Glover, 7 Ga. App. 548 813
Howard S. Co. v. Wells, 176 Fed. 512 317, 327, 1366, 2290, 2343
Howard & Callahan v. Illinois Cent. R. Co., 161 Ky. 783 3420
Howay v. Going-N. Co., 24 Wash. 88 2551
Howcott v. Collins, 23 Miss. 398 3148
Howdyshell v. Gary, 21 Ill. App. 288 547
Howe v. Ashland L. Co., 110 Me. 14 58
v. Bradley, 19 Me. 31 1197, 1883
v. Bradstreet Co., 135 Ga. 564 436
v. Buffalo, etc., R Co., 37 N. Y. 297 301, 659, 2843, 2976, 2977, 2978
v. Chicago, etc., R. Co., 139 Mich. 638 4667, 4688
v. Coates, 97 Minn. 385 1953, 2025
v. Farrar, 44 Me. 233 4173
v. Frith, 43 Colo. 75 1391
v. Handley, 28 Me. 241 1663, 1664, 1666, 1675, 4353
v. Huntington, 15 Me. 350 2231
v. Klein, 89 Me. 376 587, 589, 591
v. Martin, 23 Okla. 561 4384, 4391
v. Newmarch, 12 Allen 49 1329, 1331, 1336
v. North, 69 Mich. 272, 281 170
v. Oldham, 69 Hun 57 4629
v. Perry, 15 Pick. 506 4522, 4589

[REFERENCES ARE TO PAGES]

Howe v. Potter, 61 Barb. 357 1822
v. Ray, 113 Mass. 88 3964
v. Robinson, 13 N. Y. Misc. 256 748
v. Sunge, 15 East 440 1851
v. Sutherland, 39 Iowa 484 2956
v. Taylor, 9 Ore. 288 1627
v. Wade, 4 McLean 319 2974
v. Ward, 4 Me. 195 2853
v. Weymouth, 148 Mass. 605 3968
v. Weymouth, 155 Mass. 439 4016
v. Willson, 1 Denio 181 1390, 1391
v. Winn, 150 Ky. 667 1130
Howe Mach. Co. v. Bryson, 44 Iowa 159 260, 267, 287, 2551, 2572, 3081
v. Hickox, 106 Ill. 461 563, 583, 586
Howell v. Atlantic Coast Line R. Co., 99 S. C. 417 5129
v. Bennett, 74 Hun 555 1356
v. Caryl, 50 Mo. App. 440 4174, 4200
v. Cheatham, Cooke 247 4516
v. Coupland, 1 Q. B. Div. 258 2308
v. Dickerson, 104 Mo. App. 658 2295
v. Dimock, 15 App. Div. (N. Y.) 102 520
v. Empire State Surety Co., 183 Ill. App. 220 1014
v. Goodrich, 69 Ill. 556 4748
v. Howell, 10 Ired. 84 468, 4588
v. Howell, 162 N. C. 283 4773, 4776
v. Lansing City E. R. Co., 136 Mich. 432 147, 4747, 4753, 4755
v. Miller, 12 Daly 277 1760
v. Morlan, 78 Ill. 162 2925
v. Moores, 127 Ill. 167 2190
v. Morrisville, 212 Pa. 349 12
v. Philadelphia Mut. Ins. Co., 12 Fed. Cas. No. 6,781 3031
v. Richards, 11 East 633 2053, 2055, 2058, 2170, 3182
v. St. Louis & H. R. Co., 171 Mo. App. 92 3328
v. Scoggins, 48 Cal. 355 170, 1314, 4190
v. Shands, 35 Ga. 66 589
v. Young, 5 B. & C. 259 388, 390, 410, 2911
Howell's Est., 224 Pa. 415 1966
Howell's Succession, 121 La. 955 1103
Howells v. North American T. & T. Co., 24 Wash. 689 4661, 4758
Howenstein v. Barnes, 5 Dill. 482 1924
Howerton v. Augustine, 130 Iowa 389 697, 1443, 4391
v. Kansas N. G. Co., 82 Kan. 367 3114
Howery v. Hoover, 97 Iowa 581 4223, 4301
Howes v. Ashfield, 99 Mass. 540 4693, 4725
v. Axtell, 74 Iowa 400 2102, 4396, 4408
v. Barker, 3 Johns. 506 2053
v. Martin, 1 Esp. 162 3196
v. Woolcock, 26 Wis. 629 615
Howey v. New England N. Co., 83 Conn. 278 4861, 4953
Howgate v. Edwards, 65 Ind. 373 2464
Howie v. Bonds, 87 Miss. 698 1801
v. Rea, 70 N. C. 559 2370
Howison v. Oakley, 118 Ala. 215, 834, 1941, 1943, 1945, 1946
Howland v. Coffin, 9 Pick. 54 660
v. Davis, 40 Mich. 545 2950
v. Howland, 114 Mass. 517 501
v. Jennings, 11 Up. Can. C. P. 272 964
v. Leach, 11 Pick. 151 2231
v. Marvin, 5 Cal. 501 453, 782
v. Oakland Con. St. R. Co., 110 Cal. 513 4795
Howland v. Rench, 7 Blackf. 236 704
Howlet v. Strickland, 1 Cowp. 56 513
Howlett v. Tuttle, 15 Colo. 454 1301
Hoxsie v. Empire Lumber Co., 41 Minn. 548 763, 1391, 1445, 4216, 4263
v. Lincoln, 25 Vt. 206 2466, 2540
Hoy v. Gronoble, 34 Pa. 9 252
v. Hoft, 91 Pa. 88 3150
v. Taliaferro, 8 Sm. & M. 727 1828, 2197
Hoyle v. City of Hickory, 167 N. C. 619 3990, 4015
v. Page, 41 Mich. 533 1205
v. Stellwagen, 28 Ind. App. 681 2689, 2696
Hoyt v. Beach, 104 Iowa 257 1056
v. Byrnes, 11 Me. 475 795
v. Dengler, 54 Kan. 309 3258, 3260
v. Dougherty, 4 Sandf. 462 574
v. Fuller, 104 Fed. 192 4212, 4314, 4333
v. Gelston, 3 Wheat. 246 1256
v. Gelston, 15 Johns. 221 1255
v. Gelston, 13 Johns. 141 4174, 4205
v. Hall, 3 Bosw. 42 795
v. Hudson, 12 Johns. 207 633
v. McLaughlin, 250 Ill. 442 3934
v. Macon, 2 Colo. 113 4606, 4610
v. New York, etc., R. Co., 78 Conn. 709 1406
v. New York Ins. Co., 3 Bosw. 440 3071
v. Southern, etc., Tel. Co., 60 Conn. 385 3767
v. Thompson, 5 N. Y. 347 27
v. Tuthill, 33 Hun 196 2852, 2870
v. Western U. Tel. Co., 85 Ark. 473 3565, 3591
v. Wilkinson, 10 Pick. 31 2835
Hubachek v. Hazzard, 83 Minn. 437 2502
Hubbard v. Allyn, 200 Mass. 166 4508, 4509, 4533
v. Belden, 27 Vt. 645 2496, 2679
v. Bliss, 12 Allen 590 2380
v. Briggs, 31 N. Y. 518 4374, 4386
v. Callahan, 42 Conn. 524 954, 955, 962, 968, 1191
v. Charlestown Branch R. Co., 11 Metc. (Mass.) 124 1017
v. Chenango Bank, 8 Cow. 88 792, 799, 1236
v. Davis, 1 Aiken 296 2820
v. Epworth, 69 Mich. 92 1949
v. Fisher, 25 Vt. 539 558
v. Gould, 74 N. H. 25 172, 295, 298
v. Harnden Exp. Co., 10 R. I. 251 3386
v. Harrison, 1 Bibb. 550 1811
v. Jackson, 1 M. & P. 11 1816
v. Knous, 7 Cush. 556 1411
v. Marine H. & E. Co., 105 Me. 384 1498
v. Marshall, 50 Wis. 322 1867
v. Montgomery County, 140 Iowa 520 107
v. New York, etc., R. Co., 70 Conn. 563 4178
v. Norton, 10 Conn. 422 2091, 2093, 2149, 2181
v. Reilly, 51 Ind. App. 19 2793
v. Rogers, 64 Ill. 434 537
v. Russell, 24 Barb. 404 3842
v. St. Louis, etc., R. Co., 173 Mo. 249 425
v. Security T. Co., 38 Ind. App. 156 2798
v. Shaler, 2 Day 195 1622
v. State L. Ins. Co., 129 Iowa 13 4273, 4275
v. Weare, 79 Iowa 678 4370, 4379, 4385

[REFERENCES ARE TO PAGES]

Hubbard M. Co. v. Roche, 133 Ill. App. 602 1115
Hubbell v. Blandy, 87 Mich. 209 4240, 4244
v. Carpenter, 5 N. Y. 171 783, 2823
v. City of Des Moines, 166 Iowa 581 4135
v. Flint, 15 Gray 550 711
v. Great Western Ins. Co., 74 N. Y. 246 3014
v. Meigs, 50 N. Y. 480 319, 4403
Hubbert v. Borden, 6 Whart. 79 1414
Hubble v. Cole, 88 Va. 236 3184
v. Morristown L. Co., 95 Tenn. 585 1166, 1177, 1182
Hubbly v. Brown, 16 Johns. 70 2848
Huber v. Baum, 152 Pa. 626 3166, 3232
v. Beck, 6 Ind. App. 484 1444
v. Burke, 11 S. & R. 238 1942, 1943
v. Ryan, 26 N. Y. Misc. 428 3127
v. Ryan, 57 App. Div. (N. Y.) 34 3236
v. Stark, 124 Wis. 359 3813
Huber Brewery v. Sieke, 146 App. Div. (N. Y.) 467 1391
Huber Mfg. Co. v. Silvers, 85 Neb. 760 772
Hubley Mfg. & S. Co. v. Ives, 81 Conn. 244 590
Huckaber v. Albritton, 10 Ala. 651 2456
Huckel v. Prettyman, 18 Pa. Dist. 275 4391
Hucker v. Blake, 17 Ind. 97 1521
Huckins v. People's Ins. Co., 31 N. H. 238 3055, 3056
Huckle v. Money, 2 Wils. 205 163, 1269, 1318
Huddleson v. Polk, 70 Neb. 492 1600, 1611
Huddleston v. Francis, 124 Ill. 195 2808
Hudgins, Ex Parte, — Ala. —, 65 So. 959 418
Hudgins v. Perry, 7 Ired. 105 2388
Hudkins v. Ward, 30 W. Va. 204 574
Hudmon v. Cuyas, 57 Fed. 355 2418
Hudnit v. Nash, 16 N. J. Eq. 550 978
Hudson v. Archer, 9 S. Dak. 240 212
v. Burk, 48 Mo. App. 314 3852
v. Daily, 13 Ala. 722 1051, 1108, 1880
v. Ede, 8 B. & S. 631 3305
v. Germain F. Co., 95 Ala. 621 2271
v. Glencoe S. & G. Co., 140 Mo. 103 827
v. Hudson, 90 Ga. 581 2470, 2471, 2472
v. Matthews, Morris 94 1529
v. Miles, 185 Mass. 582 1585, 1592
v. Nicholson, 5 M. & W. 437 414
v. Nolen, 142 Ky. 824 4635
v. Northern Pac. R. Co., 92 Iowa 231 1445, 3335, 3345, 3433
v. Norwood, 13 Tex. Civ. App. 662 2395
v. Railroad, 142 N. C. 198 58
v. Reel, 5 Pa. 279 2018
v. Roberts, 6 Ex. 697 122
v. Robinson, 4 M. & S. 475 2822
v. Seeley S. Co., 19 Cal. App. 213 181, 2356
v. State, 9 Yerg. 408 1483
v. Swan, 83 N. Y. 552 4209
v. Swift, 20 Johns. 24 2013
v. Tenny, 6 N. H. 456 1132
v. Truman, 78 Neb. 840 4605, 4643
v. Voight, 15 Ohio C. C. 391 4776
v. Wilkinson, 61 Tex. 610 1135
v. Wilkinson, 45 Tex. 444 4300
v. Yeomen of America, 176 Ill. App. 445 2561
v. Young, 25 Ala. 376 1670
Hudson-Mfg. Co. v. Wishart-B. M. Works, 177 Ill. App. 301 2612
Hudson River Tel. Co. v. New York, 132 N. Y. Supp. 294 4151
v. New York, 210 N. Y. 394 4157
Hudson River Toll Bridge, In re, 81 N. Y. Misc. 324 4105
Hudspeth v. Allen, 26 Ind. 165 1521
v. Wilson, 2 Dev. 372 26
Huebel v. Leaper, 188 Fed. 769 2240, 2245
Huebsch v. Arthur H. Crist Co., 209 Fed. 885 4483
Huebschmann v. Cotzhausen, 107 Wis. 64 3708, 3710
Huelet v. Reyns, 1 Abb. Pr. (N. S.) 27 541
Huellmantel v. Huellmantel, 124 Cal. 583 1060
v. Vinton, 116 Mich. 621 4285
v. Vinton, 112 Mich. 47 4292
Hueni v. Freehill, 125 Ill. 345 1244
Huer v. Northwestern Nat. Ins. Co., 144 Ill. 393 3000
Hueston v. Mississippi & R. R. B. Co., 76 Minn. 251 3741, 3745, 3752, 3759, 3766, 3815, 3862
Huetter v. Redhead, 31 Wash. 320 1243
v. Warehouse, etc., Co., 81 Wash. 331 2607, 2682
Huey v. Starr, 79 Kan. 781 1990, 2045
Huff v. Broyles, 26 Gratt. 283 566
v. Citizens' Nat. Bank, 99 Ark. 97 1221
v. Donehoo, 109 Ga. 638 12
v. Peoria & E. R. Co., 127 Ill. App. 242 4920, 4922, 4936
v. Wagner, 63 Barb. 215 1818
Huffer v. Miller, 74 Md. 454 4587
Huffman v. Knight, 36 Ore. 581 373, 407
v. Marcey Tel. Co., 143 Iowa 590 3546
v. T. & O. C. R. Co., 9 Ohio Dec. 748 4686
Huffmans v. Walker, 26 Gratt. 314 628
Hufford v. Grand Rapids & I. R. Co., 53 Mich. 118 3464
Huffstater v. Hayes, 64 Barb. 573 714
Hufnagel v. Mt. Vernon, 49 Hun 286 431, 3931
Huftalin v. Misner, 70 Ill. 55 1499, 3827
Huganir v. Cotter, 102 Wis. 322 4416
Hugenot Mills v. Jempson, 68 S. C. 363 2239
Huger v. Tibbits, 2 Abb. Pr. (N. S.) 97 1391
Hugg v. Augusta Ins. & B. Co., 7 How. 595 3289
Huggard v. Chicago, M. & St. P. R. Co., 138 Wis. 1 3526
v. Glucose S. R. Co., 132 Iowa 724 152, 4742, 4747, 4823
Huggeford v. Ford, 11 Pick. 223 4338, 4352
Huggins v. Carey (Tex. Civ. App.), 149 S. W. 390 362, 3665, 3666, 3676, 3677
v. Clark, 51 Cal. 112 3711
v. Rider, 77 Ill. 360 2471
v. Southeastern L. & C. Co., 121 Ga. 311 2340
Hugh Andley's Case, Hardress 136 1563
Hughan v. Grimes, 62 Kan. 258 1778
Hughes v. Anderson, 68 Ala. 280 3911
v. Antill, 23 Pa. Super. 290 1967
v. Arkansas & O. R. Co., 74 Ark. 194 48
v. Atlanta S. Co., 136 Ga. 511 19
v. Auburn, 161 N. Y. 96 3908

[REFERENCES ARE TO PAGES]

Hughes v. Austin, 12 Tex. Civ. App. 178 55, 313, 320, 3817, 3818, 3889, 3896, 4187, 4197
v. Banks, 1 McCord 537 2386
v. Barrell, 167 Ill. App. 100 4239
v. Brooks, 36 Tex. 379 1700, 1707
v. Cannon, 1 Sneed 622 2524, 2525
v. Clifton, 147 Ala. 531 686
v. Crooker, 148 N. C. 318 296, 1855
v. Danville Brick Co., 180 Ill. App. 603 4881, 4882, 4883
v. Dundee Mort. T. I. Co., 26 Fed. 831 385
v. Eschback, 7 D. C. 66 2667
v. Fisher, Walk. (Miss.) 516 869, 874
v. Gibson, 15 Colo. App. 318 2747
v. Goodale, 26 Mont. 93, 101 1653, 1654
v. Graeme, 33 L. J. (Q. B.) 335 303, 306, 309, 2986
v. Graves, 1 Litt. 319 572
v. Harbor & S. B. & S. Ass'n, 131 App. Div. (N. Y.) 185 432, 4697, 4819
v. Hood, 50 Mo. 350 3183, 3189, 3190, 3199
v. Hoskins L. Co., 136 Fed. 435 2539
v. Hughes, 54 Pa. 240 1570
v. Johnson, 38 Ark. 295 716
v. Lockington, 221 Ill. 571 4412
v. Louisville & N. R. Co., 104 Ky. 768 1345
v. McDonough, 43 N. J. L. 459 116, 128, 4679
v. McDougle, 17 Ind. 399 709
v. Macfie, 2 H. & C. 744 151
v. Miller, 186 Pa. 375 1115, 1943
v. Miller, 205 Pa. 627 1943
v. Nolte, 7 Ind. App. 526 3667, 3673
v. Pennsylvania R. Co., 202 Pa. 222 3333, 3419
v. Postlethwaite, 4 B. W. C. C. 105 5176
v. Pullman's P. C. Co., 74 Fed. 499 3542
v. Quentin, 8 C. & P. 703 161, 217, 225, 4186, 4264
v. Robinson, 60 Mo. App. 194 287, 3117
v. School Dist., 66 S. C. 259 2556
v. Smith, 2 Dana 252 1126
v. Smith, 5 Johns. 168 1556, 1583, 1597, 1614
v. Standeford, 3 Dana 285 1061
v. United States, 45 Ct. of Cls. 517 842, 860
v. Vinland F. Ins. Co., 43 Wis. 323 3016
v. Wamsutta Mills, 11 Allen 201 2537, 2538
v. Western U. Tel. Co., 79 Mo. App. 133 3560
v. Western U. Tel. Co., 72 S. C. 516 3625
v. Wheeler, 8 Cow. 78 670
v. Wickliffe, 11 B. Mon. 202 1038, 1561, 1562, 1737
v. Wynne, 1 M. & K. 20 1563, 1573
Hughes Bros. & Banges, No. 49, The, 135 Fed. 746 2725
Hughes L. Co. v. Knuckles, 146 Ky. 472 2270
Hughes' App., 30 Pa. 471 708
Hughes' Case, 4 Ct. of Cls. 64 2242
Hughson v. Richmond & D. R. Co., 2 App. Cas. (D. C.) 98 768
Hugo, The, 61 Fed. 860 3393
Huiest v. Marx, 67 Mo. App. 418 3192
Huizega v. Cutler & S. L. Co., 51 Mich. 272 4690
Hulbert v. Arnold, 83 N. J. L. 114 1266, 4519, 4542, 4548
v. New Nonpareil Co., 111 Iowa 490 4502, 4543, 4587, 5117
v. Topeka, 34 Fed. 510 4850
Hulehan v. Green Bay, etc., R. Co., 68 Wis. 520 4730
Hulett v. Soullard, 26 Vt. 295 297, 2842, 2848, 2849
Hulfish v. O'Brien, 20 N. J. 230 2212
Huline v. Brown, 3 Heisk. 679 3183, 3260
Huling v. Drexell, 7 Watts 126 871
v. Henderson, 161 Pa. 553 1431, 3827
Hull v. Angus, 60 Ore. 95 832, 845
v. Bernatz, 106 Mich. 551 4297
v. Burson, 61 Ohio St. 283 1791
v. Caldwell, 3 S. D. 451 2396, 2397
v. Chapel, 77 Minn. 159 1603
v. Davidson, 6 Tex. Civ. App. 588 4212, 4300
v. Douglass, 79 Conn. 266 1302, 4792
v. Geary, 71 W. Va. 490 2404
v. Harris, 64 Ga. 309 1957, 2012
v. Kansas, 54 Mo. 598 105
v. Marshall County, 12 Iowa 142 2981
v. Peters, 7 Barb. 331 785, 791, 819, 1237
v. Reilly (Tex. Civ. App.), 64 S. W. 387 2133
v. Swarthout, 29 Mich. 249 758
v. Thoms, 82 Conn. 647 2470
v. Thomson T. Co., 135 Mo. App. 119 144, 147
v. Tommy, 30 Ga. 762 1807
Huiland v. Malken, 2 Wils. 126 2874
Hullett v. Baker, 101 Tenn. 689 27
Hulley v. Moosbrugger, 87 N. J. L. 103 5196
Hullinger v. Worrell, 83 Ill. 220 132
Hulme v. Brown, 3 Heisk. 679 548
Hulsey v. Bonsack M. Co., 65 Fed. 864 2542
Hulshizer v. Lamoreux, 58 Ill. 72 1952
Hulst v. Benevolent Hall Ass'n, 9 S. D. 144 2665, 2666
Humaston v. Telegraph Co., 20 Wall. 20 2221, 2330
Humbert v. Brisbane, 25 S. C. 506 550
v. Mason, 46 Colo. 430 4222, 4232
Humble v. Humble, 152 Ky. 160 2474
v. Shoemaker, 70 Iowa 223 4960
Humboldt County v. Ward Bros., 163 Iowa 510 2598, 2668, 2741, 2794
Humburg v. Lotz, 4 Cal. App. 438 2902, 4389
Hume v. Arrasmith, 1 Bibb 165 4506
v. Hale, 146 Mo. App. 659 3204, 3257
v. Kusche, 42 N. Y. Misc. 414 4545, 4552, 4556, 4561
v. Mazelin, 84 Ind. 574 962
v. Oldacre, 1 Stark. 351 435
v. Peploe, 8 East 168 785, 820, 1231, 1234
v. Tufts, 6 Blackf. 136 4173
Hume Bank v. Hartsock, 56 Mo. App. 291 4327
Humiston v. Wheeler, 175 Ill. 514 3127, 3138
Hummel v. Brown, 24 Pa. 310 1008, 1240
v. Del Greco, 40 Tex. Civ. App. 510 1559
v. Peterson, 69 Wash. 143 6
Hummer v. Midland Casualty Co., 181 Mich. 386 3079
Humpeler v. Hickman, 13 Ill. App. 537 699

[REFERENCES ARE TO PAGES]

Humphreville v. Billinger, 62 Ill. App. 125 3127
Humphrey v. Clement, 44 Ill. 299 602
v. Eddy T. Co., 107 Mich. 163 2513
v. Hayes, 94 N. Y. 594 2804
v. McCauley, 55 Ark. 143 987
v. Michigan United R. Co., 166 Mich. 645 3468, 3483, 3485, 3528
v. Phinney, 2 Johns. 484 3717, 3718
v. Pope, 122 Cal. 253 417
v. Pope, 1 Cal. App. 374 4976
v. Reed, 6 Whart. 435 540
v. Robinson, 134 N. C. 432 2511
Humphreys v. Comline, 8 Blackf. 516 2373, 2377, 2388
v. McLachlan, 87 Miss. 532 2495
v. Minnesota C. Co., 94 Minn. 469 4222, 4228
v. Morton, 100 Ill. 592 1209, 1210
v. Perry, 148 U. S. 627 3532, 3534
v. Pile, 144 Mo. App. 28 1310, 4508
v. Shellenberger, 89 Minn. 327 1964
Humphreysville Co. v. Vermont C. M. Co., 33 Vt. 92 2309
Humphries v. Brogden, 21 Q. B. 739 3916
v. Parker, 52 Me. 507 1315, 4524, 4634
v. Union, etc., R. Co., 84 S. C. 202 1317, 1468
Hunben, In re, 1 Edw. Ch. 1 1953
Huncheon v. Long, 25 Ind. App. 530 3693
Hundley v. Calloway, 45 W. Va. 516 4286
v. Chadick, 109 Ala. 575, 584 483, 1685, 1690, 1702
v. Lyons, 5 Munf. 342 2047
Hungerford v. Redford, 29 Wis. 345 1668, 3788, 4260
Hungren v. Union Mut. L. Ins. Co., 141 Cal. 585 4602
Hunn v. Michigan Cent. R. Co., 78 Mich. 513 1477
Hunneman v. Grafton, 10 Metc. (Mass.) 454 2229
Hunnewell v. Duxbury, 154 Mass. 286 4388
Hunsaker v. Sturgis, 29 Cal. 142 2902
Hunt v. Adams, 7 Mass. 518 1853
v. Adams, 5 Mass. 358 2769, 2779
v. Allison, 77 Wash. 58 4391
v. Amidon, 4 Hill 345 2831
v. Barfield, 19 Ala. 117 764
v. Boonville, 65 Mo. 620 1349, 3830
v. Boston, 183 Mass. 303 4207, 4210
v. Boston E. R. Co., 199 Mass. 220 303, 1102, 2629, 2636, 2638
v. Boston T. Co., 212 Mass. 99 4681
v. Boyd, 2 La. 109 660
v. Burton, 18 Ark. 188 1758
v. Chicago, B. & Q. R. Co., 95 Neb. 746 3387, 4177, 4188
v. Chicago & N. W. R. Co., 26 Iowa 363 1317
v. Chicago, etc., R. Co., 26 Iowa 363 4720
v. Colburn, 1 Sprague 215 2528, 2571
v. Conner, 26 Ind. App. 41 4862, 4882, 4894, 4900
v. Cope, 1 Cowp. 242 3122, 3125
v. Crane, 33 Miss. 669 2548, 2561, 2562
v. Devine, 37 Ill. 137 1886
v. Di Bacco, 69 W. Va. 449 434, 1267, 1343
v. Elliott, 77 Cal. 588 1480
v. Hall, 37 Ala. 702 1147, 1877, 1881
v. Haskell, 24 Me. 339 3294, 4215
v. Hay, 156 App. Div. (N. Y.) 138 2097, 2127, 2131
Hunt v. Highley Min. Co., Ltd. [1914] W. C. & Ins. Rep. 406, 7 B. W. C. C. 716 5202
v. Higman, 70 Iowa 406 663
v. Iowa Cent. R. Co., 86 Iowa 15 3842, 3941
v. Johnson (Tex. Civ. App.), 129 S. W. 879 3878
v. Johnson (Tex. Civ. App.), 141 S. W. 1060 3878
v. Jucks, 1 Hayw. 173 943, 1030, 1032
v. Kile, 98 Fed. 49 4906
v. Lowell G. L. Co., 8 Allen 169 2303, 3904, 3909
v. Marsh, 80 Mo. 396 2147, 2174, 2211
v. Mayfield, 2 Stew. 124 1182
v. Middlesworth, 44 Mich. 448 2123, 2130
v. Missouri Pac. R. Co., 76 Mo. 115 4054
v. Nevers, 15 Pick. 500, 15 Pick. 54, 1 Allen 153 643, 1018, 1102, 1105
v. Nolen, 46 S. C. 356, 551 2097, 2113
v. Oregon Pac. R. Co., 36 Fed. 481 183, 200, 2605
v. Orwig, 17 B. Mon. 73 2068, 2069, 2112, 2120, 2124, 2125
v. Otis Co., 4 Metc. (Mass.) 464 2536, 2577
v. Pierpont, 27 Conn. 301 538
v. Potter, 47 Mich. 195 3255
v. Pownal, 9 Vt. 411 105
v. Purdy, 82 N. Y. 486 2820
v. Raplee, 44 Hun 149 2091
v. Roberts, 45 N. Y. 691 2743, 2770
v. Round, 2 Dow. P. C. 558 1656
v. St. Louis, etc., R. Co., 126 Mo. App. 261 3799, 3801
v. San Lorenzo W. Co., 150 Cal. 51 172
v. Scott, 3 Pa. Co. Ct. 411 3166
v. Silk, 5 East 449 2018
v. Smith, 3 Rich. Eq. 465 (S. C.) 1074
v. Standart, 15 Ind. 33 1150, 1151, 1152, 1905
v. State, 124 Ind. 306 1578
v. Terril's Heirs, 7 Marsh. 68 773
v. Test, 8 Ala. 713 2494, 2495, 2497
v. Thompson, 19 Wyo. 523 48, 4351
v. Tuttle, 125 Iowa 676 2524
v. Van Deusen, 42 Hun 392 2406
v. Wadleigh, 26 Me. 271 2937
v. Westervelt, 4 E. D. Smith 225 1542
v. White, 1 Ind. 105 1642
Hunt Co., C. W., v. Boston El. R. Co., 217 Mass. 319 2575
Hunt F. P. Co. v. Cassidy, 53 Fed. 257 4441
v. Cassiday, 64 Fed. 585 4444
Hunter v. Bradford, 3 Fla. 269 1952
v. Chandler, 45 Mo. 452 693
v. Chesapeake & O. R. Co., 107 Va. 158 4004, 4006, 4022, 4034, 4142
v. City of New York, 151 App. Div. (N. Y.) 30 4113
v. Colfax Consol. Coal Co., — Iowa —, 154 N. W. 1037 5146, 5149, 5151, 5154, 5155, 5157, 5158, 5160, 5161, 5162, 5163, 5164, 5165, 5166, 5167, 5169, 5170
v. Commercial Security Co., 181 Ill. App. 260 1669, 2742
v. Durand, 137 Mich. 53 4675

[REFERENCES ARE TO PAGES]

Hunter v. Empire State S. Co., 159 Iowa 114 1448, 1522
v. Fry, 2 B. & Ald. 421 3270
v. Graham, 1 Hill 370 2200
v. Hatch, 45 Ill. 178 985, 992
v. Hatfield, 68 Ind. 416 3671, 3676
v. Hunter, 19 Barb. 631 642
v. King, 4 B. & Ald. 209 490
v. Le Conte, 6 Cow. 728 796, 827
v. Moul, 98 Pa. 13 663, 671, 673, 674, 677, 698, 4289
v. Ogden, 31 Up. Can. Q. B. 132 4761
v. O'Neil, 12 Ala. 37 1953
v. Osterhoudt, 11 Barb. 33 717
v. Pennsylvania R. Co., 45 Pa. Super. 468 72, 3774
v. Porter, 10 Idaho 72 3263
v. Prinsep, 10 East 378 3293
v. Reiley, 43 N. J. L. 480 557, 3129
v. Southern R. Co., 90 S. C. 507 323, 3459, 3502
v. Southern R. Co., 152 N. C. 682 54, 3818, 3820
v. Spotswood, 1 Wash. 145 1226
v. Stewart, 47 Me. 419 1364, 1371, 3495
v. Telegraph Co., 135 N. C. 458 3591, 3620, 3638
v. United States, 5 Pet. 173 2803
v. Wakefield, 97 Ga. 543 435
v. Waldron, 7 Ala. 753 2529, 2576
v. Warner, 1 Wis. 141 802, 807, 809
v. Western U. Tel. Co., 135 N. C. 458 3654
v. Wetsell, 84 N. Y. 549 624, 659, 2214, 2250
v. Wilson, 4 Ex. 489 1818
Hunter State Bank v. Mills, 90 Ark. 10 1582
Huntingdon v. Claffin, 38 N. Y. 182 2522
Huntingdon, etc., R. C. Co. v. Decker, 84 Pa. 419 4858
v. English, 96 Pa. 247 2319, 4249, 4250
Huntington v. American Bank, 6 Pick. 340 821
v. Burke, 21 Ind. App. 655 1472, 1477
v. Gault, 81 Mich. 144 4645
v. Hall, 36 Me. 501 2381
v. Harvey, 4 Conn. 124 2779
v. Lombard, 22 Wash. 202 2387, 2456
v. Newport News & M. V. Co., 78 Conn. 35 425, 1250
v. Ogdensburgh, etc., R. Co., 33 How. Pr. 416 2561, 2565
v. Rumnill, 3 Day 390 2942
v. Stemen, 37 Ind. App. 553 1430
v. Westerfield, 119 La. 615 994
v. Zeigler, 2 Ohio St. 10 830
Huntington E. P. Co. v. Parsons, 62 W. Va., 26 311, 459, 1414, 3231
Huntington L. & F. Co. v. Beaver, 37 Ind. App. 4 152
Huntley v. Bacon, 15 Conn. 267 4176
v. Cline, 93 N. C. 458 554
v. Lyons, 5 Munf. 342 1026
v. Russell, 13 Q. B. 588 3836
v. Ward, 6 C. B. (N. S.) 514 11
v. York Bank, 21 Pa. 291 1117
Hunton v. Marshall, 76 Ark. 375 2501
Huntoon v. Hazelton, 20 N. H. 388 2468
Huntress v. Burbank, 111 Mass. 213 1221
v. Patton, 20 Me. 28 2825
Huntsman v. Hendricks, 44 Minn. 423 2087, 2122
Huntsville, City of, v. Pulley, 187 Ala. 367 1434
Huntsville Elks' Club v. Garrity-H. B. Co., 176 Ala. 128 537, 2626
Hupe v. Phelps, 2 Stark 480 2476
v. Sommer, 88 Kan. 561 495, 498, 1133
Hupert v. Anderson, 35 Iowa 578 4147
Huquelet v. Warfield, 84 S. C. 87 3422
Hurd v. Blackman, 19 Conn. 177 667, 767
v. Callahan, 9 Abb. New Cas. 374 2764, 2772
v. Dunsmore, 63 N. H. 171 1948
v. Eaton, 28 Ill. 122 572, 574
v. Gallaher, 14 Iowa 394 4350, 4352
v. Hall, 12 Wis. 112 2117, 2157
v. Hubbell, 26 Conn. 389 4211
v. Palmer, 21 Up. Can. Q. B. 49 1108
v. Spencer, 40 Vt. 581 2804
v. Trimble, 1 Litt. 413 1734
Hurdle v. Hammer, 5 Jones 360 2833
Hurgren v. Union Mut. L. Ins. Co., 141 Cal. 585 4633
Hurlbert v. Topeka, 34 Fed. 510 4852
Hurlburt v. Dusenbury, 26 Colo. 240 941, 1005
v. Green, 41 Vt. 490 480, 4198, 4215, 4305, 4307
v. Kephart, 50 Colo. 353 2744
v. Western U. Tel. Co., 123 Iowa 295 3622
Hurlbut v. Boaz, 4 Tex. Civ. App. 371 4623, 4646
v. Hardenbrook, 85 Iowa 606 4620, 4646
v. Schillinger, 130 U. S. 456 4470
Hurley v. Buchi, 10 Lea. 346 238, 2444
v. Jones, 165 Pa. 34 3811
v. Metropolitan St. R. Co., 87 App. Div. (N. Y.) 66 1500
v. Oliver, 91 Ark. 427 2699
v. Packard, 182 Mass. 216 2958
Hurlock v. Reinhardt, 41 Tex. 580 1621
Hurn v. Soper, 6 Har. & J. 276 2067
Huron v. Dale, 19 Mich. 17 4596
Huron B. Co. v. Turney, 71 Fed. 972 3302
v. Turney, 79 Fed. 109 3304, 3307
Hursey v. Surles, 91 S. C. 284 2514
Hursh v. St. Paul, etc., R. Co., 17 Minn. 439 4101
Hurst, In re, 1 Flip. 462 668
Hurst v. Chambers, 12 Bush. 155 1869
v. Coley, 15 Fed. 645 4273, 4275, 4289
v. Detroit City R., 84 Mich. 539 1395, 4849, 4851, 4870, 4931, 5118
v. Everett, 91 N. C. 399 534
v. Hite, 20 W. Va. 183 739
v. Hurst, 4 Ex. 571 892
v. Randall, 68 Mo. App. 507 2754
v. Sheets, 14 Iowa 322 586
v. Webster Mfg. Co., 128 Wis. 324 1538
Hurt v. Atlanta, 100 Ga. 274 3928, 3951, 3957, 4112
v. Cook, 151 Mo. 417 798, 803
v. Miller, 120 App. Div. (N. Y.) 833 4244
v. St. Louis, etc., R. Co., 94 Mo. 225 1431, 3525, 4770
v. Southern R. Co., 40 Miss. 391 3488
Hurtin v. Union Ins. Co., 1 Wash. C. C. 530 3294
Hurxthal v. Boom & L. Co., 53 W. Va. 87 47, 172, 273, 384, 477, 1258
v. St. Lawrence B. & M. Co., 65 W. Va. 346 233, 1418, 1433, 2618
Hury v. Watson, 4 T. R. 659 1503
Husband v. Davis, 10 C. B. 645 1555
Huse v. Alexander, 2 Metc. (Mass.) 157 658
v. Hamblin, 29 Iowa 501 596, 1890

[REFERENCES ARE TO PAGES]

Huskie v. Griffin, 75 N. H. 345 14, 165
Huson v. Dale, 19 Mich. 17 470, 472, 4569, 4584
Hussey v. Collins, 30 Me. 190 2873, 2892
v. Farlow, 9 Allen 263 617
v. Holloway, 217 Mass. 100 2563, 2564
v. Manufacturers', etc., Bank, 10 Pick. 415 711, 2330
v. Ryan, 64 Md. 426 4682, 4769
v. Sibley, 66 Me. 192 1870
Hussner v. Brooklyn City R. Co., 114 N. Y. 433 3881
Hustace v. Phoenix Ins. Co., 175 N. Y. 292 3040
Husted v. Missouri Pac. R. Co., 143 Mo. App. 623 4944
Huston v. Branch Bank, 25 Ala. 250 2798
v. Crutcher, 31 Miss. 51 1107
v. de Zeng, 78 Mo. App. 522 1021
v. Freemansburg, 212 Pa. 548 78, 88
v. Newgass, 234 Ill. 285 1814
v. Noble, 4 J. J. Marsh. 130 1233
v. Twin, etc., Road, 45 Cal. 550 1356
v. Wickersham, 2 W. & S. 308 3702
Huston's App., 9 Watts 472 1085, 1200
Hutcheis v. Cedar Rapids, etc., R. Co., 128 Iowa 279 4761
Hutchings v. Ladd, 16 Mich. 494 369, 2922
Hutchins v. Hodges, 98 N. C. 404 3129
v. Hullman, 34 Ga. 346 612
v. Hutchins, 7 Hill 104 15, 120
v. Kimmel, 31 Mich. 126 4974
v. McCann, 7 Port. 94 1873
v. Moody, 30 Vt. 652, 34 Vt. 433 2147, 2188
v. Munn, 209 U. S. 246 1718, 1741
v. Munn, 28 App. (D. C.) 271 1734, 1741
v. Nichols, 10 Cush. 299 783
v. Olcutt, 4 Vt. 549 655
v. Pennsylvania R. Co., 181 N. Y. 186 3414
v. Roundtree, 77 Mo. 500 2088, 2133, 2134
v. St. Paul, etc., R. Co., 44 Minn. 5 1518, 4864, 4935, 4939
v. Western, etc., R. Co., 25 Ga. 51 3529
Hutchinson v. Chicago & N. R. Co., 37 Wis. 582 3970
v. Cummings, 156 Mass. 329 3243, 3250
v. Granger, 13 Vt. 386 1364
v. Hubbard, 21 Neb. 33 60
v. Hutchinson, 102 Mich. 635 4314
v. Mt. Vernon W. & P. Co., 49 Wash. 469 42, 1432, 2617
v. Parker, 64 N. H. 89 3769
v. Poyer, 78 Mich. 340 1453
v. Railroad, 140 N. C. 123 3483, 3507
v. Reed, 3 Camp. 320 2229
v. Ryan, 11 Cal. 142 1805
v. Stern, 115 App. Div. 791 74, 80
v. West Jersey & S. R. Co. (N. J.), 170 Fed. 615 4923
v. Wetmore, 2 Cal. 310 376, 2524
v. Wheeler, 35 Vt. 330 4581, 4582
v. Woodwell, 107 Pa. 509 2752, 2805
Hutchinson L. & P. Co. v. Baker, 74 Kan. 120 4743
Hutchinson Mfg. Co. v. Pinch, 91 Mich. 156 245, 2617, 2625, 2626, 2635, 2636
Hutchinson W. G. Co. v. Brand, 79 Kan. 340 2841
Hutchison v. Hooker, 2 New Zeal. L. R. (Sup. Ct.) 134 2899
Huth, In re, 152 N. Y. Supp. 215 4876
Hutkoff v. Glazer, 78 N. Y. Misc. 362 655
Hutt v. Bruckman, 55 Ill. 441 537
v. Hickey, 67 N. H. 411 287, 2697, 2700
Huttig-McD. P. B. Co. v. Springfield S. Co., 140 Mo. App. 374 1559
Hutton v. Campbell, 10 Lea 170 2805
v. Eyre, 6 Taunt. 289 773, 781, 782
v. Lockridge, 27 W. Va. 428 1794
v. Murphy, 9 N. Y. Misc. 151 4186
v. Williams, 35 Ala. 503 1942, 1946
Hutts v. Shoaf, 88 Ind. 395 1363
Huxley v. Berg, 1 Starkie 98 74, 97
Huxoll v. Union Pac. R. Co., — Neb. —, 155 N. W. 900 5082, 5135
Huyck v. Andrews, 113 N. Y. 81 2150, 2160, 2188
Huyett-S. Mfg. Co. v. Gray, 129 N. C. 438 2407, 2412
Huyett & S. Mfg. Co. v. Chicago Edison Co., 167 Ill. 233 384
v. Gray, 124 N. C. 322 2370, 2405
v. Gray, 111 N. C. 87, 93 2414
Huzzey v. Field, 2 Cr. M. & R. 432, 440 3509
Hyams v. Bamberger, 10 Utah 3 805, 827, 4288
Hyatt v. Adams, 16 Mich. 180 349, 1282, 4761, 4762, 4763, 4846, 4862
v. Bank, 8 Bush 193 1878
v. Boyle, 5 Gill & J. 110 2371, 2391
v. Grover & B. S. M. Co., 41 Mich. 225 1583
v. McBurney, 18 S. C. 199 611
v. Washington, 20 Ind. App. 148 1730
Hyde v. Baldwin, 17 Pick. 307 768
v. Booraem, 16 Pet. 169 2667
v. Cookson, 21 Barb. 92 362, 363, 364, 4291
v. Cooper, 26 Vt. 552 435
v. Elmer, 14 N. M. 39 4226, 4312, 4313
v. Goodnow, 3 N. Y. 266 1148
v. Greuch, 62 Md. 577 4604, 4635, 4645, 4649
v. Kiehl, 183 Pa. 414 4197
v. Lindsay, 29 Can. Sup. Ct. 595 (1899) 2245
v. Mechanical R. Co., 144 Mass. 432 2614
v. Middlesex, 2 Gray 267 4030
v. Moffatt, 16 Vt. 271 1403, 1405
v. Moxie N. F. Co., 160 Mass. 559 2492
v. Paige, 9 Barb. 250 682
v. Stone, 7 Wend. 354 1135, 4232
v. Tenwinkel, 26 Mich. 93 1867
v. United States, 38 Ct. of Cls. 649 2650
Hyde Park v. Washington I. Co., 117 Ill. 233 4033, 4108
Hyde Park Thomson-H. L. Co. v. Porter, 167 Ill. 276, aff'g 64 Ill. App. 152 3860
v. Porter, 167 Ill. 276 3936
Hyderabad, The, 11 Fed. 748 2729
Hydraulic Co. v. Chatfield, 38 Ohio St. 575 962
Hydraulic E. Co. v. McHaffie, 4 Q. B. Div. 670 2615, 2635
Hyer v. Little, 20 N. J. Eq. 443 2490
Hygienic F. U. Co. v. Way, 15 Pa. Dist. 943 1280, 1322
Hyland v. Sherman, 2 E. D. Smith 234 2371, 2377
v. Southern Bell Tel. & T. Co., 70 S. C. 315 1477
Hyman v. Jockey Club W. L. & C. Co., 9 Colo. App. 299 3123, 3129

[REFERENCES ARE TO PAGES]

Hyman v. South Coast H. Co., 146 App. Div. (N. Y.) 341 3413
Hyman & Co. v. H. H. Snyder Co., 159 Ky. 354 2589
Hymes v. Esty, 133 N. Y. 324 2113, 2134, 2160, 2188
Hynds v. Schenectady Ins. Co., 11 N. Y. 554 3019
Hynes v. Brewer, 194 Mass. 435 3904
v. Manhattan R. Co., 54 App. Div. (N. Y.) 256 4082
v. Packard, 92 Tex. 44 2112
v. Patterson, 95 N. Y. 1 2331, 4270, 4272, 4273, 4277
Hynson v. Dunn, 5 Ark. 395 2397
Hypes v. Southern R. Co., 82 S. C. 315 4509
Hyrne v. Erwin, 23 S. C. 226 449
Hysell v. Sterling C. & Mfg. Co., 46 W. Va. 158 2608, 2611
Hyslop v. Clarke, 14 Johns. 458 1851
Hysore v. Quigley, 9 Houst. 348 3207, 3229

I

I. W. Nicholas, The, 147 Fed. 793 2725, 2727
Iaeger v. Metcalf, 11 Ariz. 283 1267, 1386, 1416, 4792, 4832
Iberia, The, 46 Fed. 301 4996
Iberia C. Co. v. Christen, 112 La. 451 701
Ice v. Kilworth, 84 Kan. 458 1072
Icely v. Grew, 6 Nev. & Man. 467 2243
Ickemoth v. St. Louis T. Co., 102 Mo. App. 597 1282, 1288, 3501
Ickes v. Ickes, 237 Pa. 582 4980
Ida County Sav. Bank v. Seidensticker, 128 Iowa 54 731, 2751
Ida L. Howard, The, 1 Low. 2 2724
Idaho, The, 93 U. S. 575 361
Idaho Sheep Co. v. Oregon Short Line R. Co., 188 Ill. App. 591 3338
Idaho, etc., R. Co. v. Coey, 73 Wash. 291 3976, 3983, 3991, 4001, 4002, 4124
v. Columbia Conference, etc., R. Co., 20 Idaho 568 3962, 3969, 3986, 4004, 4048, 4133
v. Nagle, 184 Fed. 598 3952, 3981, 3984, 4020
Iddings v. Equitable G. Co., 8 Pa. Super. 244 1414, 3114, 3163
Ideal Cream Separator Repair Works v. City of Des Moines, 167 Iowa 517 1498, 1500
Ideal H. Co. v. Kramer, 127 Iowa 137 2374, 2387, 2598
Ideal Leather Goods Co. v. Eastern S. S. Corp., 220 Mass. 133 31
Ideal W. Co. v. Garvin Mach. Co., 92 App. Div. 187 205, 294, 2601
Igle v. People's Ry. Co., — Del. Super. Ct. —, 93 Atl. 666 4659, 4730, 4745, 4748
Igo v. Cleveland, etc., R. Co., 156 Ill. App. 190 1368
Ihl v. Forty-second St., etc., R. Co., 47 N. Y. 317 37, 1395, 4861, 4941
Ihrig v. Bussell, 68 Wash. 70 1654, 1655, 1673
Ijams v. Provident Sav. L. Assur. Soc., 185 Mo. 466 3087
v. Rice, 17 Ala. 404 1109
Ikard v. Armstrong, 10 Ala. App. 657 745
Iler v. Baker, 82 Mich. 226 4235
Iles v. Inter Ocean Newspaper Co., 184 Ill. App. 63 4573, 4588
Iliff v. School Directors, 45 Ill. App. 419 1725, 1737
Illidge v. Goodwin, 5 C. & P. 190 70
Illies v. Fitzgerald, 11 Tex. 417 295
Illinois Cent. R. Co. v. Winslow, 119 Ky. 877 3468
Illinois L. Ins. Co. v. McKay, 6 Ga. App. 285 623
Illinois M. Co. v. Chicago, etc., R. Co., 153 Ill. App. 568 3414
Illinois Mut. F. Ins. Co. v. Andes Ins. Co., 67 Ill. 362 3038, 3092
v. Marseilles Mfg. Co., 6 Ill. 236 3039
Illinois R. & S. Co. v. Gorton, 6 Pa. Dist. 407 2749
Illinois S. Co. v. Ryska, 200 Ill. 280 4706
v. Szutenbach, 64 Ill. App. 642 4786
v. United States, 212 Fed. 136 2794
Illinois T. & S. Bank v. Burlington, 79 Kan. 797 886
v. Stewart L. Co., 119 Wis. 54 710, 4285
Illinois Tel. News Co. v. Meine, 242 Ill. 568 4067
Illinois, etc., C. Co. v. Cobb, 82 Ill. 183 3733
Illinois, etc., R. Co. v. Adams, 78 Miss. 895 1064, 1758
v. Able, 59 Ill. 131 1480
v. Allbright, 54 Ind. App. 203 3465, 3474, 3519
v. Anderson, 184 Ill. 294 3341
v. Armstrong, 93 Miss. 583 125, 1277
v. Ashline, 56 Ill. App. 475 4882
v. Barron, 5 Wall 90 3472, 3474, 4792, 5092
v. Beebe, 174 Ill. 13 3341
v. Behrens, 233 U. S. 473, s. c. 192 Fed. 581 5043, 5047, 5067
v. Benz, 108 Tenn. 670 4862
v. Black, 122 Ill. App. 439 1330
v. Bogard, 78 Miss. 11 3336, 3383, 3390
v. Borms, 219 Ill. 179 4108, 4109, 4115, 4117
v. Brothers, 12 Ala. App. 351 3370
v. Byrne, 205 Ill. 9 3367
v. Cheek, 152 Ind. 663 4795, 4825
v. Chicago, 156 Ill. 98 4062
v. Chicago, 169 Ill. 329 4060, 4063
v. Cobb, 64 Ill. 128 193, 207, 3349, 3367
v. Cobb, 68 Ill. 53 1261, 1268
v. Cobb, 72 Ill. 148 3401
v. Cobb, 94 Ill. 55 3745
v. Cole, 165 Ill. 334 aff'd 62 Ill. App. 480 821, 4671
v. Coley, 121 Ky. 385 432
v. Commissioners of Highways, 161 Ill. 247 4060
v. Copeland, 24 Ill. 392 3535, 3536
v. Creighton, 53 Ill. App. 45 4833
v. Crudup, 63 Miss. 291 4849, 4935, 4939
v. Curry, 127 Ky. 643 3389
v. Dacus, 103 Miss. 297 3526
v. Dallas, 150 Ky. 442 4948
v. Davenport, 75 Ill. App. 579, 584 1493
v. Davidson, 76 Fed. 517 4693, 4707, 4744
v. Dodd, 104 Miss. 643 3473, 3528
v. Dodds, 97 Miss. 865 3502
v. Doss, 137 Ky. 659 294, 2614
v. Downey, 18 Ill. 259 1329
v. Easterbrook, 211 Ill. 624 3968
v. Elliott, 33 Ky. L. Rep. 537 3982, 3985, 3989
v. Elliott, 129 Ky. 121 3877, 3881, 3886
v. Engle, 102 Miss. 878 3905
v. Farrell, 86 Ill. App. 436 4833

[REFERENCES ARE TO PAGES]

Illinois, etc., R. Co. v. Ferrell, 108 Ill. App. 659 4095
v. Finnegan, 21 Ill. 646 486, 4189
v. Fleming, 148 Ky. 473 3474, 3484, 3501, 3518
v. Freeman, 210 Ill. 270 3975, 3978, 4124
v. Gortikov, 90 Miss. 787 3501
v. Grabill, 50 Ill. 241 3852, 3872, 3876, 3878, 3920
v. Griffin, 80 Fed. 278 1380, 1465
v. Haecker, 110 Ill. App. 102 139
v. Hammer, 72 Ill. 353 1344, 3506
v. Hanberry, 23 Ky. L. Rep. 1867 4731, 4732
v. Handy, 63 Miss. 609 3532, 3540, 3541
v. Harper, 83 Miss. 560 3502
v. Harris, 184 Ill. 57 3312
v. Harris, 63 Ill. App. 172 4811, 4830
v. Harris, 85 Miss. 15 444
v. Haynes, 64 Miss. 604 3403
v. Heisner, 45 Ill. App. 143 3903
v. Hopkinsville C. Co., 132 Ky. 578 170, 3322, 3329, 3345, 3369, 3425
v. Houchins, 121 Ky. 526 1477
v. Humiston, 208 Ill. 100 4124, 4133, 4137
v. Jackson, 117 Ky. 900 3476
v. Johnson, 116 Tenn. 624 172, 3322, 3323, 3330, 3343
v. Johnson, 221 Ill. 42 4930, 4940
v. Kelly, 167 Ky. 745 5065, 5126
v. Lancashire Ins. Co., 79 Miss. 114 3333
v. Latimer, 28 Ill. 552 3522
v. Le Blanc, 74 Miss. 626 1439, 1450, 3765, 3794, 4053
v. Lockard, 112 Ill. App. 423 3852, 3877
v. Lostant, 167 Ill. 85 4019, 4060, 4062
v. McClellan, 54 Ill. 58 3346
v. McClintock, 68 Ill. 296 1063
v. Minor, 69 Miss. 710 3467, 3469, 4794
v. Moore, 79 Miss. 766 3448
v. Nelson, 128 C. C. A. 525, 212 Fed. 69 4661, 5125
v. Nelson, 139 Ky. 449 3322, 3323, 3329, 3342, 3345, 3370
v. Normal, 175 Ill. 562 4060, 4062
v. O'Connor, 90 Ill. App. 142 4811
v. Ogle, 82 Ill. 627 3790, 3793
v. Outland's Adm'x, 160 Ky. 714 1276, 1277, 4866, 4877
v. Owens, 53 Ill. 391 3353
v. Parks, 88 Ill. 373 1495, 3527
v. Pearson, 80 Miss. 26 3448
v. People, 19 Ill. App. 141 1392
v. Porter, 207 Fed. 311 5069, 5074, 5075
v. Porter, 117 Tenn. 13 4728
v. Price, 72 Miss. 862 4811
v. Prickett, 109 Ill. App. 468 4885
v. Prickett, 210 Ill. 140 488
v. Radford, 23 Ky. L. Rep. 886 3387
v. Reardon, 157 Ill. 372 4935
v. Reid, 93 Miss. 458 1343, 3506
v. Ring, 219 Ill. 91 3976
v. River & Rail C. & C. Co., 150 Ky. 489 3319
v. Robinson, — Ala. —, 66 So. 519 4867
v. Robinson, 58 Ill. App. 181 1493, 4825
v. Rogers, 221 Fed. 52 5060, 5070
v. Roskemmer, 264 Ill. 103 3972, 4018, 4135, 4137
v. Rothschild, 134 Ill. App. 504 1373, 1506, 4707, 4778, 4781
Illinois, etc., R. Co. v. Schmidgall, 91 Ill. App. 23 3984
v. Seamans, 79 Miss. 106 162
v. Sheegog, 126 Ky. 252 4866
v. Siddons, 53 Ill. App. 607 1380, 3474, 3480
v. Siler, 229 Ill. 390 52, 56, 152
v. Simmons, 49 Ill. App. 443 3346
v. Smith, 85 Miss. 349 3502
v. Smith, 102 Miss. 276 3507
v. Souders, 79 Ill. App. 41 4824
v. State, 94 Miss. 759 4059
v. Stewart, 223 Fed. 30 5127, 5128
v. Stewart, 265 Ill. 35 3965, 3994, 4140
v. Sutton, 53 Ill. 397, 341, 3474, 3480
v. Switzer, 117 Ill. 399 4000
v. Treat, 75 Ill. App. 327 4813
v. Trustees of Schools, 112 Ill. App. 488 3885, 3907
v. Trustees of Schools, 212 Ill. 406 5, 3952
v. Turner, 194 Ill. 575 3952
v. Turrill, 110 U. S. 301 4476
v. United States, 16 Ct. of Cls. 312 183
v. Warriner, 132 Ill. App. 301 4941
v. Warriner, 229 Ill. 91 110, 4937, 4939
v. Weldon, 52 Ill. 290 4858, 4862, 4900, 4901
v. Western U. Tel. Co., 146 Ill. App. 163 3559, 3591
v. Wheeler, 50 Ill. App. 205 4825
v. Whiteaker, 122 Ill. App. 333 4858
v. Wilbourn, 74 Miss. 284 391
v. Williams, 147 Ky. 52 3472, 3476
v. Woolery, 163 Ill. App. 516 1500
Illsley v. Peerless M. C. Co., 177 Ill. App. 459 262
Ilse v. Aetna Ind. Co., 55 Wash. 487 2685
Ilsley v. Jewett, 2 Metc. (Mass.) 168 643, 1019, 1020
v. Jones, 12 Gray 260 1814
v. Wilson, 42 W. Va. 757 2056
Imberscheid v. Old Colony R. Co., 171 Mass. 209 4147, 4150, 4152
Imbriani v. Anderson, 76 N. H. 491 4949, 4950
Imbush v. Mechanics' Bank, 1 West. L. J. 49 648
Imel v. Van Deren, 8 Colo. 90 1654, 1659, 1681
Imeson, Ex parte, 2 Rose 225 1884
Imhoff v. Richards, 48 Neb. 590 4228
Imlay v. Union Branch R. Co., 26 Com. 249 3947
Imler v. Imler, 94 Pa. 372 871, 1921
Immanuel P. Church, In re, 112 La. 348 947
Immel v. Herb, 50 Pa. Super. Ct. 241 3880, 3892
Imperial C. Co. v. Port Royal C. Co., 138 Pa. 45 2343
Imperial F. Ins. Co. v. Murray, 73 Pa. 1 3063
Imperial H. Co. v. Claflin Co., 175 Ill. 119 1014, 1093
Imperial R. S. Co. v. Steinfeld, 232 Pa. 399 2250, 2260, 2263, 2306
Impkamp v. St. Louis T. Co., 108 Mo. App. 655 4706
Importers & T's Ins. Co. v. Christie, 5 Robert. 169 3175
Incledon v. Northcote, 3 Atk. 438 1083
Independence, The, 2 Curt. 357 2719
Independent B. Ass'n v. Burt, 109 Minn. 323 228, 259, 261, 1366, 2438
Independent C. O. Co. v. Beacham, 31 Okla. 384 4798
Independent Foresters v. Keliher, 36 Ore. 501 1253

[REFERENCES ARE TO PAGES]

Independent Ins. Co. v. Thomas, 104 Mass. 192 606
Independent Mut. Ins. Co. v. Agnew, 34 Pa. 96 3048
Independent School Dist. v. McDonald, 39 Iowa 564 1582, 1586, 1588
Inderlied v. Bullen, 80 N. J. L. 7 4976
Indian, The, 159 Fed. 20 2721, 2726
Indiana C. Co. v. Parker, 100 Ind. 181 4656, 4690, 4730
Indiana Millers' Mut. F. Ins. Co. v. People, 65 Ill. App. 355, 150 Ill. 474 1359
Indiana N. G. Co. v. Jones, 14 Ind. App. 55 3978
Indiana Nitroglycerine & Torpedo Co. v. Lippincott Glass Co., 165 Ind. 361 1331
Indiana T. Co. v. Byram, 36 Ind. App. 6 2902
v. Finitzer, 160 Ind. 647 507
v. International B. & L. Ass'n, 36 Ind. App. 685 684, 728
v. Landrum, 137 Ky. 769 2241
Indiana U. T. Co. v. Benadum, 42 Ind. App. 121 1440
v. Heller, 44 Ind. App. 385 1273, 3505
v. Jacobs, 167 Ind. 85 1384, 1471, 4675
v. McKinney, 39 Ind. App. 86 4737
v. Schwinge, 46 Ind. App. 525 4793
Indiana & O. L. S. Ins. Co. v. Bender, 32 Ind. App. 287 2793, 2796
Indiana, etc., R. Co. v. Allen, 100 Ind. 409 3962, 4095
v. Allen, 113 Ind. 308 3759
v. Conness, 184 Ill. 178 4093
v. Eberle, 110 Ind. 542 400, 3759
v. Hunter, 8 Ind. 74 3957
v. Moore, 23 Ind. 14 3243
v. Orr, 41 Ind. App. 426 3483, 3493
v. Rinehart, 14 Ind. App. 588 4014
v. Scearce, 23 Ind. App. 223 290
v. Stauber, 185 Ill. 9 3977, 3978
Indianapolis v. Gaston, 58 Ind. 224 3081, 3489, 3493, 3498, 4662, 4693, 4725, 4733, 4748
v. Marold, 25 Ind. App. 428 4752, 4795
v. Stokes, 182 Ind. 31 4795
Indianapolis Journal N. Co. v. Pugh, 6 Ind. App. 510 4516, 4530
Indianapolis Northern T. Co. v. Dunn, 37 Ind. App. 248 4120
v. Ramer, 37 Ind. App. 264 3979, 4002, 4120
Indianapolis T. Co. v. Kidd, 167 Ind. 402 4738
v. Murphy, 99 Iowa 633 2599
Indianapolis T. & T. Co. v. Beckman, 40 Ind. App. 100 4941
v. Croly, 55 Ind. App. 543 4769
v. Gillaspy, 56 Ind. App. 332 1372
v. Henby, 178 Ind. 239 4635, 4647
v. Holtzclaw, 40 Ind. App. 311 426
v. Menze, 173 Ind. 31 1504, 4757, 4761, 4763, 4764, 4797
v. Romans, 40 Ind. App. 184 1496, 4900, 4908
Indianapolis Union R. Co. v. Cooper, 6 Ind. App. 202 3468, 3470
Indianapolis W. Co. v. American S. Co., 57 Fed. 1000 3934
Indianapolis & C. T. Co. v. Larrabee, 168 Ind. 237 3976, 4021, 4025
Indianapolis & M. R. T. Co. v. Reeder, 37 Ind. App. 262 1427, 1471
v. Reeder, 42 Ind. App. 520 1417, 1499, 3515, 4756, 4758, 4759, 4760, 4763, 4846
Indianapolis & M. R. T. Co. v. Reeder, 51 Ind. App. 533 1498, 4757, 4887
Indianapolis, etc., R. Co. v. Antrobus, 33 Ind. App. 663 110
v. Barnes, 35 Ind. App. 485 3458
v. Bennett, 39 Ind. App. 141 4739
v. Birney, 71 Ill. 391 184, 222, 3459, 4680, 4730
v. Branson, 172 Ind. 383 4019, 4021, 4027
v. Bush, 101 Ind. 582 4784
v. Haverstick, 35 Ind. App. 281 1471, 4732
v. Hill, 172 Ind. 402 4019
v. Kane, 169 Ind. 25 1502
v. Keely, 23 Ind. 133 4846
v. Koons, 105 Ind. 507 381
v. Milligan, 50 Ind. 392 3519
v. Pitzer, 109 Ind. 179 162
v. Ray, 167 Ind. 236 78, 3480, 4672, 4747
v. Robinson, 157 Ind. 414 4748, 4759, 4760
v. Schmidt, 163 Ind. 360 1471
v. Smith, 78 Ill. 112 73
v. Stables, 62 Ill. 313 339, 3474, 3480, 3643, 4662, 4686
v. Wall, 54 Ind. App. 43 3526
Indianola v. Gulf, etc., R. Co., 56 Tex. 594 838, 884, 886
Indig v. National City Bank, 80 N. Y. 100 682
Industrial L. Co. v. Bivens, 47 Tex. Civ. App. 396 4745
Industrial S. & L. Co. v. Hare, 216 Pa. 389 979
Industrial Works v. Mitchell, 114 Mich. 29 207, 285, 2634, 2635
Industrial & G. T. Co. v. Tod, 52 App. Div. (N. Y.) 195 1450, 4222
Industrie, The, (1894) Prob. Div. 58 3288
Ing. v. Higgs [1914] W. C. & Ins. Rep. 84, 7 B. W. C. C. 65 5202
Ingalls v. Allen, 132 Ill. 170 2522, 2523
v. Beall, 68 Wash. 247 3230, 3242
v. Bills, 9 Metc. (Mass.) 1 148
v. Cooke, 21 Iowa 560 2147
v. Dennett, 6 Me. 79 2835
v. Lee, 9 Barb. 647 1822, 1873
v. Lord, 1 Cow. 240 2934, 2937, 4273, 4278
Inge v. Bond, 3 Hawks. 101 2381
v. McCreery, 60 App. Div. (N. Y.) 557 2511
Ingels v. Mast, 1 Flip. 424 4465
Ingersoll v. Campbell, 46 Ala. 282 1117
v. Detroit, etc., R. Co., 163 Mich. 268 4853, 4875
v. Jones, 5 Barb. 661 491, 4973
v. Musgrove, 14 Blatch. 541 4447, 4448, 4449, 4475
v. Sergeant, 1 Whart. 337 3132
v. Starkweather, Walk. Ch. 346 2902
v. Van Bokkelin, 7 Cow. 670 1680
Ingerson v. Miller, 47 Barb. 47 4960
Ingham L. Co. v. Ingersoll, 93 Ark. 447 2695
Ingle v. Batesville G. Co., 89 Ark. 378 2754
Ingledew v. Cripps, 2 Ld. Raym. 814 839
v. Northern R., 7 Gray 86 2368, 3349, 3353, 3365, 3387
Inglehart v. State, 2 Gill & J. 235 1636
Ingles v. Metropolitan R. Co., 145 Mo. App. 241 4705, 4718
v. Sutliff, 36 Kan. 444 2820
Ingleside Mfg. Co. v. Charleston L. & W. Co., 76 S. C. 95 3760
Inglish v. Watkins, 4 Ark. 199 1874

[REFERENCES ARE TO PAGES]

Ingraham v. Arnold, 1 J. J. Marsh. 406 1182
v. Postell, 1 McCord Ch. 94 1200
v. Pullman Co., 190 Mass. 33 318, 3543
v. Weidler, 139 Cal. 588 1494
Ingram v. Cox, 5 Pa. Dist. 617 1669
v. Drinkard, 14 Tex. 351 1184, 1879
v. Lawson, 5 Bing. N. C. 218 4582
v. Lawson, 6 Bing. N. C. 212 268, 4535, 4565, 4693
v. Lawson, 8 Scott 471 411
v. Lawson, 9 C. & P. 333 4597
v. Louisiana, etc., R. Co., 128 La. 933 1338
v. McComb, 17 Mo. 558 1613
v. Morgan, 4 Humph. 66 2056, 2211
v. Rankin, 47 Wis. 406 369, 4169, 4211, 4220, 4239, 4255, 4256, 4339
v. Root, 51 Hun 238 4603
v. Scattergood, 15 Ohio C. C. (N. S.) 93 966
v. Southern R. Co., 152 N. C. 762 4769
v. Wackernagel, 83 Iowa 82 2241, 2243
v. Wishkah B. Co., 35 Wash. 191 1433, 3840, 3878, 3891
Ingwaldson v. Skrivseth, 7 N. D. 388 4064, 4959, 4960
Ingwersen v. Rankin, 47 N. J. L. 18 3843
Inland Box & Label Co. v. Richie, 57 Colo. 532 531
Inland Empire R. Co. v. McKinley, 48 Wash. 675 4129
Inland S. Co. v. Harris, 49 Ind. App. 157 2551, 2563
Inman v. Ball, 65 Iowa 543 1281
v. Foster, 8 Wend. 602 4573, 4577, 4599, 4600
v. Griswold, 1 Cow. 199 631
v. St. Louis, etc., R. Co., 14 Tex. Civ. App. 39 3314, 3318, 3326, 3327, 3346
v. Sherrill, 29 Okla. 100 1602
v. Western Ins. Co., 12 Wend. 452 3021
Innes v. Agnew, 1 Ohio 179 2056, 2094
v. Bogan, 41 Colo. 9 2511
Insley v. Shepard, 31 Fed. 869 2705
Institution for Savings v. Brookline, 220 Mass. 300 3961, 3965, 4066
Insurance Co. v. Ayers, 88 Tenn. 728 3056
v. Bachler, 44 Neb. 549 3008, 3012
v. Boon, 95 U. S. 117 3003, 3040
v. Brame, 95 U. S. 754 4846
v. Conard, Baldwin 138 1706
v. Dunscomb, 108 Tenn. 724 698
v. Express Co., 95 U. S. 227 3003, 3040
v. Fogarty, 19 Wall. 640 3010
v. Huchbergers, 12 Wall. 166 1256
v. Insurance Co., 38 Ohio St. 11 3092
v. Leader, 121 Ga. 260 3048
v. Leslie, 47 Ohio St. 409 3008
v. Mordecai, 22 How. 111 3005
v. Morse, 20 Wall. 445 3016
v. Moseley, 8 Wall. 397 1472
v. Piaggio, 16 Wall. 378 3046
v. Transportation Co., 12 Wall. 194 2999, 3000, 3022, 3023
v. Tullidge, 39 Ohio St. 240 3084
v. Updegraff, 21 Pa. 513 3062
Insurance Co. of North America v. The Energia, 61 Fed. 222 3034
Interboro Brewing Co., Inc., v. Independent Consumers' Ice Co., Inc., 83 Misc. (N. Y.) 119 2274
Inter-Island S. N. Co. v. 1206 Bags of Sugar, 9 Hawaii 323 2716, 2717, 2726
International Agr. Corp. v. Abercrombie, 184 Ala. 244 1430, 1481, 1482, 3899
International B. & T. Co. v. McLane, 8 Tex. Civ. App. 665 4053, 4054
International C. Co. v. Beifeld, 173 Ill. 179 2683
v. McNichol, 105 Fed. 553 2240, 2254
International D. Co. v. Clemans, 59 Wash. 398 2152, 2157
International F. Co. v. Caney I. & C. S. Co., 84 Kan. 705 2455
International H. Co. v. Flynn, 238 Ill. 636 416
v. Industrial Comm. of Wisconsin, 157 Wis. 167 5207
v. Iowa H. Co., 146 Iowa 172 1279, 1313, 1700, 1706
v. Smith, 51 Fla. 22 697
International N. Co. v. Atlantic Mut. Ins. Co., 100 Fed. 304, aff'd 108 Fed. 987 3038
International Ocean Tel. Co. v. Saunders, 32 Fla. 434 3609, 3642
International Paper Co. v. Recording Fare R. Co., 139 Fed. 785 4490
v. Rockefeller, 161 App. Div. (N. Y.) 180 2274
International Realty & Securities Corp. v. Vanderpoel, 127 Minn. 89 4407
International T. Co. v. Boardman, 149 Mass. 158 3039
v. Marvin, 166 Mich. 660 2461
v. Schulte, 151 Mich. 149 2461
v. Schumann, 158 Mass. 287 3127
International T. C. Co. v. Hanks D. Ass'n, 111 Fed. 916 4439, 4440
International Text-Book Co. v. Anderson, 179 Mo. App. 631 2250, 2647
v. Leader P. Co., 189 Fed. 86 4508
v. Martin, 82 Neb. 403 2
International Travelers' Ass'n v. Branum, — Tex. Civ. App. —, 169 S. W. 389 3082, 3083
International, etc., R. Co. v. Addison, 100 Tex. 211 3460
v. Anchonda (Tex. Civ. App.), 68 S. W. 743 98, 3482
v. Anchonda, 33 Tex. Civ. App. 24 3486
v. Anthony, 24 Tex. Civ. App. 9 4763
v. Ball (Tex. Civ. App.), 130 S. W. 634 4139
v. Bartek, — Tex. Civ. App. —, 177 S. W. 137 1462
v. Barton, 93 Tex. 63 1140
v. Bell, (Tex. Civ. App.), 130 S. W. 634 3956, 4107, 4132
v. Benitos, 59 Tex. 326 3741
v. Boykin, 32 Tex. Civ. App. 72 4863, 4889, 4890
v. Brazil, 78 Tex. 314 4823
v. Brice (Tex. Civ. App.), 126 S. W. 613 4802
v. Butcher, 98 Tex. 462 4704
v. Campbell, 1 Tex. Civ. App. 509 3443
v. Capers, 33 Tex. Civ. App. 283 266, 3816
v. Cocke, 64 Tex. 151 4186
v. Cruseturner, 44 Tex. Civ. App. 181 4706
v. Culpepper, 19 Tex. Civ. App. 182 4895
v. Dimmitt County P. Co., 5 Tex. Civ. App. 186 3346, 3403
v. Doolan, 56 Tex. Civ. App. 503 3443, 3458
v. Duncan, 55 Tex. Civ. App. 440 4675

[REFERENCES ARE TO PAGES]

International, etc., R. Co. v. Fickey (Tex. Civ. App.), 125 S. W. 327 1430, 1433
v. Foltz, 3 Tex. Civ. App. 644 3336, 3386
v. Foster, 45 Tex. Civ. App.. 334 3893
v. Garcia, 70 Tex. 207 1338, 3513
v. Gieselman, 12 Tex. Civ. App. 123 400
v. Giesen (Tex. Civ. App.), 69 S. W. 653 3471, 3475
v. Gilbert, 64 Tex. 536 3459, 3474, 3520, 3527
v. Gordon, 72 Tex. 44 1358
v. Goswick, 98 Tex. 477 1498
v. Gready, 36 Tex. Civ. App. 536 1467
v. Haddox, 36 Tex. Civ. App. 385 4728
v. Harder, 36 Tex. Civ. App. 151 3443, 3471, 3528
v. Hinzie, 82 Tex. 623 23
v. Hood, 55 Tex. Civ. App. 334 3473
v. Irvine, 64 Tex. 529 3488
v. Jackson, 47 Tex. Civ. App. 26 3896
v. Kindred, 57 Tex. 491 4919, 4920
v. Knight, 91 Tex. 660 1395
v. Kuehn, 2 Tex. Civ. App. 210 4893
v. Kuehn, 70 Tex. 582 4884
v. Lane (Tex. Civ. App.), 127 S. W. 1066 1446, 1464, 1472, 4735
v. Leak, 64 Tex. 654 4674
v. McDonald, 75 Tex. 41 4868
v. McVey, 46 Tex. Civ. App. 181 4860, 4862
v. McVey, 99 Tex. 28 4860, 4871
v. McVey (Tex. Civ. App.), 81 S. W. 991 4900, 4906
v. Nicholson, 61 Tex. 550 3391, 3398
v. Ormond, 64 Tex. 485 4907
v. Pape, 73 Tex. 501 3801, 3894
v. Parke, — Tex. Civ. App. —, 169 S. W. 397 3397, 4177, 4181
v. Ragsdale, 67 Tex. 24 3741
v. Rhoades, 21 Tex. Civ. App. 459 4664
v. Russe'l, 48 Tex. Civ. App. 155 112
v. Sammon, 35 Tex. Civ. App. 96 3439, 3444, 3478
v. Sandlin, 57 Tex. Civ. App. 151 1425
v. Smith, 1 S. W. 565, 635 3520
v. Startz, 37 Tex. Civ. App. 51 3345
v. Telephone & T. Co., 69 Tex. 277 1270, 1312, 1495, 4159
v. Terry, 62 Tex. 380 185, 3450, 3456
v. Tisdale, 36 Tex. Civ. App. 174 1477
v. Tisdale, 74 Tex. 5 3329
v. Underwood, 64 Tex. 463 1463
v. Vandeventer, 48 Tex. Civ. App. 366 3334
v. White, 103 Tex. 567 1518
v. Wilkes, 68 Tex. 617 1513, 3476, 3520
v. Williams, 55 Tex. Civ. App. 176 1504, 3528
Interstate C. Co. v. Addington, 149 Ky. 120 4795
v. Love, 153 Ky. 323 149
Interstate Coal Co. v. Trivett, 155 Ky. 825 766
Interstate Commerce Comm. v. Cincinnati, N. O. & T. P. R. Co., 162 U. S. 184 5040
Interstate Con. R.-T. R. Co. v. Simpson, 45 Kan. 714 4119
Interstate E. Co. v. Archer, 64 Wash. 629 2346, 2347
Interstate L. Co. v. Duke, 183 Ala. 484 4168
Interstate S. & L. Ass'n v. Strine, 58 Neb. 133 1048
Interstate Tel. & Tel. Co. v. Public Service Elec. Co., 86 N. J. L. 26 5212
Interstate Trust & Banking Co. v. Young, 135 La. 465 739, 2793
Interurban C. Co. v. Hayes, 191 Mo. 248 449, 4274
Invincible, The, 1 Low. 225 3385
Ionia T. Co. v. 2,098 Tons of Coal, 128 Fed. 514 3306
Ionic, The, 5 Blatch. 538 3531
Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 260 2999, 3001, 4563
Iowa B. Mfg. Co. v. Herrick, 126 Iowa 721 2274, 2343, 2344
Iowa Mfg. Co. v. Sturtevant, 162 Fed. 460 2356
Iowa-M. L. Co. v. Conner, 136 Iowa 674 231, 244, 1432, 1962, 2619, 2620
Iowa Nat. Bank v. Carter, 144 Iowa 715 1825
Ipswich Mfg. Co. v. Story, 5 Metc. (Mass.) 310 643
Ira A. Allen, The, 128 Fed. 172 2726
Irby v. Southern Exp. Co., 96 S. C. 354 3334
v. Wilde, 150 Ala. 402 1373
v. Wilde, 155 Ala. 388 467, 1305
Ireland v. Bowman (Ky.), 114 S. W. 338 3880, 3890
v. Emmerson, 93 Ind. 1 3689
v. Elliott, 5 Iowa 478 465
v. Metropolitan E. R. Co., 52 N. Y. Super. Ct. 450 4083, 4084
v. Scharpenberg, 54 Wash. 558 1826
v. Ward, 51 Ore. 102 4979
Ireton v. Thomas, 84 Kan. 70 2150
Irick v. Black, 17 N. J. Eq. 189 2841
v. Fulton, 3 Gratt. 193 3710
Irion v. Hume, 50 Miss. 419 1561, 1709
v. Yell, — Tex. Civ. App. —, 132 S. W. 69 2793
Irish v. Cloyes, 8 Vt. 30 4296, 4299
Iribacker v. Roth, 25 App. Div. (N. Y.) 290 1032
Iron City Toolworks v. Welisch, 128 Fed. 693 226
Iron Clad Mfg. Co. v. Stanfield, 112 Md. 360 2668
Iron Cliffs Co. v. Gingrass, 42 Mich. 30 628
Irons v. Field, 9 R. I. 216 4503
v. Snyder, 49 Pa. Super. Ct. 522 2501
v. United States L. Ins. Co., 128 Ky. 640 3077
Ironton, City of, v. Harrison Const. Co., 212 Fed. 353 2700
Ironton L. Co. v. Butchart, 73 Minn. 39 244, 1418, 1434, 2592
Ironton, Ohio v. Harrison Const. Co., 212 Fed. 353 2665
Iroquois F. Co. v. Wilkin Mfg. Co., 181 Ill. 582 8, 58, 860, 861, 918
Irrgang v. Ott, 9 Cal. App. 440 4704
Irvin v. Gregory, 13 Gray 215 821
v. Hazleton, 37 Pa. 465 1244, 1245
v. Southern R. Co., 64 N. C. 5 5085
Irvine v. Barrett, 2 Grant's Cas. 73, 1147, 1878
v. Bull, 4 Watts 287 1943
v. City of Oelwein, 170 Iowa 653 3861, 3877
v. Gibson, 117 Ky. 306 1521
v. Midland, etc., R. Co., 6 L. R. Ire. 55 3315, 3326
v. Milbank, 56 N. Y. 635 748
v. Myers, 6 Minn. 562 581, 586, 589
Irving v. Bond, 76 Neb. 293 624
v. Greenwood, 1 C. & P. 350 493, 3680, 3686
v. Manning, 1 H. of L. Cas. 287, 6 C. B. 391 836, 3010

[REFERENCES ARE TO PAGES]

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v. Richardson, 1 M. & R. 153 3009
v. Viana, 2 Y. & Jer. 71 827
Irwin v. Askew, 74 Ga. 581 821, 1989
v. Backus, 25 Cal. 214 1639
v. Brandwood, 2 H. & C. 960 4534
v. Crook, 17 Colo. 16 1789
v. Dearman, 11 East 23 4963
v. Johnson, 36 N. J. Eq. 347 765
v. Kelly, 176 Ill. App. 178 2344
v. McDowell, 91 Cal. 119 4286
v. Missouri Pac. R. Co., 81 Kan. 649 160
v. Nolde, 164 Pa. 205 3815
v. Nolde, 176 Pa. 594 3190, 3193, 3744, 3799
v. Paulett, 1 Kan. 418 703, 710
v. Pennsylvania R. Co., 226 Pa. 156 4871
v. Pittsburgh, etc., R. Co., 43 Pa. 488 1224
v. Porter, 1 Hawaii 159 461, 464
v. Sprigg, 6 Gill 200 3923
v. Williar, 110 U. S. 499 2978
Isaacs, Estate of, 30 Cal. 105 1121
Isaacs v. Elkins, 11 Vt. 679 1867
v. McAndrew, 1 Mont. 437 941
v. McLean, 106 Mich. 79 4302
v. Terry, 56 N. Y. Misc. 586 2235
v. Terry, 132 App. Div. (N. Y.) 657 2248
v. Wannamaker, 189 N. Y. 122 2404, 2409
Isaacson v. Starrett, 56 Wash. 18 2307
Isabella G. M. Co. v. Glenn, 37 Colo. 165 1135, 1415, 3182, 3212, 3229, 3730
Isackson v. Lowell, 115 Minn. 481 644
Isbell-P. Co. v. Heineman, 113 App. Div. (N. Y.) 79 2404, 2409
Isenhart v. Brown, 2 Edw. Ch. 341 1079, 1085
Isenhour v. Barton County, 190 Mo. 163 1041
Isham v. Broderick, 89 Minn. 397 3843
v. Davidson, 52 N. Y. 237 533
v. Dow's Est., 70 Vt. 588 53, 111, 168
v. Erie R. Co., 112 App. Div. (N. Y.) 612 3347, 3435
v. Parker, 3 Wash. 755 2475, 2490
Isherwood v. Salene, 61 Ore. 572 357
Island City, The, 1 Black 121 2724
Island C. Co. v. Risher, 13 Ind. App. 98 1471
Isle Royale M. C. Co. v. Herton, 37 Mich. 332 364, 4263, 4345, 4346
Isler v. Brock, 134 N. C. 428 1121
Isley v. Virginia B. & I. Co., 143 N. C. 51 1494, 1514
Isman v. Loring, 130 App. Div. (N. Y.) 845 4364, 4375, 4434
Isom v. Book, 142 Cal. 666 1536, 3830
v. Rex Crude Oil Co., 140 Cal. 678 3830
Ison v. Griffin, 98 Ga. 623 13
Isphording v. Wolfe, 36 Ind. App. 250 2500
Israel v. Brooks, 23 Ill. 575 4613, 4630, 4649
v. Israel, 109 Mo. App. 366 4508, 4592
v. Jewett, 29 Iowa 475 3957
Itasca, The, 117 Fed. 885 4986, 5008, 5011
Ittner v. United States, 43 Ct. of Cls. 336 930
Ittner B. Co. v. Ashby, 198 Ill. 562 4872, 4900
Itzel v. Winn, 141 Wis. 645 3708
Ivans v. Laury, 67 N. J. L. 153 2373
Ives v. Bank, 12 Mich. 361 2804
v. Bosley, 35 Md. 262 2780
v. Carter, 24 Conn. 392 1314, 4392, 4432
v. Farmers' Bank, 2 Allen 236 1180
v. Freisinger, 70 N. J. L. 257 1448, 1453, 4169
v. Hulce, 17 Ill. App. 35 1801
v. Humphrey, 1 E. D. Smith 201 2450, 4159, 4162
v. Ives, 13 Johns. 235 3736
v. Jones, 3 Ired. 538 2891, 2978
v. Merchants' Bank, 12 How. 159 1038, 1568, 1765, 1770, 1777, 1788
v. Niles, 5 Watts 323 2206, 2399
v. Van Epps, 22 Wend. 155 519, 537, 560, 2828
v. South Buffalo Ry. Co., 201 N. Y. 271 5150, 5151, 5163
Ivey v. Colquitt, 63 Ga. 509 1607
v. Cowart, 124 Ga. 159 1531, 1532, 1534
v. Pioneer S. & L. Co., 113 Ala. 349, 359 4533
Ivie v. King, 167 N. C. 174, rehearing denied, 85 S. E. 413 4587
v. McMunigal, 66 Mo. App. 437 3882
Ivinson v. Althrop, 1 Wyo. 71 862
Ivy C. & C. Co. v. Alabama C. & C. Co., 135 Ala. 579 4260
Izon v. Gorton, 5 Bing. N. C. 501 3138, 3142

J

J. B. Carr & Co. v. Southern Ry. Co., 12 Ga. App. 830 52, 171, 227
J. E. Dunn & Co. v. Smith (Tex. Civ. App.), 74 S. W. 576 4431
J. E. Owen, The, 54 Fed. 185 3306
J. Emory Owen, The, 128 Fed. 996 2729
J. F. Farlan, The, 3 Bene. 206 2717
J. F. Farlan, The, 8 Blatch. 207 2717
J. G. Gilchrist, The, 173 Fed. 666 5013
J. G. Lindauer, The, 158 Fed. 449 152, 4652, 4991
J. G. Paint, The, 1 Bene. 545 2719
J. H. McKenzie's Sons & Co. v. Consolidated Lumber Co., 142 Ga. 375 2358
J. I. Case P. Works v. Edwards, 71 Ill. App. 655 1120
v. Niles & S. Co., 90 Wis. 590 2374, 2376, 2386, 2405, 2406, 2410, 2415
v. Niles & S. Co., 107 Wis. 9 1098, 1101, 2414, 2421
J. I. Case Threshing Mach. Co. v. Badger, 56 Ind. App. 399 2390, 2393
v. Bridger, 113 La. 754 772
v. Haven, 65 Iowa 359 2405
v. Tomlin, 174 Mo. App. 512 999
J. M. Guffey, etc., Co. v. Borison, 211 Fed. 594 2728, 2729, 2730
J. W. Watkins Medical Co. v. Lovelady, 186 Ala. 414 2768
Jack v. Dougherty, 3 Watts 151 2068
v. Hudnall, 25 Ohio St. 255 443
v. McKee, 9 Pa. 240 288
v. Nichols, 5 N. Y. 178 1878
v. Pennsylvania R. Co., 43 Pa. Super. Ct. 337 25
v. Sinsheimer, 125 Cal. 563 868
Jackel v. Caldwell, 157 Pa. 266 2508
v. Reiman, 78 Tex. 588 3832
Jacks v. Bell, 3 C. & P. 316 1308
v. Darrin, 1 Abb. Pr. 232 1546
v. Dyer, 31 Ark. 334 3710
Jackson v. Allaway, 6 M. & Gr. 942 2231
v. American M. Co., 88 Ga. 756 1159, 1161, 1162

[REFERENCES ARE TO PAGES]

Jackson v. American Tel. & T. Co., 139 N. C. 347 1332, 1348, 4631
v. Armstrong, 50 Mich. 65 4392
v. Aspell, 20 Johns. 412 3716
v. Bailey, 12 Ill. 159 710
v. Baker, 1 Wash. C. C. 394 2923, 2925
v. Baker, 2 Edw. Ch. 471 918
v. Bell, 5 S. D. 257 4619, 4647
v. Bellevieu, 30 Wis. 250 106
v. Bowen, 7 Cow. 13, 21 633
v. Bry, 3 Ill. App. 586 1676
v. Bunnell, 113 N. Y. 216 1761
v. Burke, 1 Dill. 311 719
v. Byrnes, 103 Tenn. 698 2326, 2327
v. Chicago, etc., R. Co., 210 Fed. 495 5062
v. Cleveland, 19 Wis. 400 906
v. Clopton, 66 Ala. 29 2464
v. Collins, 39 Mich. 557 4434
v. Consolidated T. Co., 59 N. J. L. 25 4937, 4940
v. Covert, 5 Wend. 139 1360, 2242, 2248, 2249
v. Crafts, 18 Johns. 110 826
v. Crum, 62 Tex. 401 1281
v. Dall, 109 La. 230 3190
v. Davenport, 18 Johns. 295 3693
v. Delancy, 4 Cow. 427 2067
v. Dickenson, 15 Johns. 309 1491
v. East & West India D. Co., L. R. 10 C. P. 300 492
v. Emmons, 19 D. C. App. Cas. 250 396
v. Erie R. Co., 86 N. J. L. 550 5200
v. Farrell, 6 Pa. Super. Ct. 31 3236, 3247
v. Glaze, 3 Okla. 143 4328
v. Griswold, 4 Hill 528 2822
v. Hall, 84 N. C. 489 74
v. Hanson, 8 M. & W. 477 1655
v. Hopkins, 92 Va. 601 1558
v. Huey, 10 Lea 184 2820
v. Humboldt, 84 Kan. 445 1499
v. Independent School Dist., 110 Iowa 313 2563
v. Isaacs, 3 H. & N. 405 3301
v. Jackson, 47 Ga. 99 1523
v. Jackson, 96 Va. 165 2473
v. Jacob, 3 Bing. N. C. 869 803
v. Jones, 22 Ark. 158 2682
v. Justices, 2 Bibb 292 1636
v. Kiel, 13 Colo. 378 3881
v. Law, 5 Cow. 248, 9 Cow. 641 784, 825, 828, 829, 1229, 1237
v. Lloyd, 44 Pa. 82 1224
v. Lommis, 4 Cow. 172 3708, 3710
v. Ludeling, 99 U. S. 513 2043
v. McGinnis, 14 Pa. 331 1954
v. Martin, 37 Tex. Civ. App. 593 1953
v. Millspaugh, 100 Ala. 285 1728, 1729
v. Moore (Okla.), 134 Pac. 1114 714
v. Morgan, 167 Ind. 528 371, 1673
v. Mott, 76 Iowa 263 419, 2405
v. Nashville, etc., R. Co., 13 Lea 491 101
v. New York Cent. R. Co., 167 Ill. App. 461 1445, 3363
v. Noble, 54 Iowa 641 4675, 4766, 4767
v. Old Colony St. R., 206 Mass. 477 461, 3468, 3499
v. Pennsylvania R. Co., 66 N. J. L. 319 754
v. People, 6 Mich. 154 422
v. Pesked, 1 M. & S. 234 3835
v. Pittsburgh, etc., R. Co., 140 Ind. 241 4846, 4847
Jackson v. Pleasonton, 101 Va. 282 2511, 2923, 2924
v. Pool, 91 Tenn. 448 4781
v. Post, 17 Johns. 432 2894
v. Rathbone, 3 Cow. 297 1403
v. Richards, 2 Cai. 343 2937
v. Rundlet, 1 Wood. & M. 381 1598
v. Sacramento, etc., R. Co., 23 Cal. 268 3385
v. St. Paul Ins. Co., 99 N. Y. 124 3093
v. Sassaman, 29 Pa. 106 2147
v. Savage, 109 App. Div. (N. Y.) 556 4163
v. Security Mut. L. Ins. Co., 233 Ill. 161 746
v. Shawl, 29 Cal. 267 1000
v. Shields, 87 N. C. 473 1121
v. Smith, 52 N. H. 9 1200
v. Smith, 75 Ala. 97 1685, 1687, 1701
v. Smithson, 15 M. & W. 563 122
v. Southern R. Co., 73 S. C. 557 1432
v. Stackhouse, 1 Cow. 122 452, 456, 767, 769, 780, 782
v. Stanfield, 137 Ind. 592 265
v. State, 213 N. Y. 34, rev'g 160 App. Div. (N. Y.) 110 3996
v. Stetson, 15 Mass. 48 4568
v. Taylor, — Tex. Civ. App. —, 166 S. W. 413 4212
v. Todd, 25 N. J. L. 121 3741, 3742
v. Turner, 5 Leigh 127 2098, 2134
v. Volkening, 81 App. Div. (N. Y.) 36, aff'd 178 N. Y. 562 750
v. Warwick, 7 T. R. 121 1826, 1827, 1830
v. Washington, etc., E. R. Co., 35 App. D. C. 41 2289
v. Watson, [1902] 2 K. B. 193 2354, 4847
v. Wells, 13 Tex. Civ. App. 275 1305, 1424, 1468, 4776
v. Western U. Tel. Co., 174 Mo. App. 70 1438, 3547, 3568
v. Williamson, 2 T. R. 281 1482, 1484
v. Wood, 24 Wend. 443 1067, 3695, 3706, 3707
Jackson A. I. Works v. Hurlbut, 158 N. Y. 34 3310, 3404, 5037
Jackson B. Co. v. Wagner, 123 La. 798 3100
Jackson E. R. L. & P. Co. v. Lowry, 79 Miss. 431 3447
Jackson Exch. Bank v. Russell, 181 Mo. App. 698 2745
Jackson F. & M. Ins. Co. v. Walle, 105 La. 89 1077
Jackson K. & S. Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242 4939
Jackson N. S. Co. v. Tootle, 96 Miss. 486 2096
Jacksonville v. Doan, 145 Ill. 23, aff'g 48 Ill. App. 247 3922, 3933
v. Lambert, 62 Ill. 519 1499
v. Loar, 65 Ill. App. 218 1413
Jacksonville E. Co. v. Adams, 50 Fla. 429 109
v. Batchis, 54 Fla. 192 1362, 1364, 1373, 4705
v. Bowden, 54 Fla. 461 4947
Jacksonville & S. R. Co. v. Wabash, 106 Ill. 253 4005, 4132
Jacksonville, etc., R. Co. v. Adams, 28 Fla. 631 4053
v. Jones, 34 Fla. 286 1440
v. Lockwood, 33 Fla. 573 3754, 3760

[REFERENCES ARE TO PAGES]

Jacksonville, etc., R. Co. v. Peninsular L., etc., Co., 27 Fla. 1, 157 1138, 2302, 2305, 3042, 4169, 4171
Jacksonville, etc., R. & N. Co. v. Hooper, 160 U. S. 514 3176
Jacob v. Louisville, 9 Dana 114 4122
v. Western U. Tel. Co., 135 Mich. 600 3550
Jacob Tome Inst. v. Crother, 87 Md. 569 3747
Jacobs, Ex parte, L. R. 10 Ch. 211 2821
Jacobs v. Adams, 1 Dall. 52 1116
v. Bangor, 16 Me. 187 4794
v. Central R. Co., 208 Pa. 535 3415
v. Crum, 62 Tex. 401 1320, 1329, 1340, 4628, 4634, 4639, 4645
v. Daugherty, 78 Tex. 682 1668
v. Davis, 34 Md. 204 391, 409
v. Fowler, 135 App. Div. (N. Y). 713 2092
v. Hoover, 9 Minn. 204 466, 4783
v. Jacobs, 130 Iowa 10 745
v. Kansas City S. & G. R. Co., 134 La. 389 4103, 4152
v. Latour, 5 Bing. 130 4295
v. Louisville, etc., R. Co., 10 Bush 263 1344, 1386
v. Postal Tel. C. Co., 76 Miss. 278 3596
v. Robb, 10 Up. Can. Q. B. 276 4631, 4642
v. Schulte, 153 App. Div. (N. Y.) 693 3185
v. Shannon F. Co., 13 Ohio C. C. (N. S.) 140 875, 890
v. Sire, 4 N. Y. Misc. 398 1311, 3673
v. Southern Ry. Co., 241 U. S. 229, aff'g 116 Va. 189 5072, 5140
v. Third Ave. R. Co., 71 App. Div. (N. Y.) 199 3449, 3475
v. Tutt, 33 Fed. 412 3534
v. Williams, 67 W. Va. 377 1374
Jacobsen v. Dalles, P. & A. N. Co., 93 Fed. 975 4992
Jacobson v. Anderson, 72 Minn. 426 1639
v. LaGrange, 3 Johns. 199 2471
v. Poindexter, 42 Ark. 97 47
v. United States G. Co., 150 Iowa 330 1141, 1539
Jacobus v. Congregation of Children of Israel, 107 Ga. 522 343, 1292, 3819, 3827
v. Monongahela Nat. Bank, 35 Fed. 395 1692, 1706, 4190
v. St. Paul, etc., R. Co., 20 Minn. 125 3335
Jacoby v. Laussatt, 6 S. & R. 300 4271
v. Peck, 23 Cal. App. 363 381
v. Stark, 205 Ill. 34 1386, 3673, 3675
v. Stettler (Pa.), 4 Atl. 342 2018
Jacot v. Emmett, 11 Paige 142 940, 1117, 1199
v. Grossmann, S. & S. Co., 115 Va. 90 2371, 2379, 2404
Jacques v. Bridgeport H. R. Co., 41 Conn. 61 4693, 4713, 4714
v. Parks, 96 Me. 268 4837, 4840
Jaeger v. Kownig, 32 N. Y. Misc. 244 586
Jaehnig v. Ferguson, 197 Mass. 364 152
Jaffray v. Davis, 124 N. Y. 164 643, 750, 753
v. Dennis, 2 Wash. C. C. 253 1146, 1179, 1182, 1878
v. King, 34 Md. 217 2556, 2565
v. Cornish, 10 N. H. 505 655, 670, 2567
Jageriskey v. Detroit United R., 163 Mich. 631 4832
Jagger v. National German-Am. Bank, 53 Minn. 386 2930
Jagger I. Co. v. Walker, 76 N. Y. 521 665, 666
Jakobsen v. Springer, 31 C. C. A. 315, 87 Fed. 953 4989
Jakopac v. Newport M. Co., 153 Wis. 176 4800
Jaksich v. Guisti, 36 Nev. 104 1691
James v. Adams, 8 W. Va. 568 252
v. Allen County, 44 Ohio St. 226 375, 2552
v. Bostwick, Wright 141 2833
v. Brown, 11 Mich. 25 574
v. Burchell, 82 N. Y. 108 1953
v. Christy, 18 Mo. 162 4858
v. Elliott, 44 Ga. 237 554
v. Fountain Inn Mfg. Co., 80 S. C. 232 147
v. Franklin Life Ins. Co., 180 Ill. App. 632 3086
v. Hodsden, 47 Vt. 127 225, 325
v. Hubbard, 1 Paige 228 571
v. Isaacs, 12 C. B. 791 679, 680, 753
v. James, 151 Wis. 78 3199
v. Jarrett, 17 Pa. 370 701
v. Kibler, 94 Va. 165 410, 3111
v. Lamb, 2 Tex. Civ. App. 185 2116, 2117
v. Lawrence, 7 Harr. & J. 73 376, 379
v. Lawrenceburgh Ins. Co., 6 Blackf. 525 533, 1847
v. Libby, 103 App. Div. (N. Y.) 256 2415
v. Long, 68 N. C. 218 2768, 2783
v. Louisville P. W. Co., 23 Ky. L. Rep. 1216 2113
v. McKernan, 6 Johns. 543 2211
v. Malone, 1 Bailey 334 703, 707, 719
v. Midland R. Co., 50 L. T. Rep. 426 3374
v. Morgan, 1 Levinz 111 867
v. Muir, 33 Mich. 223 2217
v. Newton, 142 Mass. 366 378
v. Oakland T. Co., 10 Cal. App. 785 4652, 4793
v. Parsons, 70 Kan. 156 371, 2547, 2549
v. Phelps, 11 Ad. & E. 483 4635
v. Richmond & D. R. Co., 92 Ala. 231 4859
v. Rubino, 30 N. Y. Misc. 452 3111
v. State, 65 Ark. 415 1568, 1569
v. Tampa, 52 Fla. 292 104
v. Thomas, 5 B. & Ad. 40 1555
v. West Chester, 220 Pa. 490 3988, 4155
v. Western U. Tel. Co., 86 Ark. 339 3569
v. Wilson, 7 Tex. 230 1520, 1523
v. Worcester, 141 Mass. 361 3838
James Co. v. Bank, 105 Tenn. 1 1363, 1369
v. Continental Nat. Bank, 105 Tenn. 1 277, 279
James A. Banister Co. v. Kriger, 84 N. J. L. 30 5204
James A. Dumont, The, 34 Fed. 428 5006, 5007, 5012
James River & K. Co. v. Turner, 9 Leigh 313 4014, 4110
Jameson v. Carpenter, 68 N. H. 62 620, 701
v. Coldwell, 25 Ore. 199 2513
v. Kempton, 52 Wash. 106 2928, 2976
v. Kent, 42 Neb. 412 1430, 4325
v. Midland R. Co., 50 L. T. Rep. 426 200, 3317, 3366
v. Sweeney, 29 N. Y. Misc. 584 3309

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Jamieson v. Indiana G. Co., 128 Ind. 555 2308
v. New York, etc., R. Co., 11 App. Div. (N. Y.) 50, aff'd 162 N. Y. 630 1142
Jamision v. Alvarado C. & W. Co., 45 Tex. Civ. App. 363 736
Jamison v. Cullom, 110 La. 781 374
v. Dulaney, 74 Miss. 890 1729
v. Ellsworth, 115 Iowa 90 4424
v. Hendricks, 2 Blackf. 94 4300
v. Moon, 43 Miss. 598 4192
Jamison's Assigned Est., 3 Pa. Dist. 217 4250
Jamison's Est., In re, 163 Pa. 143 4249
Jandt v. South, 2 Dak. 46 4321
Janet Court, The, [1897] Prob. 59 2735, 2736
Janett v. Martin, 70 N. C. 459 524
Jankowsky v. Slade, 60 Wash. 591 4389
Janouch v. Pence, 3 Neb. 867 3097
Jansen v. Ball, 6 Cow. 629 2394
v. Effey, 10 Iowa 227 4351
v. Minneapolis & St. L. R. Co., 112 Minn. 496 3467, 3473
v. Williams, 36 Neb. 869 2902, 2905
January v. Henry, 3 T. B. 8 2330
Janulewyez v. Quagliano, 88 Conn. 60 1953, 1954, 1983
Jaqua v. Headington, 114 Ind. 309 862, 884
Jaques v. Millar, 6 Ch. Div. 153 250, 2011, 3219
v. Stewart, 81 Ga. 81 4241
v. Witby, 1 T. R. 557 632
v. Witby, 1 H. Bl. 65 1852
Jaquith v. Hudson, 5 Mich. 123 841, 846, 849, 862, 869, 898, 922
v. Morrill, 204 Mass. 181 1437
Jarboe v. McAtee, 7 B. Mon. 279 816, 820
Jarecki v. Hays, 161 Pa. 613 1069
Jarman v. Stewart, 12 Fed. 266 4628
Jarnigan v. Fleming, 43 Miss. 710 469
Jarrait v. Peters, 145 Mich. 29 250, 3189, 3219
Jarrett v. Goodnow, 39 W. Va. 602 2380
v. Martin, 70 N. C. 459 2827
Jarrett L. Co. v. Christopher, 65 Fla. 379 3753, 3760
Jarvis v. Andrews, 80 Ark. 277 697
v. Buttrick, 1 Metc. (Mass.) 480 2147
v. Johnson, 2 West L. Monthly 389 3676
v. Rogers, 15 Mass. 389 539, 4287
v. St. Louis, etc., R. Co., 26 Mo. App. 253 3903, 3922, 3923
v. Sewall, 40 Barb. 449 2875, 2893
Jaskolski v. Marawski, 178 Mich. 325 3662
Jasper v. Purnell, 67 Ill. 358 1321, 3827
Jassoy v. Horn, 64 Ill. 379 1014
Jastrzembski v. Marxhausen, 120 Mich. 677 4571
Jauch v. Jauch, 50 Ind. 135 468, 4592
Jaudes v. Fisher, 5 Ky. L. Rep. 768 (Ky. Super. Ct.) 2627, 2632
Jauman v. McCusick, 166 Cal. 517 2502, 2503, 2513
Jay v. Almy, 1 Woodb. & M. 262 1143, 4836, 4838
v. Whitfield, 4 Bing. 644 99
Jayne v. Cortland W. Co., 42 N. Y. Misc. 263 3812
Jean v. Brentlinger, 155 Ky. 509 31
Jebeles & C. C. Co. v. Stephenson, 6 Ala. App. 103 2239
Jebsen v. East & W. India D. Co., L. R. 10 C. P. 300 491
Jefcoat v. Gunter, 73 Miss. 539 3193
Jeffcoat v. Knotts, 11 Rich. 649 3931
Jefferey v. Chicago & M. E. R. Co., 138 Wis. 1 3956, 3988, 4009, 4055
v. Osborne, 145 Wis. 351 4009, 4035, 4124, 4133
Jefferies v. Allen, 34 S. C. 189 3717, 3723
Jefferis v. Chicago & N. R. Co., 147 Iowa 124 1441, 1445, 3893, 3897
Jeffers v. Easton, 113 Cal. 345 2380, 2395, 2396
v. Johnson, 18 N. J. L. 382 1582
v. Johnson, 21 N. J. L. 73 2873, 2875, 2892, 2894
Jefferson, The, 181 Fed. 416 2726
Jefferson v. Adams, 4 Harr. 321 1305
v. Century Sav. Bank, 143 Iowa 83 2801
v. Church of St. Matthew, 41 Minn. 392 726, 735
v. Glaze, 134 Ga. 842 3257
Jefferson County v. Arrghi, 51 Miss. 668 549
v. Hawkins, 23 Fla. 223 1210
v. Lewis, 20 Fla. 980, 1009 962
v. Lineberger, 3 Mont. 231 1014, 1038, 1581
Jefferson County Sav. Bank v. Eborn, 84 Ala. 529 1332, 1689, 1698, 1699
v. Hendricks, 147 Ala. 670 2938
Jefferson F. Co. v. Rich, 182 Ala. 633 430, 3880, 3907
Jefferson H. Co. v. Brumbaugh, 168 Fed. 867 930, 931, 2657, 2668
Jefferson L. Co. v. Williams, 68 Tex. 656 566
Jefferson S. Co. v. Iowa & L. L. Co., 122 La. 983 2274
Jeffersonville, etc., R. Co. v. Downey, 61 Ind. 287 76
v. Dresson, 43 Tex. Civ. App. 282 2707
v. Esterle, 13 Bush 667 400, 3756, 3759, 3852, 3871, 3875, 3928
v. Rogers, 38 Ind. 116 1331, 1343, 3519
Jeffords v. Dreisbach, 168 Mo. App. 577 2058, 2061, 2144
Jeffras v. McKillop, 2 Hun 351 4586, 4588
Jeffress v. Norfolks S. R. Co., 158 N. C. 215 3750
Jeffrey v. Barnard, 4 A. & E. 823 1656
v. Bigelow, 13 Wend. 518 357, 2447, 4371
Jeffrey Mfg. Co. v. Blagg, 235 U. S. 571 5156, 5169
v. Central C. & I. Co., 93 Fed. 408 535, 2633
v. Mound Coal Co., 215 Fed. 222 4313
Jeffreys v. Malone, 105 Ala. 489 1582
v. Southern R. Co., 127 N. C. 377 768
Jeffries v. Allen, 29 S. C. 501 979
v. Allen, 34 S. C. 189 3720
v. Robbins, 66 Kan. 427 2511, 2902
v. Seaboard A. L. R. Co., 129 N. C. 236 4780
Jefts v. York, 10 Cush. 392 2979, 2983
Jegon v. Vivian, L. R. 6 Ch. App. 742 487, 3747, 3786, 3789
Jelalian v. New York, etc., R. Co., 134 App. Div. (N. Y.) 381 1454
Jelison v. Lee, 3 Woodb. & M. 368 615
Jellett v. St. Paul, etc., R. Co., 30 Minn. 265 3425, 4211, 4296
Jellinghaus v. New York Ins. Co., 4 Sandf. 18 3435
Jemison v. Governor, 47 Ala. 390 2823
v. Woodruff, 34 Ala. 143 534, 2456

[REFERENCES ARE TO PAGES]

Jennison v. Gray, 29 Iowa 537 127, 906, 2297, 2305, 2329
Jencks v. Alexander, 11 Paige 619 733, 739, 740
v. Coleman, 2 Sumn. 221 1347
Jenkins v. American S. Co., 45 Wash. 573 2598
v. Andover Theological Seminary, 205 Mass. 376 702
v. Atlantic C. L. R. Co., 84 S. C. 520 3408, 3413
v. Atlantic C. L. R. Co., 179 Fed. 535 390
v. Banning, 23 How. 455 1804
v. Barrows, 73 Iowa 438 524
v. Beal, 70 N. C. 440 722, 742
v. Biddulph, 4 Bing. 160 1999
v. Briggs, 65 N. C. 159 820
v. Brooklyn Heights R. Co., 29 App. Div. (N. Y.) 8, 15 3415, 3450
v. Carman Mfg. Co., — Ore. —, 155 Pac. 703 5147, 5148
v. Commercial Nat. Bank, 19 Idaho 290 215, 1430
v. Danville, 79 Ill. App. 339 864
v. Fowler, 24 Pa. 308 14, 1321
v. Freyer, 4 Paige 53 572
v. Gilligan, 131 Iowa 176 4635, 4637
v. Hamilton, 153 Ky. 163 1981
v. Hankins, 98 Tenn. 545 57, 4870
v. Hart, 2 Rand. 446 424
v. Hay, 28 Md. 547. 1778
v. Hopkins, 8 Pick. 346 2152, 2159, 2185
v. Hopkins, 9 Pick. 543 2174
v. Jones, 9 Q. B. Div. 128 2109
v. Kirtley, 70 Kan. 801 47, 355
v. La Salle County Carbon Coal Co., 182 Ill. App. 36 4820
v. Lemonds, 29 Ind. 294 1605
v. Lykes, 19 Fla. 148 3735
v. McConico, 26 Ala. 213 4211, 4240
v. McCoy, 50 Mo. 348 3736, 3800
v. McNeese, 34 Tex. 189 2808
v. Means, 59 Ga. 55 3704
v. Mitchell, 40 Neb. 664 4361
v. Montgomery L. Co., 154 N. C. 355 3774
v. Northern Pac. R. Co., 44 Mont. 295 1380
v. Parkhill, 25 Ind. 473 1863
v. Pennsylvania R. Co., 67 N. J. L. 331 208, 267, 3940
v. Richardson, 6 J. J. Marsh. 541 2218
v. Southern Bell Tel. Co., 7 Ga. App. 484 1280
v. Steanka, 19 Wis. 126 361, 1356
v. Womach, 143 Mo. App. 410 242, 3189, 3192
Jenks v. Burr, 56 Ill. 450 816
v. Quinn, 61 Hun 427 2127
v. Ward, 4 Metc. (Mass.) 412 2175
Jenne v. Sutton, 43 N. J. L. 257 436
Jennery v. Olmstead, 90 N. Y. 363 2514
Jenness v. Cutler, 12 Kan. 500 1194
v. Parker, 24 Me. 294 2198
v. Simpson, 84 Vt. 127 18, 4973, 4977, 4979
v. Wendell, 51 N. H. 63 2225, 2227
Jennette v. Sullivan, 63 Hun 361 3662
Jennings v. Alaska Treadwell G. M. Co., 95 C. C. A. 388, 170 Fed. 146 4947
v. Appleman, 159 Mo. App. 12 1279, 4719
v. Beale, 146 Pa. 125 2571
v. Bond, 14 Ind. App. 282, 3121, 3125, 3151, 3202
v. Camp, 13 Johns. 94 2525, 2666
Jennings v. Davis, 187 Fed. 703 157
v. Durflinger, 23 Ind. App. 673 748
v. Florence, 2 C. B. (N. S.) 467 4606
v. Horton, 43 Wash. 301 2013
v. Johnson, 17 Ohio 154 4359
v. Kiernan, 35 Ore. 349 2095
v. Loefler, 184 Pa. 318 4249
v. Loring, 5 Ind. 250 41
v. Lyons, 39 Wis. 553 2534
v. McCormick, 25 Wash. 427 886
v. Maddox, 8 B. Mon. 432 1268
v. Major, 8 C. & P. 61 807, 811
v. Mendenhall, 7 Ohio St. 258 791, 801
v. Moore, 189 Mass. 197 1876, 1904, 2805
v. Oregon L. Co., 48 Ore. 287 1454, 2012
v. Philadelphia, etc., R. Co., 29 App. D. C. 219 149
v. Rogers S. P. Co., 105 Fed. 967 4475
v. Rogers S. P. Co., 118 Fed. 339 4452
v. Shriver, 5 Blackf. 37 639
v. Smith, 106 Fed. 139 3333, 3417
v. Sparkman, 48 Mo. App. 246 4327, 4342
v. Stripling, 127 Ga. 778 1447
v. Van Schaick, 13 Daly 7 4658, 4796
v. Wall, 217 Mass. 278 1709, 1710
Jennison v. Hapgood, 10 Pick. 79 1023, 1121, 3728
v. Parker, 7 Mich. 355 670, 677, 2940
v. Stone, 33 Mich. 99 1823
Jensen v. Chicago, etc., R. Co., 64 Minn. 511 3464
v. Chicago, etc., R. Co., 86 Wis. 589 3471, 4653
v. Damm, 127 Iowa 555 4512
v. Denver & R. G. R. Co., 44 Utah 100 1497, 1498, 1500
v. Hallam, 51 Neb. 492 4624
v. Halstead, 61 Neb. 249 4647
v. Lee, 67 Kan. 539 2547
v. Palatine Ins. Co., 81 Neb. 523 1443
v. South Dakota Cent. R. Co., 25 S. D. 506 4, 1536
v. Southern Pac. Co., 215 N. Y. 514, aff'g 167 N. Y. App. Div. 945 5026, 5038, 5069, 5151, 5153, 5162, 5164, 5167, 5185
v. Wilslef, 36 Nev. 37 664
Jerman v. Stewart, 12 Fed. 266 1685, 1700
Jernegan v. Harrison, 1 Str. 317 300
Jerome v. McCarter, 21 Wall. 17 1770
v. Wood, 39 Colo. 197 2458
Jersey City, The, 2 C. C. A. 365, 51 Fed. 527 430, 4990, 5017
Jersey City v. Flynn, 74 N. J. L. 104 886, 947, 2047
v. O'Callaghan, 41 N. J. L. 349 1185
Jersey City, etc., R. Co. v. Morgan, 52 N. J. L. 60 596
Jersey W. S. Co. v. Metropolitan C. Co., 76 N. J. L. 419 2793
Jerseyville S. Mfg. Co. v. Bell, 125 Ill. App. 496 1407
Jervis v. Smith, 7 Abb. Pr. (N. S.) 217 574, 578
v. Tomkinson, 1 H. & N. 195 3116
Jesse v. Shuck, 11 Ky. L. Rep. 463 1378, 4731
Jessen v. Wilhite, 74 Neb. 608 4766
Jesser v. Gifford, 4 Burr. 2141 3742, 3836
Jesserich v. Walruff, 51 Mo. App. 270 2464
Jesson v. Solly, 4 Taunt. 52 3303

[REFERENCES ARE TO PAGES]

Jessup v. Fairbanks, 38 Ind. 673 2225
v. Picturesque A. Pub. Co., 10 New Zeal. 358 2260
v. Platt, 76 Misc. (N. Y.) 466 3374
Jester v. Bainbridge State Bank, 4 Ga. App. 469 305, 531
Jeter v. Glenn, 9 Rich. 374 294, 2123, 2130, 2147, 2173, 2188, 2202
v. Littlejohn, 3 Murph. 186 818, 825, 1232
Jett v. Cockrill, 85 Ky. 348 1111
Jett & Brooks v. Southern R. Co., 130 Tenn. 237 3345
Jetton v. Smead, 29 Ark. 372 4326
Jeudwine v. Agate, 3 Sim. 129 1563, 1573
Jevne v. Osgood, 57 Ill. 340, 347 1725, 1726
Jewelers' M. Agency v. Rothschild, 6 App. Div. (N. Y.) 499 313
Jewell v. Blandford, 7 Dana 473 1938
v. Colby, 66 N. H. 399 1287
v. Colonial T. Co., 12 Cal. App. 681 2546
v. Mills, 3 Bush 62 1604
v. Schroeppel, 4 Cow. 564 2667
v. Thompson, 2 Litt. 52 2525
v. Union P. R. Co., 16 Phila. 64 4828
v. Wright, 12 Abb. Pr. 55 1879
v. Wright, 30 N. Y. 259 1167
Jewell F. Co. v. Kirk, 102 Ill. App. 246 2415
Jewett v. Brooks, 134 Mass. 505 2552, 3189, 3192
v. Crane, 35 Barb. 208 2824
v. Cunard, 3 Woodb. & M. 277 416, 420
v. Dringer, 30 N. J. Eq. 291 361
v. Earle, 53 N. Y. Super. Ct. 349 796, 813, 827
v. Fisher, 9 Kan. App. 630 2056, 2136, 2139
v. Gage, 55 Me. 538 162
v. Griesheimer, 100 App. Div. (N. Y.) 210 2766
v. Israel, 35 Iowa 261 3957
v. Lawrenceburgh, etc., R. Co., 10 Ind. 539 1963
v. Petit, 4 Mich. 514 4420
v. Weston, 11 Me. 346 2667
v. Whitney, 43 Me. 242 35, 36
v. Wilmot, 51 Neb. 700 2697
v. Winship, 42 Vt. 205 628
Jifkins v. Schimpff, 50 Pa. Super. 331 1115
Jimienez v. San Juan L. & T. Co., 3 Porto Rico Fed. 178 226
Job H. Jackson, The, 161 Fed. 1015 2735
Job T. Wilson, The, 84 Fed. 204 4989, 4991
Job v. Collier, 11 Ohio 422 638
Jobe v. O'Brien, 2 Humph. 34 2053
Joch v. Dankwardt, 85 Ill. 331 3474, 3480, 3489, 3643, 4663
Jochams v. Ong, 45 La. Ann. 1289 2238, 2241
Jockers v. Borgman, 29 Kan. 109 448, 1289, 1305, 4766, 4767, 4778
Jofan v. Patterson, 67 Conn. 473 2343
Johannesson v. Borschenius, 35 Wis. 131 480, 481, 4201
Johansen v. Modahl, 4 Neb. 411 3679
v. Pioneer Min. Co., 77 Wash. 421 4820
Johanson v. City of Seattle, 80 Wash. 527 3962, 3969
Johanssen v. Bark Eloina, 4 Fed. 573 3309
John v. John, Wright 584 673
v. Jones, 16 Ala. 454 2855, 2864
v. Northern Pac. R. Co., 42 Mont. 18 3336
John Agnew Co. v. Board of Education City of Paterson, 83 N. J. Eq. 49 1222
John Church Co. v. Ætna Indemnity Co., 13 Ga. App. 826 2745
John D. Dailey, The, 158 Fed. 642 4993
John E. Clayton, The, 4 Blatch. 372 2735
John F. Gaynor, The, 124 Fed. 743 5011
John Fleming, The, 136 Fed. 486 2730
John Francis, The, 184 Fed. 746 3303
John Gilpin, The, Olcott 77 2725, 2728
John H. May, The, 53 Fed. 664 4991
John H. Starin, The, 116 Fed. 433 4999, 5011
John Hancock Mut. L. Ins. Co. v. Lowenberg, 120 N. Y. 44 2755
John V. Farwell Co. v. Wolf, 96 Wis. 10 1134, 4420
John Wurts, The, Olcott 462 2724, 2726, 2735
Johnes v. Johnes, 5 Taunt. 656 1573
Johns, In re, Ohio Ind. Comm. No. 50,018 (1914) 5173
Johns v. Marsh, 52 Md. 333 4637
v. Salamanca, 129 App. Div. (N. Y.) 717 12, 3947, 3953
Johns G. Co. v. San Juan, 1 Porto Rico Fed. 160 3826
Johns R. Penrose, The, 86 Fed. 696 5000
Johnson v. Albany D. G. Co., 12 App. Div. (N. Y.) 608 4231
v. Aldridge, 93 Ala. 77 3261
v. Allen, 78 Ala. 387 2231, 2232, 2234, 2251, 2295
v. Allen, 100 N. C. 131 1268, 1316, 1482, 4974
v. Arnold, 2 Cush. 46 292, 2569
v. Arnold, 91 Ga. 659 3771
v. Atlantic, etc., R., 43 N. H. 410 1245
v. Bailey, 17 Colo. 59 4312, 4316
v. Ballou, 25 Mich. 460 361
v. Baltimore & P. R. Co., 6 Mack. 232 4762
v. Barber, 10 Ill. 425 1330
v. Bay City, 164 Mich. 251 1362, 4816
v. Bentley, 16 Ohio 87 1193, 1194
v. Blaney, 198 N. Y. 312 4208
v. Blasdale, 1 Sm. & M. 17 2987
v. Boone, 2 Harr. 172 723
v. Boston, 130 Mass. 452 4001
v. Bouton, 35 Neb. 898 4839
v. Breedlove, 104 Ind. 521 625, 696
v. Brice, 102 Wis. 575 1609, 2156
v. Britton, 23 Ind. 105 2192, 4276
v. Brown, 51 Ga. 498 2767
v. Brown, 57 Barb. 118 1360, 4513
v. Bryant, 61 Ark. 312 3119
v. Buellesbach (Misc.), 119 N. Y. Supp. 839 2634
v. Butler, 2 Iowa 535 1047
v. Butte & S. C. Co., 41 Mont. 158 4664
v. Camp, 51 Ill. 219 1321, 4164
v. Campbell, 120 Mass. 449 3059
v. Carre, 1 Lev. 152 456
v. Caulkins, 1 Johns. Cas. 116, 3 Johns. Cas. 437 3686, 3687
v. Chamberlain, 18 App. Div. (N. Y.) 495 1644
v. Chambers, 10 Ired. 287 4639
v. Chapman, 43 W. Va. 639 427, 3741, 3941
v. Charleston & S. R. Co., 55 S. C. 152 25
v. Charleston & S. R. Co., 58 S. C. 488 766
v. Chicago, etc., R. Co., 37 Minn. 519 3977
v. Chicago, etc., R. Co., 64 Wis. 425 4935, 4939

[REFERENCES ARE TO PAGES]

Johnson v. Chicago, etc., R. Co., 77 Iowa 666 1137
v. Chicago, etc., R. Co., 80 Wis. 641 8
v. Church of St. Charles, 126 Minn. 338 2598, 2671
v. Cincinnati, 30 Ohio C. C. 696 3852, 3877
v. Clarke, 15 S. C. 72 664
v. Clay, 7 Taunt. 486, 1 Moore 200 784, 1231
v. Cleaves, 15 N. H. 332 666
v. Collier, 161 Ala. 204 1349, 1385
v. Collins, 20 Ala. 435 773
v. Collins, 116 Mass. 392 556, 2152, 2156
v. Connecticut Co., 85 Conn. 438 4746
v. Cook, 24 Wash. 474 868, 2792
v. Courts, 5 Har. & McHen. 510 65, 4185
v. Cranage, 45 Mich. 14 798, 811, 813
v. Crawford, 144 Fed. 905 1227, 2218
v. Crossland, 34 Ind. 334 1918
v. Culver, 116 Ind. 278 4398
v. Daily, 136 Mo. App. 534 339
v. Danville. U. & C. Ry. Co., 185 Ill. App. 83 1374
v. De Peyster, 50 N. Y. 666 2674
v. District of Columbia, 31 Ct. of Cls. 395 1199
v. Dixie M. & D. Co., 171 Mo. App. 134 1394, 1395
v. Dooley, 65 Ark. 71 2337
v. Downing, 76 Ark. 128 958
v. Drummond, 16 Ill. App. 641 74
v. Dun, 75 Minn. 533 .4209, 4277
v. Durant, 4 C. & P. 327 1033
v. East Tennessee, etc., R. Co., 90 Ga. 810 3328
v. Ebberts, 11 Fed. 129 4841
v. Eicke, 12 N. J. L. 316 1117
v. Elwood, 82 N. Y. 362 1716
v. Emery, 31 Utah 126 361
v. Far West L. Co., 47 Wash. 492 437
v. Featherstone, 141 Ky. 793 4509, 4528, 4530
v. Fehsefeldt, 106 Minn. 202 2666
v. Freeman, 160 Pa. 317 2599, 2600
v. Freeport, etc., R. Co., 111 Ill. 413 4033, 4132, 4135
v. Futch, 57 Miss. 73 3711
v. Garlichs, 63 Mo. App. 578 803, 811
v. Gavitt, 114 Iowa 183 4366, 4380
v. Gillen, 140 Mich. 152 4210
v. Gorham, 38 Conn. 513 1391
v. Great Northern R. Co., 178 Fed. 643 5049
v. Great Northern R. Co., 107 Minn. 285 1506
v. Green, 102 Va. 373 1030
v. Groff, 22 Pa. Super. Ct. 85 4332
v. Grondin, 170 Mich. 447 4689, 4794
v. Gulf & C. R. Co., 82 Miss. 452 4284
v. Gulick, 46 Neb. 817 4383
v. Gwathmey, 2 Bibb 186 1559
v. Haggin, 6 J. J. Marsh. 581 1117
v. Hall, 84 Mo. 210 583
v. Hall, 101 Ga. 687 1638
v. Hannahan, 3 Strobh. 425 3825
v. Hanson, 6 Ala. 351 1957
v. Harker, 8 Heisk. 388 1597
v. Harvey, 84 N. Y. 363 2853, 2854
v. Hayward, 74 Neb. 157 2903
v. Henry, 127 Mich. 548 2649
v. Hessel, 134 Pa. 315 1794
v. Hicks, 97 Ky. 116 2852
Johnson v. Hoffman, 53 Mo. 504 549
v. Hollensworth, 48 Mich. 143 685
v. Holyoke, 105 Mass. 80 334, 4186
v. Hoover & Lyons, — Tex. Civ. App. —, 165 S. W. 900 748
v. Hoxsie, 19 R. I. 703 1404
v. Hunt, 81 Ky. 321 763
v. Husband, 22 Kan. 277 1483
v. Industrial L. Co., 131 La. 897 4923, 4930
v. Jenkins, 24 N. Y. 252 3669, 3673, 3674, 3681, 3690
v. Johnson, 5 Jones' Eq. 167 739
v. Johnson, 5 Ohio Dec. 717 4619
v. Johnson, 11 Mass. 361 659, 662
v. Johnson, 104 Ky. 714 1503
v. Jones, 9 A. & E. 809 504
v. Kathan, 88 Hun 456 3788
v. Kennion, 2 Wils. 262 1817
v. King, 64 Tex. 226 4609
v. Lamm, 156 Ill. App. 287 1316, 4668
v. Lancaster, 1 Str. 576 784
v. Larcade, 110 Ill. App. 611 1272
v. Levy, 3 Cal. App. 591 1416, 3699
v. Levy, 118 La. 447 27, 3662
v. Levy, 122 La. 118 1350, 1511, 3662, 3666, 3674, 3677
v. Lewis, 12 Conn. 307 3842
v. Long Island R. Co., 80 Hun 306, aff'd 144 N. Y. 719 4940
v. McConnell, 80 Cal. 545 1459
v. McDaniel, 5 Ohio Dec. 717 4616
v. McKee, 27 Mich. 471 467, 4683, 4783
v. McMullin, 3 Wyo. 237 1439, 1980, 4421
v. Manhattan R. Co., 52 Hun 111 4695, 4749
v. Marcum, 152 Ky. 629 3922
v. Marks, 66 N. Y. Misc. 153 4234, 4295
v. Marshall, 34 Ala. 521 4240, 4325, 4331, 4333, 4337
v. Mason, 64 N. J. L. 258 1675
v. Masters, 49 S. C. 525 1056
v. Mathews, 5 Kan. 118 178, 196, 2343, 2635
v. Meyer, 34 Mo. 255 294
v. Meyer, 36 La. Ann. 333 4610
v. Miller, — Tex. Civ. App. —, 163 S. W. 592 2311, 2343
v. Miller, 69 Iowa 562 4638
v. Milmine, 150 Ill. App. 208 1011
v. Miln, 14 Wend. 195 532
v. Missouri Pac. R. Co., 18 Neb. 690 4870, 4939
v. Missouri Pac. R. Co., 96 Mo. 340 4813
v. Monell, 2 Keyes 663 4377
v. Moser, 72 Iowa 654 1735, 1742
v. Mullen, 12 Ohio 10 1529
v. Nelson, 128 Minn. 158 5172
v. New York Cent. R. Co., 31 Barb. 196 2922, 2925
v. New York Cent. R. Co., 33 N. Y. 610 3425
v. New York N. H. & H. R. R., 111 Me. 263 3328, 3386
v. Nixon, 2 Brev. 472 2200
v. Northern Pac. R. Co., 1 N. D. 354 1142
v. Northern Pac. R. Co., 47 Minn. 430 1428
v. Norton, 159 Fed. 361 1038, 2783
v. Nyce, 17 Ohio 66 2122
v. Oakes, 80 Ga. 722 1489
v. Oakes, 110 Minn. 94 56
v. Oehmig, 95 Ala. 189 2396
v. Oil Well S. Co., 85 Co. 507 4233

[REFERENCES ARE TO PAGES]

Johnson v. O'Neill, 181 Mich. 326 2598
v. Oppenheim, 12 Abb. Pr. (N. S.) 448 3124, 3129
v. Oppenheim, 43 How. Pr. 433 3139
v. Oppenheim, 55 N. Y. 280 3129
v. Park, 13 Ky. L. Rep. 437 3740, 3794
v. Patterson, 13 Lea 626 1088
v. Pensacola, etc., R. Co., 16 Fla. 623 3280
v. Peoria R. Co., 179 Ill. App. 304 14, 16
v. Perry, 2 Humph. 569 1279
v. Philadelphia & R. R. Co., 163 Pa. 127 25
v. Pickering L. & T. Co., 132 La. 425 4652, 4812
v. Planters' Bank, 4 Sm. & M. 165 2814
v. Porter, 42 Conn. 234 3876
v. Pullman S. Bank, 40 Wash. 64 949
v. Purvis, 1 Hill 322 2200, 2201, 2204
v. Railroad Co., 140 N. C. 574 56, 3815, 3822
v. Reed, 9 Mass. 78 764
v. Reed, 136 Mass. 421 10
v. Robbins, 20 La. Ann. 569 711, 739
v. St. Andrew's Church, 1 Can. Sup. Ct. 235 3186
v. St. Louis, 172 Fed. 31 6
v. St. Louis Butchers' S. Co., 60 Ark. 387 532
v. St. Paul & D. R. Co., 31 Minn. 283 1394
v. St. Paul & W. C. Co., 131 Wis. 627 1484, 4739
v. St. Paul City R. Co., 67 Minn. 260 4804, 4831
v. San Juan F. & P. Co., 31 Wash. 238 236, 1447
v. Saum, 137 Iowa 138 4422
v. Schultz, 74 Mich. 75 4777, 4778
v. Seattle, 53 Wash. 564 1066
v. Seattle E. Co., 39 Wash. 211 417, 418
v. Shepard, 35 Mich. 115 2791
v. Shields, 32 Me. 424 3716
v. Simpson, 36 N. H. 96 2072
v. Slaymaker, 18 Ohio C. C. 104 2626, 2666, 2668
v. Smith, 3 Pittsb. 184 3681, 3686
v. Smith, 64 Me. 553 1306, 1311, 1315, 1316, 1317, 4524
v. Southern Pac. Co., 150 Cal. 535 1461
v. Southern Pac. Co., 157 Cal. 333 4634, 4639, 4644
v. Southern Pac. R. Co., 154 Cal. 285 4900
v. Southern Pac. Co., 196 U. S. 1 5024
v. Southwestern S. Ins. Co., 206 Fed. 486 883
v. Stark County, 24 Ill. 75 622
v. Stear, 15 C. B. (N. S.) 330 39, 4288
v. Stoddard, 10 Mass. 306 2227
v. Success Brick Mach. Co., 93 Miss. 169 2793
v. Summer, 1 Metc. (Mass.) 172 1135
v. Sutton, 94 Miss. 544 2503
v. Thomas, 2 Paige 377 3725, 3728
v. Thompson, 28 Ill. 352 991
v. Tindall, — Tex. Civ. App. —, 161 S. W. 401 4621
v. Totten, 3 Cal. 343 2956
v. Travis, 33 Minn. 231 3673, 3676, 3681
v. Trenton Mut. Ins. Co., 24 N. J. L. 576 3071
Johnson v. Triggs, 4 G. Greene 97 825, 1229
v. Troy, 124 App. Div. (N. Y.) 29 1383
v. United States, 2 Ct. of Cls. 391 3105
v. Utley, 79 Ky. 72 1193
v. Vaughan, 9 B. Mon. 217 1763
v. Von Kettler, 66 Ill. 63 1499, 1510
v. Von Kettler, 84 Ill. 315 1364, 1380
v. Von Schoiley, 218 Mass. 454 768, 781
v. Wade, 2 Baxt. 280 2946
v. Walker, 155 Mass. 253 2563
v. Wallower, 18 Minn. 288, 15 Minn. 472 4371, 4413
v. Wasson C. Co., 173 Ill. App. 414 1468
v. Weed, 9 Johns. 310 666
v. Weedman, 5 Ill. 495 1269
v. Wells, Fargo & Co., 6 Nev. 224 78, 222, 334, 336, 338, 345, 3472, 3480, 3643, 4657, 4663, 4686, 4784
v. Western U. Tel. Co., 14 Tex. Civ. App. 536 3625
v. Western U. Tel. Co., 79 Miss. 58 118 3569, 3596
v. Western U. Tel. Co., 81 S. C. 235 3638
v. Western U. Tel. Co., 144 N. C. 410 3557, 3621
v. Western U. Tel. Co. (Tex. Civ. App.), 132 S. W. 814 3654
v. White, 21 Miss. 584 373
v. White Mountain C. Ass'n, 68 N. H. 437 511, 513, 520, 538
v. Wild Rice B. Co., 118 Minn. 24 171, 188, 227, 2635
v. Williams, 1 J. J. Marsh. 489 1182, 1398
v. Williams, 23 Ky. L. Rep. 658 1259
v. Williams, 23 Ky. L. Rep. 578 1607
v. Williams, 54 L. R. A. 220 1602, 1608
v. Williams, 111 Ky. 289 1605
v. Willis, 7 Gray 164 701
v. Winona, etc., R. Co., 11 Minn. 296 3467
Johnson-B. C. Co. v. Wabash R. Co., 64 Mo. App. 590 3378
Johnson County v. Carmen, 71 Neb. 682 4862
v. Hughes, 12 Iowa 360 1616
Johnson County Sav. Bank v. Kramer, 42 Ind. App. 548 1905
Johnson & Co., Wm., v. Johansen, 30 C. C. A. 675, 86 Fed. 886 4980
Johnson's Adm'r v. Parmenter, 74 Vt. 58 936
Johnson's App., 37 Pa. 268 728, 741
Johnsons v. Anderson, 3 N. J. L. 983 872
Johnston v. Atlantic, etc., R. Co., 23 N. H. 410 1244
v. Bennett, 5 Abb. Pr. (N. S.) 331 27
v. Blanchard, 16 Cal. App. 321 929
v. Brannan, 5 Johns. 268 1199
v. Bunn, 108 Va. 490 2685
v. Chicago, etc., R. Co., 130 Wis. 492 1330
v. Cleveland & T. R. Co., 7 Ohio St. 337 1394, 1395
v. Columbian Ins. Co., 7 Johns. 315 825, 1411, 3020
v. Cowan, 59 Pa. 275 884
v. Crawford, Phillips 342 1309
v. Dahlgren, 48 App. Div. (N. Y.) 537, 166 N. Y. 354 711
v. Disbrow, 47 Mich. 59 341, 4974
v. Fargo, 184 N. Y. 379 22
v. Fish, 105 Cal. 420 3698

[REFERENCES ARE TO PAGES]

Johnston v. Gerry, 34 Wash. 524 1250
v. Glancy, 4 Blackf. 94 2047
v. Governor, 2 Bibb 186 1616
v. Great Western R. Co., [1904] 2 K. B. 250 1493, 1497, 4754
v. Green, 102 Va. 373 634
v. Lance, 7 Ired. 448 4599, 4600
v. Lanter, 87 Kan. 32 2379
v. Milwaukee & W. I. Co., 46 Neb. 480 687
v. Morrow, 60 Mo. 339 1512
v. New Omaha T. H. E. L. Co., 78 Neb. 24 55
v. New York & L. B. R. Co., 65 N. J. L. 421 4700
v. Old Colony R. Co., 18 R. I. 642 12, 4017
v. Patterson, 91 Ga. 531 547
v. Sexton, 159 Fed. 70 1689
v. Spencer, 51 Neb. 198 4434
v. United States, 41 Ct. of Cls. 76 18
v. Western U. Tel. Co., — Tex. Civ. App. —, 167 S. W. 272 3620
v. Whittemore, 27 Mich. 463 4290
Johnston H. Co. v. Clark, 30 Minn. 308 1918, 1921
Johnstone v. Hall, 10 Manitoba 161 4408
v. Milling, 16 Q. B. Div. 460, 470, 473 2289
v. Richmond, etc., R. Co., 39 S. C. 55 3333, 3386, 3411
Joiner v. Enos, 23 Ill. App. 224 962
Joint Drainage Dist., In re, 160 Iowa 293 3956, 4098
Joliet v. Adler, 71 Ill. App. 456 3969
v. Blower, 155 Ill. 414, rev'g 49 Ill. App. 464 3987, 4098, 4144
v. Conway, 17 Ill. App. 577 4829
v. Conway, 119 Ill. 489 4714, 4779
v. Donnelly, 129 Ill. App. 119 1417
v. Fox, 135 Ill. App. 444 1416
v. Harwood, 86 Ill. 110 3738
v. Le Pla, 109 Ill. App. 336 4681
v. Shufeldt, 144 Ill. 403 106
v. Verley, 35 Ill. 58 104
Joliffe v. Collins, 21 Mo. 338 1826, 1828
v. Hite, 1 Call 262 2048
Jolley v. Rutherford, 112 Ga. 342 1710
Jolliffe v. Northern Pac. R. Co., 52 Wash. 433 3321
Jolly v. Single, 16 Wis. 280 252, 3253
v. Walker, 26 Ala. 690 2331
Jonas v. Noel, 98 Tenn. 440 3190, 3191
v. Springfield W. Co., 65 Mo. App. 388 3139
Jones, In re, 143 App. Div. (N. Y.) 692 1120, 1121
Jones v. Allen, 1 Head 626 4211
v. Allen, 38 Colo. 512 424
v. Allen, 85 Fed. 523 1754, 1761
v. Alsbrook, 115 N. C. 46 4196
v. Andover, 10 Allen 18 19
v. Aronson, 45 Pa. Super. 148 1272, 2968
v. Arthur, 8 Dowl. P. C. 442 791, 809
v. Atlantic C. L. R. Co., 148 N. C. 580 3414
v. Balsley, 154 N. C. 61 311, 2141, 2143
v. Bates, 26 Neb. 693 448
v. Belt, 8 Houst. 562 4730
v. Berryhill, 25 Iowa 289 870, 998
v. Bigstaff, 15 Ky. L. Rep. 821 2093
v. Binford, 74 Me. 439 869, 886
v. Birmingham Railway, Light & Power Co., 12 Ala. App. 474 4867
v. Blanks, 178 Ill. App. 196 3243, 3246, 3258
Jones v. Blanton, 6 Ired. Eq. 115 1651
v. Board of Mississippi Levee Com'rs, — Miss. —, 66 So. 413 3971
v. Bondurant, 21 Colo. App. 24 319, 1414, 3751
v. Boyce, 1 Stark. 493 91, 148
v. Bradford, 25 Ind. 305 2842, 2869
v. Bright, 5 Bing. 533 2374
v. Broadhurst, 9 C. B. 173 679, 681, 754
v. Broadhurst, 9 M., G. & S. 173 1816
v. Brooke, 4 Taunt. 464 2848
v. Brooklyn Heights R. Co., 23 App. Div. (N. Y.) 141 4688
v. Bullitt, 2 Litt. 49 755, 758, 761
v. Bunker Hill & S. M. & C. Co., 124 Fed. 675 4654
v. Byrum, 189 Ala. 677 4784
v. Caldwell, 20 Idaho 5 4675
v. Call, 96 N. C. 337 266
v. Chalfant, 55 Cal. 505 588
v. Chapman, 5 Blackf. 88 4599
v. Charleston, etc., R. Co., 98 S. C. 197 5025, 5094
v. Chesapeake & O. R. Co., 149 Ky. 566 5125
v. Chicago Great Western R. Co., 97 Neb. 306 4751
v. Chicago, etc., R. Co., 68 Ill. 380 3957, 3964, 3976, 3977, 3979, 4025
v. Childs, 8 Nev. 121 2873, 2875, 2893
v. Chism, 73 Ark. 14 424
v. City of Aurora, 97 Neb. 825 3982
v. Clarke, 3 Q. B. 194 4410
v. Club, 122 Mo. App. 113 3894
v. Cobb, 84 Me. 153 4209, 4287, 4306
v. Cooley Lake Club, 122 Mo. App. 113 3893, 3896
v. Crawford, 107 Ga. 318 1920, 4401
v. Crosthwaite, 17 Iowa 393 2823
v. Davids, 4 Russ. 277 644
v. Davis, 24 Wis. 229 2147
v. Diver, 22 Ind. 184 4503
v. Dow, 142 Mass. 130 2781
v. Dyer, 16 Ala. 221 2576
v. Dyke, Sugd. Vend. & Pur., App. 9 1999
v. Ennis, 18 Hun 452 1012
v. Erie, etc., R. Co., 169 Pa. 333 3988
v. Farquhar, 186 Pa. 386, 396 1073, 1074
v. First State Bank (Tex. Civ. App.), 140 S. W. 116 1288
v. Foster, 67 Wis. 296 284, 2333
v. Freidenburg, 66 Ga. 505 3126
v. Gardiner, [1902] 1 Ch. 191 1968, 1980, 1990, 2011
v. George, 56 Tex. 149 2448
v. George, 61 Tex. 345 170, 190, 239, 2375, 2435
v. George, 227 Ill. 64 1504, 4739, 4778
v. Gibson, 82 Ky. 561 2803
v. Gilmore, 91 Pa. 310 173
v. Gooday, 8 M. & W. 146 3761, 3762
v. Goodwin, 39 Cal. 493 2780
v. Greeley, 25 Fla. 629 1316, 4506, 4520, 4522, 4524, 4549
v. Greenfield, 25 Pa. Super. Ct. 315 6
v. Grimmett, 4 W. Va. 104 1531
v. Hannovan, 55 Mo. 462 35, 38, 3846

[REFERENCES ARE TO PAGES]

Jones v. Harris, 2 Str. 1108 1531
v. Haseltine, 124 Mo. App. 674 2086
v. Hay, 52 Barb. 501 2517
v. Hays, 27 Tex. 1 1710
v. Hibbert, 2 Stark. 304 1817, 1820
v. Hicks, 52 Miss. 682 4289
v. Hoffman, 150 Mich. 129 2592
v. Holmes, 7 New South Wales St. Rep. 821 4363, 4391
v. Horn, 51 Ark. 19 547, 4211, 4287, 4291
v. Howard, 9 C. B. 19 1561
v. Jenkins, 3 Wash. 17 4603, 4614
v. Jennings, 168 Pa. 493 2237
v. Johnson, 3 W. & S. 276 779
v. Jones, 4 Md. 609 2558
v. Jones, 6 M. & W. 84 1835
v. Jones, 71 Ill. 562 1316, 1318
v. Jones, 87 Ky. 82 2093, 2094
v. Jones, 119 La. 677 10
v. Joyner, 8 Ga. 562 2838
v. Judd, 4 N. Y. 411 246, 2308, 2529, 2530, 2663, 2687, 2696, 2710
v. Just, L. R. 3 Q. B. 197, 202 2372
v. Kansas City, etc., R. Co., 178 Mo. 528 143, 4873, 4876, 4893, 4905
v. Kansas City, etc., R. Co., 137 La. 178, rev'd 241 U. S. 181 5110, 5126
v. Kellogg, 51 Kan. 263 4174, 4284
v. Kennedy, 11 Pick. 125 1491, 1528
v. Kilgore, 2 Rich. Eq. 63 731, 732, 742
v. King, 33 Wis. 422 1521
v. Kinney, 146 Wis. 130 4389
v. Kramer, 133 N. C. 446 3849, 3878, 3893
v. Lamon, 92 Ga. 529 4167, 4196
v. Lightfoot, 10 Ala. 17 2117
v. Littler, 7 M. & W. 423 4532
v. McCreery L. & I. Co., 82 S. C. 456 1261, 4158
v. McLean, 18 Ark. 456 984
v. McMillan, 129 Mich. 86 1477, 4884
v. McNeil, 2 Bailey 466 4173, 4196
v. Manufacturers' Nat. Bank, 99 Pa. 317 1224
v. Marks, 40 Ill. 313 2965
v. Marsh, 22 Vt. 144 2231
v. Marshall, 56 Iowa 739 1386
v. Martini F. Co., 71 Mo. App. 474 4271
v. Mastin, 60 Mo. App. 578 1717
v. Mathews, 75 Tex. 1 1322
v. Mayer, 16 N. Y. Misc. 586 2408
v. Merrimack R. L. Co., 31 N. H. 381 1461
v. Metropolitan Cas. Ins. Co., 144 Wis. 66 3040
v. Mial, 89 N. C. 89 2663, 2666
v. Michigan Ins. Co., 36 N. J. L. 29 3021
v. Minneapolis, etc., R. Co., 91 Minn. 229 141
v. Minnesota T. R. Co., 108 Minn. 129 5121
v. Monson, 137 Wis. 478 4980
v. Morehead, 1 Wall. 155 4465
v. Morgan, 90 N. Y. 4 4228
v. Morris, 97 Va. 43 4647
v. Morrison, 31 Minn. 140 2500
v. Mudd, 4 Russ. Ch. 122 1026, 1969, 2031
v. Murphy, 8 W. & S. 275, 301 1414
v. Murray, 3 T. B. Mon. 83 2371
v. Murray, 167 Mo. 25 4586
v. Myrick, 8 Gratt. 179 572
v. Nathrop, 7 Colo. 1 172
Jones v. National P. Co., 13 Daly 92 183, 2341, 2343
v. Nelson, 61 Wash. 167 2629
v. New Orleans & S. R. Co., 70 Ala. 227 3755, 4052, 4053, 4101
v. New York, 47 App. Div. (N. Y.) 39 2693
v. New York, 57 App. Div. (N. Y.) 403 2693
v. New York Cent., etc., R. Co., 99 App. Div. (N. Y.) 1 4652, 4659, 4730, 4793
v. New York Cent. etc., R. Co., 144 App. Div. (N. Y.) 55 1506
v. Niagara Junction R. Co., 63 App. Div. (N. Y.) 607 4683
v. Ortel, 114 Md. 205 1452, 4207
v. Parks, 78 Ind. 537 2189
v. Penwyllt Dinas Silica Brick Co., [1913] W. C. & Ins. Rep. 394, 6 B. W. C. C. 492 5174
v. People, 19 Ill. App. 300 47
v. Perkins, 29 Miss. 139 711, 752
v. Perry, 10 Yerg. 59 2027
v. Peterson, 44 Ore. 161 4656, 4794
v. Phoenix Bank, 8 N. Y. 228 2541
v. Priester, (Tex.) White & W. 326 3531
v. Quinnipiack Bank, 29 Conn. 25 452, 456
v. Radatz, 27 Minn. 240 1924
v. Rahilly, 16 Minn. 321 1282
v. Ransom, 3 Ind. 327 764
v. Reynolds, 7 C. & P. 335 3102
v. Rice, 19 N. Y. Misc. 357 748
v. Richardson, 10 Metc. (Mass.) 481 2817
v. Rider, 60 N. H. 452 1166
v. Roach, 21 Tex. Civ. App. 301 3625
v. Roberts, 73 Vt. 201 4504
v. Ross, 98 Ala. 448 2420, 2436
v. Rountree, 11 Ga. App. 181 1730
v. Royster G. Co., 6 Ga. App. 506 491, 3881, 3907, 3929
v. Ryde, 5 Taunt. 488 2385
v. St. John's College, L. R. 6 Q. B. 115 931
v. Sanders, 138 Cal. 405 3826
v. Sanitary Dist., 252 Ill. 591 3751, 3841, 3872, 3893, 3899
v. Sanitary Dist. of Chicago, 265 Ill. 98 4018
v. School Board, 140 Iowa 179 3959
v. Scullard, [1898] 2 Q. B. 565 109
v. Seattle, 23 Wash. 753 3914, 3964
v. Shawan, 4 W. & S. 257 658
v. Short, 53 Ore. 525 1709, 1711, 1712
v. Smith, 4 Tex. Civ. App. 353 1921, 1923
v. Smith, 14 Ohio 606 3140
v. Smith, 22 Mich. 360 703
v. Smith, 79 Me. 452 1676
v. Spokane, etc., R. Co., 69 Wash. 12 1500
v. Stanton, 11 Mo. 433 2211
v. State, (Tex. Civ. App.) 81 S. W. 1010 1567
v. Steamship Cortez, 17 Cal. 487 330, 3439
v. Steinbergh, 1 Barb. Ch. 250 2786
v. Stevens, 11 Price 235 4572, 4575, 4579
v. Stevens, 36 Neb. 849 2502
v. Swank, 54 Minn. 259 546
v. Tarleton, 9 M. & W. 675 827
v. Tatum, 19 Gratt. 735 2048

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v. Texas & N. O. R. Co., 23 Tex. Civ. App. 65 3370
v. Texas & P. R. Co., 125 La. 542 4185
v. Townsend, 21 Fla. 431 468, 4502, 4576
v. United States, 7 How. 681 707, 736, 737, 1584, 1588
v. United States, 18 Wall. 662 1592
v. United States, 96 U. S. 24 2308, 2527
v. Vance St. Co., 92 Ill. App. 158 2468
v. Voorhees, 10 Ohio 145 3335, 3531
v. Waggoner, 7 J. J. Marsh. 144 2211
v. Ward, 10 Yerg. 160 1121, 1200, 2068
v. Ward, 71 Wis. 152 2821
v. Wells, Fargo & Co., 28 Cal. 260 3380
v. Wells Fargo Exp. Co., 83 Misc. (N. Y.) 508 3333
v. Western U. Tel. Co., 70 S. C. 539 3633
v. Western U. Tel. Co., 75 S. C. 208 3591, 3613
v. Williams, 2 Call 85, 102 1016, 1116
v. Williams, 7 M. & W. 493 302
v. Williams, 39 Wis. 300 704
v. Wolcott, 2 Allen 247 2983, 2984
v. Woodbury, 11 B. Mon. 167 291, 2650, 2655
Jones & L. S. Co. v. Abner Doble Co., 162 Cal. 497 2657, 2682
Jonesboro, etc., R. Co. v. Cable, 89 Ark. 518 3800
v. Dunnavant, — Ark. —, 174 S. W. 1187 3331
v. United I. W. Co., 117 Mo. App. 153 1103
v. Watts, 80 Ark. 543 624
Joost v. Craig, 131 Cal. 504 1609
Joplin Con. M. Co. v. Joplin, 124 Mo. 129 4001
Joplin W. Co. v. Bathe, 41 Mo. App. 285 2415
Jonl'ng v. Bluefield W. & I. Co., 70 W. Va. 670 1281
Jordan v. Adams, 7 Ark. 348 2836
v. Alabama, etc., R. Co., 74 Ala. 85 1332
v. Alabama, etc., R. Co., 81 Ala. 227 4645
v. Benwood, 42 W. Va. 312 429, 3834, 3836
v. Bowen, 46 N. Y. Super. Ct. 355 1468, 4700
v. Cedar Rapids, etc., R. Co., 124 Iowa 177 4705, 4724, 4746
v. Delaware & A. Tel. & T. Co., 1 Boyce (Del.) 107 3773, 3826
v. Dobbins, 122 Mass. 168 2743, 2769
v. Eaton, 2 Hask. 236 3269
v. Gallup, 16 Conn. 536 39
v. Gillen, 44 N. H. 424 27
v. Great Northern R. Co., 80 Minn. 405 2458
v. Hardie, 131 Ala. 72 643
v. Henderson, 39 Tex. Civ. App. 89 1602
v. Jordan, Dudley 181 1835
v. La Vine, 15 Ore. 329 2876
v. Lewis, 2 Stew. 426 874
v. Lindsay, 132 Ala. 567 4208
v. Middlesex R. Co., 138 Mass. 425 4702, 4727
Jordan v. Mississippi Cent. R. Co., 107 Miss. 323 3430
v. New York & H. R. R. Co., 16 Daly 130 4803
v. Patterson, 67 Conn. 473 2276, 2344
v. Seattle, 30 Wash. 298 4676
v. Trumbo, 6 Gill & J. 103 978
v. Warren Ins. Co., 1 Story 342 540, 3290
v. Welch, 61 Wash. 569 27
Jordon v. Agawam W. Co., 106 Mass. 571 1786
Jorgenson v. Grand Rapids & I. Ry. Co., — Mich. —, 155 N. W. 535 5104, 5124, 5126
José E. Moré, The, 37 Fed. 122 5011
Joseph v. Brandy, 112 Mich. 579 4349
v. Lyon, 9 Ky. L. Rep. 324 (Ky. Super. Ct.) 1149, 1181
v. Richardson, 2 Pa. Super. 208 2372, 2387, 2392, 2405, 2414
v. Sulzberger, 136 App. Div. (N. Y.) 499 317, 2319, 2970
Joseph B. Thomas, The, 81 Fed. 578 72
Joseph B. Thomas, The, 158 Fed. 559 1783
Joseph Stickney, The, 127 Fed. 763 2729
Joseph T. Ryerson & Sons v. Crawford Locomotive & Car Co., 187 Ill. App. 640 1804
Josey v. Wilmington, etc., R. Co., 11 Rich. 399 4169
Joshua Barker, The, Abb. Adm. 215 3411, 5015
Joske v. Pleasants, 15 Tex. Civ. App. 433 2697, 2706
Joslin v. Caughlin, 27 Miss. 852 2396
v. Coughlin, 26 Miss. 134 2373
v. Grand Rapids I. Co., 50 Mich. 516 1374
v. Grand Rapids I. Co., 53 Mich. 322 4692
v. Williams, 76 Neb. 594, 602 1809
Josling v. Irvine, 6 H. & N. 512 2276, 2298
v. Kingsford, 13 C. B. (N. S.) 447 2380
Joslyn v. Eastman, 46 Vt. 258 828, 2807
Josselyn v. Ames, 3 Mass. 274 2768, 2781
v. McAllister, 22 Mich. 300 474, 4840, 4841
Jost v. King, 166 Cal. 394 1594
Joule v. Taylor, 7 Ex. 58 34
Journeay v. Brackley, 1 Hilt. 447 3133
Jouralmon v. Ewing, 80 Fed. 604 1005, 1965
v. Ewing, 85 Fed. 103 1247
Jouston East. etc., R. Co. v. Reasonover, 36 Tex. Civ. App. 274 3904
Jowett v. Wallace, 112 Me. 389 4974
Joy v. Bitzer, 77 Iowa 73 2447
v. Grindstone-Neck W. Co., 85 Me. 109 3967
v. Hopkins, 5 Denio 84 1419
v. York, 99 Me. 237 1376
Joyce v. Adams, 8 N. Y. 291 2225, 2227, 2276
v. Auten, 179 U. S. 591, 595 2818
v. Cockrill, 92 Fed. 838 2792
v. Shafer, 97 Cal. 335 2013
v. Smith, 132 Ga. 779 2095
v. Weeks, [1891] 2 Q. B. 31 3163
Jozsa v. Moroney, 125 La. 813 4535
Judah v. Harris, 19 Johns. 144 1885
v. Randel, 2 Caines' Cas. 324 3011
Judd v. Ballard, 66 Vt. 668 4726, 4738

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v. Dennison, 10 Wend. 512 534, 556
v. Dike, 30 Minn. 380 1131
v. Ensign, 6 Barb. 258 803
v. Fellows, 9 App. Div. (N. Y.) 203 3258
v. Littlejohn, 11 Wis. 176 638
v. N. Y. Cent. & H. River R. Co., 165 App. Div. (N. Y.) 935 4816
v. Seaver, 8 Paige 548 1873
v. Walker, 215 Mo. 321 4380
Judevine v. Hardwick, 49 Vt. 180 2902
Judge v. Coulter, 3 Stew. & P. 348 1636
v. Emery, 6 N. H. 141 1636
v. Looney, 2 Stew. & P. 70 1636
v. New York, etc., R. Co., 56 Hun 60 3700
Judge of Probate v. Heycock, 8 N. H. 491 1570
v. Southard, 62 N. H. 228 1634
v. Sulloway, 68 N. H. 511 1638, 1641
Judgy v. Sterrett, 52 Ill. App. 265 3680
Judice v. Southern Pac. Co., 47 La. Ann. 255 3448, 3452, 3459, 3503
Judicial Ditch, No. 14, Martin Co., In re, 119 Minn. 392 4140
Judkins v. Walker, 17 Me. 38 2540
Judson v. Parry, 38 Wash. 37 61
v. Western R. Corp., 6 Allen 486 20, 3414
Julian v. Kansas City Star Co., 209 Mo. 35 4517
v. Laudenberger, 16 N. Y. Misc. 646 2377
Julin v. Poths Mfg. Co., 54 Ill. App. 460 523
Jullard v. Orems, 70 Md. 465 1073
Jumel v. Jumel, 7 Paige 591 572
v. Marine Ins. Co., 7 Johns. 412 3028
Junction City v. Blades, 1 Kan. App. 85 4779
Junction City L. Co. v. Sharp, 92 Ark. 538 3839, 3877, 3882
Junction R. Co. v. Philadelphia, 88 Pa. 424 4018
June v. Falkinburg, 89 Mo. App. 563 2372, 2389, 2456
Jung v. Second Ward Sav. Bank, 55 Wis. 364 622
Jungblum v. Minneapolis, etc., R. Co., 70 Minn. 153 3882
Junget v. Aurora, etc., R. Co., 177 Ill. App. 435 1467, 4745
Juniata, The, 93 U. S. 337 5017
Juniper Ave., In re, 162 App. Div. (N. Y.) 291, aff'd 213 N. Y. 654 4105
Junker v. Hustes, 113 Ind. 524 583
Junt v. Conner, 26 Ind. App. 41, 5 4903
Jurnick v. Manhattan O. Co., 66 N. J. L. 380 32
Jury v. Ogden, 56 Ill. App. 100 4895
Just v. Greve, 13 Ill. App. 302 388
v. Porter, 64 Mich. 565 4312, 4330, 4352
Justice v. Button, 89 Neb. 367 1997
v. Empire State Surety Co., 209 Fed. 105 2758
v. Kirlin, 17 Ind. 588 4522
v. Nesquehoning Valley R. Co., 87 Pa. 28 4052, 4053, 4106
Justices v. Ennis, 5 Ga. 569 1559
v. Willis, 3 Yerg. 461 1642
v. Wynn, Dudley 22 1558
Justis v. Atchison, etc., R. Co., 12 Cal. App. 639 772, 3438
Justy v. Erro, 16 Cal. App. 519 2506
Jutte v. Hughes, 67 N. Y. 267 225, 1369, 3881, 3889, 3920, 3944
Juvinall v. Jamesburg D. Dist., 204 Ill. 106 3956

K

K. P. Min. Co. v. Jacobson, 30 Utah 115 833, 868
Kaaterskill, The, 48 Fed. 701 2729
Kabus v. Frost, 50 N. Y. Super. 74 3250
Kadish v. Young, 108 Ill. 170 2256
Kadym v. Miller, 13 Ill. App. 474 1289
Kagy v. Western U. Tel. Co., 37 Ind. App. 73 345, 3559, 3576, 3631, 3642
Kahaleaahu v. Pereira, 15 Hawaii 284 3719
Kahl v. Love, 37 N. J. L. 5 1594
Kahle v. Crown Oil Co., 180 Ind. 131 3788, 3789
Kahn v. Cincinnati Times-Star, 10 Ohio Dec. 599 4531, 4545
v. Freytag, 2 Robert. 678 4967, 4971
v. Kahn, 24 Neb. 209 375
v. Lichtenstein, 28 App. Div. (N. Y.) 211 2471
v. Love, 3 Ore. 206 3233
v. Tobias, 16 N. Y. Misc. 83 3131
Kaigh v. Fuller, 14 N. J. Eq. 419 2766
Kaill v. Bell, 79 Kan. 358 1559
Kain v. Kansas City, etc., R. Co., 29 Mo. App. 53, 61 3392
Kaiser v. Detroit United R., 167 Mich. 288 1373
v. St. Louis T. Co., 108 Mo. App. 708 4739
Kaiser Wilhelm Der Grosse, The, 106 Fed. 963 2727, 2729
Kake v. Horton, 2 Hawaii 209 4862
Kalb v. Bankhead, 18 Tex. 228 1269
v. O'Brien, 86 Ill. 210 1269
Kalembach v. Michigan Cent. R. Co., 87 Mich. 509 1377, 4684
Kalen v. Terre Haute & L. R. Co., 18 Ind. App. 202 78, 4686
Kaley v. Shed, 10 Metc. (Mass.) 317 480, 481, 4196, 4305
Kalfur v. Broadway Ferry, etc., 34 App. Div. (N. Y.) 267 4805
Kalinouski v. Jacobowski, 52 Wash. 359 2150
Kalis v. Detroit United R., 155 Mich. 485 4924
Kalkhoff v. Nelson, 60 Minn. 284 375
Kalkner v. Henry, 80 Cal. 636 1124
Kalliner v. Western U. Tel. Co., 126 Minn. 122 3560
Kamber v. Becker, 27 Pa. Super. 266 1106
Kamboris v. Oregon-Washington R. & N. Co., 75 Ore. 358 5047, 5056, 5062
Kamerick v. Castleman, 23 Mo. App. 481 548, 549
v. Castleman, 29 Mo. App. 658 1135
Kamm v. Holland, 2 Ore. 59 2779
Kanaga v. Taylor, 7 Ohio St. 134 1146
Kanawha & M. Ry. Co. v. Kerse, 239 U. S. 576 5141
Kancher v. Blinn, 29 Ohio St. 62 4503
Kane v. Casgrain, 69 Wis. 430 1715
v. Commercial Ins. Co., 8 Johns. 229 3009
v. Fisher, 2 Watts 246 566
v. Kane, 146 Mo. 605 1124
v. Mitchell T. Co., 90 Hun 65, aff'd 153 N. Y. 680 4941
v. New York E. R. Co., 125 N. Y. 164 4084
v. New York, etc., R. Co., 132 N. Y. 160 4748
v. Sanger, 14 Johns. 89 1028, 2123, 2124

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v. W. M. Hoyt Co., 182 Ill. App. 371 1464
Kaneko v. Atchison, etc., R. Co., (Cal.) 164 Fed. 262 4856
Kanen v. Philadelphia & R. R. Co., 70 N. J. L. 619 4746
Kankakee, etc., R. Co. v. Horan, 131 Ill. 288 1443, 3836
v. Horan, 17 Ill. App. 650 3897
v. Horan, 22 Ill. App. 145 3889
Kannen v. McMullen, Peake 59 2476
Kanouse v. Wise, 76 N. J. L. 423 2754
Kansas B. P. Co. v. United States F. & G. Co., 81 Kan. 596 1740
Kansas City v. Kansas City B. R. Co., 102 Mo. 633 4057
v. Kansas City B. R. Co., 187 Mo. 146 4059
v. Morton, 117 Mo. 446 4031
v. North American T. Co., 110 Mo. App. 647 579
v. Orr, 62 Kan. 61 19
v. Siese, 71 Kan. 283 143
v. Slangstrom, 53 Kan. 431 433, 434, 3936
v. Youmans, 213 Mo. 151 2750
Kansas City H. Co. v. Sauer, 65 Mo. 279 2876
Kansas City H. P. Co. v. Devol, 127 Fed. 363 4454, 4457, 4459, 4465
Kansas City Star Co. v. Carlisle, 108 Fed. 344 4570
Kansas City S. Y. Co. v. Hawkins, 8 Kan. App. 155 3404
Kansas City T. Co. v. Neiswanger, 27 Mo. App. 356 821, 823
Kansas City, etc., R. Co. v. Anderson, 88 Ark. 129 3962, 3996, 3997, 3998, 4011
v. Anderson, 104 Ark. 500 aff'd 233 U. S. 325, 58 L. ed. 983 4159
v. Berry, 55 Kan. 186 1244
v. Blaker, 68 Kan. 244 418
v. Boles, 88 Ark. 533 4034, 4103, 4125
v. Butler, 143 Ala. 262 1471, 4715
v. Carl, 91 Ark. 97 3337
v. Carl, 227 U. S. 639, 57 L. ed. 683 3338
v. Cook, 100 Ark. 467 5041, 5044, 5050
v. Dalton, 65 Kan. 661 3481
v. Dawley, 50 Mo. App. 480 4132, 4142
v. Eagan, 64 Kan. 421 4779
v. Farrell, 76 Mo. 183 4018
v. Fite, 67 Miss. 373 3452
v. Foster, 134 Ala. 244 3449, 3475
v. Frost, 93 Ark. 183 4903, 4905
v. Henrie, 87 Ark. 443 4871, 4876
v. Jones, 241 U. S. 181, rev'g 137 La. 178 5081, 5082, 5126, 5134
v. Kansas City, etc., R. Co., 118 Mo. 599 4072, 4075
v. Kregelo, 32 Kan. 608 3977, 3984, 4021, 4028
v. Lackey, 72 Miss. 881 4145
v. Langley, 70 Kan. 453 149
v. Leslie, 112 Ark. 305, rev'd 238 U. S., 599 4877, 5095, 5102, 5108, 5110, 5112, 5132
v. Little, 66 Kan. 378 3446, 3447, 3476
v. Littler, 70 Kan. 556 4126
v. Louisiana, etc., R. Co., 116 La. 178 4072
v. Mabry, 112 Ark. 110 3385, 3387
Kansas City, etc., R. Co. v. McAdow, 240 U. S. 51 aff'g 164 S. W. 188 5037, 5127, 5141
v. McGahey, 63 Ark. 344 3529, 3530, 3535
v. Matthews, 142 Ala. 298 1471
v. Merrill, 25 Kan. 421 4125
v. Miller, 117 Ark. 396 5068
v. Morris, 80 Ark. 528 4877
v. Morrison, 34 Kan. 502 3532
v. Perry, 65 Kan. 792 3774
v. Prunty, 66 C. C. A. 163 113
v. Norcross, 137 Mo. 415 4094, 4103, 4125, 4132
v. Oakley, — Ark. —, 170 S. W. 565 3336, 3338, 3346
v. Pope, — Tex. Civ. App. —, 152 S. W. 185 5050, 5066
v. Roe, — Okla. —, 150 Pac. 1035 5103, 5111
v. Rogers, 203 Fed. 462 4661, 4686
v. Rogers, 48 Neb. 653 3777
v. Schwake, 70 Kan. 141 395, 4002, 4028
v. Second Street, etc., Co., 256 Mo. 386 3965, 3981, 4053, 4103
v. Simpson, 30 Kan. 645 3334, 3412
v. Skinner, 88 Ark. 189 3531
v. Southern R. News Co., 151 Mo. 373 2898, 2899
v. Splitlog, 45 Kan. 68 4034, 4042
v. State, 65 Ark. 363 3532
v. Stoner, 1 C. C. A. 231, 49 Fed. 209 4748
v. Thornhill, 141 Ala. 215 47
v. Turley, 71 Kan. 256 1523
v. Weidenmann, 77 Kan. 300 4034, 4130, 4134
v. West, (Tex. Civ. App.) 149 S. W. 206 1140
Kansas I. Co. v. Carter, 160 Mass. 421, 430 3126
Kansas Postal Tel. C. Co. v. Leavenworth T. R. & B. Co., 89 Kan. 418 4018, 4035
Kansas Protective Union v. Whitt, 36 Kan. 760 3076, 3077
Kansas Ref. Co. v. Pert, 3 Kan. App. 364 2387
Kansas S. B. R. Co. v. McElroy, 161 Mo. 584 4140
Kansas S. Y. Co. v. Couch, 12 Kan. 612 1437, 1438
Kansas Z. M. & S. Co. v. Brown, 8 Kan. App. 802 3897
Kansas & T. C. Co. v. Galloway, 71 Ark. 351 4633, 4636, 4638, 4644
Kansas, etc., R. Co. v. Commissioners, 45 Kan. 716 4057
v. Curry, 6 Kan. App. 561 380
v. Cuykendall, 42 Kan. 234 3982
v. Little, 19 Kan. 267 1269
v. Lundin, 3 Colo. 94 4865, 4874, 4939
v. Mihlman, 17 Kan. 224 396, 397, 398, 3759
v. Miller, 2 Colo. 465 4862, 4865
v. Nichols, 9 Kan. 235 3353
v. Painter, 9 Kan. 620 4714, 4779
v. Peavey, 34 Kan. 472, 29 Kan. 169 22, 4817
v. Reynolds, 8 Kan. 623 3349
Kanton v. Kelly, 65 Wash. 614 4918
Kantzler v. Grant, 2 Ill. App. 236 3686
Kanuss v. Krueger, B. Co., 142 N. Y. 70 2513
Kapischki v. Koch, 79 Ill. App. 238, 180 Ill. 44 371, 1662, 4319, 4323

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v. Whitworth, 116 La. 337 947
Kaplron v. Tucker, 35 App. Div. (N. Y.) 310 1997
Kappus v. Metropolitan St. R. Co., 82 App. Div. (N. Y.) 13 1384
Karamon v. Krause, 93 Minn. 455 3767
Karasich v. Hasbrouck, 28 Wis. 569 412
Karau v. Pease, 45 Ill. App. 382 4887
Karbach v. Fogel, 63 Neb. 601 3210, 3212, 3214
Karch v. Commonwealth, 3 Pa. 269 1556, 1607
Kares v. Covell, 180 Mass. 206 1955, 2025, 2044
Karlowski v. Peoria R. Co., 179 Ill. App. 411 4805
Karner v. Stump, 12 Tex. Civ. App. 460 4836, 4843
Karney v. Paisley, 13 Iowa 89 4524
Karns v. Allen, 135 Wis. 48 392, 1272, 3856, 3858, 3881, 3912
v. Tanner, 74 Pa. 339 3724
Karr v. Barstow, 24 Ill. 580 4330
v. Karr, 6 Dana 5 1117
v. Parks, 44 Cal. 49 3496, 3517, 4767, 4772
v. Peter, 60 Ill. App. 209 2874
Karrick v. Hannaman, 168 U. S. 328 255
Karst v. St. Paul, etc., R. Co., 22 Minn. 118 3762
Karter v. Fields, 130 Ala. 430 4292
Karthaus v. Owings, 6 Har. & J. 134 820, 830, 1764, 1779
Kase v. John, 10 Watts 107 2390
Kaskaskia B. Co. v. Shannon, 6 Ill. 15 558, 3301
Kaspar v. People, 230 Ill. 342 1648
Kaspari v. Marsh, 74 Wis. 563 4874
Kasper v. Walla, 49 Neb. 288 4286
Kasson v. People, 44 Barb. 347 775
v. Smith, 9 Wend. 437 1825
Kastner v. Long Island R. Co., 76 App. Div. (N. Y.) 323 1335, 1339
Kastor Adv. Co. v. Elders, 170 Mo. App. 490 1019
Katahdin P. & P. Co. v. Peltomaa, 156 Fed. 342 1376
Kate, The, [1899] 1 Prob. 165 4995
Kate B. Jones, The, [1897] Prob. 366 2723, 2727
Kates T. & W. Co. v. Klassen, 6 Ala. App. 301 1454, 3369, 3398, 3539
Kath v. Wisconsin Cent. R. Co., 121 Wis. 503 1473
Katie O'Neil, The, 65 Fed. 111 741
Katsulis v. Confectioners & B. S. Co., 166 Ill. App. 581 4611
Kattelman v. Guthrie, 142 Ill. 357, rev'g 43 Ill. App. 188 1117, 1124
Katz v. American B. & T. Co., 86 Minn. 168 1669, 1679, 1683
v. Brooklyn Heights R. Co., 35 N. Y. Misc. 302 1495
v. Hlavac, 88 Minn. 56 1665
v. Moessinger, 110 Ill. 372 2799
Kauffman v. Babcock, 67 Tex. 241 227, 1270, 4621
v. Beasley, 54 Tex. 563 2947
v. Mendelsohn, 24 N. Y. Misc. 182 2548
Kauffman's App., 55 Pa. 383 1942
Kaufman v. Armstrong, 74 Tex. 65 1693
v. Barbour, 98 Minn. 158 2856
v. Cooper, 39 Mont. 146 531
v. Davis, 175 Mo. App. 470 4391
v. Fye, 99 Tenn. 145 3661, 3671, 3673
v. Loomis, 13 Ill. App. 124 2804
v. Shaw, 10 Cal. App. 572 763
Kaufman v. Sorrels, 164 Ill. App. 324 761
v. Tacoma, etc., R. Co., 11 Wash. 632 4120
Kaufman Adv. Agency v. Snellenburgh, 43 N. Y. Misc. 317 2471
Kaufmann v. Kaufmann, 239 Pa. 42 1075
v. Kirker, 22 Pa. Super. 201 10, 2000
Kauss v. Rohner, 172 Pa. 481 288, 2470
Kavan v. South Omaha, 86 Neb. 469 4124
Kavanaugh v. Day, 10 R. I. 393 1147, 1158, 1878
v. Janesville, 24 Wis. 618 1503, 4757
v. McIntyre, 74 N. Y. Misc. 222 4233, 4243
v. Taylor, 2 Ind. App. 502 4225, 4232
Kavanaugh Mfg. Co. v. Rosen, 132 Mich. 44 2286, 2344
Kavenaugh v. Saunders, 2 Me. 422 1558, 1559
Kaw F. & C. Co. v. Atchison, etc., R. Co., 129 Mo. App. 498 3748
Kaw Valley F. Ass'n v. Miller, 42 Kan. 20 784
Kay v. Fredrigal, 3 Pa. 221 469
v. Glade Creek & R. R. Co., 47 W. Va. 467 3976, 4133
Kay Gee A. Co. v. Cave, 177 Ill. App. 250 883
Kaye v. Powel, 1 Ves. Jr. 403 4425
Kayser v. Chicago, etc., R. Co., 88 Neb. 343 3969, 3976, 3983
Keables v. Christie, 47 Mich. 594 4285, 4298
Keady v. White, 168 Ill. 76 1070
Kealing v. Vansickle, 74 Ind. 529 2780
Kean v. Kinnear, 171 Pa. 639 1626
v. Landrum, 72 S. C. 556 1116, 1442, 1990
v. McLaughlin, 2 S. & R. 469 4515
Keane v. Branden, 12 La. Ann. 20 704
v. Main, 83 Conn. 200 1267, 1326
Kear v. Garrison, 13 Ohio C. C. 447 87, 1345, 4687
Kearney v. Davin, 162 Ill. App. 37 389, 4389, 4432
v. Doyle, 22 Mich. 294 2688
v. Farrell, 28 Conn. 317 1421
v. Fitzgerald, 43 Iowa 580 445
v. Kane, 32 Pa. Super. 236 1967
v. King, 2 B. & Ald. 301 1157, 1888
v. Metropolitan E. R. Co., 129 N. Y. 76 4082, 4083
Kearney E. Co. v. Laughlin, 45 Neb. 390 1394
Kearsley v. Cole, 16 M. & W. 128 2823
Keas v. McMillan, 2 J. J. Marsh. 12 1958
Keating v. Boston El. R. Co., 209 Mass. 278 4767
v. Bruns, 3 Dema. 233 1083
v. Cincinnati, 38 Ohio St. 141 3762, 3918
v. People, 160 Ill. 480, 486 595
v. Springer, 146 Ill. 481 548
Keaton v. Boughton, 83 Mo. App. 158 1783
v. Campbell, 2 Humph. 224 1642
Keats v. Gas Co., 29 Pa. Super. Ct. 480 3768, 3769
Keehner v. Kinder, 81 Ill. App. 23 1087
Keck v. Bieber, 148 Pa. 645 415, 918
v. Pfeil, 173 Ill. App. 319 2693
v. State, 12 Ind. App. 119 660
Keckley v. Coshocton G. Co., 86 Ohio St. 213 3072
Keddie v. North British R. Co., 14 Rettie 233 3354

[REFERENCES ARE TO PAGES]

Keeble v. Hickeringill, 11 East 574 161
v. Jones, 1 Tenn. Cas. 541 2805
v. Keeble, 85 Ala. 552 833, 884, 885, 886, 890, 917
Keefe v. Fairfield, 184 Mass. 334 889, 930
v. Lee, 197 N. Y. 68 1382
Keegan v. Geraghty, 110 Ill. 26 5101
v. Harlan, 134 Ill. App. 363 266, 1441, 4158, 4184
v. Kinnare, 123 Ill. 280 515, 531, 553, 3099, 3101, 3183, 3260
v. Minneapolis, etc., R. Co., 76 Minn. 90 139
Keel v. Construction Co., 143 N. C. 429 2607, 2611, 2658
v. Larkin, 72 Ala. 493 663, 668
Keeler v. Bartine, 12 Wend. 110 783
v. Clifford, 165 Ill. 544 2693
v. Herr, 157 Ill. 57, 60, 54 Ill. App. 468 2599, 2682
v. Neal, 2 Watts 424 754
v. Niagara F. Ins. Co., 16 Wis. 523 3019
v. Paulus Mfg. Co., 43 Tex. Civ. App. 555 2379, 2408
v. Ricker, 3 Northampton Co. Rep. 48 1691, 1706, 1710
v. Salisbury, 73 N. Y. 648 748, 753, 756, 764
v. Salisbury, 27 Barb. 485, 33 N. Y. 648 754
v. Seaman, 47 N. Y. Misc. 292 4386
v. Wood, 30 Vt. 242 2110, 2143, 3196
Keeler Co. v. Schott, 1 Pa. Super. 458 2262, 2263
Keeley v. Great Northern R. Co., 139 Wis. 448 444, 4848, 4873
Keeling v. Pommer, 83 Neb. 510 1490, 4741, 4887
v. Schastey, 18 Cal. App. 764 2607, 2664, 2669
Keen v. Fletcher, 31 Okla. 791 4347
v. Keen, 49 Ore. 362 4978
v. Priest, 4 H. & N. 236 4202, 4204
v. St. Louis, etc., R. Co., 129 Mo. App. 301 1470, 3470, 4707
v. Tupper, 33 N. Y. Super. 465, 52 N. Y. 550 2230
v. Vaughan, 48 Pa. 477 749
v. Whittington, 40 Md. 489 1778
Keenan, Matter of, 15 N. Y. Misc. 368 1087
Keenan v. Blue, 240 Ill. 177 1917
v. Brooklyn City R. Co., 145 N. Y. 348 4934, 4940
v. Cavanaugh, 44 Vt. 288 51, 3825, 4678
v. Dorflinger, 19 How. Pr. 153 2484
v. Getsinger, 1 App. Div. (N. Y.) 172 2478
v. Metropolitan St. R. Co., 118 App. Div. (N. Y.) 56 1375, 4740
v. Mutual L. Ins. Co., 77 N. J. L. 64 3083
v. Stimson, 32 Minn. 377 4952
Keene v. Dilke, 4 Ex. 388 215, 4196, 4307
v. Keene, 3 C. B. (N. S.) 144 961, 962, 964, 965
v. Metropolitan E. R. Co., 79 Hun 451 4080
v. Munn, 1 C. E. Green 398 3728
Keene Five Cents Sav. Bank v. Herrick, 62 N. H. 174 2867
Keenholts v. Becker, 3 Denio 346 4516, 4552, 4554, 4562
Keep v. Fuller, 42 Fed. 896 4458
Keep v. National T. Co., 154 Fed. 121 100, 2448, 4952
Keesling v. Frazier, 119 Ind. 185 2878
Keever v. Market St. R. Co., 59 Cal. 294 350
Kehl v. Hope O. M. & C. Co., 77 Miss. 762 4647
Kehnast v. Daum, 6 Ohio Dec. 401 2859
Kehoe v. Allentown, etc., T. Co., 187 Pa. 474 4785
v. Philadelphia, 199 Pa. 45 4145
v. Rounds, 69 Ill. 351 4330
v. Rutherford, 56 N. J. L. 23 2689, 2697
Kehres v. New York, 162 App. Div. (N. Y.) 349 3961, 3963
Keifer v. Summers, 137 Ind. 106 1056
Keigher v. St. Paul, 69 Minn. 78 1044
Keightlinger v. Egan, 65 Ill. 235 4831, 4832
Keil v. Grays Harbor, etc., R. Co., 71 Wash. 163 3755, 3756, 3976
Keim v. Gilmore & P. R. Co., 23 Idaho 511 4658
v. Reading, 32 Pa. Super. Ct. 613 4036
v. Vette, 167 Mo. 389 981
Keinath, Schuster & Hudson v. Reed, 18 N. M. 358 2502, 2503
Keiny v. Ingraham, 66 Barb. 250 1392
Keirman v. Heaton, 69 Iowa 136 3795
Keiser v. Beam, 117 Ind. 31 2865
v. Mahonay City G. Co., 143 Pa. 276 3846, 3912
v. Smith, 71 Ala. 481 461
Keith v. Crump, 22 Ind. App. 364 3179
v. Day, 15 Vt. 660 2110, 2123
v. Forbes, 3 Paton 350 2869
v. Goodwin, 31 Vt. 268 2856
v. Haggart, 4 Dak. 438 4169, 4196, 4286
v. Ham, 89 Ala. 590 431, 483, 4307
v. Henkleman, 173 Ill. 137, 68 Ill. App. 623 1715, 1721, 1761
v. Hinkston, 9 Bush 283 414
v. Jones, 9 Johns. 120 1885
v. Ridge, 146 Mo. 90 2667
v. Smith, 1 Swan 92 1605
v. Trapier, 1 Bailey Eq. 63 3729
Keith Co. v. Booth F. Co., (Del.) 87 Atl. 715 319, 1137
Keithsburg v. Simpson, 70 Ill. App. 467 3882
Keithsburg, etc., R. Co. v. Henry, 79 Ill. 290 1434, 4139
Keithsbury, etc., R. Co. v. Henry, 79 Ill. 290 3976
Kelchner v. Kansas City, 86 Kan. 762 4143
Keler v. Cohen, 217 Pa. 522 1866
Kell v. Larkin, 72 Ala. 493 658
v. Trenchard, 142 Fed. 16 4389, 4391
Kellam v. Hampton (Tex. Civ. App.), 124 S. W. 970 862, 868
Kellar v. Carr, 119 Ind. 127 1669, 1670
v. Central Tel. & T. Co., 53 N. Y. Misc. 523 3774
v. James, 63 W. Va. 139 436
v. Williams, 10 Bush 216 2859
Kellebrew v. Carlisle, 97 Ala. 535 4618
Kellenberger v. Oskaloosa Nat. B., L. & I. Ass'n, 129 Iowa, 582 684, 1035
Keller v. American Bottler's P. Co., 140 App. Div. (N. Y.) 311 4569, 4591, 4593
v. Ashford, 133 U. S. 610, 623 2867
v. Blasdel, 1 Nev. 491 423
v. Boatman, 49 Ind. 104 659

[REFERENCES ARE TO PAGES]

Keller v. Chicago, W. & V. Coal Co., 184 Ill. App. 248 334
v. Donnelly, 5 Md. 211 4958, 4960
v. Fisher, 7 Ind. 718 791, 819
v. Gilman, 93 Wis. 9 1424, 1473, 4756
v. Paine, 34 Hun 167, 177 4226
v. St. Louis, 152 Mo. 596 417
v. Stolzenbaugh, 43 Fed. 378 4441
Kellerman v. Kansas City, etc., R. Co., 136 Mo. 177 3333
Kellett v. Robie, 99 Wis. 303 3677
Kelley v. Archer, 48 Barb. 68 4303
v. Chicago, etc., R. Co., 50 Wis. 381 1394, 4858, 4870
v. Clark, 23 Idaho 1 817
v. Dillon, 5 Ind. 426 4599
v. Fielding, 180 Ill. App. 705 831
v. Fond du Lac, 31 Wis. 179 106
v. Hart-P. Co., 137 Iowa 301 2274
v. Highfield, 15 Ore. 290 3668, 3671, 3673, 3677, 3681
v. Hopkins, 105 Minn. 155 758
v. Kelley, 8 Ind. App. 606 405, 4668
v. Killourey, 81 Conn. 320 123
v. LaCrosse C. Co., 120 Wis. 84 231, 235, 312, 319, 1418, 2280, 2364
v. Louisville & N. R. Co., 49 Ill. App. 304 2547, 2561
v. Louisville & N. R. Co., 145 Ky. 398 2588
v. Mayberry, 154 Pa. 440 4756, 4759
v. Ohio River R. Co., 58 W. Va. 216 4864, 4869
v. People's National Fire Ins. Co., 262 Ill. 158 3053
v. Phenix Nat. Bank, 17 App. Div. (N. Y.) 496 807, 948, 1032, 2929
v. Richardson, 69 Mich. 430 1446, 2491, 2492, 2498
v. St. Louis, I. M. & S. R. Co., 180 Mo. App. 637 4170
v. Seay, 3 Okla. 527 840, 861
v. Shay, 206 Pa. 215 1071
v. Third Nat. Bank, 64 Ill. 541 1358
v. Union Pac. R. Co., 16 Colo. 455 3469, 4849
v. West, 36 Minn. 520 1948
Kellogg v. Albany & H. R. & P. Co., 72 App. Div. (N. Y.) 321 4939, 4941
v. Chicago, etc., R. Co., 26 Wis. 223 68, 143, 3400, 4678
v. Citizens' Ins. Co., 94 Wis. 554 2522
v. Curtis, 9 Pick. 634 835
v. Denslow, 14 Conn. 411 512, 534, 557
v. Frolich, 139 Mich. 612 2236, 2243
v. Ingersoll, 2 Mass. 101 2150
v. Kirksville, 132 Mo. App. 519 391, 3876
v. Kirksville, 149 Mo. App. 1 3875
v. Krauser, 14 S. & R. 137 1443, 2305
v. Lavender, 15 Neb. 256 962, 963
v. Malick, 125 Wis. 239 233, 242, 251, 294, 320, 3229, 3231, 3236, 3237, 3247, 4210, 4300, 4301
v. Malin, 62 Mo. 429, 432 2149, 2153, 2182, 2183
v. Malin, 50 Mo. 496 2181
v. Manro, 9 Johns. 300 495, 496, 497, 1810
v. Miller, 2 McCrary 395 1163, 1169
v. Olmsted, 28 Barb. 96 764
v. Richards, 14 Wend. 116 747, 749, 755
Kellogg v. Robinson, 6 Vt. 276 2147
v. Scott, 58 N. J. Eq. 344 2756
v. Sweeney, 46 N. Y. 291 604, 606
v. Thompson, 142 Mass. 76 4279
Kellogg B. Co. v. Hamilton, 110 U. S. 108, 28 L. ed. 86 2375, 2612
Kellow v. Central Iowa Ry. Co., 68 Iowa 470 5108
Kellum v. Berkshire L., etc., Ins. Co., 101 Ind. 455 2149
Kelly v. Allen, 34 Ala. 663 2211, 4396
v. Altemus, 34 Ark. 184 4322
v. Bradford, 33 Vt. 35 356, 494, 2679, 2681
v. Burroughs, 102 N. Y. 93 2860
v. Caffrey, 79 Ill. App. 278 1914
v. Carthage W. Co., 62 Ohio St. 598 2522, 2547, 2555
v. Chicago, etc., R. Co., 50 Wis. 381 4894
v. City of Higginsville, 185 Mo. App. 55 4861, 4923, 4925, 4930
v. Courter, 1 Okla. 277 18
v. Cunningham, 36 Ala. 78 1942
v. Davis, 9 Ky. L. Rep. 647 (Ky. Super. Ct.) 294
v. Durham T. Co., 132 N. C. 368 4613, 4628, 4634, 4841
v. Dutch Church, 2 Hill 105 2135, 3185
v. Fahrney, 97 Fed. 176 41, 196
v. Fejervary, 111 Iowa 693 862, 864
v. Galbraith, 186 Ill. 593 3147
v. Greany, 216 Mass. 296 2123
v. Hendrie, 26 Mich. 255 4853
v. Herrick, 131 Mass. 373 2867
v. Homer C. Co., 110 La. 983 759
v. Keith, 85 Ark. 30 816
v. Kellogg, 79 Ill. 477 2755
v. Lembeck & Belz Eagle Brewing Co., 86 N. J. L. 471 52
v. Lewis, 38 Colo. 18 4311
v. Low, 18 Me. 244 2117, 2157, 2159
v. McDonald, 39 Ark. 387 4166, 4168, 4169, 4199
v. McKibben, 54 Cal. 192 4321
v. Marshall, 172 Pa. 396, 399 2508
v. Mesiet, 21 App. Div. (N. Y.) 253 4301
v. Miles, 58 N. Y. Super. 495 254, 3211
v. Moody, 12 Ky. L. Rep. 389 (Ky. Super. Ct.) 1591
v. Navy Yard, Route, 77 Wash. 148 3467, 3525
v. Partington, 5 B. & Ad. 645 157
v. Partington, 3 Nev. & M. 116 4554
v. Pember, 35 Vt. 183 527, 532
v. Pierce, 16 N. D. 234 1928, 2229
v. Protected Home Circle, 152 Ill. App. 183 779
v. Renfro, 9 Ala. 325 3688
v. Riley, 106 Mass. 339 3663
v. Rogers, 21 Minn. 146 1314, 4190
v. Security Mut. L. Ins. Co., 106 App. Div. (N. Y.) 352 3088, 3089
v. Sherlock, L. R. 1 Q. B. 686 37, 4593
v. Smith, 1 Blatch. 290 2946
v. Southern Wisconsin R. Co., 152 Wis. 328 4778
v. State, 25 Ohio St. 567 1583, 1586
v. Thompson, 101 Mass. 299 859
v. United States, 31 Ct. of Cls. 361 2691, 2692, 2709
v. Valentine, 17 Ill. App. 87 4432
Kelly P. Co. v. London, — Tex. Civ. App. —, 125 S. W. 974 413, 2545, 2551, 2560

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Kelly's Adm'x v. Chesapeake & O. Ry. Co., 201 Fed. 602 5132
Kellyville C. Co. v. Petraytis, 195 Ill. 215 4856
v. Yehnka, 94 Ill. App. 74 4663
Kelsay v. Chicago, etc., R. Co., 41 Ind. App. 128 3843
Kelsey v. Hay, 84 Ind. 189 4794
v. Murphy, 30 Pa. 340 1244, 1245, 1252
v. Remer, 43 Conn. 129 325, 2156
v. Ward, 16 Abb. Pr. 98, 38 N. Y. 83 548, 3128
Kelso v. Marshall, 24 App. Div. (N. Y.) 128 2267
v. Reid, 145 Pa. 606 833, 840
v. Russell, 33 Wash. 474 721
Kemble v. Farren, 6 Bing. 141 849, 850, 855, 869, 876, 900, 912
Kemmerer v. Edelman, 23 Pa. 143 37
v. Kemmerer, 85 Iowa 193 1073
Kemmerer's App., 102 Pa. 558 665
Kemmil v. Wilson, 4 Wash. C. C. 308 674
Kemmitt v. Adamson, 44 Minn. 121 1268, 3827, 4165
Kemp v. Amacker, 13 La. 65 550
v. Baltimore City P. R. Co., 61 Md. 79 4682
v. Finden, 12 M. & W. 421 297, 2862
v. Knickerbocker I. Co., 69 N. Y. 45 841, 886, 902
v. Knickerbocker I. Co., 51 How. Pr. 31 901
v. McCormick, 1 Mont. 420 525
v. Pennsylvania R., 156 Pa. 430 769
v. San Antonio C. Co., 118 Mo. App. 134 3109
v. Thompson, 17 Ala. 9 4283
v. Western U. Tel. Co., 28 Neb. 661 3592
Kemper v. Louisville, 14 Bush 87 3822, 3871, 3904
Kempker v. Roblyer, 29 Iowa 274 2923
Kempner v. Beaumont L. Co., 20 Tex. Civ. App. 307 2098, 2099
v. Cohn, 47 Ark. 519 2008, 2011
v. Heidenheimer, 65 Tex. 587 1943, 1944, 1947
v. Patrick, 43 Tex. Civ. App. 216 2793
Kempton v. People, 139 Ill. App. 563 1014
Kendall, Ex parte, 17 Ves. 520 577
Kendall v. Albia, 73 Iowa 241 4662, 4704, 4713, 4729, 4737, 4748
v. Aleshire, 28 Neb. 707 1606
v. Davis, 55 Ark. 318 977
v. Dunn, 71 W. Va. 262 3666, 3670, 3676, 3688
v. Fitts, 22 N. H. 1 4352
v. Honey, 5 T. B. Mon. 282 3718
v. Lyman, 161 Fed. 652 1599
v. May, 10 Allen 59 1446
v. New England C. Co., 13 Conn. 383 577
v. Porter, 120 Cal. 106 966
v. Raybould, 13 Utah 226 2557
v. Robertson, 12 Cush. 156 1178
v. Stokes, 3 How. 87 384
v. Stone, 5 N. Y. 14 15, 4566
v. Stone, 2 Sandf. 269 4543
v. Vanderlip, 2 Mackey, 105 712
v. Wilson, 41 Vt. 567 4392
Kendall B. & S. Co. v. Bain, 46 Mo. App. 581 4352
Kendall Bank Note Co. v. Commissioners, 79 Va. 563 285, 2687, 2697
Kenderdine H. C. F. Co. v. Plumb, 182 Pa. 463 2584
Kendillon v. Maltby, Car. & M. 402 157
Kendle v. Sarren, 6 Bing. 141 972
Kendrick v. Chicago, etc., R. Co., 188 Ill. App. 172 5034, 5080
v. Cypert, 10 Humph. 291 4646
v. Forney, 22 Gratt. 748 2836
v. Kyle, 78 Miss. 278, 288 989, 1196
v. McCrary, 11 Ga. 603 4960, 4964
v. Ryus, 225 Mo. 150 4393, 4410
v. Towle, 60 Mich. 363 1136
v. Warren, 110 Md. 47 2668
Kendrick-Roan Grain & Elevator Co. v. Weaver, 128 Tenn. 609 2742
Kenerson v. Colgan, 164 Mass. 166 293
Kenkele v. Manhattan R. Co., 55 Hun 398 4082
Kenley v. Commonwealth, 6 B. Mon. 583 1670
Kennebec Bank v. Turner, 2 Me. 42 2766
Kennebec W. Dist. v. Waterville, 97 Me. 185 4049, 4071, 4080
Kennedy, In re, 94 Cal. 22 1053
Kennedy v. American Exp. Co., 22 Ont. App. 278 200
v. Barnwell, 7 Rich. 124 1101
v. Brown, 21 Kan. 177 1673
v. Brown, 13 C. B. (N. S.) 611 2486
v. Busse, 60 Ill. App. 440 477
v. Chesapeake & O. R. Co., 68 W. Va. 589 3527
v. Crandall, 3 Lans. 1 532
v. Davis, 7 T. B. Mon. 376 2098
v. Davis, 171 Ala. 609 4867
v. Dickey, 99 Md. 295 1080
v. Dodge, 1 Bene. 215 3301
v. Erdman, 150 Pa. 427 3827
v. Fidelity & C. Co., 100 Minn. 1 655, 2873
v. Gibbs, 15 Ill. 406 1014
v. Gibson, 68 Kan. 612 1826
v. Glen Alum C. Co., 72 W. Va. 635 1499
v. Gregory, 1 Binn. (Pa.) 85 470, 4576, 4599
v. Grooves, 50 Tex. Civ. App. 266 664
v. Hammond, 16 Mo. 341 1754
v. Hill, 89 S. C. 462 1072, 1074
v. Holborn, 16 Wis. 457 4569, 4586
v. Holladay, 25 Mo. App. 503 4529
v. Koopman, 166 Mo. 87 2031
v. Moore, 91 Iowa 39 813
v. Nash, 1 Starkie 152 949
v. New York, 73 N. Y. 365 104
v. New York, 196 N. Y. 19 371, 413, 3099
v. Nims, 52 Mich. 153 1778
v. North M. R. Co., 36 Mo. 351 1269, 1274, 1309
v. Richardson, 70 Ind. 524 1917
v. Rodgers, 2 Kan. App. 764 3661, 3662, 3666, 3676
v. St. Louis T. Co., 103 Mo. App. 1 1372, 1500
v. St. Paul City R. Co., 59 Minn. 45 4830
v. Shea, 110 Mass. 147 4958, 4960, 4967
v. Smith, 14 Ga. App. 644 1949
v. Soloman, 14 O. B. 628 2168
v. South Shore L. Co., 102 Wis. 284 2548, 2558, 2568
v. Spokane, etc., R. Co., 73 Wash. 387 4730
v. Standard S. R., 125 Mass. 90 350
v. Strong, 14 Johns. 128 1135, 4211

[REFERENCES ARE TO PAGES]

Kennedy v. Travis County, — Tex. Civ. App. —, 130 S. W. 844 4108, 4111, 4112
v. United States, 24 Ct. of Cls. 122, 142 896, 2685
v. Welch, 196 Mass. 592 1826
v. Whitwell, 4 Pick. 466 369, 1135, 1680, 4169, 4211, 4215
v. Woods, 3 Bibb 322 1354
Kennedy's Ex'r v. Hammond, 16 Mo. 341 1756
Kennel v. Atlas Elevator Co., 34 S. D. 101 4210
Kennell v. Gershonovitz, 84 N. J. L. 577 4667
Kennerly v. Nash, 1 Stark. 453 1874
v. Sommerville, 64 Mo. App. 75 2510
Kennerson v. Thames Towboat Co., 89 Conn. 367 5172
Kennerty v. Etiwan P. Co., 17 S. C. 4411 770, 780
Kennett v. Fickel, 41 Kan. 211 4314
v. Peters, 54 Kan. 119 4208
Kenney v. Collier, 79 Ga. 743 35
v. First Nat. Bank, 50 Barb. 112 647
v. Knight, 127 Fed. 403 259, 261
v. Lane, 9 Tex. Civ. App. 150 2995
v. McLaughlin, 5 Gray 3 4577
v. New York Cent. R. Co., 6 Thomp. & C. 498, 54 Hun 143 23
v. Roberts, 26 Hun 166 4587
v. Seaboard Air Line Ry. Co., 165 N. C. 99, aff'd 240 U. S. 489 5072, 5099, 5143
Kennison v. Taylor, 18 N. H. 220 2056, 2137, 2141, 2143
Kenniston v. Avery, 16 N. H. 117 674, 677
Kennon v. Dickins, Cam. & Norw. Conf. R. (by Battle) 357 1206
v. Gilmer, 131 U. S. 22 1503, 1518, 1519, 1539, 4664, 5089
v. Gilmer, 5 Mont. 257 4802
v. McRae, 3 Stew. & Port. 249 1399
v. Western U. Tel. Co., 92 Ala. 399 35, 3611
v. Western U. Tel. Co., 126 N. C. 232 3654
Kenny v. Collier, 79 Ga. 743 39, 3189, 3210
v. Knickerbocker B. & Y. Co., 136 App. Div. (N. Y.) 568 2699
v. Union Ry. Co. of New York City, 166 N. Y. App. Div. 497 5176, 5177
Kensington, The, 94 Fed. 885 3416
Kensington, The, 183 U. S. 263 3419
Kent v. Barnes, 72 Ill. App. 617 1825
v. Brown, 3 Minn. 347 958, 968
v. Cantrall, 44 Ind. 452 556, 2156
v. Carcaud, 17 Md. 291 2047
v. Dunham, 106 Mass. 586 1085
v. Ginter, 23 Ind. 1 2311, 2318, 4240
v. Halliday, 23 R. I. 182 1361, 2435, 2440
v. Hudson River R. Co., 22 Barb. 278 3349
v. Lincoln, 32 Vt. 591 4742
v. Reynolds, 8 Hun 559 755
v. Whitney, 9 Allen 62 1453, 4228
Kent B. & L. Co. v. Middleton, 112 Md. 10 793, 819
Kent County A. Soc. v. Idle, 128 Mich. 423 3749
Kent L. & B. Co. v. Payne, 119 La. 916 2645
Kent's Case, 39 Ch. Div. 259 628
Kenton Ins. Co. v. First Nat. Bank, 93 Ky. 129 1036
Kentucky Cent. R. Co. v. Biddle, 17 Ky. L. Rep. 1363 3452, 3461, 3475, 3503
v. Gastineau, 83 Ky. 119 1289, 1311
v. Ryle, 13 Ky. L. Rep. 862 4803
Kentucky D. & W. Co. v. Lillard, 160 Fed. 34 319, 2346, 2352
v. Wells, 149 Ky. 275 1514, 4822
Kentucky H. Co. v. Hood, 133 Ky. 383 51, 56, 4158, 4169, 4184, 4293, 4296
Kentucky I. & B. Co. v. Hall, 125 Ind. 220 425, 774
Kentucky Journal Pub. Co. v. Brock, 140 Ky. 373 1366
Kentucky L. & I. Co. v. Crabtree, 118 Ky. 395 1660, 1668, 1670
Kentucky M. R. Co. v. Stump, 12 Ky. L. Rep. 316 3828
Kentucky Nat. Bank v. Stone, 93 Ky. 623 2499
Kentucky S. Co. v. Page (Ky.), 125 S. W. 170 3778, 3781, 3782, 3826
Kentucky S. Mfg. Co. v. Carraway, 136 Ky. 581 2554
Kentucky State Journal Co. v. Workmen's Compensation Board, 161 Ky. 562 5151
Kentucky T. Ass'n v. Ashby, 9 Ky. L. Rep, 109 1353
Kentucky T. & S. Co. v. Ringo, 145 Ky. 190 4271
Kentucky Traction & Terminal Co. v. Bain, 161 Ky. 44 78
v. Downing, 152 Ky. 25 4828
Kentucky W. Mfg. Co. v. Louisville & N. R. Co., 11 Ry. & Corp. L. J. 49 3309
v. Ohio, etc., R. Co., 98 Ky. 152 3309
v. Shake, 137 Ky. 742 1499, 1514, 4809
Kentucky & T. Ry. Co. v. Minton, 167 Ky. 516 5045, 5080
Kentucky, etc., R. Co. v. Dills, 4 Barb. 593 3503
Kenty v. Universal L. Ins. Co., 3 Dill. 448 3071
Kenum v. Henderson, 6 Ala. 132 1537
Kenwood B. Co. v. Dunderdale, 50 Ill. App. 581 2608, 2700
Kenwood H. Co. v. Hiland, 153 Ill. App. 108 932, 3099
Kenworthy v. Sawyer, 125 Mass. 28 2823
Kenyon v. Brightwell, 120 Ga. 606 1357
v. Cameron, 17 R. I. 122 1309, 1311
v. Mondovi, 98 Wis. 50 4748
v. New York Cent., etc., R. Co., 29 App. Div. (N. Y.) 80 3753, 3759
v. Western U. Tel. Co., 100 Cal. 454 41, 208, 209
v. Woodruff, 33 Mich. 310 4425
Kenzie v. Boutwell, 79 Vt. 383 1439
Keokuk v. Love, 31 Iowa 199 2841
Keon v. Byington, 70 Conn. 429 1104
Keough v. McNitt, 6 Minn. 513 658
Keown v. Vogel, 25 Mo. App. 35 684
Kepler v. Hyer, 48 Ind. 499 4668, 4690
Kepley v. Carter, 49 Kan. 72 2755
Kepner v. Mix, 81 Mo. 93 4321
Keppel v. Lehigh C. & N. Co., 200 Pa. 649 3892
Keppele v. Carr, 4 Dall. 155 1904
Kerfoot v. Marsden, 2 F. & F. 160 3680
Kerley v. Richardson, 17 Ga. 602 1957, 2012
Kerling v. Van Dusen, 109 Minn. 481 4926
Kermott v. Ayer, 11 Mich. 181 1183, 1184
Kern v. Creditors, 49 La. Ann. 886 2876

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Kerngood v. Gusdorf, 5 Mackey 161 1748, 1752
Kernochan v. Manhattan R. Co., 161 N. Y. 339, 17 App. Div. (N. Y.) 634 3835, 4083
v. Murray, 111 N. Y. 306 2749
v. New York Bowery F. Ins. Co., 17 N. Y. 428, 5 Duer 1 3019, 3049, 3059, 3062
Kerns v. Hagenbuchle, 60 N. Y. Super. Ct. 222 3682, 4964, 4969
v. Kansas City, 79 Kan. 562 1413, 3849, 3887
v. Western U. Tel. Co., 170 Mo. App. 642 227, 3565, 3604
Keroes v. Weaver, 27 App. D. C. 384 1416
Kerone v. Block, 144 Mo. App. 575 1387
Kerr v. Blair, 47 Tex. Civ. App. 406 1437, 2635
v. Brandon, 84 N. C. 128 1604
v. Cotton, 23 Tex. 411 2960
v. Cusenbary, 60 Mo. App. 558 2464, 2469
v. Fullarton, 10 Up. Can. C. P. 250 1810
v. Hammond, 97 Ga. 567 821
v. Haverstick, 94 Ind. 178 962
v. Kingsbury, 39 Mich. 150 3256
v. Laird, 27 Miss. 544 1121
v. Love, 1 Wash. (Va.) 217 1108
v. McGuire, 28 N. Y. 446 1419
v. Merchants' Exch. Co., 3 Edw. 315 3142
v. Minnesota Mut. B. Ass'n, 39 Minn. 174 3000, 3076
v. New York E. R. Co., 49 N. Y. Misc. 331 4151
v. O'Connor, 63 Pa. 341 443
v. Quaker City Ins. Co., 33 Mo. 158 3032
v. Shaw, 13 Johns. 236 3125
v. Shurtleff, 218 Mass. 167 4407
v. South Park Com'rs, 117 U. S. 379 4134
Kerr E. Co. v. French River T. Co., 21 Ont. App. 160 930
Kerr's Est., 35 Pa. Super. 350 1131
Kerrigan v. Market St. R. Co., 138 Cal. 506 4883
v. Pennsylvania R. Co., 194 Pa. 98 1478, 4752
Kerrison v. Cole, 8 East 231 1851
Kerry v. Pacific M. Co., 121 Cal. 564 1354, 1355
Kersenbrock v. Martin, 12 Neb. 374 4352
Kersey v. Garton, 77 Mo. 645 2477, 2497
v. Schuylkill River, etc., R. Co., 133 Pa. 234 4012, 4026
Kershaw v. Kershaw, L. R. 9 Eq. 56 1027
v. Schafer, 88 Kan. 691 2906
Kersting v. White, 107 Mo. App. 265 4560
Kervin v. Utter, 120 App. Div. (N. Y.) 610 1097, 1114
Kerwhacker v. Cleveland, etc., R. Co., 3 Ohio St. 172 3922
Kerz v. Wolf, 131 Ill. App. 387 1723, 1725, 1726
Kesler v. Smith, 66 N. C. 154 4858, 4874, 4906
Kessee v. Mayfield, 14 La. Ann. 90 2526
Kessler v. McConachy, 1 Rawle 435 3123, 3129
Kessler & Co., In re, 171 Fed. 751 1223
Kessler & Co. v. Miller, 119 N. C. 475 2415
v. Rockell, 2 W. & S. 365 1027
v. Western U. Tel. Co., 1 Ohio Dec. 453, 8 Ohio C. C. 236 3642
v. Western U. Tel. Co., 55 Fed. 603 3644
Ketcham v. Jauncey, 23 Conn. 123 2894
v. United States, 40 Ct. of Cls. 220 2236
Ketchum v. American Exp. Co., 52 Mo. 390 3335
v. Crippen, 37 Cal. 223 826
v. Evertson, 13 Johns. 359 2007, 2013
v. Fillingham, 162 Mich. 704 1376
v. Stetson & P. M. Co., 33 Wash. 92 2372
v. Stout, 20 Ohio 453 2048, 2052
v. Texas & P. R. Co., 38 La. Ann. 777 4810
v. Van Dusen, 11 App. Div. (N. Y.) 332 1355
v. Wells, 19 Wis. 25 534, 2376
Keteltas v. Interborough Rapid Transit Co., 164 App. Div. (N. Y.) 870 3989, 4081
Kethledge v. City of Petoskey, 179 Mich. 301 1417, 4744
Kettelkake v. American C. & F. Co., 171 Mo. App. 528 4885
Kettell v. Alliance Ins. Co., 10 Gray 144 3015
Kettering Mercantile Co. v. Shepard, C. W., — N. M. —, 142 Pac. 1128 254
Kettle v. Harvey, 21 Vt. 301 2679
v. Lipe, 6 Barb. 467 2894
Keuter v. Thompson, 13 Bush 287 2859
Keuthan v. St. Louis T. Co., 101 Mo. App. 1 288, 1137
Kevane v. Miller, 4 Cal. App. 598 2902
Key v. Harris, 116 Tenn. 161 2473
v. Henson, 17 Ark. 254 537, 556, 557
v. Western U. Tel. Co., 76 S. C. 301 3617
Key West, City of, v. Baldwin, 69 Fla. 136 4661, 4690, 4730, 4751
Keyes v. Bennett, 218 Ill. 625 2821
v. Cedar Falls, 107 Iowa 509 4677
v. Devlin, 3 E. D. Smith 518 465
v. Fuller, 9 Ill. App. 528 696, 699
v. Minneapolis, etc., R. Co., 36 Minn. 290 321, 348, 4186, 4686
v. Roder, 1 Head 19 825
v. Western Vermont S. Co., 34 Vt. 81 316, 476, 537, 558, 3162, 3244, 3247
Keyes-M. L. Co. v. St. Louis, etc., R. Co., 113 Mo. App. 144 3414
Keyes & M. Realty Co. v. Trustees, 146 App. Div. (N. Y.) 796 2094, 2130
Keys v. Hoppe, 85 Misc. (N. Y.) 364 386
v. Johnson, 68 Pa. 42 2502
v. Keys, 217 Mo. 48 662, 1869
v. Lardner, 55 Kan. 331 998
v. Morrison, 3 Colo. App. 441 1014
v. Westford, 17 Pick. 273 2975
Keyser v. Hinkle, 127 Mo. App. 62 664
v. Michigan S. R. Co., 142 Mich. 143 400
Keyser & Co. v. Jurvelius, 58 C. C. A. 664, 122 Fed. 218 3304
Keystone Mfg. Co. v. Adams, 151 U. S. 139 4445, 4448, 4457, 4465
Keyton v. Brawford, 5 Leigh 39 2203

[REFERENCES ARE TO PAGES]

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v. Otley, 204 Ill. 402 3851
Kibbey v. Jones, 7 Bush 243 665
Kibinger v. Sauk Bank, 131 Wis. 595 35
Kibler v. Caplis, 140 Mich. 28 1437, 1452
v. Southern R., 64 S. C. 242 3447
Kick v. Doerste, 45 Mo. App. 134 2647
Kicks v. State Bank, 12 N. D. 576 2018, 2029, 2043
Kid v. Mitchell, 1 Nott & McC. 334 4218, 4240
Kidd v. Belden, 29 Barb. 266 2272
v. McCormick, 83 N. Y. 391 2590
v. Ward, 91 Iowa 371 4540
Kiddall v. Trimble, 1 Md. Ch. 143 3720, 3725
Kidder v. Barker, 18 Vt. 454 43, 1620
v. Blake, 45 N. H. 530 1850
v. Kidder, 33 Pa. 268 642
v. Knox, 48 Me. 555 661
v. Norris, 18 N. H. 532 717, 721
v. Oxford, 116 Mass. 165 4145, 4155
Kidder P. Co. v. Reed, 133 Ky. 350 2414
Kiddle v. Lovett, 16 Q. B. Div. 605 298, 302
Kidgell v. Moore, 14 Jurist 790 1388
Kidney v. Stoddard, 7 Metc. (Mass.) 252 3685, 4392
Kiefer v. Grand Trunk R. Co., 12 App. Div. (N. Y.) 28, aff'd 153 N. Y. 688 1182
Kiefert v. Maple Valley Mut. Home Fire Ins. Co., 158 Wis. 340 1229
Kier v. Peterson, 41 Pa. 357 4259
Kierman v. Chicago, etc., R. Co., 123 Ill. 188 3962, 4000, 4131
v. Heaton, 69 Iowa 136 3740, 3829
v. Manhattan O. Tel. Co., 50 How. Pr. 194 4478
v. New Jersey I. Co., 74 N. J. L. 175 1330
v. Terry, 26 Ore. 494, 502 3260
Kiersted v. State, 1 G. & J. 231 1811
Kiff v. Youmans, 86 N. Y. 324 460, 1291, 1321, 1322, 4783
Kiger v. McCarthy Co., 10 Cal. App. 308 1989, 2009
Kikuchi v. Ritchie, 202 Fed. 857 2497
Kilborn v. Johnson, — Tex. Civ. App. —, 164 S. W. 1108 2025
Kilbourn v. Bradley, 3 Day 356 992, 1178
v. Thompson, MacArthur & M. (D. C.) 401 4836, 4840
Kilbourne v. Burt L. Co., 23 Ky. L. Rep. 985 886
v. State Sav. Inst., 22 How. 503 1256, 1804
v. Suffolk, 120 Mass. 393 3957
Kilburn v. Coe, 48 How. Pr. 144 4765
Kilby v. Erwin, 84 Vt. 266 3774, 3775
Kilby Locomotive & Machine Works v. D. B. Lacey & Sons, 12 Ala. App. 464 4394
Kildea v. Washington L. Co., 22 Wash. 385 1028
Kilderhouse v. Saveland, 1 Ill. App. 65 1107
Kiler v. Wohletz, 79 Kan. 716 757
Kiley v. Chicago City R. Co., 189 Ill. 384 3463
v. Chicago City R. Co., 90 Ill. App. 275 3501
Kilgore v. Bruce, 166 Mass. 136 4375, 4376, 4415
v. Dempsey, 25 Ohio St. 413 1163, 1879
v. Lyle, 30 Okla. 596 1454, 3751
Kilgore v. Powers, 5 Blackf. 22 959, 962, 1874
Kill v. Hollister, 1 Wils. 129 3016
Kille v. Ege, 82 Pa. 102 3693, 3699, 3702
Killebrew v. Carlisle, 97 Ala. 535 4613
Killen v. North Jersey St. R. Co., 74 N. J. L. 286 1493
Killian v. Ashley, 24 Ark. 511 2780
Killilan v. Herndon, 4 Rich. 609 1216
Killips v. Putman F. Ins. Co., 28 Wis. 472 3021
Killmer v. New York, etc., R. Co., 100 N. Y. 395 3280
Killorin v. Bacon, 57 Ga. 497 736
Kilmer v. Gallaher, 107 Iowa 676 946
Kilpatrick v. Dye, 4 Sm. & M. 289 2197, 2211
v. Haley, 66 Fed. 133 1340
v. Home B. & L. Ass'n, 119 Pa. 30 670
v. Inman, 46 Colo. 514 2702
v. Whitmer, 118 App. Div. (N. Y.) 98 1442, 2278
Kimball, The, 3 Wall. 37 658, 664, 666, 669, 3301
Kimball v. Bates, 50 Me. 308 4637
v. Bath, 38 Me. 219 4794
v. Bryant, 25 Minn. 496 2060, 2073, 2087, 2122
v. Burns, 84 Ind. 370 962
v. Citizens' G. & E. Co., 141 Iowa 632 476, 2362
v. Connolly, 3 Keyes 57, 33 How. Pr. 237 15
v. Cunningham, 4 Mass. 502 2391
v. Derre, 108 Iowa 676, 685 2260, 2263
v. Doggett, 62 Ill. App. 528 549, 876, 3236
v. Fernandez, 41 Wis. 329 471
v. Goldman, — Ark. —, 174 S. W. 1185 3536
v. Hall, 87 Conn. 563 4486
v. Holmes, 60 N. H. 163 168, 3651, 4162, 4192
v. Howard Ins. Co., 8 Gray 33 3021
v. Louisville & N. R. Co., 94 Miss. 306 404
v. Miller, 1 Alaska 347 3699
v. Moir, 15 Ore. 427 1921
v. Munger, 2 Hill 364 589
v. Newell, 7 Hill 116 2825
v. Northern E. Co., 159 Cal. 225 1425, 1475, 4739
v. Salisbury, 19 Utah 161 2382
v. Williams, 36 App. D. C. 43 1199
v. Wilson, 3 N. H. 96 421, 770, 771
Kimball Co. v. Baker, 62 Wis. 526 2749, 2755
Kimball & A. Mfg. Co. v. Vroman, 35 Mich. 310 2370
Kimber v. Barber, L. R. 8 Ch. App. 56 2903
Kimberly v. Arms, 40 Fed. 551 1054
v. Howland, 143 N. C. 398 58, 87, 95, 111, 4688, 4750, 4757, 4761, 4762
Kimble v. Cummins, 3 Metc. (Ky.) 327 2834, 2843
Kimbrel v. Glover, 13 Rich. 191 1119
Kimbro v. Wells, 112 Ark. 126 834, 887
Kimbrough v. Boswell, 119 Ga. 201 2994
Kimel v. Kimel, 4 Jones 121 35, 39
Kimic v. San Jose-L. G. I. R. Co., 156 Cal. 273 4793
Kimick v. Campbell, 31 Cal. 238 1356
Kimmans v. Chandler, 13 Iowa 327 4426
Kimmel v. Bean, 68 Kan. 598 716

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Kimmell v. Kint, 2 Watts 431 1673
Kimpton v. Bronson, 45 Barb. 618 602
Kinahan v. Bolton, 15 Ir. Ch. (N. S.) 75 4487
Kinard v. First Nat. Bank, 125 Ga. 228 655
v. Glenn, 25 S. C. 590 1104
Kincaid v. Brittain, 5 Sneed 119 2056, 2060, 2072, 2076, 2083
v. Kansas City, etc., R. Co., 62 Mo. App. 365 132
v. Price, 18 Colo. App. 73 2238, 2257, 2291
v. School Dist., 11 Me. 188 792
Kinch v. Moadinger, 26 Misc. (N. Y.) 778 2516
Kindle v. State, 7 Blackf. 589 1597
Kindred v. Stitt, 51 Ill. 401 4837
Kindt's App., 102 Pa. 441 2814
Kinerien v. New York, etc., R. Co., 109 App. Div. (N. Y.) 709 3531
King, Estate of, 18 Phila. 81 2183
King, Ex parte, 2 Dev. 341 633
King, In re, Estate of, 94 Mich. 411 1110
King v. Ann Arbor R. Co., 144 Mich. 65 1511, 4858, 4872
v. Apple River P. Co., 131 Wis. 575 4644
v. Atlantic C. L. R. Co., 157 N. C. 44 25, 503, 763, 765
v. Baldwin, 2 Johns. Ch. 554 2795, 2841
v. Baldwin, 2 Johns. Ch. 558 2819
v. Baldwin, 17 Johns. 384 2819, 2841
v. Bangs, 120 Mass. 514 503
v. Bardeau, 6 Johns. Ch. 38 2051
v. Block A. Co. (Misc.), 115 N. Y. Supp. 243 2555
v. Boston, 7 East 481 516
v. Brewer, 19 Ind. 267 1562
v. Brown, 31 Pa. Super. 50 1049
v. Brown, 2 Hill 485 1958, 2458, 2517
v. Butler, 15 Johns. 281 2981
v. Chicago, etc., R. Co., 80 Minn. 83 404
v. Coe Com. Co., 93 Minn. 52 559
v. Colvin, 11 R. I. 582 4650
v. Com'rs of Manchester, 4 B. & A. 335 4147
v. Cooney-Eckstein Co., 66 Fla. 246 55
v. Danville, 128 Ky. 321 1455, 3847, 3853, 3879
v. Des Moines, 99 Iowa 432 2691
v. Diehl, 9 S. & R. 409 1079
v. Duluth, etc., R. Co., 61 Minn. 487 2654
v. Eagle Mills, 10 Allen 548 4385
v. Erskins, 116 La. 480 4601, 4615, 4647
v. Finch, 60 Ind. 423 622
v. Franklin, 132 Ala. 559 4295
v. Gillett, 7 M. & W. 55 764
v. Gilson, 32 Ill. 348 2055, 2074, 2087
v. Griffin, 39 Tex. Civ. App. 497 3229
v. Ham, 6 Allen 298 4211, 4273, 4278, 4279
v. Henkie, 80 Ala. 505 145
v. Herron [1903], 2 Irish 474 2756
v. Hoare, 13 M. & W. 494, 504 589
v. Howard, 1 Cush. 137 1503
v. Hudson River Realty Co., 210 N. Y. 467 1451, 2619
v. Hudson River Realty Co., 141 App. Div. (N. Y.) 346 2589
v. Hughes [1895], 2 Q. B. 550 3384
King v. Hungerford M. Co., 4 B. & A. 327 4147
v. Hutchins, 28 N. H. 561 674
v. Iowa, etc., R. Co., 34 Iowa 458 4017
v. Ivanhoe G. Co., 7 Aust. Com. L. R. 617 48, 2463
v. Kehoe, 91 Iowa 91 1688, 1696
v. Keith, 1 New Bruns. Eq. 538, 555 1214
v. Kerr, 5 Ohio 154 2093, 2111, 2114, 2122, 2124, 2133
v. Kilbride, 58 Conn. 109 2148
v. King, 37 Ga. 205 612
v. King, 69 Ind. 467 1860
v. King, 42 Okla. 405 4329
v. Little, 77 N. C. 138 3694
v. McConnell, 57 Fla. 77 664
v. Mercer, 7 Ky. L. Rep. 590 (Ky. Super. Ct.) 1964
v. Merriman, 38 Minn. 47 3788, 3789
v. Minneapolis Union R. Co., 32 Minn. 224 4009, 4034, 4039
v. Mott, 37 App. Div. (N. Y.) 124 4392, 4410
v. Nichols, 16 Ohio St. 80 1614
v. Nichols, 53 Minn. 453 2605
v. Norman, 4 C. B. 884 2767
v. Ohio & M. R. Co., 22 Fed. 413 3467
v. Pagham, 8 B. & C. 355 11
v. Palmer, 18 Iowa 377 1284
v. Pedley, 1 Ad. & E. 822, 827 3936
v. Perfection B. Mach. Co., 81 Kan. 809 294
v. Phillips, 95 N. C. 245 939
v. Phillips, 12 M. & W. 705 1853
v. Phillips, Pet. C. C. 350 1898, 2848
v. Phoenix Ins. Co., 195 Mo. 290 3039
v. Pittsburgh, etc., R. Co., 13 Ohio N. P. (N. S.) 201 161
v. Pope, 28 Ala. 602 2464
v. Pyle, 8 S. & R. 166 1996, 2112
v. Ramsay, 13 Ill. 619 1674, 1676
v. Reynolds, 67 Ala. 229 3183
v. Rhode Island Co., 27 R. I. 112 1400
v. Richards, 6 Whart. 418, 427 2396, 4284
v. Root, 7 Cow. 613 4584
v. Root, 4 Wend. 113 4507, 4549
v. Ruckman, 24 N. J. Eq. 556 1027
v. St. Louis, 250 Mo. 501 32
v. St. Louis, etc., R. Co., 130 Mo. App. 368 4859
v. Sarria, 69 N. Y. 24 4953
v. Shaw, 7 "The Argus" L. R. 163 (Australia) 2777
v. Shepherd, 3 Story 349 3404
v. Sherwood, 22 App. Div. (N. Y.) 548, 48 N. Y. Supp. 34 3387
v. Southern Pac. Co., 109 Cal. 96 1142
v. State, 100 Ala. 851 1468
v. State Mut. F. Ins. Co., 7 Cush. 1 3060, 3077
v. Steiren, 44 Pa. 99 2551, 2561
v. Stetson, 11 Allen 407 3728
v. Sturer, 44 Pa. 99 2561
v. Sutton, 42 Kan. 600 724
v. Talbot, 50 Barb. 453 1083
v. Thompson, 87 Pa. 365 417
v. Thompson, 9 Pet. 204 2045
v. Vicksburg R. & L. Co., 88 Miss. 456 3841, 3842
v. Viscoloid Co., 219 Mass. 420 5148, 5204
v. Welcome, 5 Gray 41 2517

[REFERENCES ARE TO PAGES]

King v. White, 119 Ala. 429 4366
v. Whiteley, 1 Hoffm. Ch. 477 3729
v. Wise, 43 Cal. 628 525
v. Woodbridge, 34 Vt. 565, 3328, 3349
King County v. Ferry, 5 Wash. 536 1596, 1613
King I. B. & Mfg. Co. v. St. Louis, 43 Fed. 768 930
King L. Co. v. Bowen, (Ala. App.) 61 So. 22 8
v. Bowen, 7 Ala. App. 462 3900, 3942
King of Spain v. Oliver, Pet. C. C. 276 709
King Phillip's Mills v. Slater, 12 R. I. 82 2232
Kingdon v. Nottle, 4 M. & S. 53 2056, 2057, 2175
v. Nottle, 1 M. & S. 355 2175, 3155
Kingfisher v. Altizer, 13 Okla. 121 1465, 1468
Kinghorne v. Montreal Tel. Co., 18 Up. Can. Q. B. 60 3605, 3606
Kingman v. Draper, 14 Ill. App. 577 553, 560
v. Hanna W. Co., 176 Ill. 545, aff'g 74 Ill. App. 22 2260
v. Pierce, 17 Mass. 247 686, 1235
v. Western Mfg. Co., 92 Fed. 486 2258, 2269, 2702
Kingsbury v. Dedham, 13 Allen 186 161
v. Joseph, 94 Mo. App. 298 2480, 2492
v. Milner, 69 Ala. 502 2098
v. Missouri, etc., R. Co., 156 Mo. 379 4
v. Smith, 13 N. H. 109 2137
v. Westfall, 61 N. Y. 356 489, 2752, 3143, 3165
Kingsland v. Clark, 24 Mo. 24 3146
v. Haines, 62 App. Div. (N. Y.) 146 2209
v. Koeppe, 137 Ill. 344 2780, 2781
v. Mayor, etc., 110 N. Y. 569, 45 Hun 198 4078
Kingsley v. Anderson, 103 Minn. 510 796, 2480
v. Butterfield, 35 Neb. 228 1363
v. Purdom, 53 Kan. 56 636
v. United R. Co., 66 Ore. 50 3826
v. Wheeler, 95 Minn. 360 2902
Kingston v. Ft. Wayne & E. R. Co., 112 Mich. 40 338, 4724, 4789
v. Kelly, 18 L. J. (Ex.) 360 2469
v. McIntosh, 1 Camp. 518 1034
v. Wilson, 4 Wash. C. C. 310 2922
Kingston Bank v. Gay, 19 Barb. 459 623, 625
Kingston Mut. Ins. Co. v. Clark, 33 Barb. 196 1582, 1596
Kingsville P. Co. v. Frank, 81 Ill. App. 586 815
Kinkead v. Lynch, 132 Fed. 692 2259
v. Peet, 164 Iowa 65 705
Kinkler v. Junica, 84 Tex. 119 4369
Kinley v. Hill, 4 W. & S. 426 636
Kinnaird v. Standard O. Co., 89 Ky. 468 391, 3891
v. Webster, 10 Ch. Div. 139 742
Kinner v. Shepard, 118 Fed. 48 4455
Kinney v. Avery & Co., 14 Ga. App. 180 1709
v. Central R. Co., 34 N. J. L. 513 21
v. Conant, 166 Fed. 720 1065
v. Crocker, 18 Wis. 74 252, 3489, 3493, 3495
v. Ensign, 18 Pick. 232 643
v. Folkerts, 78 Mich. 687 4751
v. Hosea, 3 Harr. 397 4543
v. Koopman, 116 Ala. 310 100
Kinney v. Laughenour, 89 N. C. 365 4965
v. Mahoning Mills, 13 Pa. Super. Ct. 573 2902
v. Reid I. C. Co., 57 App. Div. (N. Y.) 206 1704
v. Robison, 52 Mich. 389 592
v. State, 14 Ohio C. C. 91 1037
v. Watts, 14 Wend. 38 3185
Kinports v. Breon, 193 Pa. 309 2275
Kinsella v. Cahn, 185 Ill. 208 1808
Kinser v. Farmers' Nat. Bank, 58 Iowa 728 740
Kinser C. Co. v. State, 145 App. Div. (N. Y.) 41 2700
Kinsey v. City of New York, 75 App. Div. (N. Y.) 262 3772
Kinsler v. Pope, 5 Strobh. 126 753
Kinsley v. Morse, 40 Kan. 588 1480
Kinsman v. Parkhurst, 18 How. 289 20
Kinster v. Babcock, 26 N. Y. 378 699
Kinyon v. Palmer, 18 Iowa 377 4586
Kinzer C. Co. v. State (N. Y. Misc.), 125 N. Y. Supp. 46 2692, 2700, 2710
v. State (Misc.), 4 N. Y. 338 2710
Kip v. Berdan, 20 N. J. L. 239 4967
v. Brigham, 6 Johns. 158 295, 2191, 2978
v. Brigham, 7 Johns. 168 2894
Kipp v. Wiles, 3 Sandf. 585 2275, 2294
Kipros v. Uintah Ry. Co., 45 Utah 389 4871
Kirbs v. Provine, 78 Tex. 353 1693
Kirby v. Commonwealth, 1 Bush 114 1560
v. Forbes, 141 Ala. 294 1708
v. Marlborough, 2 M. & S. 18 727
v. Panhandle & G. R. Co., 39 Tex. Civ. App. 252 4003, 4027, 4107, 4117, 4124, 4135
v. St. Louis, etc., R. Co., 146 Mo. App. 304 1511, 4662, 4711
v. Spiller, 83 Ala. 481 524
v. Studebaker, 15 Ind. 45 2743
v. Thompson, 138 Ga. 544 1500
v. Turner, Hopk. 309 769
v. Turner, 6 Johns. Ch. 242 2823
v. Western U. Tel. Co., 77 S. C. 404 1425, 3547, 3559
v. Western U. Tel. Co., 7 S. D. 623 3546
Kirby L. Co. v. Cummings, 57 Tex. Civ. App. 291 196
v. Cummings (Tex. Civ. App.), 122 S. W. 273 204, 2343
Kirby Planing Mill Co. v. Titus, 14 Ga. App. 1 664
Kircher v. Larchwood, 120 Iowa 578 1362, 1376, 4746
Kirchman v. Tuffli B. P. I. & C. Co., 92 Ark. 111 2236, 2250, 2255
Kirchner v. New Home S. Mach. Co., 59 Hun 186 770
Kirchof v. United R. Co., 155 Mo. App. 70 1425
Kirk v. Eaton, 10 S. & R. 103 1546
v. Hartman, 63 Pa. 97 2458
v. Middlebrook, 201 Mo. 245 30
v. Seattle E. Co., 58 Wash. 283 1430, 3457, 3464, 4694, 4730, 4736
v. Wiener-L. L. Co., 120 La. 820 4635, 4644
Kirkbride v. Bartz, 82 Conn. 615 1359, 1490
Kirkendall v. Hartsock, 58 Mo. App. 234 4327
v. Keogh, 2 Ill. App. 492 2157
v. Omaha, 39 Neb. 1 4114
Kirkey v. Crandall, 90 Tenn. 532 2939
Kirkham v. Wheeler-O. Co., 39 Wash. 415 4750

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Kirkland v. Niagara Gorge R. Co., 109 App. Div. (N. Y.) 201 1110
Kirkman v. Vanlier, 7 Ala. 217 1225
Kirkpatrick v. Adams, 20 Fed. 287 2978
v. Alexander, 44 Ind. 595 2271
v. Bessalo, 116 Mich. 657 664
v. Canadian Pac. R. Co., 35 New Bruns. 598 87, 96
v. Downing, 58 Mo. 32 1989, 2008
v. Howk, 80 Ill. 122 2804
v. McCullough, 3 Humph. 171 1888, 1889, 1890
v. McNamee, 36 Can. Super. Ct. 152 3788
v. Metropolitan St. R. Co., 129 Mo. App. 524 4757, 4758, 4759, 4761
v. Muirhead, 16 Pa. 117 1836
v. Puryear, 93 Tenn. 409 658, 668, 672
v. San Angelo Nat. Bank, — Tex. Civ. App. —, 148 S. W. 362 432, 4273
Kirksey v. Friend, 48 Ala. 276 2893
v. Kirksey, 41 Ala. 626 644
Kirn v. Cape Girardeau & C. R. Co., 124 Mo. App. 271 4148
Kirschbaum v. Blair, 98 Va. 35 2752, 2755
Kirschmann v. Lediard, 61 Barb. 573 2305, 2309, 2331, 2333
Kirtland v. Molton, 41 Ala. 548 2329
Kirton v. Braithwaite, 1 M. & W. 310 785, 794
v. North Chicago St. R. Co., 91 Ill. App. 554 4655, 4774
Kirwan v. Kirwan, 4 Tyrwh. 491 754
Kirwane v. Blake, 4 Brown P. C. (Toml. ed.) 532 1573
Kiser v. Lovett, 106 Ind. 325 1763
v. Metropolitan St. R. Co., 188 Mo. App. 169 5051
v. Ruddick, 8 Blackf. 382 677
Kishlar v. Southern Pac. R. Co., 134 Cal. 636 4048
Kiskadden v. Allen, 7 Colo. 206 2779
Kissenger v. Fitzgerald, 152 N. C. 247 3418, 3419
Kissick v. Bolton, 134 Iowa 650 730
Kist v. Atkinson, 2 Camp. 63 517, 2582
Kistler v. Mosser, 140 Pa. 367 1062
Kitchell v. Schneider, 180 Ind. 589 791, 796, 818
Kitchen v. Branch Bank, 14 Ala. 233 958
v. Campbell, 2 W. Bl. 827 372
v. Fenelon, Newf. Rep. (1884-1896) 740 3139
v. Greenabaum, 61 Mo. 110 18
Kitchen Bros. H. Co. v. Philbin, 2 Neb. (Unof.) 340 284, 3182, 3208, 3258
Kitchenman v. Skeel, 3 Ex. 49 1529
Kitchens v. Ryner, 8 Ga. App. 587 4398, 4426
Kitchin v. Oregon N. Co., 65 Ore. 20 1093, 1418, 2378, 2404, 2445
Kittel v. Augusta, etc., R. Co., 84 Fed. 386 1117
Kittel's Est., 156 Pa. 445 1070
Kittera's Est., 17 Pa. 416 578
Kittle v. Huntley, 67 Hun 617 1439
Kittredge v. Holt, 58 N. H. 191 373
v. Peaslee, 3 Allen 235 3097
Kittrell v. Irwin (Tex. Civ. App.), 149 S. W. 199 3826
Kitzinger v. Sanborn, 70 Ill. 146 2276, 2309
Kivett v. Western U. Tel. Co., 156 N. C. 296 3635
Kjelsberg v. Chilberg, 177 Fed. 109 250, 3188, 3192
Klages v. Philadelphia & R. T. Co., 150 Pa. 386 1064, 4151
Klair v. Philadelphia, etc., R. Co., 2 Boyce (Del.) 274 3334, 3387, 3400, 3414, 3430
v. Wilmington S. Co., 4 Penne. 51 3414
Klass C. Co. v. Wabash R. Co., 80 Mo. App. 164 3346, 3357
Klassing v. Pavlovski, 134 Ga. 815 4219
Klauber v. Biggerstaff, 47 Wis. 551 596, 1890
Klauck v. Federal Ins. Co., 131 App. Div. (N. Y.) 519 536, 2893
Klauder v. McGrath, 35 Pa. 128 433, 444, 3940
Kleczewski v. Chicago City R. Co., 152 Ill. App. 481 1493
Kleeb v. McInturff, 71 Wash. 419 797, 1452
v. McInturff, 62 Wash. 508 2392, 2404
Kleiderer & Son v. Aldridge's Ex'x, 160 Ky. 638 2596, 2598, 2644, 2646, 2669
Klein v. Burleson, 138 App. Div. (N. Y.) 405 1372
v. Jewett, 26 N. J. Eq. 474 222, 3472, 3487, 3515
v. Klein (Ky.), 101 S. W. 382 1379
v. Pollard, 149 Mich. 200 4843
v. St. Louis T. Co., 117 Mo. App. 691 4169, 4195
v. Thompson, 19 Ohio St. 569 4730, 4733
Kleiner v. Third Ave. R. Co., 162 N. Y. 193 1382
Kleinpeter v. Castro, 11 Cal. App. 83 152, 1605
Kleppner v. Lemon, 198 Pa. 581 3115
v. Lemon, 197 Pa. 430 3115
v. Pittsburgh, etc., R. Co., 247 Pa. 605 3961, 3963, 4043
Klepsch v. Donald, 4 Wash. 436 4859, 4866
Kleven v. Great Northern R. Co., 70 Minn. 79 3444, 3495, 3529
Klewin v. Bauman, 53 Wis. 244 4521, 4543
Kleybolte v. Buffon, 89 Ohio St. 61 1261, 4776
Kliegel v. Aitken, 94 Wis. 432 4744
Klinck v. Colby, 46 N. Y. 427 4543, 4570
Klindt v. Higgins, 95 Iowa 529 687
Kline v. Central Pac. R. Co., 37 Cal. 400 1338
v. Guaranty Oil Co., 167 Cal. 476 3186
v. Kline, 158 Ind. 602 162, 168
v. McCandless, 139 Pa. 223 480, 4198, 4216
v. Miller, 107 Va. 453 706
v. Ragland, 47 Ark. 111 725, 735
v. Santa Barbara C. R. Co., 150 Cal. 741 1384, 1425, 4703
v. Shuler, 8 Ired. 484, 486 4607
v. Western U. Tel. Co., 4 Ohio Dec. 224 3642
v. Wood, 9 S. & R. 294 1527
Kling v. Sejour, 4 La. Ann. 128 2099
v. Torello, 87 Conn. 301 4849
Klingle v. Ritter, 54 Ill. 140 895
Klingman v. Holmes, 54 Mo. 304 1269
v. Racine Sattley Co., 143 Iowa 435 260
v. Racine-S. Co., 149 Iowa 634 3208, 3230, 3231

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Klinkert v. Fulton S. & M. Co., 113 Wis. 493 4285, 4312, 4316, 4317, 4334
Klock v. Robinson, 22 Wend. 157 1051, 1053, 1248
Klopfer v. Bromme, 26 Wis. 372 1391, 4968
Klopp v. Chicago, etc., R. Co., 142 Iowa 474 3968, 3972, 3980, 3986
Klosterman v. United E. & P. Co., 101 Md. 29 2743
Kloths v. Hess, 126 Wis. 587 4510, 4545
Klumph v. Dunn, 66 Pa. 141 4522, 4527
Knadler v. Sharp, 36 Iowa 232 2160, 2176
Knaish v. Joline, 138 App. Div. (N. Y.) 854 152
Knapheide v. Jackson County, 215 Mo. 516 4108, 4138
Knapp v. Alexander E. L. Co., 145 Wis. 528 3734, 3735
v. Barnard, 78 Iowa 347 1426, 1695
v. Great Northern R. Co., 130 Minn. 405, aff'd 240 U. S. 464 5079
v. Guyer, 75 N. H. 397 4222
v. Lee, 3 Pick. 459 2198
v. Maltby, 13 Wend. 587 869, 884, 889, 899
v. Marlboro, 34 Vt. 234 2094, 2095, 2130
v. Pepsin S. Co., 137 Mo. App. 472 760
v. Roche, 94 N. Y. 329 682, 696, 774
v. Sioux City & P. R. Co., 65 Iowa 91 148
v. Sioux City & P. R. Co., 71 Iowa 41 1477, 4731, 4810
v. United States & C. Exp. Co., 55 N. H. 348 3379, 3395, 4279
v. Wallace, 4 N. Y. 477 2506
v. Wing, 72 Vt. 334 4981
Knapp & C. Mfg. Co. v. New York, etc., R. Co., 76 Conn. 311 3737, 3759
Knatchbull v. Hallett, 13 Ch. Div. 696 736
Knatz v. Wise, 16 Mont. 555 1036
Knauss v. Krueger B. Co., 142 N. Y. 70 2513
Knauss's Est., 148 Pa. 265 1081, 2471
Kneeland v. American L. & T. Co., 138 U. S. 509 1254
v. Fuller, 51 Me. 518 1958
v. Glenn, 73 Iowa 730 1639
v. Kurtz, 58 Pa. 480 2094
Knettle v. Crouse, 6 Watts 123 1079, 1086
Knickerbacker v. Colver, 8 Cow. 111 435
Knickerbocker v. Seattle, 69 Wash. 336 4110
Knickerbocker I. Co. v. Gardiner D. Co., 107 Md. 556 289, 354, 1259
v. Leyda, 128 Ill. App. 66 4672
v. Philadelphia, 246 Pa. 84 3961, 3963, 4133
Knickerbocker Ins. Co. v. Gould, 80 Ill. 388 943, 1032, 1089, 3021
Knickerbocker & Nevada S. M. Co. v. Hall, 3 Nev. 194 1525
Knife & S. Co. v. Hathaway, 27 Ohio C. C. 745, aff'd 72 Ohio 623 4923, 4941
Kniffen v. McConnell, 30 N. Y. 285 3663, 3671, 4524
Knight v. Abbott, 30 Vt. 577 803, 805
v. Beach, 7 Abb. Pr. (N. S.) 241 784, 1236
v. Bean, 22 Me. 531 2307
v. Beckwith C. Co., 6 Wyo. 500 4322
v. Carriage Co., 71 Fed. 662 430
v. Castle, 172 Ind. 97 2792
v. Charter, 22 W. Va. 422 2814
Knight v. Chicago, etc., R. Co., 122 Mo. App. 38 3811
v. Collings, 227 Ill. 348 1479
v. Continental Auto. Mfg. Co., 82 Conn. 291 4792
v. Donnelly, 131 Mo. App. 152 4940
v. Empire L. Co., 55 Fla. 301 3734
v. Eureka, etc., Ins. Co., 26 Ohio St. 664 3000
v. Foster, 39 N. H. 576 469
v. Gibbs, 3 Nev. & M. 467, 1 Ad. & E. 43 157, 4556, 4561
v. Hughes, 3 C. & P. 467 2855, 2863
v. Hunt, 5 Bing. 432 1827
v. Kerfoot (Ind. App.), 102 N. E. 983 660
v. Leighton, 110 Minn. 254 4395, 4400
v. McLean, 3 Brown Ch. 496 1563
v. Mantz, Ga. Dec. 22 1019
v. Mitchell, 3 Brev. 506 1008
v. Nelson, 117 Mass. 458 437
v. New York, etc., R. Co., 99 N. Y. 25, rev'g 30 Hun 415 76
v. Quincy, etc., R. Co., 120 Mo. App. 311 3424
v. Reese, 2 Dall. 182 1117
v. Sadtler L. & Z. Co., 75 Mo. App. 541, 550 4862, 4863
v. Supreme Court of Chosen Friends, 2 Silvernail 453, 631
v. Turner, 11 Ala. 636 2196
v. West Jersey R. Co., 108 Pa. 250 4952, 4954
Knights of Pythias v. Allen, 104 Tenn. 623 1091
Knights Templars & M.'s L. Ind. Co. v. Crayton, 110 Ill. App. 648 1089, 3082
Knightstown v. Homer, 36 Ind. App. 139 4170
v. Musgrove, 116 Ind. 121 108, 109
Knipe v. Blair [1900], 1 Irish 372 1564
Knisely v. Hire, 2 Ind. App. 86 3774
v. Leathe, 256 Mo. 341 2506
Knitson v. Moe Bros., 72 Wash. 290 1506
Knittel v. Schmidt, 16 Tex. Civ. App. 7, 10 4691
Knobell v. Fuller, Norris' Peake Add. Cas. 32 470, 4583
Knohlauch v. Foglesong, 37 Minn. 320 2801
v. Kronschnabel, 18 Minn. 300 2271
Knoch v. Haizlip, 163 Cal. 146 290, 2982, 2992
Knoche v. Knoche, 160 Mo. App. 257 1318, 1379, 4668
Knock v. Tonopah & G. R. Co., — Nev. —, 145 Pac. 939 4809
Knoefel v. Atkins, 40 Ind. App. 428 4833
Knopf v. Morel, 111 Ind. 570 2855, 2871
Knopp v. American Car & Foundry Co., 186 Ill. App. 605 5196
Knost v. Van Hoose, 182 Mo. App. 40 2598, 2648
Knoth v. Barclay, 8 Colo. 300 4087
Knott v. Burwell, 96 N. C. 272 4594
v. Cottee, 16 Beav. 77 1123
Knouff v. Logansport, 26 Ind. App. 202 104
Knowing v. Manly, 2 Abb. Pr. (N. S.) 377 781
Knowlden v. Guardian P. & P. Co., 69 N. J. L. 670 4508, 4511
Knowles v. Armstrong, 15 Kan. 371 1814, 1910
v. Elyton L. Co., 88 Ga. 642 4363
v. Kennedy, 82 Pa. 445 2087
v. Knowles, 128 Ill. 110 746
v. New York, etc., R. Co., 164 N. Y. App. Div. 711 5067

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Knowles v. Norfolk S. R. Co., 102 N. C. 59 1268
v. Pennsylvania R. Co., 175 Pa. 623 3934
v. Sandercock, 107 Cal. 629 1077
v. Steele, 59 Minn. 452 285, 3189
Knowlson v. Piehl, 130 Mich. 597 2343
Knowlton v. Black, 102 Me. 503 749
v. Fitch, 48 Barb. 593, 52 N. Y. 288 2946, 2965
v. Mackay, 29 Up. Can. C. P. 601 862, 889
v. McMahon, 13 Minn. 386 1482
v. Milwaukee City R. Co., 59 Wis. 278 19, 148
v. New York, etc., R. Co., 147 Mass. 606 383
v. Oliver, 28 Fed. 516 2260
Knox v. American R. M. Co., 236 Ill. 437 4711
v. Gerhauser, 3 Mont. 267 663
v. Great Western Q. M. Co., 6 Sawyer 430 4460, 4465, 4466
v. Gregorious, 43 Kan. 26 1530
v. Jones, 2 Dall. 193 1008
v. Kearns, 73 Iowa 286 1639, 1643, 1651
v. Lee (Legal Tender Cases), 12 Wall. 457 601, 797
v. Light, 12 Ill. 86 822
v. Robbins (Tex. Civ. App.), 151 S. W. 1134 1472, 4681, 4690
v. Singmaster, 75 Iowa 64 3104
Knox R. B. Co. v. Grafton S. Co., 64 Ohio St. 361, 16 Ohio C. C. 21 844, 883, 909
Knoxville T. Co. v. Lane, 103 Tenn. 376, 389 1276, 1333, 1343, 3468, 3482, 3501, 3507, 3509
Knuckey v. Butte E. R. Co., 45 Mont. 106 1511
Knudsen v. Muskegon, 158 Mich. 185 4744
Knudston v. Schjelderup, 98 Minn. 531 2301
Knut v. Nutt, 83 Miss. 265 2489
Knutson v. Knapp, 35 Wis. 86 2539
Kobiter v. Albrecht, 82 Wis. 58 4393
Koch v. Fox, 71 App. Div. (N. Y.) 288 162
v. Godshaw, 12 Bush 318 2275
v. Hebel, 32 Mo. App. 110 2517
v. Peters, 97 Wis. 492 434, 440
v. Roth, 150 Ill. 212, 226 703
v. Sackman P. I. Co., 9 Wash. 405 3761, 3765, 3898, 3899
v. Schuylkill County, 12 Pa. Super. Ct. 567 1042
v. Streuter, 218 Ill. 546 926, 929
v. Williams, 82 Wis. 186 2465, 2471, 2548
Koch's App., 93 Pa. 434 3113
Kochmann v. Baumeister, 73 App. Div. (N. Y.) 310 1431
Kock v. Emmerling, 22 How. 69 2475
Koehler v. Buhl, 94 Mich. 496 790
Koehne v. New York, etc., R. Co., 32 App. Div. (N. Y.) 419 4705
Koehring M. Co. v. Chicago Builders' S. Co., 177 Ill. App. 100 262
Koehringer v. Muemminghoff, 60 Mo. 406 936
Koelsch v. Philadelphia Co., 152 Pa. 355 67
Koeltz v. Blackman, 46 Mo. 320 1513, 2684
Koenig v. Bramlett, 20 Mo. App. 636 2821
v. Truscott B. Mfg. Co., 155 Mo. App. 685 2214
Koenke v. Bauer, 162 Mo. App. 718 4962, 4970
Koenigkraemer v. Missouri G. Co., 24 Mo. App. 124 2561
Koenigs v. Jung, 73 Wis. 178 3827
Koennecke v. Seaboard A. L. Ry., 101 S. C. 86 aff'd 239 U. S. 352 5129
Koepp v. National E. & S. Co., 151 Wis. 302 1504
Koerber v. Patek, 123 Wis. 453 2, 343, 3652
Koerner v. Oberly, 56 Ind. 284 1305, 4675, 4777
Koestel v. Cunningham, 97 Ky. 421 1288
Koestenbader v. Pierce, 41 Iowa 204 2105, 2153
Kofoed v. Gordon, 122 Cal. 315 813
Kohai v. Macdonald, 9 New Zeal. L. R. 221 4255
Kohl v. Lindley, 39 Ill. 195 2225, 2373, 2375
v. Taylor, 62 Wash. 678 4376
v. United States, 91 U. S. 367 3146
Kohler v. Matlage, 72 N. Y. 259 2893
v. Smith, 2 Cal. 597 962, 963
Kohlhoss v. Mobley, 102 Md. 199 4977
Kohlsaat v. Crate, 144 Ill. 14 1714
v. Crate, 50 Ill. App. 552 1759
Kohn v. Dravis, 94 Fed. 288 4285, 4287, 4289, 4292
v. Kelly, 76 N. J. Eq. 132 995
Kohne v. Insurance Co., 1 Wash. C. C. 93 4279
v. White, 12 Wash. 199 3236, 3240, 3248
Kokomo v. Mahan, 100 Ind. 242 3948
Kokomo S. Co. v. Inman, 134 N. Y. 92 2231
Kolb v. Bankhead, 18 Tex. 229 3737, 3773, 3827
v. O'Brien, 86 Ill. 210 1281
v. St. Louis T. Co., 102 Mo. App. 143 1480
v. Southern R. Co., 81 S. C. 536 200, 3322, 3323
Kolka v. Jones, 6 N. D. 461 4609, 4610, 4619
Kollitz v. Equitable Mut. F. Ins. Co., 92 Minn. 234 801
Kolsch v. Jewell, 21 App. Div. (N. Y.) 581 3677
Komp v. Raymond, 175 N. Y. 102 699
v. Raymond, 42 App. Div. (N. Y.) 32 761
Kompass v. Light, 122 Mich. 86 4634, 4645
Komuk, The, 120 Fed. 841 4987
Koneman v. Seymour, 176 Ill. App. 629 3190, 3191, 3196, 3201
Konitzky v. Meyer, 49 N. Y. 571 2217, 2826, 2831
Koon v. Greenman, 7 Wend. 121 542, 2709
v. Munro, 11 S. C. 139 1131
v. Snodgrass, 18 W. Va. 320 819
Koons v. Miller, 3 W. & S. 271 1009
v. St. Louis, etc., R. Co., 65 Mo. 592 155
Koonz v. Hempy, 142 Iowa 337 3751
Koosa v. Warten, 158 Ala. 496 1441, 4168
Kopczynski v. Bolcom-V. L. Co., 71 Wash. 93 172, 475, 2352
Kopelke v. Kopelke, 112 Ind. 435 1148, 1181, 1184
Kopp v. Northern Pac. R. Co., 41 Minn. 310 3762
Koppang v. Steenerson, 100 Minn. 239 2797
Koppe v. Groginsky (Tex. Civ. App.), 132 S. W. 984 1918

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Korab v. Chicago, R. I. & P. R. Co., 165 Iowa 1 4907, 4908
Korber v. Dime Sav. Bank, 134 App. Div. (N. Y.) 149 1385
Korf v. Lull, 70 Ill. 420 2626
Korne v. Korne, 30 W. Va. 1 758
Kornegay v. Georgia State B. & L. Ass'n, 91 Miss. 551 639
v. White, 10 Ala. 255 1134, 2421
Korrady v. Lake Shore, etc., R. Co., 131 Ind. 261 1395
Kortright v. Buffalo Com. Bank, 20 Wend. 91, aff'd 24 Wend. 248 2311
v. Cady, 21 N. Y. 343 785, 793, 816, 826
Kortz v. Carpenter, 5 Johns. 120 2096
Korzib v. Netherlands-Am. S. N. Co., 175 Fed. 998 4652
Koshkonong v. Burton, 104 U. S. 668 1209
Kossler v. Pittsburg, etc., R. Co., 208 Pa. 50 4037, 4127
Kost v. Ashland, 236 Pa. 164 4929, 4930
v. Bender, 25 Mich. 515 1818
Kostendader v. Pierce, 37 Iowa 645 2182
Koster v. Seney, 99 Iowa 584 4646
Kostopolos v. Pezzetti, 207 Mass. 277 3199, 3210
Kotz v. Illinois Cent. R. Co., 188 Ill. 578 13, 4146
Kountz v. Gates, 78 Wis. 415 2926
v. Kirkpatrick, 72 Pa. 376 2298
v. Toledo, etc., R. Co., 189 Fed. 494 1477, 4861, 4872
Kountze v. Kennedy, 147 N. Y. 124 4385
v. Omaha H. Co., 107 U. S. 378 1558, 1770, 1771, 1778
Kovacs v. Mayoras, 175 Mich. 582 4528, 4582
Kover v. White, 6 Tex. Civ. App. 381 4296
Kraber v. Union Ins. Co., 129 Pa. 8 2916
Krach v. Heilman, 53 Ind. 517 158
Kraemer v. Metropolitan St. R. Co., 51 App. Div. (N. Y.) 475 4815
Kraft v. Auw, 192 Ill. 547 1806
v. Fancher, 44 Md. 204 2835
Krakowski v. Aurora, etc., R. Co., 167 Ill. App. 469 1505, 4656, 4665, 4716, 4718, 4736, 4834
Kramer v. Bjerrum, 19 App. Div. (N. Y.) 432 4386
v. Carter, 136 Mass. 504 2158
v. Goodlander, 98 Pa. 353 3781, 3830
v. Greenville, etc., R. Co., 94 S. C. 59 1288
v. Messner, 101 Iowa 88 194
v. Ricksmeier, 159 Iowa 48 117
v. San Francisco St. R. Co., 25 Cal. 434 4846
v. Winslow, 130 Pa. 484 2902
v. Wolf C. S. Co., 99 Tex. 597 2558, 2565
Kramer's App., 37 Pa. 71 2867
Krapp v. Aderholt, 42 Kan. 247 1072
Krasilnikoff v. Dundon, 8 Cal. App. 406 1093, 2406, 2423
Kraus v. Arnold, 7 Moore 59 804
v. Torry, 146 Ala. 548 1155, 1182
Krause v. Bishop, 18 S. D. 298 4644
v. Busacker, 105 Wis. 350 4380, 4383, 4390
v. Modern Woodmen, 133 Iowa 199 3083
v. Rutherford, 45 App. Div. (N. Y.) 132 1733
Krause v. Spiegel, 94 Cal. 370 4614
Krauss v. Ballinger, 171 Ill. App. 534 1475
Krausse v. Greenfield, 61 Ore. 502 832, 2348
Krbel v. Krbel, 84 Neb. 160 775
Kreamer v. Irwin, 46 Neb. 827 2697
Krebs v. Bambrick C. Co., 144 Mo. App. 649 3877, 3881, 3884, 3887, 3901, 3912
v. Blatz, 134 Ky. 505 725
v. Security T. & L. Ins. Co., 156 Fed. 294 3086
Krebs H. Co. v. Livesley, 59 Ore. 574 384, 2236, 2243, 2255
Krebs Mfg. Co. v. Brown, 108 Ala. 508 172
Krehbiel v. Henkle, 152 Iowa 604 165, 344, 357, 3819, 4609
Kreibohm v. Yancey, 154 Mo. 67 1485, 4352
Kreider's Est., 18 Pa. 374 1480
Kreiter v. Nichols, 28 Mich. 496 1289, 1330
Krejci v. Chicago, etc., R. Co., 117 Iowa 344 3773, 3774, 3804
Kremer v. Chicago, etc., R. Co., 51 Minn. 15 3947, 3964, 4101, 4124
Krepp v. St. Louis, etc., R. Co., 99 Mo. App. 94 1965, 1981, 1989
Kress v. Lawrence, 158 Ala. 652 1267, 1329
v. Moscowetz, 105 Ark. 638 758
Kress's Est., 52 Pa. Super. 29 1653
Kretzinger v. Lewis, 174 Ill. App. 45 1360
Kreuger v. Sylvester, 100 Iowa 647 1360
Krhut v. Phares, 80 Kan. 515 2511, 2902
Kribs v. Jones, 44 Md. 396 368, 2309
Kriger v. Leppel, 42 Minn. 6 2517
Krilling v. Cramer, 152 Mo. 431 1997
Krisinger v. Creston, 141 Iowa 154 4738
Kroeger v. Good, 13 Idaho 184 2982
v. Passmore, 36 Mont. 504 4795
v. Pitcairn, 101 Pa. 311 2979, 2986
Kroener v. Chicago, etc., R. Co., 88 Iowa 16 4804
Krohn v. Oechs, 48 Barb. 127 3410
Krolik v. Curry, 148 Mich. 214 437
Kroll v. Chicago, etc., R. Co., 150 Ill. App. 438 4913
Krom v. Schoonmaker, 3 Barb. 647 57, 354, 1287
v. Heim, 75 N. Y. 574 763
Kronenberger v. Binz, 56 Mo. 121 813
Kronold v. New York, 186 N. Y. 40 4695
Kronschnable v. Knoblauch, 21 Minn. 56 2305
Kropidlouski v. Pfister & V. L. Co., 149 Wis. 421 781
Krouse v. Deblois, 1 Cranch C. C. 156 2524
v. Detroit United R. Co., 170 Mich. 438 4814
Kruck v. Wilbur L. Co., 148 Wis. 76 4700
Kruegel v. Kitchen, 33 Wash. 214 1418, 2646
Krueger v. Chicago & A. R. Co., 94 Mo. App. 458 4705
v. Le Blanc, 62 Mich. 70 1368, 3803
v. Union G. & E. Co., 163 Ill. App. 486 4934
Krug v. Pitass, 162 N. Y. 154 4504, 4508, 4546
v. Ward, 77 Ill. 603 306, 4606, 4627
Krulder v. Ellison, 47 N. Y. 36 2227
Krulevitz v. Eastern R., 140 Mass. 573 1331

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Krumbhaar v. Stetler, 20 Phila. 341 1675
Krumm v. Beach, 96 N. Y. 398, 25 Hun 293 2209, 4382, 4392, 4410
Krutz v. Robbins, 12 Wash. 7 871, 918
Krzyszke v. Kamin, 163 Mich. 290 4605
Kucheman v. C., C. & D. R. Co., 46 Iowa 366 4016
Kucera v. Merrill L. Co., 91 Wis. 637 4744
Kuechle v. Springer, 145 Ill. App. 127 209, 4389, 4424
Kuehne P. Co. v. Allen, 148 Fed. 666 1280, 1396, 4868
Kuelling v. Lean Mfg. Co., 183 N. Y. 78 56, 99, 4371, 4374, 4387
Kuenzi v. Elvers, 14 La. Ann. 391 1905
Kuerzi v. Scott, 74 N. J. Eq. 218 1874
Kuffersmith v. Delaware Ins. Co., 84 N. J. L. 271 3047
Kugler v. Wiseman, 20 Ohio 361 2693, 2711
Kuhl v. Chamberlain, 140 Iowa 546 1560, 2754
Kuhlman v. Wieben, 129 Iowa 188 820, 1499
Kuhmis v. Lewis River B. & L. Co., 51 Wash. 196 3924
Kuhn v. Bercher, 114 La. 602 701
v. Chicago, etc., R. Co., 74 Iowa 137 1322
v. Freeman, 15 Kan. 423 1955
v. McKay, 7 Wyo. 42 1093, 1097, 2275, 2318
v. Myers, 37 Iowa 351 871, 876
v. Morrison, 75 Fed. 81 1166, 1177
v. Spellacy, 3 Lea 278 1659
Kuhne v. Ahlers, 45 N. Y. Misc. 454 4504
Kuhnert v. Angell, 10 N. D. 59 2995
Kuhns v. Chicago, etc., R. Co., 65 Iowa 528 809
Kujek v. Goldman, 150 N. Y. 176, 9 N. Y. Misc. 34 3, 4373, 4432
Kuker v. McIntyre, 43 S. C. 117 721
Kulberg v. National Council Knights & Ladies of Security, 124 Minn. 437 3084
Kumberger v. Congress S. Co., 158 N. Y. 339, 345 476
Kumli v. Southern Pac. Co., 21 Ore. 505 1495
Kunkel v. Markell, 26 Md. 390 4524
v. Roberts, 16 Pa. Dist. 179 858
v. Utah L. Co., 29 Utah 13 3736, 3813
v. Wherry, 189 Pa. 198 833, 894
Kunsman v. Harris, 6 Northampton Co. Rep. 230 1462
Kuntz v. Schnugg, 99 App. Div. (N. Y.) 191 1941
Kunz v. Boll, 140 Wis. 69 2793
Kupfer v. Bank, 34 Ill. 328 606
Kupferschmid v. Southern E. R. Co., 70 Mo. App. 438 4732
Kupfert v. Guttenberg B. Ass'n, 30 Pa. 465 708, 986
Kurinsky v. Lynch, 201 Mass. 28 2511
Kurpgeweit v. Kirby, 88 Neb. 72 339, 347, 1511
Kurtz v. Frank, 76 Ind. 594 3663, 3688
v. Robbins, 12 Wash. 7 876
v. Sponab'e, 6 Kan. 395 868
v. Suppiger, 18 Ill. App. 630 939, 946, 947
Kushes v. Ginsburg, 99 App. Div. (N. Y.) 417 3251
Kusmir v. Pressed Steel C. Co., 201 Fed. 146 4794
Kuter v. Michigan Cent. R. Co., 1 Biss. 35 3534
Kutner v. Fargo, 20 N. Y. Misc. 207 4607
Kutz v. McCune, 22 Wis. 628 2059, 2150
Kuula v. Moose Mountain Limited, 26 Ont. L. R. 332 429
Kyd v. Cook, 56 Neb. 71 266, 4180, 4191, 4195, 4267
Kyes v. Valley Tel. Co., 132 Mich. 281 4656, 4849
Kyle, Ex parte, 1 Cal. 332 591, 592
Kyle v. Caravello, 103 Ala. 150 4291
v. Chicago, etc., R. Co., 182 Fed. 613 78, 3483
v. Fauntleroy, 9 B. Mon. 620 2133
v. Kyle, 67 N. Y. 400 3725
v. Laurens R. Co., 10 Rich. 382 3394
v. Pou, 96 Ga. 166 2565
v. Roberts, 6 Leigh 495 1068
Kyles v. Southern R. Co., 147 N. C. 394 343, 1340, 4158, 4163
Kytle v. Kytle, 128 Ga. 387 1357

L

L. Memphis v. Woodward, 12 Heisk. 499 694
L. P. & J. A. Smith Co. v. United States, 34 Ct. of Cls. 472 860, 865
L. W. Perry, The, 71 Fed. 745 2724, 2731, 2735
Labadie v. Hawley, 61 Tex. 177 2994
Labahn B. Co. v. Hecht, 169 Ill. App. 447 1360
Labaree v. Klosterman, 33 Neb. 150 2773
Labasse v. Piat, 121 La. 601 3907
La Baw v. Hawkins, 2 Bann. & Ard. 561 4441, 4459
Labbe v. Bernard, 196 Mass. 551 2852, 2866
La Belle v. Grand Central M. Co., 172 Ill. App. 582 3209
La Bourgogne, In re, 117 Fed. 261 4846
La Bourgogne, 144 Fed. 781 3438, 3536
Labowitz v. Frankfort, 4 Misc. (N. Y.) 275 2661
Laboyteaux v. Swigart, 103 Ind. 596 753
Labrador, The, 39 Fed. 503 2729
Lacas v. Detroit City R. Co., 92 Mich. 412 1472, 4738
La Casse v. New Orleans, etc., R. Co., 135 La. 129 5049, 5132
Lacey v. Davis, 126 Iowa 675 1714
v. John Mowlem & Co., [1914] W. C. & Ins. Rep. 63, 7 B. W. C. C. 135 5202
v. Kinaston, 1 Ld. Raym. 688, 12 Mod. 551 773
v. Marnan, 37 Ind. 168 1996, 2060, 2066, 2069
v. Mitchell, 23 Ind. 67 4635
v. Oregon R. & N. Co., 63 Ore. 596 3418, 3430
La Champagne, 53 Fed. 398 5003, 5008, 5010, 5013
La Chapelle v. Warehouse & Builders' S. Co., 95 Wis. 518 4212
Lachner v. Adams Exp. Co., 72 Mo. App. 13 3385, 3397, 3403
Lack v. Brecht, 166 Mo. 242 4212
Lackawanna, The, 151 Fed. 499 4990
Lack'and v. Renshaw, 256 Mo. 133 2758
La Compania General de Tabacos, etc., v. Araza, 7 Philip. Isl. 455 1110
La Conner T. & T. Co. v. Widmer, 136 Fed. 177 3381, 3393, 3401
Laconte v. Kenosha, 149 Wis. 343 4856
Lacorazza v. Cantalupo, 127 C. C. A. 459, 210 Fed. 875 4778
Lacoste v. Splivalo, 64 Cal. 35 1648

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Lacour v. Mayor, 3 Duer 406 257, 3209, 3214
LaCoursier v. Russell, 82 Wis. 265 2542
La Crosse P. Co. v. Brooks, 142 Wis. 640 2373
Lacs v. Everard's Breweries, 61 App. Div. (N. Y.) 431 1468
Lacy v. Getman, 119 N. Y. 109 2529, 2534, 2536, 2556
v. Holbrook, 4 Ala. 88 1886
v. Johnson, 58 Wis. 414 4285
v. Kynaston, 2 Salk. 575, 12 Mod. 548, 1 Ld. Raym. 688 773, 780, 781, 782
v. Osbaldiston, 8 C. & P. 80 2526
v. Stemper, 27 Gratt. 42 1228
v. Winn, 4 Pa. Dist. 409 4179
Lacy Mfg. Co. v. Los Angeles G. & E. Co., 12 Cal. App. 37 2481, 2667, 2670
Ladd v. Bedle, 12 Wyo. 362 1281
v. Boston, 151 Mass. 285 3946
v. Blunt, 4 East 402 633
v. Chamber of Commerce, 37 Ore. 49 2851, 2852
v. Foster, 12 Sawyer 547, 31 Fed. 827 4947
v. Hawkes, 41 Ore. 247 3118, 3237, 3257
v. Lord, 36 Vt. 194 2429, 2438
v. Mason, 10 Ore. 308 804
v. Newell, 34 Minn. 107 4203
v. Ney, 36 Tex. Civ. App. 201 4236, 4238
v. Patten, 1 Cranch C. C. 263 802
v. Prentice, 14 Conn. 109 1658
v. Putnam, 79 Me. 568 2198
v. Redle, 12 Wyo. 362 40
Ladies' B. Ass'n v. Robbins, 1 Mart. Ch. 134, 152 273
Ladner v. Balsley, 103 Iowa 674 3236, 3243
Ladoga C. Co. v. Corydon C. Co., 52 Ind. App. 23 32, 2276
Ladue v. Seymour, 24 Wend. 60 542, 2666, 2670
La Duke v. Exeter, 97 Mich. 450 1368, 1377
La Du-King Mfg. Co. v. La Du. 36 Minn. 473 2466, 2517, 2528
Ladwig v. Heyer, 136 Iowa 196 4519, 4520, 4585
v. Supreme Assembly Equitable Fraternal Union, 125 Minn. 72 1413
Lady Worsley, The, 2 Spinks 253 2737
Laetz v. Tierney, 153 Mich. 279 40
Laevison v. Baird, 91 Ky. 204 2029, 2205
La Farge v. Kneeland, 7 Cow. 456 2993
v. Mansfield, 31 Barb. 345 3128
La Farge Ins. Co. v. Bell, 22 Barb. 54 572, 574
Lafargue v. Harrison, 70 Cal. 380 2746
La Favorite R. Mfg. Co. v. Channon Co., 113 Ill. App. 491 259
Lafayette v. James, 92 Ind. 240 2756
v. Nagle, 113 Ind. 425 400, 1444
Lafayette Ben. Soc. v. Lewis, 7 Ohio 81 986
La Fayette County M. Co. v. Magoon, 73 Wis. 627 666
La Fayette G. Co. v. Kelsay, 164 Ind. 563 673, 684
LaFayette R. Co. v. New Albany, 13 Ind. 90 399
Lafayette, etc., R. Co. v. Murdock, 68 Ind. 137 4103
v. Winslow, 66 Ill. 219 1419, 1443, 2305, 4013, 4017, 4030
Lafferty v. Hannibal, etc., R. Co., 44 Mo. 291 76
Lafferty v. Jelley, 22 Ind. 471 2902
v. Milligan, 165 Pa. 534 2146, 2158
v. Schuylkill River, etc., R. Co., 124 Pa. 297 4088, 4093
Laffoon v. Kerner, 138 N. C. 281 2821
Lafitte & Co., In re, 23 Week. Rep. 379 1941
Lafler v. Fisher, 121 Mich. 60 1290, 4679
Laflin v. Chicago, etc., R. Co., 33 Fed. 415 3978, 4028, 4033, 4049, 4135
v. Pomeroy, 11 Conn. 440 2779
v. Willard, 6 Pick. 64 34, 39, 1620
Lafontain v. Hayhurst, 89 Me. 388 2467, 3672
La France v. Krayer, 42 Iowa 143 448
Lafrentz v. Cavanagh, 166 Ill. App. 306 760
Lahaina, 19 Fed. 923 2732
La Hesbaye, 71 Fed. 742 2726
Lahiff v. St. Joseph's Total A. & B. Soc., 76 Conn. 648 2, 347
Lahr v. E. R. Co., 104 N. Y. 268 4084
v. Metropolitan E. R. Co., 104 N. Y. 268 401, 4081, 4084, 4085, 4096
Lahrman v. Bauman, 76 Neb. 846 1826
Laidley v. Merrifield, 7 Leigh 346 1051
Laing v. Barclay, 3 Stark 38 1903
v. Colder, 8 Pa. 479 3472, 3491, 3495, 4732
v. Fidgeon, 4 Camp. 169, 6 Taunt. 108 2376
v. Meader, 1 C. & P. 257 800, 809
v. Mitten, 185 Mass. 233 4616, 4619
v. Nelson, 40 Neb. 252 4559
v. Nelson, 41 Minn. 522 4173
v. Stone, 2 M. & Ry. 561 1880
v. United Jersey R. & C. Co., 54 N. J. L. 576 4136
Lair v. Jelf, 3 Dana 181 1059, 1061
Laird v. Chicago, etc., R. Co., 100 Iowa 336 4699, 4715
v. German Sav. Bank of Lake Park, 167 Iowa 187, 149 N. W. 90 1119
v. Laird, 127 Mich. 24 2647
v. Piedmont Mut. F. Ins. Co., 82 S. C. 424 1450
v. Pim, 7 M. & W. 474 1936, 1937, 1940
v. Pittsburg T. Co., 166 Pa. 4 3451
v. State, 61 Me. 311 1891
v. Taylor, 66 Barb. 143 4644
Lai Say v. Kaaahu, 10 Hawaii 499 2134
Laishley v. Goold B. Co., 6 Ont. L. R. 319 258, 261
Lake, In re [1903], 1 K. B. 439 369
Lake v. Campbell, 5 L. T. Rep. 582 2547
v. Hargis, 82 Kan. 711 1660, 1670
v. Park, 19 N. J. L. 108 1117
v. Merrill, 10 N. J. L. 288 1358
v. Milliken, 62 Me. 240 161
Lake Drummond C. & W. Co. v. West End T. & S. D. Co., 142 Fed. 41 1416, 2898
Lake Erie T. Co. v. Gilchrist T. Co., 142 Fed. 89 4987
Lake Erie, etc., R. Co. v. Arnold, 8 Ind. App. 297 3465
v. Bradford, 15 Ind. App. 655 1288
v. Chriss, 57 Ind. App. 145 4926, 4927, 4929, 4939, 4940
v. Close, 5 Ind. App. 444 3450, 3461, 3482
v. Commissioners, 63 Ohio St. 23 4030, 4061
v. Falk, 62 Ohio St. 297 489
v. Fix, 88 Ind. 381 341, 3461, 3474, 3476, 3482, 3518

[REFERENCES ARE TO PAGES]

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v. Hobbs, 40 Ind. App. 511 3774, 4176
v. Middlecoff, 150 Ill. 27 433
v. Oland, 49 Ind. App. 494 1382
v. Power, 15 Ind. App. 179 176
v. Purcell, 75 Ill. App. 573 3860, 3878
v. Rosenberg, 31 Ill. App. 47 3392
v. Tierney, 29 Ohio C. C. 83 2554
v. Wilson, 189 Ill. 89 1475
Lake Koen N., R. & I. Co. v. McLain L. & I. Co., 69 Kan. 334 4034, 4124, 4151
Lake Phalen L. & I. Co. v. Stees, 54 Minn. 471 1969
Lake Roland E. R. Co. v. Frick, 86 Md. 259 4108
Lake Shore C. Co. v. Modoc L. & L. Co., 130 Cal. 669 946
Lake Shore, etc., R. Co. v. Baltimore & O. R. Co., 149 Ill. 272 4110, 4119
v. Bennett, 89 Ind. 457 3329
v. Bradford, 15 Ind. App. 655 1267
v. Burtscher, 8 Ohio C. C. (N. S.) 137 4793
v. Chicago, 148 Ill. 509 4059
v. Chicago, 151 Ill. 359 4062
v. Chicago & W. I. R. Co., 100 Ill. 21 4073
v. Hochstim, 67 Ill. App. 514 3535
v. People, 46 Mich. 193 1065
v. Prentice, 147 U. S. 101 1260, 1266, 1331, 1333, 1338, 1339, 1344, 3511, 3512, 3514
v. Richards, 40 Ill. App. 560 2694
v. Richards, 126 Ill. 448 2698
v. Richards, 152 Ill. 59 413
v. Rosenzweig, 113 Pa. 519 1268, 1278, 1344, 3450, 3507, 3523
v. Schultz, 19 Ohio C. C. 39 4796
v. Scofield, 2 Ohio C. C. 305 3280
v. Teed, 2 Ohio Dec. 662 3473, 3475, 3482
v. Teeters, 166 Ind. 335 3334, 3438, 4721
v. Tierney, 8 Ohio C. C. (N. S.) 521, aff'd 53 Ore. 149 2551, 2561
v. Warren, 3 Wyo. 135 3536
Lake St. El. R. Co. v. Brooks, 90 Ill. App. 173 12
v. Gormley, 108 Ill. App. 59 335, 4652, 4672
v. Johnson, 70 Ill. App. 413 4830
v. Shaw, 203 Ill. 39 1472
Lake Superior, etc., R. Co. v. Greve, 17 Minn. 322 3998, 4094
Lakeland T. Co., In re, 103 Fed. 328 4989, 4996
Lakeman v. Grinnell, 5 Bosw. 625 1137, 3401, 3410
v. North Missouri T. Co., 147 Mo. App. 48 2804
v. Pollard, 43 Me. 463 2496, 2528, 2534
Lakeside Mfg. Co. v. Worcester, 186 Mass. 552 3993, 3999
Lakeside P. Co. v. State, 45 App. Div. (N. Y.) 112, 55 App. Div. (N. Y.) 208 231, 1042, 3889, 3902
Lakeside P. & P. E. Co. v. Campbell, 39 Fla. 523 684
Lakeside R. Co. v. Duluth St. R. Co., 78 Minn. 129 949
Lakin v. State, 89 Ind. 68 1619
Lallande v. Trezevant, 39 La. Ann. 830 1711, 1723, 1749
Lally v. Crookston L. Co., 85 Minn. 257 2459, 2517, 2518, 2522, 2548
v. Wise, 28 Cal. 539 1762
Lamb v. Buker, 34 Neb. 485 207, 2100
Lamb v. Camden, etc., R. Co., 46 N. Y. 371 3385
v. Chicago, etc., R. Co., 101 Wis. 138 3336
v. Danforth, 59 Me. 322 2124, 2188, 2189
v. Dart, 108 Ga. 602 1578
v. Day, 8 Vt. 407 4304
v. Goodwin, 10 Ired. 320 749
v. Gregory, 12 Neb. 506 773
v. Gulland, 44 Cal. 609 4643
v. Harbaugh, 105 Cal. 680 405, 416, 1388, 3823, 3824, 3829
v. Jeffrey, 41 Mich. 719 813
v. Kincaid, 38 Can. Sup. Ct. 516 361, 4210, 4264, 4266
v. O'Reilly, 13 N. Y. Misc. 212 4223
v. Rowman, 83 Miss. 45 1074
v. St. Louis, etc., R. Co., 33 Mo. App. 489 405
v. Shaw, 43 Minn. 507 1721, 1728
v. Stone, 11 Pick. 527 118, 4429
v. Stone, 95 Wis. 254 4774, 4790
v. Walker, 3 Q. B. Div. 389 393, 3760, 3914
v. West, 15 New South Wales, L. R. 120 4521, 4543
v. W. H. Mitchell & Co., 15 Ga. App. 759 3438
Lamb's Est., 11 Pa. Dist. 243 1071
Lambert v. Alcorn, 144 Ill. 313 1715, 1727, 1728, 1729
v. Craig, 12 Pick. 199 1503, 1509, 3527
v. Estes, 99 Mo. 604 2067, 2095, 2098, 2134
v. Giffin, 257 Ill. 152 4048, 4135
v. Haskell, 80 Cal. 611 1730, 1749, 1750, 1762, 3206
v. Jenkins, 112 Va. 376 2596, 2598
v. Lambert, [1910] 1 Irish 280 1080
v. McFarland, 2 Nev. 58 4328
v. Pharis, 3 Head 622 4530, 4574, 4576
v. Schmalz, 118 Cal. 33 959
v. Southern Exp. Co., 146 N. C. 321 3349
Lambert H. E. Co. v. Paschal, 151 N. C. 27 20
Lamberton v. Harris, 112 Ark. 503 746
Lambeth v. Southern P. Co., 152 N. C. 371 3964
Lambeth R. Co. v. Brigham, 170 Mass. 518 1011
Lambkin v. Southeastern R. Co., 5 App. Cas. 352 4795
Lamblin v. Nance, 2 Brev. 99 1051
Lambourne v. Halfin, 23 Utah 489 1481
Lamby v. Gage, 2 El. & B. 216 2526
Lamden v. St. Louis Southwestern Ry. Co., — Ark. —, 170 S. W. 1001 3473
Lame v. Wells, 7 Wend. 175 4581
La Mere v. Railway Transfer Co., 125 Minn. 159 5072, 5083
Lamerlee v. Barthelmy, 2 McGloin 106 2099, 2143
Lamerson v. Marvin, 8 Barb. 9 556, 1828, 2193
La Mesa Community Ditch v. Applezoeller, — N. M. —, 140 Pac. 1051 519, 531
Laming v. Peters S. Co., 71 Mo. App. 646 2547
Lamington, The, 86 Fed. 675 2729, 2731
Lamins v. Woods, 4 Ky. L. Rep. 365 2469
L'Amistad de Rues, 5 Wheat. 385, 5 L. ed. 115 2919

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v. Reese, 7 Ala. 170 1956
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Lammers v. Brennan, 46 Minn. 209 3934
v. Goodeman, 69 Ind. 76 586
Lammiman v. Detroit Citizens' St. R. Co., 112 Mich. 602 4732, 4738
Lammon v. Fusier, 111 U. S. 17 1600
Lamon v. Speer H. Co., 198 Fed. 53 172
Lamond v. Seacoast C. Co., 108 Me. 155 239, 3902
Lamont v. Canadian T. Co., 19 Ont. L. R. 291 3414, 3416
v. Wenger, 22 Ont. L. R. 642 1415, 4407, 4429
Lamoreaux v. Rolfe, 36 N. H. 33 2597, 2670
Lamos v. Snell, 6 N. H. 413 4530, 4573
La Motte v. Angle, 1 Hawaii 237 3301, 3387
Lamoure v. Carol, 4 Denio 370 1446
Lampert v. Judge & D. D. Co., 119 Mo. App. 693 32, 4494, 4496
v. Judge & D. D. Co., 238 Mo. 409 1288, 1324, 4494
Lamphear v. Buckingham, 33 Conn. 237 1400, 1404, 1408, 1537
Lamphere v. Glover, 60 Ill. App. 564 1723
Lamping v. Hyatt, 27 Cal. 102 1355
Lampkin v. Garwood, 122 Ga. 407 1367
v. Louisville & N. R. Co., 106 Ala. 287 460
Lampley v. Atlantic C. L. R. Co., 63 S. C. 462 3799, 3802, 3894
v. Weed, 27 Ala. 621 792
Lampman v. Brunning, 120 Iowa 167 4965
v. Cochran, 16 N. Y. 275 839, 856, 925
v. Cochran, 19 Barb. 388 889
Lampon v. Corke, 5 B. & Ald. 606 2067
Lamprell v. Bellericay Union, 3 Ex. 283 717
Lamprey v. Mason, 148 Mass. 231 943, 955, 1219
Lampton v. Usher, 7 B. Mon. 57, 66 1761
Lamson v. Great Northern R. Co., 114 Minn. 182 3468, 3502
v. Marshall, 133 Mich. 250 862, 929, 2684
Lamson & G. M. Co. v. Russell, 112 Mass. 387 569
Lanahan v. Heaver, 79 Md. 413 233, 2702, 2707, 2714
v. Ward, 10 R. I. 299 1206, 1218
Lanark v. Dougherty, 153 Ill. 163 1468
Lancashire Ins. Co. v. Bush, 60 Neb. 116 3009
v. Callahan, 68 Minn. 277 2796
Lancashire R. Co. v. Evans, 15 Beav. 322 399
Lancashire W. Co. v. Fitzhugh, 6 H. & N. 502 1629
Lancashire & Y. R. Co. v. Gidlow, L. R. 7 Eng. & Ir. App. Cas. 517 3322
Lancaster, The, 8 Prob. Div. 65 2729
Lancaster v. Connecticut Mut. L. Ins. Co., 92 Mo. 460 419
v. Frescoln, 192 Pa. 452 2755
v. Harrison, 4 M. & P. 561, 6 Bing. 726 783
v. Providence, & S. S. S. Co., 26 Fed. 233 1498
v. Southern R., 92 S. C. 177 3508
Lancaster Mills v. Merchants' C. P. Co., 89 Tenn. 155 2914
Lancaster & J. E. L. Co. v. Jones, 75 N. H. 172 34, 58, 3748, 3768
Lance v. Butler, 135 N. C. 419 361, 4232
Lancey v. Clark, 64 N. Y. 209 637
Lancoure v. Dupre, 53 Minn. 301 2008, 2026, 2029
Land v. Klein, 21 Tex. Civ. App. 3 4271, 4272
Land, L. & L. Co. v. Oneida County, 83 Wis. 649 1032
Land M. Co. v. Gillam, 49 S. C. 345 989
Land Title & T. Co. v. Fulmer, 24 Pa. Super. 256 1144
Landa v. Heermann, 85 Tex. 1 1789
v. Obert, 45 Tex. 539 223, 4623
Landau v. Cottrill, 159 Mo. 308 1957
v. New York, 180 N. Y. 48 3841, 3887
Lande v. Hyde, 66 N. Y. Misc. 258 284, 2284, 2288, 2298
Lander v. Castro, 43 Cal. 497 2983
Landes v. Eichelberger, 2 Tex. Civ. Cas. 127 1700, 4191
v. Matthews, 136 Mo. App. 637 2113, 2132
Landie v. Western U. Tel. Co., 124 N. C. 528 3608
Landis v. Saxton, 89 Mo. 375 827
v. Shanklin, 1 Ind. 92 4569
v. Wolf, 206 Ill. 392, 109 Ill. App. 44 238, 1720, 1728, 1750
Landon v. Watkins, 61 Minn. 137 4567
Landreth v. Wyckoff, 67 App. Div. (N. Y.) 145 2374, 2440
Landro v. Great Northern R. Co., 114 Minn. 162 3528
v. Great Northern R. Co., 117 Minn. 306 1469, 1511
Landrum v. Wells, 7 Tex. Civ. App. 625 1430
Landry v. Lake Charles, 125 La. 210 4025
Landsberger v. Magnetic Tel. Co., 32 Barb. 530 3597
Landsdale v. Cox, 7 T. B. Mon. 401 2853
Landsdowne v. Landsdowne, 2 Bligh 78 1888
Lane v. Atlantic Works, 11 Mass. 136 51
v. Atlantic Works, 107 Mass. 104 71
v. Atlantic Works, 111 Mass. 136 151, 4678
v. Barnard, 111 Va. 680 6
v. Concord, 70 N. H. 485 3848
v. Cook, 3 Day 255 386
v. Dayton, etc., Co., 101 Tenn. 581 761
v. Duchac, 73 Wis. 646 689
v. First Nat. Bank (Tex. Civ. App.), 155 S. W. 307 686
v. Fury, 31 Ohio St. 574 2117, 2137, 2143, 2145
v. Gluckauf, 28 Cal. 288 605
v. Hitchcock, 14 Johns. 213 1756
v. Holman, 145 Mass. 221 4794
v. Jones, 79 Ala. 156 725
v. Lantz, 27 Md. 211 2405, 2410
v. Mayer, 15 Ind. App. 382 2749
v. Mitchell, 153 Iowa 139 358
v. Montreal Tel. Co., 7 Up. Can. C. P. 23 3611
v. Northern Pac. R. Co., 119 Minn. 258 4893
v. Owings, 3 Bibb 247 452, 456, 780, 781

[REFERENCES ARE TO PAGES]

Lane v. Pennsylvania R. Co., 78 N. J. L. 672 4636
v. Pittsburg R. Co., 230 Pa. 29 4723
v. Ruhl, 103 Mich. 38 3147, 3707
v. Richardson, 104 N. C. 642 2149, 2156
v. Sharpe, 3 Scam. 566 1861
v. Sharpe, 4 Ill. 566 1853, 1856
v. Spence, 70 Neb. 204 4979
v. Spokane Falls & N. R. Co., 21 Wash. 119 1462
v. Storke, 10 Cal. App. 347 207
v. Taylor, 80 Ark. 469 2458
v. Thompson, 43 N. H. 320 3742
v. Turner, 114 Cal. 396 1102
v. Wentworth, 69 Ore. 242 767
v. Wilcox, 55 Barb. 615 4433
Lane County v. Oregon, 7 Wall. 71 603
Lanehart, Matter of, 32 App. Div. (N. Y.) 4 2459
Lang v. Brevard, 3 Strobh. Eq. 59 2816
v. De Luca, 108 La. 304 4634
v. Dietz, 93 Ill. App. 148 2464, 2473
v. Hill, 157 Mo. App. 685 3233
v. Lane, 83 Ill. App. 543 814, 815
v. Merbach, 96 Minn. 431 4395
v. Moole, 31 N. J. Eq. 413 1025, 1026
v. New York, etc., R. Co., 51 Hun 603 3516, 3525, 4768
v. Pennsylvania R. Co., 154 Pa. 342 3335
v. Pike, 27 Ohio St. 498 1788, 1801
v. Shaw, 6 Ga. App. 747 662
v. Waters, 47 Ala. 624 801
Langan v. Aetna Ins. Co., 99 Fed. 374 3030
v. Potter, 8 N. Y. Misc. 541 266
Langhein v. Swift, 121 Fed. 416 4797
Langdale v. Bowden, 139 Ga. 324 4219
Langden v. Stokes, Cro. Car. 383 764
Langdon v. Bowen, 46 Vt. 512 730, 736, 737, 738, 741
v. Bullock, 8 Ind. 341 1399
v. Clarke, 73 Neb. 516 1500
v. Mayor, etc., 133 N. Y. 628 4134
v. Shearer, 43 App. Div. (N. Y.) 607 1366, 4552
v. Sherrod, 21 Iowa 518 4371
v. Wintersteen, 58 Neb. 278 1444
Lange v. Interstate Sales Co., — Tex. Civ. App. —, 166 S. W. 900 2235
v. Kearney, 127 N. Y. 676 2463, 2480
v. Kohne, 1 McCord 115 790, 802
v. Schoettler, 115 Cal. 388 4852, 4859, 4865, 4930
v. Wagner, 52 Md. 310 1752
v. Werk, 2 Ohio St. 519 887
Langenberg v. Heer D. G. Co., 74 Mo. App. 12 2174
Langendorfer's Est., 8 Pa. Dist. 273 1080, 1083
Langfelt v. McGrath, 33 Ill. App. 158 3882
Langford v. Boston & A. R. Co., 144 Mass. 431 4602
v. Perrin, 5 Leigh 552 2802
v. United States, 95 Fed. 933 2694, 2709
Langhorne v. Turman, 141 Ky 809 3738, 3762, 3765
Langhorst v. Ahlers, 9 Ohio Dec. 607 1080
v. Ahlers, 12 Ohio Dec. 405 1080
Langley v. Augusta, 118 Ga. 590 3853, 3882, 3887, 3891, 3892, 3897
v. East River G. Co., 41 App. Div. (N. Y.) 470 4634
v. Rouss, 185 N. Y. 206 2657
Langley v. Warner, 1 Sandf. 209 2993
v. Warner, 3 N. Y. 327 1542, 1543
Langridge v. Levy, 2 M. & W. 519 99, 159, 169
Langsford v. United States, 95 Fed. 933 2692
Langsdale v. Nicklaus, 38 Ind. 289 2147
Langstaff-Orm Mfg. Co. v. Wilford, 160 Ky. 733 2545, 2681, 2687, 2695
Langston v. Roby, 68 Ga. 406 589, 591
v. South Carolina R. Co., 2 S. C. 248 953, 958
v. Watts, 142 Ga. 439 2822
Langstroth v. J. C. Turner Cypress Lumber Co., 162 App. Div. (N. Y.) 818 2274, 2277
Langton v. Hagerty, 35 Wis. 150 4507
Langworthy v. Hulette, 187 Ill. App. 162 1806
v. McKelvey, 25 Iowa 48 306, 1719, 1728, 1731
Lanier v. Little Rock C. Co., 88 Ark. 557 2273
Lanigan v. Kille, 97 Pa. 120 3185, 3205
v. Neely, 4 Cal. App. 760 3664, 3666, 3676
Laning v. Iron City Nat. Bank, 89 Tex. 601 1920, 1921
Lanius v. Druggist P. Co., 20 Mo. App. 12 4514, 4543, 4549
Lannen v. Albany G. L. Co., 44 N. Y. 459 67, 152
Lanning v. Chicago, etc., R. Co., 68 Iowa 502 1392, 1457
Lannon v. Chicago, 159 Ill. App. 595 105, 4793
La Normandie, 7 C. C. A. 285, 58 Fed. 427 4994, 4999
Lanoy v. Duchess of Athol, 2 Atk. 448 572
Lanquest v. Ten Eyck, 40 Iowa 213 3711
Lanquist v. Chicago, 200 Ill. 69 4140
Lansdale v. Graves, 2 Ky. Rep. 215 706, 707
v. Mitchell, 14 B. Mon. 348 709
Lansing v. Carpenter, 9 Wis. 540 4503
v. Dodd, 45 N. J. L. 525 859, 861, 868, 883, 918, 926
v. Goelet, 9 Cow. 346 632
v. Lansing, 1 Abb. Pr. (N. S.) 280 2471
v. New York Cent., etc., R. Co., 52 N. Y. Misc. 334 3415
v. Rattoone, 6 Johns. 42 1069
v. Smith, 8 Cow. 146, 4 Wend. 9 16, 3935
v. Van Alstyne, 2 Wend. 47 3259
v. Van Alstyne, 2 Wend. 561 569, 3125
v. Wiswall, 5 Denio 213 16
Lanski v. Chicago & N. W. Ry. Co., 181 Ill. App. 565 3431
Lanston M. Mach. Co. v. Mergenthaler L. Co., 147 Fed. 871 4561
v. Mergenthaler L. Co., 154 Fed. 42 1364
v. Times-Dispatch Co., 115 Va. 797 171, 207
Lanten v. Rowan, 59 N. H. 215 704
Lantry v. Parks, 8 Cow. 63 2525, 2544
Lanum v. Patterson, 151 Ill. App. 143 1720
Lanusse v. Barker, 3 Wheat. 101 616, 1154, 1179, 1180, 1899
Lanyon v. Woodward, 65 Wis. 543 4362
La Page v. Forbes, 151 App. Div. (N. Y.) 795 2700
v. Hill, 87 Me. 158 4169, 4200
Lapham v. Green, 9 Vt. 407 418
v. Osborne, 20 Nev. 168 2465
Lapice v. Smith, 13 La. 91 1146, 1878

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Laporte v. Osborn, 43 Ind. App. 100 106
v. Wallace, 89 Ill. App. 517 3680
Laporte I. Co. v. Brock, 99 Iowa 485 176, 2276
Lapp v. Illinois W. Co., 104 Ill. App. 255 2342, 2344
v. Smith, 183 Ill. 179 760
Larabee v. Cook, 8 Kan. App. 776 1663
Larabee F. M. Co. v. Missouri Pac. R. Co., 85 Kan. 214 1414, 1417, 3316, 3317
Laraway v. Perkins, 10 N. Y. 371 1364, 1369, 1960, 2589
Large v. Steer, 121 Pa. 30 1716
Larido v. Perkins, 132 La. 660 3699, 3708, 3713
Larimore v. Wells, 29 Ohio St. 13 699, 700
Larios v. Gurety, L. R. 5 P. C. 346 277, 2908
Larkin v. Buck, 11 Ohio St. 561 376, 2524, 2544
v. Butterfield, 29 Mich. 254 423
v. Hecksher, 51 N. J. L. 133 2542, 2561
v. Misland, 100 N. Y. 212 3185
v. Trammel, 47 Tex. Civ. App. 548 2061, 2066, 2096, 2097, 2112
Larkins v. Eckwurzel, 42 Ala. 322 433
v. Tarter, 3 Sneed 681 4600
Larminie v. Carley, 114 Ill. 196 2965
Larned v. Allen, 13 Mass. 295 1614
v. Buffinton, 3 Mass. 546 469, 4523, 4528, 4568, 4586
v. Dubuque, 86 Iowa 166 2494
v. Hudson, 57 N. Y. 151 3715
La Roche v. Fa'ligant, 130 Ga. 596 3713
v. O'Hagan, 1 Ont. 300 2406
Larocque v. Conheim, 42 N. Y. Misc. 613 4853, 4959
La Roe v. Roeser, 8 Mich. 537 4842
Laroe v. Sugar Loaf D. Co., 180 N. Y. 367 757
v. Sugar Loaf D. Co., 85 App. Div. (N. Y.) 585 760
La Rose v. Logansport Nat. Bank, 102 Ind. 332 2768, 2770, 2771, 2796
Larrabee v. Baldwin, 35 Cal. 155 778
v. Minnesota Tribune Co., 36 Minn. 141 4504, 4514, 4587
v. Southard, 95 Me. 385 1875
Larrowe v. Beam, 10 Ohio 498 3718
Larry v. Brown, 153 Ala. 452 717, 735
Larsen v. Breene, 12 Colo. 480 665, 791
v. Groeschel, 98 Ind. 160 4433
v. Home Tel. Co., 164 Mich. 295 4869, 4871
v. Oregon R. & N. Co., 19 Ore. 240 3753, 3979, 4087
v. Postal Tel.-C. Co., 150 Iowa 748 269, 3570
Larson v. Anderson, 122 Minn. 39 1030, 1238
v. Calder, 16 N. D. 248 312, 2387, 2421
v. Chase, 47 Minn. 307 3651, 4163
v. Cook, 85 Wis. 564 2059, 2061
v. Grand Forks, 3 Dak. 307 1350, 1495
v. Haglin, 103 Minn. 257 4808
v. Hanson, 26 N. D. 406 2821
v. Lammers, 81 Minn. 239 3799, 3802
v. Metropolitan Stock Exch., 200 Mass. 367 4372
v. Metropolitan St. R. Co., 110 Mo. 234 3913
v. O'Hara, 98 Minn. 71 1986
Larson v. Thoma, 143 Iowa 338 2501
Larwell v. Stevens, 12 Fed. 559 3699
Larzelere v. Kirchgessner, 73 Mich. 276 4778, 4882
Lasala v. Holbrook, 4 Paige 169 6
La Salle v. Thorndike, 7 Ill. App. 282 4779, 4786
Lasar Mfg. Co. v. Pelligreen Const. & Inv. Co., 179 Mo. App. 447 2663, 2681, 2687, 2689
Lasca, The, 133 Fed. 1005 2719
Lasch's App., 109 Pa. 72 4095
Laser v. Jones, — Ark. —, 172 S. W. 1024 3775
Lash v. Edgerton, 13 Minn. 210 739
v. Lambert, 15 Minn. 416 958
v. McCormick, 17 Minn. 403 1830, 1866
v. S. Bolton's Sons, 161 App. Div. (N. Y.) 381 1462
Lasher v. Williamson, 55 N. Y. 619 524, 2828
Lashus v. Chamberlain, 5 Utah 140, 6 Utah 385 173, 1365, 1370, 2323
Lasoya Oil Co. v. Zulkey, 40 Okla. 690 825
Lassas v. McCarty, 47 Ore. 474 1823, 1921
Lassiter v. Okeetee Club, 70 S. C. 102 3703
v. Western U. Tel. Co., 89 N. C. 334 3549, 3551
Lastrapes v. Roequet, 23 La. Ann. 68 530
Laswell v. National H. Co., 147 Mo. App. 497 2259, 2261
Latapee v. Pecholier, 2 Wash. C. C. 180 748
Latchtimacker v. Jacksonville T. & W. Co., 181 Fed. 276 1510, 4672, 4833
Latham v. Barwick, 87 Ark. 328 2524
v. Brown, 16 Iowa 118 1929, 4273, 4278
v. Cleveland, etc., R. Co., 164 Ill. App. 559 4168, 4185, 4189
v. Darling, 2 Ill. 203 870, 975, 976
v. Fagan, 6 Jones 62 1614
v. Sumner, 89 Ill. 233 537
v. Wilcox, 99 N. C. 367 1127
Latham M. & C. Co. v. Harrod, 71 Kan. 565 2914
Lathan v. Western U. Tel. Co., 75 S. C. 129 3566, 3570
Lathers v. Coates, 18 N. Y. Misc. 231 3126
v. Wyman, 76 Wis. 616 51, 4227
Lathrop v. Atwood, 21 Conn. 117 2189, 2893, 2894
v. Judson, 19 How. 66 1804
v. Mathers, 143 App. Div. (N. Y.) 376 4647
v. O'Brien, 44 Minn. 15 1948
v. Sunberg, 55 Wash. 144 4503
Lathrop, Haskins & Co., In re, 216 Fed. 102 2976, 2978
Lathrope v. Flood, 135 Cal. 458 30
Latimer v. Marchbanks, 57 S. C. 267, 278 2032
v. Metropolitan St. R. Co., 126 Mo. App. 70 4761
v. York C. Mills, 66 S. C. 135 2556, 2561
Latman v. Douglas, 149 Iowa 699 4747
Laton v. King, 19 N. H. 280 356
Latour v. Southern R., 71 S. C. 532 3450
Latrobe v. Winans, 89 Md. 636 1970, 1971
Latta v. New Orleans, etc., R. Co., 131 La. 272 117, 1137
Lattimore v. Hardsocg Mfg. Co., 121 Fed. 986 4465
Lattin v. Vail, 17 Wend. 188 2193

[REFERENCES ARE TO PAGES]

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Latusek v. Davies, 79 Minn. 279 4208
Laubach v. Cedar Rapids S. Co., 122 Iowa 643 2522
Laubaugh v. Pennsylvania R. Co., 28 Pa. Super. 247 1437, 4181
Laubengayer v. Rohde, 167 Mich. 605 4389
Laubenheimer v. Mann, 17 Wis. 542 19 Wis. 519 890, 896, 1521
Lauer v. Banning, 152 Iowa, 99 18, 3663, 3675
v. Griffith, 92 Ill. App. 388 1787
v. Northern Pac. Ry. Co., 83 Wash. 465 5084
Lauer B. Co. v. Riley, 195 Pa. 449 2796
Laufer v. Boynton F. Co., 84 Hun 311 242, 2433
Laugerenne v. Dougherty, 35 Pa. 45 3099
Laughead v. Frick C. Co., 209 Pa. 368 760
Laughlin v. Barnes, 76 Mo. App. 258 4266, 4321
v. Coakley, 19 Ky. L. Rep. 407 1777
v. Corry, 77 Pa. 109 4657
v. Excelsior P. Mfg. Co., 153 Mo. App. 508 424
v. Harvey, 24 Ont. App. 438 1470
v. Marshall, 19 Ill. 390 1886
Laughman v. Sun P. L. Co., 52 Tex. Civ. App. 485 759
v. Thompson, 6 Sm. & M. 259 2197
Laughren v. Barnard, 115 Minn. 276 286, 4188
Laumier v. Dolph, 145 Mo. App. 78 2309
Launberga, The, 154 Fed. 959 2725, 2735
Laundry v. Dilley, 111 Ark. 350 1815
Launstein v. Launstein, 159 Mich. 524 8
Laura Jane v. Hagan, 10 Humph. 332 1079, 1220
Laura Lee, The, 24 Fed. 483 1450
Laurea v. Bernauer, 33 Hun 307 848, 859, 926
Laurel Springs L. Co. v. Fougeray, 57 N. J. Eq. 318 1222
Laurens Tel. Co. v. Enterprise Bank, 90 S. C. 50 1320
Laurent v. Chatham Ins. Co., 1 Hall 41 3042, 3043, 3063
v. Vaughn, 30 Vt. 90 2640, 3365, 3389
Laut v. White Feather Main Reefs, 7 West Aust. L. R. 203 4786
Lauten v. Rowan, 59 N. H. 215 710
Lauter v. Duckworth, 19 Ind. App. 535 4795
Lauth v. Chicago Union Traction Co., 244 Ill. 244 208, 413, 1424, 1504, 4747
Lautz v. Archdale, 11 T. L. Rep. 452 1114
v. Frey, 19 Pa. 366 1360
Lavalle v. Societe St. Jean Baptiste, 17 R. I. 680 3089
v. Western U. Tel. Co., 102 Ark. 607 3555, 3622
La Valley v. Ravenna, 78 Vt. 152 2225
Lavender v. Hudgens, 32 Ark. 763 4603, 4613, 4615, 4630, 4633
Lavendon, Succession of, 39 La. Ann. 952 2099
Lavens v. Lieb, 12 App. Div. (N. Y.) 487 244, 2573
Lavenson v. Standard S. Co., 80 Cal. 245 3838
Laverty v. Snethen, 68 N. Y. 522 2922
Lavery v. Crooke, 52 Wis. 612 4969
La Vie v. Crosby, 43 Ore. 612 4352
Lavin v. Dodge, 30 R. I. 8 3734
v. Wells Bros. Co., 272 Ill. 609 5154
Law v. Billington, 180 Pa. 84 2519
v. Crawford, 67 Mo. App. 150 1184
v. Cross, 1 Black 533 416
v. Davy, 2 S. & R. 553 3294
v. East India Co., 4 Ves. 824 2792, 2804
v. Illinois Cent. R. Co., 208 Fed. 869 5064
v. Jackson, 9 Cow. 641 825, 828
v. Local Board of Redditch, [1892] 1 Q. B. Div. 127 838, 843, 888, 894, 914
v. London, etc., Assur. Co., 1 K. & J. 223 3069
v. Stokes, 32 N. J. L. 249 684
v. Sutherland, 5 Gratt. 357 725
v. Ware, 238 Ill. 360 2512
Law Trust Soc. v. Hogue, 37 Ore. 544 998, 999
Lawall v. Groman, 180 Pa. 532 2575, 2578, 2943
Lawe v. Chicago, etc., R. Co., 89 Iowa 420 4905
Lawhon v. Toors, 73 Ark. 473 2792
Lawis v. Lawis, 75 Ark. 191 2472
Lawler v. Armstrong, 53 Wash. 664 2503
v. Earle, 5 Allen, 22 11, 4580
v. Murphy, 58 Conn. 294 3076
Lawless v. Collier, 19 Mo. 480 2056, 2060, 2076, 2077
Lawlor v. Alton, 8 Irish L. 160 1772
v. Merritt, 81 Conn. 715 1714, 1745
Lawrence, Ex parte, 4 Cow. 417 633
Lawrence v. Boston, 119 Mass. 126 4086, 4131
v. Burrell, 17 Abb. N. C. 312 3235
v. Chase, 54 Me. 196 1984
v. Cleary, 88 Wis. 473 4601
v. Cooke, 56 Me. 187 3667, 3670, 3677, 3678
v. Cowles, 13 Ill. 577 870, 976, 998, 1003
v. Dougherty, 5 Yerg. 435 1889
v. Embree, 3 Bradf. 354 1083, 1085
v. Fast, 20 Ill. 338 1541
v. French, 25 Wend. 443 3123, 3125
v. Great Northern R. Co., 16 Q. B. 643 4145
v. Griswold, 30 Mich. 410 1841
v. Gullifer, 38 Mo. 532 2526
v. Hagerman, 56 Ill. 68 223, 306, 1269, 1694, 4605, 4625
v. Heidbreder I. Co., 119 Mo. App. 316 58, 144, 147
v. Housatonic R. Co., 29 Conn. 390 3474, 4536, 4662
v. Hull, 169 Mass. 250 4490
v. Jenkins, L. R. 8 Q. B. 274 66, 112
v. Keim, 19 Phila. 351 1462
v. Latimer, 28 Ill. App. 552 3482
v. Leathers, 31 Ind. App. 414 436, 4635, 4647
v. McCalmont, 2 How. 426 2746
v. Maxwell, 6 Lans. 469 4246
v. Middle States L., B., etc., Co., 7 D. C. App. Cas. 161 993
v. Miller, 86 N. Y. 131 921, 2013
v. Montgomery, 37 Cal. 183, 188 2056
v. Mt. Vernon, 35 Me. 100 162
v. Murray, 3 Paige 400 1132
v. New York, etc., R. Co., 36 Conn. 63 3386
v. Penn Mut. L. Ins. Co., 113 La. 87 3083
v. Philadelphia, 154 Pa. 20 4126
v. Porter, 63 Fed. 62 317, 325, 2275, 2298
v. Rector, 137 U. S. 139 3700

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v. Simons, 4 Barb. 354 2018, 2666
v. Simonton, 13 Tex. 220 1952
v. Spence, 99 N. Y. 669 4967
v. Stearns, 11 Pick. 501 1485
v. Stonington Bank, 6 Conn. 521 1825
v. Traner, 136 Ill. 474, 488 1727, 1728
v. Trustees, 2 Denio 577 950
v. Tucker, 23 How. 15 1853
v. Van Horne, 1 Caines 276 3025
v. Vilas, 20 Wis. 381, 389-391 525
v. Wardwell, 6 Barb. 423 183, 196, 2695
Lawrence C. Co. v. Lee M. Co., 5 Kan. App. 77 2237, 2249
Lawrence County v. Stewart, 72 Ark. 525 932
Lawrence Mfg. Co. v. Tennessee Mfg. Co., 138 U. S. 537 4487
Lawrence R. Co. v. Cobb, 35 Ohio St. 94 1140
Lawrence St., In re (Misc.), 136 N. Y. Supp. 845 4097
Lawrence, etc., R. Co. v. Cobb, 35 Ohio St. 94 3809
Lawrenceburgh Nat. Bank v. Stevenson, 51 Ind. 594 647
Lawrie v. Dyeball, 8 B. & C. 70 1529
Lawry v. Farmington P. & M. Co., 65 Mo. App. 266 2525
Lawshe v. Tacoma R. & P. Co., 29 Wash. 681 3451
Lawson v. Barber, 189 Fed. 165 2414
v. Black Diamond, C. M. Co., 53 Wash. 614 2509
v. Carson, 50 N. J. Eq. 370 690
v. Chicago, etc., R. Co., 64 Wis. 448 4874
v. Conaway, 37 W. Va. 159 1425
v. Douglas, 7 New Zeal. L. R. 55 3180
v. Goodwin, 37 Tex. Civ. App. 484 1281, 1322
v. Hicks, 38 Ala. 279 11
v. Missouri & Kansas Tel. Co., 178 Mo. App. 124 2496
v. Morton, 6 Dana 471 3717
v. Nicholson, 52 N. J. Eq. 821 689
v. Price, 45 Md. 123 320
v. Pulaski, 3 Ark. 1 1608
v. Seattle & R. R. Co., 34 Wash. 500 4737
v. Vernon, 38 Wash. 422 4380, 4384, 4389, 4418
v. Worms, 6 Cal. 365 3301
Lawther v. Everts, 63 Ill. App. 432 656
v. Hamilton, 64 Fed. 221, 224 4445, 4463
Lawton v. Chase, 108 Mass. 238 1445, 2303
v. Erwin, 9 Wend. 233 1558, 1598
v. Green, 64 N. Y. 326 1713, 1719, 1732, 1737
v. Herrick, 83 Conn. 417 168, 1734, 3903, 3925
v. Keil, 61 Barb. 558 2387
v. Kittredge, 30 N. H. 500 4377
v. Lawton, 3 Ark. 13 3256
v. Seaboard A. L. R., 75 S. C. 82 3860
v. State, 5 Tex. 272 1556
Lawton R. T. R. Co. v. Lawton, 31 Okla. 458 4019, 4038, 4048
Lawyer v. Fritcher, 130 N. Y. 239, 4960, 4964
v. Loomis, 3 Thomp. & C. 393 4608, 4634
Lay v. Postal Tel. C. Co., 171 Ala. 172 1366, 1424, 3632, 3635
v. Reid, 11 Ala. App. 231 175
v. Wissman, 36 Iowa 305 1822
Laycock v. Moon, 97 Wis. 59 2666
v. Parker, 103 Wis. 161 6, 940, 1007, 1016, 1032, 1097, 1099, 1101, 1102, 1114
Layman v. Detharding, 106 Ill. App. 594 1110
Layon v. Alvord, 18 Conn. 66 3037
Layton v. Brady, 1 N. Y. Misc. 519 4186
v. Butler, 4 Harr. 507 3718, 3719
v. Hogue, 5 Ore. 93 1127
v. Hudson, 2 Boyce (Del.) 573 3773
Lazarus v. Ely, 45 Conn. 504 480
v. Metropolitan R. Co., 14 App. Div. (N. Y.) 438 4082
Lazell v. Newfance, 70 Vt. 440 4862
Lazelle v. Empire State S. Co., 58 Wash. 589 2686
v. Newfane, 70 Vt. 440 4846, 4896
Lazier v. Cady, 44 Wash. 339 4391
v. Horan, 55 Iowa 75 687
Lazier G. E. Co. v. Dubois, 130 Fed. 834 193, 226, 2614
Lea v. Charrington, 23 Q. B. Div. 45 4648
v. Deakin, 11 Biss. 40 1719
v. Henderson, 1 Cold. 146 4971, 4972
v. Robertson, 1 Stew. 138 4568
v. Whitaker, L. R. 8 C. P. 70 835, 858, 919, 928
Leach v. Bond, 129 Mo. App. 315 4383
v. Detroit E. R., 125 Mich. 373 1478
v. Forney, 21 Iowa 271 2046
v. Great Northern R. Co., 97 Minn. 503 3820
v. Greene, 116 Mass. 534 1905
v. Leach, 11 Tex. Civ. App. 699 340
v. New York, etc., R. Co., 89 Hun 377 266, 3328, 3329, 3344
v. Smith, 25 Ark. 246 2309, 2328
v. Thomas, 2 M. & W. 427 1528
Leadbeater v. Roth, 25 Ill. 587 3125, 3261
Leadville v. Bishop, 14 Colo. App. 517 2557
Leafgreen v. Telford, 169 Ill. App. 582 756
Leahy v. Campbell, 70 App. Div. (N. Y.) 127 2464, 2469
v. Davis, 121 Mo. 227 4923, 4929, 4931, 4941
Leaird v. Smith, 44 N. Y. 618 1952
Leak and City of Toronto, In re, 26 Ont. App. 351 4156
Leake v. Brown, 43 Ill. 376 659
v. Covington, 99 N. C. 559 2871
Leapald v. McCartney, 14 Colo. App. 442 624
Leard v. Pennsylvania R. Co., 229 Pa. 475 3975
Learn v. Upstill, 52 Neb. 271 2979
Learned v. Castle, 78 Cal. 454 435, 3939
Learock v. Paxson, 208 Pa. 602 4250
Leary v. Laflin, 101 Mass. 334 860, 922
v. Meier, 78 Ind. 393 3129
v. Murray, 178 Fed. 209 10
v. United Hercules H. S. Co., 10 New Zeal. L. R. 420 3827
Lease v. Pennsylvania Co., 10 Ind. App. 47 25
Leask v. Hoagland, 136 App. Div. (N. Y.) 658 1035
Leathe v. Thomas, 288 Ill. 246 590

[REFERENCES ARE TO PAGES]

Leather Cloth Co. v. Hirschfield, L. R. 1 Eq. 299 4493, 4499
Leatherdale v. Sweepstone, 3 C. & P. 342 803, 804
Leathers v. Blackwell D. T. Co., 144 N. C. 330 125, 1393
v. Sweeney, 41 La. Ann. 287 2597
Leavell v. Coleman, 144 Ky. 825 2406, 2421
v. Leavell, 114 Mo. App. 24 1315, 1316, 1317, 1318, 4981, 4982, 4983
v. Leavell, 122 Mo. App. 654 4980
Leavenworth v. Brockway, 2 Hill 201 1184, 1879
v. Packer, 52 Barb. 132 553, 2230
Leavenworth, etc., R. Co. v. Usher, 42 Kan. 637 4145
Leavitt v. Beers, Hill & Denio, 221 627
v. Canadian Pac. R. Co., 90 Me. 153 3813
v. Cutler, 37 Wis. 46 1391, 3664, 3668, 3671, 3673
v. Dow, 105 Me. 50 1494, 4659
v. Fiberloid Co., 196 Mass. 440 2373, 2374, 2376, 2430
v. Fletcher, 10 Allen 119 3150, 3154
v. Lamprey, 13 Pick. 382 3727
v. Morrow, 6 Ohio St. 71 754
v. Palmer, 3 N. Y. 19, 37 1851
Lebanon v. Twiford, 13 Ind. App. 384 1523
Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. 28 3020
Lebanon, etc., Tel. Co. v. Lanham L. Co., 131 Ky. 718 3575
Lebeaume v. Woolfolk, 18 Mo. 514 1536
Le Blanc v. Sweet, 107 La. 355 4930
Le Blanche v. London, etc., R. Co., 1 C. P. Div. 286 328, 476, 3315, 3444, 3449, 3456
Leblond v. McNear, 104 Fed. 826 3269
Le Breton v. Stanley C. Co., 15 Cal. App. 429 1048
Lecatt v. Sallee, 3 Port. 115 2490
Le Cheminant v. Pearson, 4 Taunt. 367 3028, 3033
Lechowitzer v. Hamburg-Am. P. Co., 59 N. Y. St. Rep. 486 3415
Leckie v. Sears, 109 Mass. 424 3288
Leclaire v. Tacoma R. & P. Co., 62 Wash. 157 1504, 3528
Le Clear v. Perkins, 103 Mich. 131 4633, 4634, 4644, 4645
Lecroy v. Wiggins, 31 Ala. 13 234
Ledbetter v. Davis, 121 Ind. 119 4381
v. Morris, 3 Jones, 543 38
Leddel v. Starr, 20 N. J. Eq. 274 765
Ledder v. Riggin, 65 Fla. 153 2979, 2992
Leddy v. Barney, 139 Mass. 394 425, 773
Ledford v. Emerson, 141 N. C. 596 1414
v. Hartford F. Ins. Co., 161 Ill. App. 233 1089
Ledgerwood v. Bushnell, 128 Ill. App. 555 2340
Lediard v. Boucher, 7 C. & P. 1 509
Ledlie v. Wallen, 17 Mont. 150 4553
Ledoux v. Anderson, 2 La. Ann. 558 2905
v. Cooper, 2 La. Ann. 586 2905
v. Jones, 20 La. Ann. 539 3111
Leduc v. Ward, 20 Q. B. Div. 475 3426
Ledwich v. McKim, 53 N. Y. 307 2382
Ledyard v. Bull, 119 N. Y. 62 1102, 1104
Ledyard v. Jones, 7 N. Y. 550 495, 496, 1621
Lee v. Alexander, The, 2 Paine 466 2721
v. Ashbrook, 14 Mo. 378 543
v. Bagwell, 14 Ga. App. 699 1505
v. Baldwin, 10 Ga. 208 677
v. Barreda, 16 Md. 190 3301, 3302
v. Biddis, 1 Dall. 175 790, 802, 1887
v. Briggs, 99 Mich. 487 2697
v. Burk, 15 Ill. App. 651 3815
v. Burlington, 113 Iowa 356 78, 129, 4686
v. Carroll N. S. Co., 1 Neb. (Unof.) 681 858
v. Carter, 52 Ind. 342 2469
v. Charmley, 20 N. D. 570 1604
v. Clark, 1 Hill 56 296, 2843, 2898
v. Clements, 48 Ga. 128 537, 2581
v. Crump, 146 Ala. 655 4544
v. Davis, 1 A. K. Marsh. 397 1190, 1192
v. Dean, 3 Whart. 316 2047
v. Dick, 10 Pet. 482, 9 L. ed. 503 2745, 2746, 2748
v. Dodd, 20 Mo. App. 284 813
v. Dow, 71 N. H. 326 2554, 2555
v. Early, 44 Md. 80 717
v. Eure, 93 N. C. 5 529, 531
v. Feamster, 21 W. Va. 108 979
v. Fidelity S. & T. Co., 51 Wash. 208 4223
v. Fountaine, 10 Ala. 755 723
v. Gibbons, 14 S. & R. 110 421
v. Grand Trunk R. Co., 36 Up. Can. Q. B. 350 3534
v. Green, 83 Ala. 491 662
v. Grinnell, 5 Duer 400 3026, 3036
v. Haley, L. R. 5 Ch. App. 155 4484
v. Hampton, 79 Miss. 321 2565
v. Harris, 85 Conn. 212 2588
v. Hastings, 13 Neb. 508 1679
v. Hederman, 158 Iowa 719 59, 4906
v. Hefley, 21 Ind. 98 4968
v. Hill, 92 S. C. 114 802
v. Hillman, 74 Wash. 408 997
v. Hodges, 13 Gratt. 726 4962
v. Homer, 37 Hun 634 1707
v. Humphries, 124 Ga. 539 1490, 3705
v. Kendall, 56 Hun 610 377, 382, 383
v. Knapp, 90 N. C. 171 1407
v. Knapp, 137 Mo. 385 1494
v. Laprade, 106 Va. 594 1116
v. Lashbrooke, 8 Dana 214 1073
v. Lomax, 219 Ill. 218 1447
v. McDonnell (Tex. Civ. App.), 72 S. W. 612 4270
v. Manley, 154 N. C. 244 703, 717, 722, 816
v. Mathews, 10 Ala. 682 4211
v. Maxwell, 98 Mich. 496 440, 2889
v. Melby, 93 Minn. 4 1202, 1209
v. Moore, 12 Mo. 458 1712
v. Munn, 8 Taunt. 45 1034
v. Nill, 92 S. C. 114 1106
v. Overstreet, 44 Ga. 507 918
v. Payne, 4 Mich. 106 3167
v. Peckham, 17 Wis. 383 662, 711
v. Powell, 126 La. 51 152
v. Prudential L. Ins. Co., 203 Mass. 299 697
v. Raleigh, etc., R. Co., 72 N. C. 236 3335
v. Republic I. & S. Co., 148 Ill. App. 585 1510, 4831
v. Riley, 18 C. B. (N. S.) 722 66, 112, 123

[REFERENCES ARE TO PAGES]

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v. St. Louis, etc., R. Co., 136 N. C. 533 3328, 3343
v. Selleck, 20 How. Pr. 275, 33 N. Y. 615 1878, 1881
v. Sickles S. Co., 38 Mo. App. 201 2232, 2370
v. Southern Pac. R. Co., 101 Cal. 118 1493, 4795
v. Springfield W. Co., 176 Pa. 223 4036
v. Storz B. Co., 75 Neb. 212 715
v. Tarplin, 183 Mass. 52 4375, 4391
v. Tebo R. Co., 53 Mo. 178 4110
v. Tinges, 7 Md. 215 664, 669
v. Toledo, St. L. & W. R. Co., 184 Ill. App. 144 4882, 4883
v. Western U. Tel. Co., 51 Mo. App. 375 1365, 3568, 3591, 3611, 4728
v. Western U. Tel. Co., 130 Ky. 202 3635
v. White, 4 Stew. 178 1956
v. Wilcocks, 5 S. & R. 48 616, 1902
v. Woolsey, 19 Johns. 319 460, 465, 468, 1291, 4782, 4783
Lee L. Co. v. Hotard, 122 La. 850 1728
Leech v. Baldwin, 5 Watts 446 540, 3301
v. Clemons, 14 Colo. App. 45 2501
v. Pirain, 5 Ark. 118 1809
Leeds v. Cheetham, 1 Sim. 146 3165
v. Cook, 4 Esp. 256 502, 3683, 3685, 3686
v. Dunn, 10 N. Y. 469 2755
v. Little, 42 Minn. 414 2675, 2682
v. Metropolitan G. L. Co., 90 N. Y. 26 32, 4718, 4911
v. New York Tel. Co., 64 App. Div. (N. Y.) 484 162
Leeds & H. Theatres of Varieties, [1902] 2 Ch. 809 4368
Leeds & H. Theater v. Broadbent, [1898] 1 Ch. 343 620
Leef v. Goodwin, Taney 460 728
Leek v. Northern Pac. Co., 65 Wash. 453, 4 N. C. C. A. 999 3449
Leek M. Co. v. Langford, 81 Miss. 728 2339
Leep v. St. Louis, etc., R. Co., 58 Ark. 407 2575
Leener v. First Nat. Bank, 26 Okla. 707 1675
Leerburger v. Hennessey R. Co., 154 App. Div. (N. Y.) 158 6
Leers, Ex parte, 6 Ves 644 1817
Leeson v. Anderson, 99 Mich. 247 748
v. Saw-Mill Phoenix, 41 Wash. 423 4715
Leesville Mfg. Co. v. Morgan W. & I. Works, 75 S. C. 342 2274, 2283
Leet v. Gratz, 92 Mo. App. 422 2095, 2115, 2117, 2120, 2131
v. Gratz, 124 Mo. App. 394 2056, 2057, 2086, 2093
v. Gratz, 137 Mo. App. 208 2137
Leete v. Pacific M. & M. Co., 89 Fed. 480 1116
Lefebure v. American Exp. Co., 160 Iowa 54 3415
Leffel v. Platt, 126 Mich. 443 1030
Leffingwell v. Elliott, 10 Pick. 204, 8 Pick. 457 294, 556, 2117, 2137, 2143, 2157, 2164, 3196
v. Gilchrist 40 Iowa 416 4238
Leffler v. McDermotte, 18 Ind. 246 1146, 1878
v. Witten, 8 Ohio C. C. (N. S.) 192 2696
v. Witten, 28 Ohio C. C. 533 2699
Leffman v. Long Island R. Co., 120 App. Div. (N. Y.) 528 4018, 4081
Leftey v. Mills, 4 T. R. 170 788
Leftkovitz v. First Nat. Bank, 152 Ala. 521 209, 275, 2859
Legatee v. Marr, 8 Blackf. 404 1764
Leger v. Bonnaffe, 2 Barb. 475 649
Legg v. Britton, 64 Vt. 652 4851, 4853, 4854
Leggat v. Gerrick, 35 Mont. 91 1030
v. Palmer, 39 Mont. 302 1196
Legge v. Harlock, 12 Q. B. 1015 888, 894
Leggett v. Cooper, 2 Starkie N. P. 103 518
v. Humphrys, 21 How. 66 1568
v. Jones, 10 Wis. 34 1902
v. McCarty, 3 Edw. Ch. 124 2212
v. McClelland, 39 Ohio St. 624 2866
v. Metropolitan R. Co., L. R. 5 Ch. 716 1026
v. Mutual L. Ins. Co., 53 N. Y. 394 858
v. Mutual L. Ins. Co., 50 Barb. 616 889
v. Rome, etc., R. Co., 41 Hun 80 76
v. Steele, 4 Wash. C. C. 305 3718
v. Young, 29 New Bruns. 675 2379
Leggott v. Great Northern R. Co., 1 Q. B. Div. 599 4851, 4852
Legh v. Legh, 1 Bos. & P. 447 772
Legoux v. Wante, 3 Har. & J. 184 978
Le Grew v. Cooke, 1 Bos. & Pul. 332 823
Le Guen v. Gouverneur, 1 Johns. Cas. 436 2923
Lehamaier v. Standard S. & T. Co., 123 App. Div. (N. Y.) 431 2255
Lehamann v. Hartford Fire Ins. Co., 183 Mo. App. 696 3046
Lehan v. Dillon, 19 Vict. L. R. 730 3788
Lehane v. Keyes, 2 Nev. 361 1805
Le Herisse v. Meehan, 144 App. Div. (N. Y.) 581 2695, 2699
Lehigh v. Standard T. Co., 149 Mich. 102 1451
Lehigh C. Co. v. Wilkes Barre & E. R. Co., 187 Pa. 145 3997, 4048, 4049
Lehigh C. & I. Co. v. Scallen, 61 Minn. 63 2759
Lehigh I. Co. v. Rupp, 100 Pa. 95 4859, 4935
Lehigh Valley R. Co., In re, 78 N. J. L. 699, rev'g 77 N. J. L. 239 4125
v. Canal Board, 204 N. Y. 471 12
v. Lazarus, 28 Pa. 203 3977
v. State, 66 N. Y. Misc. 432 3956
Lehigh Z. & I. Co. v. Bamford, 150 U. S. 665 909, 3116, 4375, 4383
Lehigh, etc., R. Co. v. Lazarus, 28 Pa. 203 3975
v. Marchant, 28 C. C. A. 544, 84 Fed. 870 4667
v. Wright, 177 Pa. 387 3116
Lehmaier v. Jones, 100 App. Div. (N. Y.) 495 3156, 3162
v. Standard S. & T. Co., 123 App. Div. (N. Y.) 431 2236, 2270
Lehman v. Amsterdam C. Co., 146 Wis. 213 1511, 4695
v. Amsterdam C. Co., 151 Wis. 207 1057, 1785
v. Louisiana W. R. Co., 37 La. Ann. 705 3528, 4810
v. McOuown, 31 Fed. 138 1750
v. Press, 106 Iowa 389 1815
Lehmeyer v. Moses, 69 N. Y. Misc. 476 3151, 3162, 3164
Lehmicke v. St. Paul, etc., R. Co., 19 Minn. 464 4134, 4139
Lehnert v. Levy, 142 Ala. 149 2792

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Lehrer v. Elmore, 100 Ky. 56 4537, 4543
Leib v. Stribling, 51 Md. 285 574
Leiber v. Chicago, etc., R. Co., 84 Iowa 97 3773
v. Goodrich, 5 Cow. 186 1885
Leiby v. Clear Spring W. Co., 205 Pa. 634 4138, 4139
Leicester v. Walter, 2 Camp. 251 470, 4574, 4575, 4583
Leick v. Tritz, 94 Iowa 322 3236, 3237
Leidig v. Bucher, 74 Pa. 67 440, 1535
Leifer Mfg. Co. v. Gross, 93 Ark. 277 564, 2598, 2627
Leiferman v. Osten, 167 Ill. 93 3127
Leigh v. Graysburg Mfg. Co., 132 N. C. 167 520, 3753
v. Patterson, 8 Taunt. 540 2256
v. Taylor, [1902] App. Cas. 157 3256
Leighton v. Brown, 98 Mass. 516 1038, 1575, 1664, 1672
v. Grant, 20 Minn. 345 1830, 1866
v. Ricker, 173 Mass. 564 3109
v. Wales, 3 M. & W. 545 887
v. Young, 52 Fed. 439 3712
Leipsic, The, 5 Fed. 108 2716, 2718
Leischner v. Kaiser, 156 Ill. App. 123 807, 3723
Leisenring v. LaCroix, 58 Neb. 803 1141
Leishman v. White, 1 Allen 489 3121, 3123
Leisse v. St. Louis, etc., R. Co., 2 Mo. App. 105 1727
Leister v. Walter, 2 Camp. 251 4579
Lekeug v. Nash, 2 Str. 1221 3133
Leitensdorfer v. King, 7 Colo. 436 2480
Leiter v. Day, 35 Ill. App. 248 3829
v. Pike, 127 Ill. 287 3125, 3146
Leitgabel v. Belt, 108 Wis. 107 2473
Leither v. Philadelphia T. Co., 125 Pa. 397 425
Leitzell v. Delaware, etc., R. Co., 232 Pa. 81 4788
v. Delaware, etc., R. Co., 232 Pa. 475 326, 4785
Leland v. Stone, 10 Mass. 459 867, 2060, 2068
v. Tousey, 6 Hill 328 1361, 3693
v. Western U. Tel. Co., 159 Ala. 245 3626
Le Laurin v. Murray, 75 Ark. 232 436, 460, 461, 467
Le Loir v. Bristow, 4 Camp. 134 458
Lemars B. & L. Ass'n v. McLain, 120 Iowa 527 980
Le Massena v. Storm, 62 App. Div. (N. Y.) 150 4566
Lemay v. Williams, 32 Ark. 166 4634
Lembeck v. Jarvis T. C. S. Co., 70 N. J. Eq. 757 981
Lemeunier v. McClearley, 41 La. Ann. 411 1716, 1728
Lemke v. Franzenburg, 159 Iowa 466 3676, 3690
Lemly v. Ellis, 143 N. C. 200 1458
v. Ellis, 146 N. C. 221 2112, 2116
Lemma v. Blanding, 139 Wis. 156 1074
Lemmert v. Guthrie, 69 Neb. 499 2793
Lemmon v. Brown, 4 Bibb 308 2027, 2052
v. Strong, 55 Conn. 443 2787
Lemoine v. Cook, 36 Mo. App. 193 4742
v. Sullivan (Tex. Civ. App.), 134 S. W. 946 4793
Lemon v. Stevenson, 36 Ill. 49 525
v. Trull, 13 How. Pr. 248, 16 How. Pr. 576 534, 2829
Lemont v. Lord, 52 Me. 365 3297
Lenahan v. Pittston C. M. Co., 218 Pa. 311 125
Lenfest v. Robbins, 101 Me. 176 1279
Lenheim v. Fay, 27 Mich. 70 1824
Lenke v. Franzenburg, 159 Iowa 466 3682
Lenney v. Finley, 118 Ga. 427 1407
Lennig v. Ralston, 23 Pa. 137 1905, 1906, 1915
Lennon v. Grauer, 159 N. Y. 433 1870
v. Rawitzer, 57 Conn. 583 1400
v. Smith, 124 N. Y. 578 520
v. Smith, 14 Daly 520 841, 899
Lennox v. Interurban St. R. Co., 104 App. Div. (N. Y.) 110 4684
v. Vandalia C. Co., 158 Mo. 473 3108, 3116
Lenoch v. Yoss, 157 Iowa 314 4396
Lenoir v. Marlin, 10 Tex. Civ. App. 376 4646
Lenox v. United Ins. Co., 3 Johns. Cas. 224 3034, 3036
Lentz v. Carnegie, 145 Pa. 612 9, 3769, 3771, 3890
v. Choteau, 42 Pa. 435 252
v. Dallas, 96 Tex. 258 4745
Lenwig v. Ralston, 1 Pa. 139 1148
Lenzen v. Miller, 51 Neb. 855 1505
Leo Austrian & Co. v. Springer, 94 Mich. 343 2275, 2290
Leon v. McIntyre, 88 Ill. App. 349 686
Leonard v. Allen, 11 Cush. 241 4530, 4573
v. Beaudry, 68 Mich. 310 245, 252, 2591
v. Belknap, 47 Vt. 602 361
v. Chicago & A. R. Co., 54 Mo. App. 293 3335
v. Columbia St. N. Co., 84 N. Y. 48 4952
v. Dyer, 26 Conn. 177 2543, 2662
v. Fowler, 44 N. Y. 289 2379
v. Hair, 133 Mass. 455 4306
v. Hoboken P. Co., 69 N. J. L. 238 1311
v. Maginnis, 34 Minn. 506 480, 4317
v. New York, etc., Tel. Co., 41 N. Y. 544 170, 193, 3546, 3581
v. Patton, 106 Ill. 99 1202
v. Peebles, 30 Ga. 61 2454
v. Pope, 27 Mich. 145 1299, 4513, 4515
v. Portier (Tex. App.), 15 S. W. 414 2241
v. Rutland, 66 Vt. 105 3946, 4001
v. Speidel, 104 Mass. 356 2755
v. Springer, 197 Ill. 532 4365, 4372
v. Swanson, 58 Minn. 231, 232 2801
v. Villars, 23 Ill. 377 1202, 1204
v. Whitney, 109 Mass. 265 1674, 1676
v. Whitwill, 19 Fed. 547 5010
Leoncini v. Post, 37 N. Y. St. Rep. 255 4236, 4284
Leopold v. Chicago, 150 Ill. 568 4111, 4119, 4147
v. Furber, 8 Ky. L. Rep. 198, 84 Ky. 214 1777
v. Van Kirk, 27 Wis. 152 2376
Leostzky v. Canning, 33 Cal. 299 3129
Le Page v. Lalence & G. Mfg. Co., 98 App. Div. (N. Y.) 179 760
v. McCrea, 1 Wend. 164 753, 755, 761, 764
v. Russia C. Co., 51 Fed. 941 4486, 4487
Lepanto, The, [1892] Prob. 122 2724, 2735
Lepla v. Rogers, [1893] 1 Q. B. 31 194, 3174
Lepman v. Employers' L. A. Co., 170 Ill. App. 379 3067
Leppard v. Western U. Tel. Co., 88 S. C. 388 3547, 3639, 3656

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Leque v. Madison G. & E. Co., 133 Wis. 547 4927, 4935
Le Roy v. Jacobosky, 136 N. C. 443 1989, 2009, 2986
v. United Ins. Co., 7 Johns. 344 3024, 3025
Leroy & W. R. Co. v. Hawk, 39 Kan. 638 4130, 4132
v. Ross, 40 Kan. 598 3984, 4119, 4138
Le Sage v. Coussmaker, 1 Esp. 189 2469
Lescalect v. Rickner, 16 Ohio C. C. 461 2173
Lesch v. Great Northern R. Co., 93 Minn. 435 1332
v. Great Northern R. Co., 97 Minn. 503 97, 3735
Leschen & Sons R. Co. v. Mayflower G. M. & R. Co., 173 Fed. 855 666
Lesher v. Getman, 30 Minn. 321 2888, 2889
Leslie v. Jackson & S. T. Co., 134 Mich. 518 1376, 4676
v. Macmichal, 2 New South Wales, (law) 250 (1881) 836, 2243
Leslie E. Brooks Co. v. Long, 67 Fla. 68 3186
Less v. Butte, 28 Mont. 27 3951
Lessee of Battin v. Bigelow, 1 Pet. C. C. 452 3692
Lessee of Dilworth v. Sinderling, 1 Bin. 494 1024
Lessenden v. Missouri Pac. R. Co., 238 Mo. 247 4805, 4835
Lesser v. Norman, 51 Ark. 301 4317
v. St. Louis & S. R. Co., 85 Mo. App. 326 4708
Lester v. Elwert, 25 Ore. 102 1808
v. Highland Boy G. M. Co., 27 Utah 470 3799, 3814
v. Houston, 101 N. C. 605 741
Lestern v. Western U. Tel. Co., 84 Tex. 313 3555
Lestershire v. Ritter, 153 Fed. 573 2369
Lestershire L. & B. Co. v. Ritter L. Co., 153 Fed. 573 2391
Letcher v. Woodson, 1 Brock. 212 1025
Le Tegre, 3 Wash. C. C. 567 2723
Lethbridge v. Mytton, 2 B. & Ad. 772 283, 2165, 2168, 2173, 2189
Le Tourneux v. Gilliss, 1 Cal. App. 546 1826, 1847
Letson v. Dodge, 61 Barb. 121 1665
Lett v. St. Lawrence, etc., R., 11 Ont. App. 1, 1 Ont. 545 4857
Letton v. Young, 2 Metc. (Ky.) 558 4514
Leucht v. Leucht, 129 Ky. 700 4980
Leucker v. Seileu, 89 Ill. 545 4965
Leuque v. Madison G. & E. Co., 133 Wis. 547 4921
Leurey v. Bank, 131 La. 30 4210, 4224, 4241
Levan v. Atlantic C. L. R. Co., 86 S. C. 514 3450
v. Sternfeld, 55 N. J. L. 41 784, 830, 831
v. Wilten, 135 Pa. 61 663, 4291
Levens v. Briggs, 21 Ore. 333 1201, 1202, 1921
Levenson v. Bollowa (N. Y. Misc.), 85 N. Y. Supp. 386 1417
v. Boston E. R. Co., 191 Mass. 75 4139, 4143
Lever v. Lever, 2 Hill's Ch. 158 1118
Leverenz v. Stevens, 124 Ill. App. 401 500, 1290
Leverick v. Meigs, 1 Cow. 668 2922, 2946, 2958
Leverone v. Arancio, 179 Mass. 439 2655
Levert v. Daily States P. Co., 123 La. 594 4508, 4509, 4535, 4586
v. Sharpe, 52 La. Ann. 599 1728
Le Vette v. Hardman Estate, 77 Wash. 320 2983, 3235
Levey v. Dyess, 51 Miss. 501 3151
Levi v. Brooks, 121 Mass. 501 1136
v. Dimmick, 99 Cal. 490 2409, 2411
Levidow v. Starin, 77 Conn. 600 339, 3473
Levine v. Baldwin, 87 App. Div. (N. Y.) 150 3233
v. Rosenschein, 134 App. Div. (N. Y.) 157 2566
Leviness v. Consolidated G. E. L. & P. Co., 114 Md. 559 1969
Levins v. New York, etc., R. Co., 183 Mass. 175 3532, 3540
Levinski v. Middlesex B. Co., 92 Fed. 449 227, 234
Levis v. Royal P. & D. Co., 1 Cal. App. 241 2241
Levise v. Lochiel I. & S. Works, 129 Pa. 238 4357
Levison v. Bernheimer, 31 N. Y. Misc. 26 1384
Levitski v. Canning, 33 Cal. 298 3183, 3196
Levitt v. Miller, 64 Mo. App. 147 2462, 2478
Levois v. Gale, 17 La. Ann. 302 3282
Levy v. Bank of the United States, 4 Dall. 234, 1 Bin. 27 652
v. Brannan, 39 Cal. 485 4634
v. Fleischner, 12 Wash. 15 1302, 1699, 1700, 1701
v. Freiman, 131 App. Div. (N. Y.) 298 886
v. Goldsoll (Tex. Civ. App.), 131 S. W. 420 842
v. Hall, 29 L. J. (C. P.) 127 1629
v. Langridge, 4 M. & N. 337 99, 159, 169
v. McClintock, 141 Mo. App. 593 3734
v. Peabody Ins. Co., 10 W. Va. 560 3021
v. Steinbach, 43 Md. 217 2830
v. Taylor, 24 Md. 282 1749
v. Very, 12 Ark. 148 752, 763
v. Walker, 10 Ch. Div. 436, 27 Moak 17 4484, 4485
Lew v. Katz, 187 Ill. App. 460 1804
Lewark v. Parkinson, 73 Kan. 553 3438, 3444, 4739
v. Norfolk & S. R. Co., 137 N. C. 383 3328
Lewellyn v. Pere Marquette R. Co., 185 Ill. App. 171 3431
Lewine v. Interborough R. T. Co., 61 N. Y. Misc. 77 1338
Lewinson v. Montauk T. Co., 60 App. Div. (N. Y.) 572 814
Lewis v. Armstrong, 80 Ga. 402 2810
v. Atlanta, 77 Ga. 756 4737
v. Atlas Mut. L. Ins. Co., 61 Mo. 534 234, 235, 264, 410, 2551, 2574
v. Bacon, 3 Hen. & Munf. 89 1202
v. Bacon's Legatee, 3 Hen. & Munf. 89 1214
v. Bailey, 62 Wash. 296 1952
v. Bibb, 4 Port. 84 1952
v. Bradford, 8 Ala. 632 1016
v. Brannen, 6 Ga. App. 419 18
v. Brehme, 33 Md. 412 2957, 2958
v. Briggs, 81 Ark. 96 2503
v. Brotherhood Acc. Co., 194 Mass. 1 3017

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v. Burlington Sav. Bank, 64 Vt. 626 1113
v. Chapman, 19 Barb. 252 4524
v. Chisholm, 68 Ga. 40 547, 3235, 3236
v. Collier, 157 Ala. 533 1735, 1751
v. Colorado, etc., R. Co., 122 La. 571 3877, 3912
v. Cooke, 1 Harr. & McH. 159 1360
v. Cosgrave, 2 Taunt. 2 1827, 1830, 1838, 1847
v. Courtright, 77 Iowa 190 3788
v. Crockett, 3 Bibb 196 2875
v. Donohue, 27 N. Y. Misc. 514 754
v. Englewood E. R. Co., 223 Ill. 223 4138, 4141
v. Esther, 2 Cranch C. C. 423 2524
v. Fleer, 30 Pa. Super. 237 1267
v. Flint, etc., R. Co., 54 Mich. 55 136
v. Fountain, 168 N. C 277 4783
v. Greider, 49 Barb. 606, 51 N. Y. 231 2238, 2242, 2249
v. Harrison, 31 Ala. 689 2117
v. Hartford D. Co., 68 Conn. 221 2621
v. Hawley, 2 Day 495 4503, 4532
v. Hayes, 165 Cal. 527 1310, 4507, 4531
v. Holmes, 109 La. 1030 331
v. Humphries, 64 Mo. App. 466 4587
v. Ingersoll, 3 Abb. App. Dec. 55 1159
v. James, 8 Humph. 537 3728
v. Johns, 34 Cal. 629 427, 435
v. Jones, 4 B. & C. 506 747
v. Jones, 6 D. & R. 567, 4 B. & C. 513 749
v. Leahey, 14 Mo. App. 564 1728, 1729, 1730
v. Lee, 15 Ind. 499 210, 1941
v. Lewis, 9 Ind. 105 460
v. Lewis, 76 Conn. 586 3700
v. Lewis, Mart. & Hayw. 191 1108, 1880, 1881
v. Louisville & N. R. Co., 135 Ky. 361 3333
v. Lyons, 13 Ill. 117 691
v. McElvain, 16 Ohio 347 1193, 1194
v. McMillen, 31 Barb. 395 1952, 1954
v. McMillen, 41 Barb 420 1950, 1952, 1954
v. Manufacturers' F. & M. Ins. Co., 131 Mass. 364 3009
v. Maulden, 93 Ga. 758 1795
v. Mills, 47 Neb. 910 1601
v. Mobley, 4 Dev. & Batt. 323 4208
v. Morland, 2 B. & A. 56 1629
v. Morton, 5 T. B. Mon. 1 2212
v. Muse, 130 Mo. App. 194 4391
v. New York S. C. Co., 143 Mass. 267 3539, 3540
v. Nicholson, 18 Q. B. 502 2982
v. Northern Pac. R. Co., 36 Mont. 207 1493, 1502, 4729
v. Ocean Navigation, etc., Co., 125 N. Y. 341 3256
v. Omaha, etc., R. Co., 158 Iowa 137 3968, 4095, 4124
v. Owen, 4 B. & Ald. 654 1147, 1878
v. Palmer, 28 N. Y. 271 2797
v. Paschal, 37 Tex. 315 1206
v. Paull, 42 Ala. 136 1363
v. Payn, 4 Wend. 423 3122, 3123
v. Peachey, 1 H. & C. 518 411
Lewis v. Peake, 7 Taunt. 153 302, 2400, 3159, 3196
v. Pennsylvania R. Co., 76 N. J. L. 220 391
v. Phoenix Mut. L. Ins. Co., 39 Conn. 104 3071
v. Portland R., L. & P. Co., 59 Ore. 314 4714
v. Read, 13 M. & W. 834 435
v. Richardson, 2 Ind. Ty. 341 4402
v. Ritoff, 51 N. Y. Misc. 605 3118
v. Roby, 79 Vt. 487 4976
v. Ross, 95 Tex. 358 2127
v. Rountree, 79 N. C. 122 196
v. Rountree, 78 N. C. 323 535, 2370, 2371
v. Rucker, 2 Burr. 1167 3006
v. San Francisco, 2 Cal. App. 112 1065
v. Scott, 14 Ky. L. Rep. 713 (Ky. Super. Ct.) 2558, 2562
v. Scott, 24 Ky. L. Rep. 2367 1546
v. Sherin, 194 Fed. 976 2552
v. Ship Success, 18 La. Ann. 1 3387
v. Simpson, 122 Iowa 663 2506
v. Small, 75 Me. 323 1201
v. Smith, 2 S. & R. 142 1540
v. Smith, 107 Mass. 334 54
v. Smith, 179 Mo. App. 348 2793
v. Springfield F. & M. Ins. Co., 10 Gray 159 3048
v. Springfield W. Co., 176 Pa. 230 4036
v. Stanbridge, [1913] W. C. & Ins. Rep. 515, 6 B. W. C. C. 568 5174
v. Steamboat Buckeye, 1 Handy 150 3429
v. Susmilch, 130 Iowa 203 2502
v. Terry, 111 Cal. 39 153
v. Thompson, 3 App. Div. (N. Y.) 329 3742
v. Tilton, 64 Iowa 220 2979
v. Trickey, 20 Barb. 387 1419, 1446, 2462, 2469, 2478
v. Virginia-C. C. Co., 69 S. C. 364 3788, 3792
v. Walter, 4 B. & Ald 605 4586, 4599, 4600
v. West, 23 Mo. App. 503 2199
v. Western U. Tel. Co., 57 S. C. 325 3618, 3642
v. Western U. Tel. Co., 84 S. C. 54 3654
v. White, 16 Ohio St. 444 1954
v. Williams, 41 Tex. Civ. App. 464 1968
v. Wilson, 151 U. S. 551 1503
v. Yagle, 77 Hun 337 2656, 2665
v. Yale, 4 Fla. 418 2050
Lewis Township I. Co. v. Royer, 38 Ind. App. 151 3946
v. Rover, 38 Ind. App. 151 3968
Lewis' Adm'x v. Taylor Coal Co., 112 Ky. 845 5120
Lewis & Clark County v. Industrial Acc. Board of Montana, — Mont. —, 155 Pac. 268 5151
Lewiston v. Junction R. Co., 7 Ind. 597 766
Lewiston & Y. F. R. Co. v. Ayer, 27 App. Div. (N. Y.) 571 4108
Lexington v. Chenault, 151 Ky. 774 3963, 4131, 4138, 4930
v. Union Nat. Bank, 75 Miss. 1 1210
Lexington R. Co. v. Britton, 130 Ky. 676 1364, 1373, 1377, 4832
v. Cozine, 23 Ky. L. Rep. 1137 3507
v. Cropper, 142 Ky. 39 1461

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v. Johnson, 139 Ky. 323 1249, 1377, 1501, 1523, 3501, 3506
Lexington & E. R. Co. v. Baker, 156 Ky. 431 3767
v. Fields, 152 Ky. 19 4732
v. Napier's Heirs, 160 Ky. 579 3963, 4132
Ley v. Miller, 28 Neb. 822 2768
Leyde v. Martin, 16 Minn. 38 1101
Leyhan v. Leyhan, 47 Ind. App. 280 5093
Leyson v. Davenport, 38 Mont. 62 3699
L'Hommedieu v. The H. L. Dayton, 38 Fed. 926 807
Libbey v. Tolford, 48 Me. 316 3127
Libby v. Fowle, 90 Me. 262 4549
v. Hopkins, 104 U. S. 303 703, 710
Liber v. Parsons, 1 Bay 19 2110
Libert v. Unfried, 47 Wash. 186 997
Liberty Bell G. M. Co. v. Smuggler-Union M. C. 122 C. C. A. 113, 203 Fed. 795 3790, 3793
Libhart v. Wood, 1 W. & S. 265 2525
Licardi v. Cohen, 3 Gill 430 1147
Licey v. Licey, 7 Pa. 251 642
Lichetti v. Conway, 44 Pa. Super. 71 833, 889, 1942
Lichtenstadt v. Fleisher, 24 Ill. App. 92 1725
Lichtenstein v. Brooks, 75 Tex. 196 2551
v. Fargo, 66 N. Y. Misc. 149 3331
v. Lyons, 115 La. 1051 727
Lichty v. Hayne, 38 Pa. 434 2490
Licking R. M. Co. v. Fischer, 8 Ky. L. Rep. 89 55
Liddard v. Lopes, 10 East 526 3288, 3294
Liddell v. McVickar, 11 N. J. L. 44 1023
v. Wiswell, 59 Vt. 365 2852, 2864, 3851
Liddle v. Market F. Ins. Co., 4 Bosw. 179 3056
Lidgerwood Mfg. Co. v. S. R. H. Robinson & Son Contracting Co., 183 Ill. App. 431 2374, 2387
Lidgett v. Secretan, L. R. 6 C. P. 616 3006, 3028
Liebe v. Nicolai, 30 Ore. 364 3255
Lieber v. St. Louis A. & M. Ass'n, 36 Mo. 382 692
Lieberman v. Chicago, etc., R. Co., 141 Ill. 140 4102
Lieberthal v. Montgomery, 121 Mich. 369 3138, 3139, 3143, 3144
Liebler v. Carrel, 155 Mich. 196 475
Liebrandt v. Myron Lodge, 61 Ill. 81 802
v. Sorg. 133 Cal. 571 3667
Lienkauf v. Morris, 66 Ala. 406 1258, 1278, 4165, 4167, 4169, 4199
Lienkauf B. Co. v. Haney, 93 Miss. 613 1905
Lienow v. Ritchie, 8 Pick. 235 3734
Liermann v. Chicago, etc., R. Co., 82 Wis. 286 4872
v. Milwaukee, 132 Wis. 628 3935
Lierz v. Morris, 19 Pa. Super. Ct. 73 558
Liese v. Meyer, 143 Mo. 547 3662, 3663, 3668, 3671, 3677
Life Ass'n v. Ferrill, 60 Ga. 414 2574
v. Neville, 72 Ala. 517 2808
Life Ins. C. Co. v. Altschuler, 55 Neb. 341 673
Life, etc., Ins. Co. v. Mechanics' F. Ins. Co., 7 Wend. 31 1416
Lifebure v. American Exp. Co., 160 Iowa 54 3401
Ligare v. Chicago, etc., R. Co., 166 Ill. 249 3962, 4033
Ligare v. Peacock, 109 Ill. 94 1073
Ligget v. Smith, 3 Watts, 331 543
Liggett v. Ritter, 54 Pa. Super. Ct. 405 2403
Liggett A. Co. v. Michigan B. Co., 106 Mich. 445 2343
Light v. Detroit & M. R. Co., 165 Mich. 433 3461, 3464
v. Hardy, 29 Ont. 25 2434
v. Jacobs, 183 Mass. 206 4434
v. Light, 21 Pa. 407 4378
v. Reed, 234 Ill. 626 1804
v. Stevens, 159 Cal. 288 697, 699
v. Stoever, 12 S. & R. 431 532
Lightbody v. Ontario Bank, 11 Wend. 1 595
v. Ontario Bank, 11 Wend. 9, aff'd 13 Wend. 101 648, 649, 651
Lightburn v. Cooper, 1 Dana 273 2390
Lighter P. R. R. No. 250, The, 209 Fed. 493 2717
Lightfoot v. Hurd, 113 Mo. App. 612 813
v. Murphy, 47 Tex. Civ. App. 112 273, 1322
v. Price, 4 Hen. & Munf. 431 1214
v. St. Louis, etc., R. Co., 126 Mo. App. 532 139
v. West, 98 Ga. 546 3236, 3240
Lighthall v. Caldwell, 56 Ill. 108 2682
Lightner v. Menzel, 35 Cal. 452 887
Lightner M. Co. v. Lane, 161 Cal. 689 360, 1338, 3734, 3741, 4259
Lignante v. Panama R. Co., 147 App. Div. (N. Y.) 97 329, 3542
Lighty v. Shorb, 3 P. & W. 447 2207
Ligon v. Dunn, 6 Ired. 133 763
v. Western U. Tel. Co., 46 Tex. Civ. App. 408 3607
Like v. McKinstry, 41 Barb. 186, 4 Keyes 397 4566
Liles v. Montgomery T. Co., 7 Ala. App. 537 4794
v. Rogers, 113 N. C. 197 2803
Lilienthal v. Suffolk B. Co., 154 Mass. 185 4376
Liljengren F. & L. Co. v. Mead, 42 Minn. 420 174, 1366, 2341, 2629, 2631
Lillard v. Kentucky D. & W. Co., 134 Fed. 168 193, 319, 323, 1365, 1414, 2346, 2354
v. Whittaker, 3 Bibb 92 4169, 4211
v. Wilson, 178 Mo. 145 2473
Lilley v. Doubleday, 7 Q. B. Div. 510 175, 178, 287
Lillie v. Dunbar, 62 Wis. 198 4359
v. Lillie, 55 Vt. 470 1728, 1762
v. McMillan, 52 Iowa 463 4339
Lilly v. Lilly, 39 Wash. 337 2295
v. St. Louis, etc., R. Co., 31 Okla. 521 3450, 3501
Liman v. Pennsylvania R. Co., 4 N. Y. Misc. 539 194, 201
Limerick v. Lee, 17 Okla. 165 2689
Limpus v. State, 7 Blackf. 43 1621
Limron v. Blair, 181 Mich. 76 5205
Linam v. Anderson, 12 Ga. App. 735 1922
v. Reeves, 68 Ala. 89 4211
Linblom v. Sonstelie, 10 N. D. 140 1311
Linch v. Paris L. & G. E. Co., 80 Tex. 23 2664, 2682, 2683
Linck v. Vorhauer, 104 Mo. App. 368 4981
Lincoln, City of, 15 Prob. Div. 15 4992
Lincoln v. Alshuler Mfg. Co., 142 Wis. 475 1449, 2225, 2237, 2255, 2258
v. Bassett, 23 Pick. 154 674
v. Blanchard, 17 Vt. 464 295

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Lincoln v. Central Vermont R. Co., 82 Vt. 187 143
v. Chrisman, 10 Leigh 338 4514
v. Clafin, 7 Wall. 132 1134
v. Commonwealth, 164 Mass. 368 3984, 3949, 4001, 4003
v. Commonwealth, 164 Mass. 1 4022
v. Detroit & M. R. Co., 179 Mich. 189 4931
v. Hope Ins. Co., 8 Gray 22 3032
v. Johnson, 43 Vt. 74 2215
v. Levi C. M. Co., 128 Fed. 865 2236, 2241
v. Lincoln St. R. Co., 67 Neb. 469 703, 1051
v. Little Rock G. Co., 56 Ark. 405 867, 2585
v. New York & Cuba M. S. Co., 30 N. Y. Misc. 752 3530
v. Packard, 25 Tex. Civ. App. 22 1450, 1455, 4223
v. Saratoga, etc., R. Co., 23 Wend. 425 3472, 3488, 4693, 4714, 4749
v. Schwartz, 70 Ill. 134 2539, 2688
v. Smith, 28 Neb. 762 1477
Lincoln County v. Brock, 37 Wash. 14 4120
Lincoln G. Co. v. Chicago, etc., R. Co., 91 Neb. 203 3408, 3411
Lincoln S. Mfg. Co. v. Sheldon, 44 Neb. 279 2237
Lincoln Sav. Bank & S. D. Co. v. Allen, 82 Fed. 148 753
Lincoln, etc., Co. v. Ludwig, 94 Neb. 722 2596, 2598, 2613, 2669
Lind v. United States, 44 Ct. of Cls. 558 3304
Lindberg v. Howard, 146 Fed. 467 1723
Lindeke v. McArthur's, Inc., 125 Minn. 1344
Lindemann v. Dennis, 65 Mo. App. 511 2648
Linden v. Anchor M. Co., 20 Utah 134 4886
v. Graham, 1 Duer 670 1370, 4566
Lindenbaum v. New York, etc., R. Co., 197 Mass. 314 444
Linder v. Brown, 137 Ga. 352 4834
v. Monroe, 33 Ill. 388 1539, 1541
v. Renfroe, 1 Ga. App. 58 1359
Lindh v. Great Northern R. Co., 99 Minn. 408 3487, 3652
Lindler v. Southern R. Co., 84 S. C. 536 1267
Lindley v. Horton, 27 Conn. 58 4506
v. Miller, 67 Ill. 244 547, 548, 3257, 3263, 4361
v. Richmond & D. R. Co., 88 N. C. 547 3370, 3387
Lindner v. Cape B. & I. Co., 131 Mo. App. 680 2525, 2543, 2545
v. St. Paul F. & M. Ins. Co., 93 Wis. 526 3012
Lindquest v. Union Pac. R. Co., 33 Fed. 372 401
Lindsay v. Anesley, 6 Ired. 188 864, 884
v. Blood, 2 Mass. 518 1655
v. Bridgewater G. Co., 3 Pa. Dist. Rep. 716 489, 3424
v. Carpenter, 90 Iowa 529 2484
v. Cusimano, 12 Fed. 503 3307
v. Grande Ronde L. Co., 48 Ore. 430 1498
v. Kansas City, 195 Mo. 166 1471, 4706, 4717, 4793
v. Larned, 17 Mass. 190 4605
v. Oregon S. L. R. Co., 13 Idaho 477 3483
Lindsay v. Pettigrew, 5 S. D. 500 2914
v. Stevenson, 17 Vict. L. R. 112 285
v. Stewart, 72 Cal. 540 566
v. Wabash R. Co., 141 Mich. 204 1384
Lindsay's Est., 210 Pa. 224 1037, 2306
Lindsey v. Danville, 46 Vt. 144 4758
v. Hewitt, 42 Ind. App. 573 1663, 1664, 1666, 1668, 1669, 1672, 1673
v. Parker, 142 Mass. 582 2164, 2876, 2899
v. Rockwall County, 10 Tex. Civ. App. 225 858, 867
v. Smith, 7 Johns. 359 4503
v. Stevens, 5 Dana 107 717, 721
Line v. Nelson, 38 N. J. L. 358 424
v. Philadelphia, etc., R. Co., 218 Pa. 604 3969
v. Stephenson, 4 Bing. N. C. 578, 5 Bing. N. C. 183 3182
Lineham v. Nelson, 197 N. Y. 482 4589
Linerode v. Rasmussen, 63 Ohio St. 545 4392
Lines v. Alaska C. Co., 29 Wash. 133 4223, 4226
v. Mack, 19 Ind. 223 1164, 1878
v. Smith, 4 Fla. 47 2381
Linford v. Lake, 3 H. & N. 276 459, 4783
Linforth v. San Francisco G. & E. Co., 156 Cal. 58 1480, 3768
Ling v. Malcom, 77 Conn. 517 315, 1367, 4244, 4267, 4309
Linge v. Alaska Treadwell Co., 3 Alaska 9 1493, 4949
Lingham v. Eggleston, 27 Mich. 324 2226
Lingo v. Burford, 112 Mo. 459 4112
Lining v. Giles, 3 Brev. 530 1636
Lininger v. Webb, 51 Neb. 10 2755
Link v. Sheldon, 136 N. Y. 1 1472
Linn v. Duquesne, 204 Pa. 551 88, 4666, 4672
v. Minor, 4 Nev. 462 602
Linn County Nat. Bank v. Crawford, 69 Fed. 532 1867
Linnan v. Linnan, 131 La. 535 2473
Linnell v. Lyford, 72 Me. 280 4421
Linnen v. Banfield, 114 Mich. 93 4839
Linningdale v. Livingston, 10 Johns. 36 2531
Linscott v. Moseman, 84 Kan. 541 1981
Linsley v. Bushnell, 15 Conn. 225 1313, 3472, 4164
Linsly v. Carpenter, 4 Robert. 200 2945
Lint v. Lint, 158 Iowa 444 4613, 4633
Linthicum v. Truitt, 2 Boyce (Del.) 338 4772
Linton v. Armstrong W. Co., 29 Pa. Super. Ct. 172 3760, 3761
v. Hary, 25 Pa. 193 3132
v. Hurley, 104 Mass. 353 27
v. Hurley, 14 Gray 191 449
v. National L. Ins. Co., 104 Fed. 584 971, 1061
v. Porter, 31 Ill. 107 2380
Linton C. & M. Co. v. Persons, 11 Ind. App. 264 4690, 4715
Linville v. Black, 5 Dana 177 4211
v. Jones (Tex. Civ. App.) 137 S. W. 415 692, 4391
v. Leininger, 72 Ind. 491 1579
v. Rhoades, 73 Mo. App. 217 4566
Linz v. Schuck, 106 Md. 220 2654, 2655
Lionberger v. Kinealy, 13 Mo. App. 41 630
Liotard v. Graves, 3 Cai. 226 1009, 1019, 1103
Liotta v. Abruzzo, 82 App. Div. (N. Y.) 429 892

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Lipford v. Charlotte, etc., R. Co., 7 R'ch 409 3329
Lipowicz v. Jervis, 209 Pa. 315 4640, 4643, 4644
Lippert v. Saginaw M. Co., 108 Wis. 512 2276, 2359
Lippett v. Kelley, 46 Vt. 516 3699, 3702
Lippincott v. Rich, 19 Utah 140 681
v. Rich, 22 Utah 196 1924
Lipscomb v. Adams, 193 Mo. 530 2489
v. De Lanos, 68 Ala. 592 698
v. Fuqua, 103 Tex. 585 889
v. Houston, etc., R. Co., 95 Tex. 5 4885
v. Lipscomb, 66 W. Va. 55 2003
v. Seegers, 19 S. C. 425 848, 867, 886
v. Shofner, 96 Tenn. 112 4609
Liscom v. Boston Mut. F. Ins. Co., 9 Metc. (Mass.) 205 3041, 3054
Lisenbury v. St. Louis & S. Ry. Co., 184 Ill. App. 395 49, 4742
Lishey v. Lishey, 2 Tenn. Ch. 5, 6 Lea 418 1070
Lishy v. O'Brien, 4 Watts. 141 677
Lisle v. Tribble, 92 Ky. 304 640
Lissberger v. Kellogg, 78 N. J. L. 85 2370, 2379, 2410, 2415, 2417
Lisseck v. Anderson, 167 Ill. App. 393 4633
List v. Miner, 74 Conn. 50 1303
Lister v. Batson, 2 Kan. 420 1981, 2005
v. Lane (1893) 2 Q. B. 212 3152
v. McKee, 79 Ill. App. 210 439
v. Perryman, L. R. 5 Ex. 365 4643
v. Windmuller, 52 N. Y. Super. 407 2394
v. Wright, 2 Hill 320 468, 4594
Lichtenstein v. Brooks, 75 Tex. 196 375, 2552
Litchfield v. Allen, 7 Ala. 779 1839, 1846
v. Bond, 105 App. Div. (N. Y.) 229 3946
v. Hutchinson, 117 Mass. 195 4378, 4384
v. Whitenack, 78 Ill. App. 364 1493, 3883
Litchfield & M. R. Co. v. Shuler, 134 Ill. App. 615 4882
Littauer v. Goldman, 73 N. Y. 506 1872
Littell v. Nichols, Hardin, 66 622, 803, 806
Little v. Banks, 85 N. Y. 258 832, 923, 1038
v. Bennett, 94 Ga. 405 2860
v. Bishop, 22 Ky. L. Rep. 1747 2205
v. Bliss, 55 Kan. 94 1655, 1659, 1663, 1676
v. Boston, etc., R. Co., 66 Me. 239 51, 3283, 3335, 3389, 3412, 4678
v. Bousfield, 165 Mich. 654 1511, 4877, 4878, 4913
v. Dawson, 4 Dall. 111 2469
v. Derby, 7 Mich. 325 1869
v. Greek, 233 Pa. 534 3788
v. Hackett, 116 U. S. 366 108
v. Hall, 18 How. 165 4478
v. Herzinger, 34 Utah 337 2501
v. Hobbs, 8 Jones 179 416
v. Larabee, 2 Me. 37 1483, 1488
v. Little, 13 Pick. 426 2843, 2873
v. McGuire, 43 Iowa 447 323
v. Martin, 3 Wend. 219 3103
v. Munson, 54 Ill. App. 437 4843
v. Patliter, 3 Me. 6 3734
v. Phenix Bank, 2 Hill 425, 7 Hill 359 670, 671, 1885, 2940
Little v. Portland, 26 Ore. 235 378
v. Ragan, 83 Ky. 314 2873
v. Riley, 43 N. H. 109 1147, 1208, 1878
Little Miami R. Co. v. Collett, 6 Ohio St. 182 4120
Little Rock Furniture Mfg. Co. v. Kavanaugh, 111 Ark. 575 2983
Little Rock Junction R. v. Woodruff, 49 Ark. 381 4033, 4036, 4131, 4139
Little Rock R. & E. Co. v. Dobbins, 78 Ark. 553 1343, 3506
v. Goerner, 80 Ark. 158 3501
Little Rock T. & E. Co. v. McCaskill, 75 Ark. 133 101
v. Winn, 75 Ark. 529 3471, 3502
Little Rock, etc., R. Co. v. Allen, 41 Ark. 431 3964, 3970, 3977, 3980
v. Allister, 62 Ark. 1 1429, 4093
v. Allister, 68 Ark. 600 4095, 4108, 4115, 4120
v. Barker, 39 Ark. 491 4889, 4937
v. Conatser, 61 Ark. 560 3311
v. Eubanks, 48 Ark. 460 22, 23, 24
v. Haynes, 47 Ark. 497 1431
v. McGehee, 41 Ark. 202 4033
v. Record, 74 Ark. 125 3414, 3529, 3534
v. Wallis, 82 Ark. 447 3893, 3894
Little Rock, etc., Tel. Co. v. Davis, 41 Ark. 79 3547
Little Schuylkill, etc., Co. v. Richards, 57 Pa. 142 440, 3937
Little Silver, The, 189 Fed. 980 4676, 4739, 4740, 4750, 4756, 4757
Littlefield v. Biddeford, 29 Me. 310 1680
v. Perkins, 100 Me. 96 1830
v. Perry, 21 Wall. 205 4450, 4453, 4466, 4476
Littlehale v. Dix, 11 Cush. 364 4789
Littlejohn v. Greeley, 13 Abb. 41 4510, 4518
v. Mulligan, 3 New Zeal. L. R. (Sup. Ct.) 446 4486
v. Sample, 173 Mich. 419 4405
v. Wilcox, 2 La. Ann. 620 1687
Littleton v. Frank, 2 Lea 300 1706
v. Richardson, 32 N. H. 59 295, 299
v. Richardson, 34 N. H. 187 2131
v. Wells, etc., Council, 98 Md. 453 683
Littlewood v. Mayor, 89 N. Y. 24 4854, 5118
Live Stock R. Co. v. White, 90 Mo. App. 498 4383
Liverman v. Roanoke, etc., R. Co., 114 N. C. 692 3969
Livermon v. Roanoke, etc., R. Co., 109 N. C. 52 3756
Livermore v. Claridge, 33 Me. 428 723
v. Crane, 26 Wash. 529 2508
v. Jamaica, 23 Vt. 361 3957
v. Northrup, 44 N. Y. 107 482
v. Rand, 26 N. H. 85 736
v. Truesdell, 9 Colo. App. 332 637
v. Wortman, 25 Hun 241 1129
Liverpool Packet, The, 2 Sprague 37 2732
Liverpool W. W. Co. v. Atkinson, 6 East 507 1596
Liverpool & G. W. S. Co. v. Phenix Ins. Co., 129 U. S. 397, 458 1146, 1182, 3334
Liverpool, etc., Ins. Co., v. Verdier, 33 Mich. 138 3049
Livesay v. First Nat. Bank, 36 Colo. 526 439
Livesley v. Johnston, 48 Ore. 40 369, 2274

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Livesley v. Krebs Hop Co., 57 Ore. 352 2250, 4241
v. Muckle, 46 Ore. 420 2025
Livie v. Janson, 12 East 648 3027, 3033
Livingston v. Bishop, 1 Johns. 291 682
v. Burroughs, 33 Mich. 511 1321, 4551
v. Exum, 19 S. C. 223 1721, 1739
v. Harrison, 2 E. D. Smith 197 817, 820, 1235
v. Jones, 3 Wall. Jr. 330 4439
v. L'Engle, 27 Fla. 502 3129
v. McCartin, Vict. L. R. (1907) 48 4503
v. Miller, 11 N. Y. 80 1069, 3148
v. Platner, 1 Cow. 175 1536
v. Rawyards Coal Co., 5 App. Cas. 25 3791, 4260
v. Robb, 61 N. Y. Misc. 81 3162, 3164
v. Salter, 6 Ga. App. 377 1058, 1920
v. Tanner, 12 Barb. 481 3715
v. Tompkins, 4 Johns. Ch. 415 978
v. Tremper, 4 Johns. 416 1852
v. Tremper, 11 Johns. 101 424
v. Van Rensselaer, 6 Wend. 63 2863
v. Wagner, 23 Nev. 53 2216
v. Woods, 20 Mont. 91 1578, 1581
v. Woodworth, 15 How. 546 4453, 4455
Livingston Co. v. Graves, 32 Mo. 479 2608
Livingstone, The, 104 Fed. 918, rev'd 113 Fed. 879 4989, 4990, 5017
Lizana v. Lang, 90 Miss. 469 463
Lizardi v. Cohen, 3 Gill 430 1878
Lizotte v. Tenniscouata R. Co., 37 New. Bruns. 397 77
Llano I. Co. v. Watkins, 4 Tex. Civ. App. 428 1058
Llano I. & F. Co. v. Eubanks, 5 Tex. Civ. App. 108 1927
Llansamlet T. P. Co., Ex parte, L. R. 16 Eq. 155 2232
Llewellyn v. Llewellyn, 3 Dowl. & L. 318 759
Llewellyn v. Two Anchors and Chains, 1 Bene. 80 2732, 2735
Lloyd v. Campbell, 186 Ill. App. 566 1067
v. Fair Haven, 67 Vt. 167 4105
v. Galbraith, 32 Pa. 103 574
v. Guibert L. R. 1 Q. B. 115, 120 1145
v. Haugh, 223 Pa. 148 3398
v. Jewell, 1 Me. 352 2198
v. McGarr, 3 Pa. 482 1908, 1915
v. Matthews, 223 Ill. 477 2778, 2783
v. Morris, Willes 443 1528
v. Quinby, 5 Ohio St. 262 2098, 2115
v. Railroad, 53 Mo. 629 1462
v. Sadlier, 7 Irish Jur. (N. S.) 15 4281
v. Sandusky, 203 Ill. 621 1987, 1997
v. Sandusky, 95 Ill. App. 593 2068, 2073
v. Scott, 4 Pet. 205 998, 1147
v. Southern R. Co., 166 N. C. 24, aff'd 239 U. S. 496 5059, 5061, 5135
v. Turner, 70 N. J. Eq. 425 3722
Lloyd L. Co. v. Solon, 17 Ohio C. C. 194 2275
Lloyds v. Harper, 16 Ch. Div. 290 2749, 2770
Llynvi Co. v. Brogden, L. R. 11 Eq. 188 364, 3786
Loader v. Kemp, 2 C. & P. 375 3233
Loan Ass'n v. Stonemetz, 29 Pa. 534 2467
Loan & Exchange Bank v. Miller, 39 S. C. 175 1012
Lobb v. Seattle, etc., R. Co., 48 Wash. 238 1360
Lobban v. Wabash R. Co., 159 Mo. App. 464 4788
Lobdell v. Baker, 1 Metc. (Mass.) 193 2383, 4373
v. Baker, 3 Metc. (Mass.) 469 2783, 4373
v. Parker, 3 La. 328 191
v. Stowell, 51 N. Y. 70 2311, 4246
Lobeck v. Duke, 50 Neb. 568 2774
Loch Trool, The, 150 Fed. 429 4999, 5001
Lochenmeyer v. Fogarty, 112 Ill. 572 656, 685, 698
Lochrane v. Solomon, 38 Ga. 286 2816
Lock v. Ashton, 12 Q. B. 871, 13 Jur. 167 4616
v. Ashton, 18 L. J. (Q. B.) 76 4617
v. Citizens' Nat. Bank, — Tex. Civ. App. —, 165 S. W. 536 1823, 1920
v. Furze, 19 C. B. (N. S.) 96, aff'd in Ex. Ch. L. R. 1 C. P. 441 2106, 2109, 2171, 3187
Lock Haven B. Co. v. Clinton County, 157 Pa. 379 4077
Locke v. Andres, 7 Ired. 159 631
v. Garrett, 16 Ala. 698 4296
v. Homer, 131 Mass. 93 2189, 2895
v. International, etc., R. Co., 25 Tex. Civ. App. 145 4672
v. McLean, 33 Mich. 473 2745, 2759
v. Stearns, 1 Metc. (Mass.) 560 449
v. Williamson, 40 Wis. 377 535, 2371
Lockenour v. Sides, 57 Ind. 360 4606, 4609
Lockett v. Ft. Worth, etc., R. Co., 78 Tex. 211 3904
Lockhart v. Hamlin, 190 N. Y. 132 2508
v. Western & A. R. Co., 73 Ga. 472 430
Lockport v. Tonawanda Iron & Steel Co., 166 App. Div. (N. Y.) 962 4020
Lockridge v. Foster, 5 Ill. 56 4383
Lockwood v. Atlantic Mut. Ins. Co., 47 Mo. 50 3006
v. Bartlett, 7 N. Y. Supp. 481 1535
v. Boston E. R. Co., 200 Mass. 537 152
v. Halsey, 41 Kan. 166 2503
v. Lindsey, 6 D. C. App. Cas. 396 1905, 1923
v. Lockwood, 67 Minn. 476 4983
v. New York, etc., R. Co., 98 N. Y. 523 4861, 4895, 4906, 4935, 4943, 4954
v. Saffold, 1 Ga. 72 1760
v. Sturdevant, 6 Conn. 373 2077, 2089
v. Thorne, 11 N. Y. 170 759
v. Troy City R. Co., 92 App. Div. (N. Y.) 112 1381
v. Twenty-third St. R. Co., 15 Daly 374 4658, 4796
Lockyer v. Jones, Peake, 180n 790
Locomotive Safety T. Co. v. Pennsylvania R. Co., 14 Phila. 432 4439, 4450
v. Railroad Co., 2 Fed. 681 1069
Loder v. Kekule, 3 C. B. (N. S.) 128 291, 2406, 2413, 4241, 4410
Lodge v. Ainscow, 1 Penne. 327 736
v. Dicas, 3 B. & Ald. 611 753
v. Martin, 31 App. Div. (N. Y.) 13 3145

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Lodge Holes C. Co. v. Mayor, etc., [1908] App. Cas. 323 3768
v. Wednesbury, [1908] App. Cas. 323 321
Lodwick L. Co. v. Taylor, 39 Tex. Civ. App. 302 4683, 4705
Loe v. Chicago, etc., R. Co., 57 Mo. App. 350 4719
Loeb v. Flash. 65 Ala. 526 4240
v. Homer C. & Mfg. Co., 111 La. 726 2280
v. Mann, 39 S. C. 465 4321
v. Stern, 198 Ill. 371, aff'g 99 Ill. App. 637 2302
v. Weil, 209 Fed. 608 1815
Loeder v. Kemp, 2 C. & P. 375 3242
Loehr v. Dickson, 141 Wis. 332 14, 34, 312
Loellke v. Grant, 120 Ill. App. 74 1395, 1404
Loesch v. Koehler, 144 Ind. 278 1363, 1367, 4180
Loescher v. Deisterberg, 26 Ill. App. 520 204, 2286
Loeser v. Humphrey, 41 Ohio St. 378 4787
Loetscher v. Dillon, 119 Iowa 202 4239, 4244
Loevenhart v. Lindell R. Co., 190 Mo. 342 1494
Loewenberg v. Rosenthal, 18 Ore. 178 550, 3830
Loewer v. Harris, 6 C. C. A. 394, 57 Fed. 368 4372, 4429
Lofft v. Davis, 1 El. & El. 474 3165
Lofink v. Interborough R. T. Co., 102 App. Div. (N. Y.) 275 4667
v. Interborough R. T. Co., 106 App. Div. (N. Y.) 202 1384
Lofland v. McDaniel, 1 Penne. 416 623
v. Maull, 1 Del. Ch. 359 1026, 1966
Loftis v. Alexander, 139 Ga. 346 1920
Loftus v. Bennett, 68 App. Div. (N. Y.) 128 4540
v. Metropolitan St. R. Co., 220 Mo. 470 1492
v. Midland Coal Co., 181 Ill. App. 197 1494
v. Riley, 83 Iowa 503 2236
Log Cabin, etc., Ass'n v. Gross, 71 Md. 456 979
Logan v. Agricultural Soc., 156 Mich. 537 1461
v. Anderson, 18 B. Mon. 114 574, 577, 578
v. Austin, 1 Stew. 476 463, 4783
v. Boston El. R. Co., 188 Mass. 414 4084, 4139
v. Caffrey, 30 Pa. 106 372
v. Cincinnati, etc., R. Co., 139 Ky. 202 157
v. Davidson, 18 App. Div. (N. Y.) 353, aff'd 162 N. Y. 624 814
v. Field, 192 Mo. 54 2463, 2476
v. Hall, 19 Iowa 491 1070
v. Hodges, 146 N. C. 38 4505, 4508, 4545, 4586
v. Illinois T. & S. Bank, 93 Ill. App. 39 1058
v. Jennings, 4 Rawle 355 1399
v. Lewis, 7 J. J. Marsh. 3 3097
v. Moulder, 1 Ark. 313 2056, 2060
v. Murray, 6 S. & R. 175 4961
v. Tibbott, 4 Greene 389 537
v. Western U. Tel. Co., 84 Ill. 468 3622
Logansport, etc., R. Co. v. Buchanan, 52 Ind. 163 4103
v. Wray, 52 Ind. 578 316, 2592, 2601
Logie v. Black, 24 W. Va. 1 531, 537
v. Gillies, 4 New Zeal. L. R. (Sup. Ct.) 65 2923
Lohman v. Crouch, 19 Gratt. 331 802
Lohner v. Coldwell, 15 Tex. Civ. App. 444 3677, 3689
Lohr B. Co. v. Ferguson, 223 Ill. 88 2684
Loiseau v. Threlstad, 14 S. D. 257 2113, 2185
Loisseau v. Gates, 31 S. D. 227 2404, 2416
Loker v. Damon, 17 Pick. 284 161, 212, 225, 312, 315
Loloff v. Sterling, 31 Colo. 102 4136, 4144
Lomax v. Bailey, 7 Blackf. 599 542
v. Colorado Nat. Bank, 46 Colo. 229 658
v. Pendleton, 3 Call 465 1121
v. Ragor, 85 Ill. App. 679 1725, 1727
Lombard v. Batchelder, 58 Vt. 558 1328
v. Byrne, 194 Mass. 236 1853
v. Chicago, 4 Biss. 460 4725
v. Chicago Sinai Congregation, 64 Ill. 477, 75 Ill. 271 1026
v. Chicago, etc., R. Co., 47 Iowa 494 1512, 3529
v. Kennedy, 23 L. R. Ir. 1 3158
v. Lennox, 155 Mass. 70 167, 4537
v. Mayberry, 24 Neb. 674 2783
v. Overland D. & R. Co., 41 Colo. 253 2666, 2667
Lombard I. Co. v. Burton, 5 Kan. App. 197 1057
Lombard W. W. G. Co. v. Great Northern P. Co., 101 Me. 114 2373, 2386
Lombarde v. Older, 17 Beav. 542 525
Lombardi v. California St. R. Co., 124 Cal. 311 1374, 3488, 4694, 4696
Lombardo v. Boston & M. R. R., 223 Fed. 427 5065
Lomi v. Tucker, 4 C. & P. 15 516
Lomme v. Sweeney, 1 Mont. 584 1654, 1683
Lommeland v. St. Paul, etc., R. Co., 35 Minn. 412 1426, 3799, 3801, 3893
Lomoe v. Superior W., L. & P. Co., 147 Wis. 5 4930
London v. Miller, 19 Tex. Civ. App. 446 1684, 4208
London Assur. Co. v. Bold, 6 Q. B. 514 2754, 2767
v. Russell, 1 Pa. Super. Ct. 320 2916
London Guarantee & Acc. Co. v. Horn, 206 Ill. 493, aff'g 101 Ill. App. 355 167
London & B. Bank v. Walker, 74 Hun 395 1727
London & F. Ins. Co. v. Liebes, 105 Cal. 203 4363
London & L. F. Ins. Co. v. Turnbull, 86 Ky. 230 3050
London & San Francisco Bank v. Parrott, 125 Cal. 472 664
London & W. T. Co. v. Grand Trunk R. Co., 22 Ont. App. 262 4921, 4936
London, etc., R., In re, 24 Q. B. Div. 326 4003
London, etc., R. Co. v. Evershed, L. R. 3 App. Cas. 1029 3279, 3281
v. South Eastern R. Co., [1893] App. Cas. 429 1033
v. Southeastern R. Co., [1892] 1 Ch. 120, [1893] App. Cas. 429 1095
Lonergan v. Small, 81 Kan. 48 167, 1511
v. Waldo, 179 Mass. 135 2341, 2347
Loney v. Oliver, 21 Ont. 89 2002

[REFERENCES ARE TO PAGES]

Long v. Abeles, 77 Ark. 150 2627
v. Allen, 2 Fla. 402 2198
v. American S. Co., 23 N. D. 492 2741, 2793
v. Athol, 196 Mass. 497 2671
v. Booe, 106 Ala. 570 4973, 4974
v. Bowring, 33 Beav. 585 839, 840
v. Chapman, 97 App. Div. (N. Y.) 241 2406, 2409
v. Chicago, etc., R. Co., 15 Okla. 512 3486
v. Clapp, 15 Neb. 417 313, 2447
v. Conklin, 75 Ill. 32 2294
v. Cummings, 156 Ala. 577 360, 3734
v. Davis, 136 Iowa 734 4391, 4395
v. Elberton, 109 Ga. 28 9
v. Evening News Ass'n, 113 Mich. 274 4224
v. Fulton C. Co., 133 App. Div. (N. Y.) 842 1383
v. Furnas, 130 Iowa 504 833
v. Gieriet, 57 Minn. 278 3235, 3236
v. Harrisburg, etc., R. Co., 126 Pa. 143 4098
v. Hickingbottom, 28 Miss. 772 2381
v. Israel, 9 Leigh 556 2212
v. Kansas City, etc., R. Co., 170 Ala. 635 488
v. Kaufman, 128 La. 767 244
v. Kee, 42 La. Ann. 899 2519
v. Lamkin, 9 Cush. 361 4216
v. Long, 57 Iowa 497 755, 774
v. Long, 141 Mo. 352 1164
v. Long, 16 N. J. Eq. 59 1564, 1568, 1569
v. Louisville & N. R. Co., 128 Ky. 26 7, 3881, 3931
v. Miller, 93 N. C. 233 703, 711
v. Moler, 5 Ohio St. 271 2147, 2149
v. Morrison, 14 Ind. 509 4763, 4846, 4858, 5120
v. O'Bryan, 28 Ky. L. Rep. 1062 2324
v. Ottumwa R. & L. Co., 162 Iowa 11 4792
v. Pierce County, 22 Wash. 330 930, 2686
v. Pruyn, 128 Mich. 57 2444, 2446
v. Robinson, 13 La. Ann. 465 1804
v. Rogers, 17 Ala. 546 4602
v. Rucker, 166 Mo. App. 472 4567
v. Rucker, 177 Mo. App. 402 1502
v. Seigel, 177 Ala. 338 461, 4778
v. Sinclair, 40 Mich. 569 2112, 2117, 2120
v. Thompson, 73 Kan. 76 2501
v. Towl, 42 Mo. 545 918
v. Tribune P. Co., 107 Mich. 207 4521, 4537
v. Waters, 47 Ala. 624 790
v. Wheeler, 84 Mo. App. 101 2141
v. Woodman, 58 Me. 49 4377
Long Beach City School Dist. v. Dodge, 135 Cal. 401 882, 2598, 2606
Long Distance Tel. & T. Co. v. Schmidt, 157 Ala. 391 3963, 4015, 4033
Long Island Bank v. Townsend, Hill & Denio, 204 714, 716
Long Island C. & S. Co. v. New York, 204 N. Y. 73 2696
Long Island L. & T. Co. v. Long Island City & N. R. Co., 85 App. Div. (N. Y.) 36 1210
Long Island R. Co. v. Garvey, 159 N. Y. 334 3984
v. State, 157 App. Div. (N. Y.) 12 399, 3967
Long Island W. S. Co. v. Brooklyn, 166 U. S. 685 4079
Long Pole L. Co. v. Saxon L. & L. Co., 108 Va. 497 2277, 2281
Longacre v. State, 3 Miss. (2 How.) 637 1527
Longdon v. Bilsky, 22 Ont. L. R. 4 4644
Longfellow v. City of Seattle, 76 Wash. 509 1302
v. McGregor, 56 Minn. 312, 61 Minn. 494 2750, 2776
v. Quimby, 29 Me. 196 3804
v. Quimby, 33 Me. 457 3778, 3785
Longford, The, 4 Asp. 385 2734
Longley v. Griggs, 10 Pick. 121 2856
Longman v. Fenn, 1 H. Bl. 541 1398
Longmeid v. Halliday, 6 Eng. L. & Eq. 562 2448, 2449
v. Holliday, 6 Ex. 761 99
Longmore v. Puget Sound Traction, Light & Power Co., 78 Wash. 468 4779
Longobardi v. Yuliano, 33 N. Y. Misc. 472 921
Longridge v. Dorville, 5 B. & Ald. 117 759, 831
Longuell v. Ridinger, 1 Gill. 57 1069
Longworth v. Askren, 15 Ohio St. 370 879, 881
v. Aslin, 106 Mo. 155 703
v. Meriden & W. R. Co., 61 Conn. 451 3948, 4146
v. Mitchell, 26 Ohio St. 334 601, 2046
Longyear v. Gregory, 110 Mich. 277 3831
Lonsdale v. Church, 2 T. R. 388 1038, 1567, 1571
Lonsdale Co. v. Woonsocket, 25 R. I. 428 1061
Loofbourow v. Utah L. & R. Co., 33 Utah 480 4705
Looff v. Lawton, 97 N. Y. 478 4389
Loomer v. Thomas, 38 Neb. 277 312, 476
Loomis v. Bedel, 11 N. H. 74 2117
v. Besse, 148 Wis. 647 4169
v. Eagle Bank, 10 Ohio St. 327 2231
v. Eagle Ins. Co., 6 Gray 396 3071
v. Eaton, 32 Conn. 550 980
v. Fay, 24 Vt. 240 2810
v. Federal Union Surety Co., 180 Ill. App. 590 1502
v. Gillett, 75 Conn. 298 1016, 2477
v. Greer, 7 Me. 386 361
v. Hollister, 75 Conn. 275 339
v. Norman P. S. Co., 81 Conn. 343 2357
v. Perkins, 70 Conn. 444 1500
v. Robinson, 76 Mo. 488 391
v. Storrs, 4 Conn. 440 632
v. Tyler, 4 Day 141 1538
v. Wadhams, 8 Gray 557 1988
Loomis M. Co. v. Vawter, 8 Kan. App. 437 2404
Looney v. District of Columbia, 113 U. S. 258 673, 678
v. McLean, 126 Mass. 33 3234
v. Pinckston, 1 Overt. 384 1889
v. Reeves, 5 Kan. App. 279 2060, 2066, 2087, 2099, 2102
Loop v. Litchfield, 42 N. Y. 351 99
Loos v. Wilkinson, 113 N. Y. 485 952
Loosemore v. Radford, 9 M. & W. 657 283, 2892, 4276, 4281
Loper v. State, 48 Kan. 540 1591
v. Western U. Tel. Co., 70 Tex. 689 3596, 3621, 3646
Lopes v. Connolly, 120 Mass. 487 55, 167, 287, 344
Lorain S. Co. v. Hayes, 6 Ohio C. C. (N. S.) 353 1480
v. Norfolk & B. St. R. Co., 187 Mass. 500 4210, 4221, 4292

[REFERENCES ARE TO PAGES]

Loraine v. Cartwright, 3 Wash. C. C. 151 2946
Loranger v. Loranger, 115 Mich. 681 4525
Lorce v. Webster Mfg. Co., 134 Wis. 173 2221
Lord v. Baldwin, 6 Pick. 352 419
v. Belknap, 1 Cush. 279 2231, 2658, 2667
v. Carnes, 98 Mass. 308 418
v. Comstock, 52 N. Y. Super. 548 2599, 2629
v. Dall, 12 Mass. 115 3071, 3072
v. Gaddis, 9 Iowa 265 918
v. Hingham Nat. Bank, 186 Mass. 161 2929
v. Lancey, 21 Me. 468 1559
v. Maine Cent. R. Co., 105 Me. 255 1267, 3343, 3748
v. Manchester St. R. Co., 74 N. H. 295 4908
v. Mayor, 3 Hill 426 1243, 1246, 1249
v. Neptune Ins. Co., 10 Gray 109 3022, 3289
v. New York Evening Journal Co., 130 App. Div. (N. Y.) 105 4510, 4551
v. Staples, 23 N. H. 448 2842
v. Stong, 6 Mich. 61 3314
v. Tiffany, 98 N. Y. 412 424, 775
v. Wheeler, 1 Gray 282 2608
v. Wood, 120 Iowa 303 1708
Lord Arlington v. Merricke, 2 Saund. 411 1596, 2753
Lord Ashtown v. White, 11 Irish L. 400 874, 877, 881
Lord Derby, The, 17 Fed. 265 4664
Lord Dunsany v. Plunkett, 2 Bro. P. C. 251 1564
Lord Elphinstone v. Monkland I. & C. Co., 11 App. Cas. 332 895
Lord Oakley v. Kensington C. Co., 5 B. & Ald. 138 396
Lorentz v. Pinnell, 55 W. Va. 114 731, 995
Lorentzen v. Warner, 3 Alaska 218 994
Lorenzo v. Hunger, 185 Ill. App. 574 4347
v. Puerto Rico S. Co., 5 Porto Rico Fed. 535 476
Lorf v. Detroit, 145 Mich. 265 1496, 4700
Lorick v. Palmetto Bank & T. Co., 74 S. C. 185 277
v. Seaboard A. L. R. Co., — S. C. —, 86 S. E. 675 5051
Lorillard v. Clyde, 122 N. Y. 41 2545
v. Palmer, 15 Johns. 12 3286
Loring v. Anderson, 95 Minn. 101 1815
v. Bacon, 3 Cush. 465 2859
v. Baker, 3 Cush. 465 1651
v. Brodie, 134 Mass. 453 4273
v. Cooke, 3 Pick. 48 807, 811
v. Gurney, 5 Pick. 15 1008, 2229
v. Mansfield, 17 Mass. 394 637
v. Morrison, 15 App. Div. (N. Y.) 498 2830
v. Neptune Ins. Co., 20 Pick. 411 3034
v. Oxford, 18 Tex. Civ. App. 415 2053
v. Sumner, 23 Pick. 98 1831
v. Woodward, 41 N. H. 381 1085
Lorni v. Tucker, 4 C. & P. 15 1848
Lorton v. Wabash R. Co., 159 Mo. App. 559 4659
Los Angeles v. City Bank, 100 Cal. 18 944, 1199
v. Gayer, 10 Cal. App. 378 4102, 4151
v. Kerckhoff C. M. & L. Co., 15 Cal. App. 676 4034, 4044
v. Pomroy, 124 Cal. 597 4102
Los Angeles Olive Growers' Ass'n v. Pacific Surety Co., 24 Cal. App. 95 886, 917
Los Angeles, etc., R. Co. v. Rumpp, 104 Cal. 20 4026
Lot v. Parish, 1 Litt. 393 2124, 2129, 2137
v. Thomas, 2 N. J. L. 297 2058
Loth v. Mothner, 53 Ark. 116 673
Lothian v. Rickards, 12 Aust. Com. L. R. 165 153
v. Western U. Tel. Co., 25 S. D. 319 56, 3546, 3547, 3549, 3591
Lothrop v. Adams, 133 Mass. 471 449, 4574
v. Michaelson, 44 Neb. 633 3710
v. Otis, 7 Allen 435 2379
v. Parke, 202 Mass. 104 1635
v. Southworth, 5 Mich. 436 1760
Lott v. Mitchell, 32 Cal. 23 2873, 2892
v. New Orleans, etc., R. Co., 37 La. Ann. 337 160
v. Swenzey, 29 Barb. 87 1542
Lottawanna, The, 21 Wall. 558 5023
Lottie v. Hopkins, The, 133 Fed. 405 2729
Lotz v. Levy, 120 App. Div. (N. Y.) 477 2512
Lotze v. Cincinnati, 61 Ohio St. 272 3957
Loucks v. Dolan, 211 N. Y. 237 3232
Loud v. Campbell, 26 Mich. 239 3269
v. Merrill, 45 Me. 516 995
v. Merrill, 47 Me. 351 1814
Loud L. Co. v. Peter, 20 Ohio C. C. 73 195
Louden v. Birt, 4 Ind. 566 655
v. Vinton, 108 Mich. 313 2831
Louder v. Hinson, 4 Jones 369 1349
Loudermilk v. Loudermilk, 98 Ga. 780 1880
Loudon v. Taxing Dist., 104 U. S. 771 273
Loudy v. Clarke, 45 Minn. 477 2645
Lougarre v. Haas, 131 La. 871 2946
Lougee v. Washburn, 16 N. H. 134 1184, 1879
Lough v. Davis, 30 Wash. 204 2995
v. Minneapolis, etc., R. Co., 116 Iowa 31 3960, 3965, 4033, 4150
v. Outerbridge, 143 N. Y. 271 3280
Loughborough v. McNevin, 74 Cal. 250 811, 813, 827
Loughlin v. Carey, 21 Pa. Super. Ct. 477 3162
Loughran v. Des Moines, 72 Iowa 382 3878, 3905
v. Ross, 45 N. Y. 792 3255
Louis v. The Buckeye, 1 Handy (Cincinnati Super. Ct.) 150 3389
Louis P. Hyman & Co. v. H. H. Snyder Co., 159 Ky. 354 2245
Louisiana E. R. Co. v. Carstens, 19 Tex. Civ. App. 190 4872
Louisiana Lumber Co. v. J. W. Farrior Lumber Co., 9 Ala. App. 383 748
Louisiana M. Co. v. Le Sassier, 52 La. Ann. 2070 796, 2613
Louisiana R. & N. Co. v. Baton Rouge Brickyard, 136 La. 833 3051, 3961, 4032, 4034, 4043, 4131
v. Jones, 113 La. 29 3963
v. Kohn, 116 La. 159 4131, 4140
v. Morere, 116 La. 997 1440, 4131, 4140
v. Sarpy, 125 La. 388 3980, 4025, 4048, 4103
Louisiana Rio Grande Canal Co. v. Quinn, — Tex. Civ. App. —, 161 S. W. 375 2569

[REFERENCES ARE TO PAGES]

Louisiana & A. R. Co. v. Nix, 94 Ark. 270 146
v. Rider, 103 Ark. 558 135, 988, 3528
Louisiana & N. R. Co. v. Reeves, 95 Ark. 214 3609, 3656, 3658
Louisiana & N. W. R. Co. v. Athens Lumber Co., 134 La. 788 2891
Louisville v. Graham, 98 Ky. 688 4906
v. Hart, 143 Ky. 171 107, 487
v. Hegan, 20 Ky. L. Rep. 1532 3951
v. Hehemann, 161 Ky. 523 3905
v. Henderson, 11 Ky. L. Rep. 796 1031, 1044
v. Kaye, 122 Ky. 599 4122
v. Keher, 117 Ky. 841 4812
v. Koshewa, 161 Ky. 359 3954
v. Lausberg, 161 Ky. 361 3954
v. Louisville R. Co., 118 Ky. 534 1066
v. McGill, 21 Ky. L. Rep. 718 3882
v. Nicholls, 158 Ky. 516 774
v. O'Malley, 21 Ky. L. Rep. 873 3882
v. Sauter, 149 Ky. 721 3877, 3880, 3883
Louisville B. Co. v. Monarch Co., 68 Mo. App. 603 1728
Louisville B. & I. Co. v. Hart, 122 Ky. 731 1477
Louisville City R. Co. v. Mercer, 11 Ky. L. Rep. 810 3464, 3501
Louisville Courier-Journal Co. v. Pope, 15 Ky. L. Rep. 877 4539
Louisville G. Co. v. Fuller, 122 Ky. 614 4832
v. Gutenkuntz, 82 Ky. 432 67
v. Hargis, 17 Ky. L. Rep. 1190 2479, 2495
v. Kentucky H. Co., 132 Ky. 435 7, 1267, 1363, 4158, 4180
Louisville Home Tel. Co. v. Gasper, 123 Ky. 128 152
Louisville Ins. Co. v. Monarch, 99 Ky. 578 3030
Louisville Mfg. Co. v. Welch, 10 How. 461 2773
Louisville P. Co. v. Crain, 141 Ky. 379 2214, 2256, 2282
Louisville P. W. Co. v. James, 139 Ky. 434 2113, 2114, 2133, 2137, 2143
Louisville R. Co. v. Gaugh, 133 Ky. 467 1381, 1384
v. Raymond, 135 Ky. 738 4854
v. Sumner, 106 Ind. 55 2619
v. Vieth, 157 Ky. 424 1384
Louisville Times Co. v. Lancaster, 142 Ky. 122 782
Louisville Underwriters v. Pence, 93 Ky. 96 3015
Louisville W. Co. v. Upton, 18 Ky. L. Rep. 326 4797
v. Youngstown B. Co., 16 Ky. L. Rep. 350 869
Louisville & S. I. Traction Co. v. Lloyd. — Ind. App. —, 105 N. E. 519 1378
Louisville, etc., Ins. Co. v. Bland, 9 Dana 143 3025, 3033, 3034
Louisville, etc., R. Co. v. Alford, 5 Ga. App. 428 940
v. Allen, 67 Fla. 257 783
v. Allen, 152 Ky. 145, s. c. 152 Ky. 837 5053
v. Allnutt, 150 Ky. 831 1266
v. Anderson, 150 Ala. 350 4877
v. Asher, 10 Ky. L. Rep. 1021 4105
v. Ballar, 6 Ky. L. Rep. 542 3503
v. Ballard, 88 Ky. 159 1268, 1343, 1345, 3467
v. Ballard, 85 Ky. 307 1268, 1345, 3507
v. Banks, 132 Ala. 471 4882
v. Barnes, 117 Ky. 860 776
Louisville, etc., R. Co. v. Barnwell, 131 Ga. 791 4732
v. Barrett, 91 Ky. 487 3965, 3980, 4026, 4122
v. Barrett, 13 Ky. L. Rep. 232 4145
v. Barrett, 143 Ga. 742 5070
v. Beeler, 126 Ky. 328 3773, 3779
v. Berry, 96 Ky. 604 4832, 4910
v. Binion, 107 Ala. 645 4779
v. Bizzell, 131 Ala. 429 1266, 1311
v. Blow, 136 Ky. 434 4298
v. Bogue, 177 Ala. 349 4867
v. Bolton, 18 Ky. L. Rep. 824 3911
v. Breckinridge, 99 Ky. 1 3521
v. Brinley, 17 Ky. L. Rep. 9 3328
v. Brooks, 83 Ky. 129 1311
v. Brown, 127 Ky. 732 1500, 4663, 4665, 4686, 4742, 4834
v. Brownlee, 14 Bush 59 3332
v. Buck, 116 Ind. 566 19, 4894
v. Burke, 6 Cold. 45 4849
v. Byrley, 152 Ky. 35 3473
v. Carothers, 23 Ky. L. Rep. 1673 4790
v. Case, 9 Bush 728 4871, 4949
v. Cayce, 17 Ky. L. Rep. 1389 3521
v. Clarke, 152 U. S. 230 4906, 4909
v. Cody, 119 Ga. 371 1353
v. Collinsworth, 45 Fla. 403 4779
v. Commonwealth, 89 Ky. 531 1064
v. Conner, 2 Baxt. 382 478
v. Cornelius, 6 Ala. App. 386 3503
v. Cottengim, 31 Ky. L. Rep. 871 3448, 3464
v. Coyle, 123 Ky. 854 207, 2236, 2248, 2261, 2263
v. Creighton, 20 Ky. L. Rep. 1691 4825
v. Culbertson, 158 Ky. 561 3969
v. Daniel, 122 Ky. 256 336, 4905
v. Dawson, 11 Ala. App. 621 3443
v. Dickson, 63 Miss. 380 4053
v. Donaldson, 19 Ky. L. Rep. 1384 3476, 3482
v. Dyer, 152 Ky. 264 3473
v. Eaden, 122 Ky. 818 1277
v. Eakin, 103 Ky. 465, 479 4948, 4949
v. Earl, 94 Ky. 368 1277, 1514, 4659
v. Earl, 139 Ga. 456 1280, 4271
v. Eckman, 137 Ky. 331 143
v. Elmore & Brame, 19 Ala. App. 627 1199
v. Empire State C. Co., 189 Fed. 174 531
v. Engleman, 146 Ky. 19 4947, 4950
v. Falvey, 104 Ind. 409 477, 3452, 4679, 4690, 4742, 4786, 4787
v. Finley, 7 Ky. L. Rep. 129 288, 324
v. Finley, 86 Ky. 294 3952
v. Flanagan, 113 Ind. 488 3311, 3313, 3315
v. Fleming, 14 Lea 128 3459
v. Fleming, — Ala. —, 69 So. 125 5076, 5111, 5112, 5133
v. Foley, 94 Ky. 220 4817
v. Forrest, 6 Ga. App. 766 1318
v. Fort, 112 Tenn. 432 1138, 1538
v. Frawley, 110 Ind. 18 19
v. Gaddie, 31 Ky. L. Rep. 502 3443, 3456
v. Garrett, 8 Lea 438 1344, 3506, 3522
v. Gilbert, 88 Tenn. 430 3333
v. Gilmer, 89 Ala. 534 3389
v. Glazebrook, 1 Bush. 325 4026, 4122
v. Goben, 15 Ind. App. 123 3475, 3502
v. Gollihur, 40 Ind. App. 480 436, 4935
v. Goodin, 14 Ky. L. Rep. 622 324

[REFERENCES ARE TO PAGES]

Louisville, etc., R. Co. v. Gormley, 33 Ky. L. Rep. 802 4185
v. Gower, 85 Tenn. 465 4779
v. Graham, 98 Ky. 688 28
v. Greer, 16 Ky. L. Rep. 667 1277
v. Grundy, 12 Ky. L. Rep. 293 1346
v. Guinan, 11 Lea 98, 103 1276, 3503
v. Hall, 87 Ala. 708 1282
v. Hall, 115 Ky. 567 4779
v. Hall, 131 Ala. 161 3734
v. Hall, 143 Ky. 497 3979, 4022
v. Hartwell, 99 Ky. 436 1522, 3426
v. Heinig's Adm'x, 162 Ky. 14 5074, 5078, 5083, 5142
v. Helm, 121 Ky. 645 790, 794, 799
v. Hendricks, 13 Ind. App. 10 4639
v. Higginbotham, 153 Ala. 334 3736, 3759
v. Hine, 121 Ala. 234 3450, 3459, 3476, 3500
v. Hodge, 6 Bush 141 1510
v. Hodges, 9 Bush 645 3335
v. Hollerbach, 105 Ind. 137 2709
v. Holloway's Adm'r, 163 Ky. 125 5079, 5126
v. Home Ins. Co., 146 Ky. 281 3767
v. Hopson, 73 Miss. 773 4099, 4123
v. Hull, 113 Ky. 561 3381, 3621, 3651
v. Jackson, 18 Ky. L. Rep. 296 3503
v. Jackson, 139 Ga. 543 3877, 3925
v. Johnson's Adm'x, 161 Ky. 824 5079, 5131, 5135
v. Jones, 12 Ala. App. 347 3334
v. Jones, 45 Fla. 407 4918
v. Jones, 108 Ind. 551 476, 4676
v. Keefer, 146 Ind. 21 3335, 3341
v. Keiffer, 132 Ky. 419 114
v. Kelly, 100 Ky. 421 1271, 1333, 1345, 4866, 4949
v. Kelsey, 89 Ala. 287 3389
v. Kemp, 149 Ky. 344 4680
v. Kemp, 140 Ga. 657 5049
v. Kenney's Adm'r, 162 Ky. 403 4947
v. Kimble, 140 Ky. 759 4947, 4950
v. King, 131 Ky. 347 4866
v. Kingman, 18 Ky. L. Rep. 82 1345, 4676
v. Kohlruss, 124 Ga. 250 3774
v. Lankford, 209 Fed. 321 5073, 5087
v. Lansford, 102 Fed. 62 4867
v. Lellyett, 114 Tenn. 368 3846, 3850, 3877, 3881
v. Logsdon (Ky.), 71 S. W. 905 334
v. Long, 94 Ky. 410 4775, 4828
v. Louisville, 131 Ky. 108 4058, 4059
v. Lucas, 119 Ind. 583 58
v. Lynch, 137 Ky. 696 152, 4660
v. McCarthy, 129 Ky. 814 109
v. McCaskell, 98 Miss. 20 1272
v. McClain, 23 Ky. L. Rep. 1878 1277, 1467
v. McElwain, 98 Ky. 700 4889, 5120
v. McEwan, 17 Ky. L. Rep. 406 1378, 3468, 4818
v. McNary, 128 Ky. 408 1280
v. Mahoney, 7 Bush 238 1317, 1344
v. Martin, 113 Tenn. 266 125, 478
v. Mask, 64 Miss. 738 3452, 3461, 3523
v. Mason, 10 Ala. App. 263 3505
v. Mason, 11 Lea 116 3387, 3432
v. Mason, 126 Ky. 844 833, 929, 2623
v. Massie, 138 Ky. 449 4878, 4905
v. Maybin, 66 Miss. 83 3507
v. Melton, 127 Ky. 276 4806
v. Melton, 146 Ky. 242 1037
v. Melton, 158 Ala. 509 4188
v. Mertz, 149 Ala. 561 4168
v. Miller, 156 Ky. 677 3536
v. Millett, 20 Ky. L. Rep. 532 4947, 4949
Louisville, etc., R. Co. v. Mink, 126 Ky. 337 3329, 3371, 3375
v. Minogue, 90 Ky. 369 4828
v. Mitchell, 87 Ky. 327 4802
v. Moore, 83 Ky. 675 4802
v. Moore, 150 Ky. 692 1374, 4706, 4732, 4755
v. Morgan, 114 Ala. 449 4879, 4906, 4911
v. Morris, 14 Ky. L. Rep. 466 4949
v. Morris, 179 Ala. 239 4871, 4905, 4907
v. Mount, 125 Ky. 593 311, 3502
v. Neafus, 13 Ky. L. Rep. 951, 93 Ky. 53 1391, 1961, 2066
v. Nicholai, 4 Ind. App. 119 3386, 3415
v. Nitsche, 126 Ind. 229 68
v. Ohio Valley Tie Co., 161 Ky. 212 165, 3318
v. Orr, 91 Ala. 548 4859, 4865, 4866, 4906
v. Owen, 93 Ky. 201 3335
v. Parker's Adm'r, 165 Ky. 658 5067
v. Pearson, 97 Ala. 211 4912
v. Peck, 99 Ind. 68 1433
v. Pedigo, 129 Ky. 661 1493
v. Perkins, 1 Ala. App. 376 589, 4867
v. Popp, 96 Ky. 99 4804
v. Power, 119 Ind. 269 176
v. Queen City C. Co., 13 Ky. L. Rep. 832 (Ky. Super. Ct.) 3322, 3327, 3329
v. Raymond's Adm'r, 135 Ky. 738 5118, 5120
v. Reaume, 128 Ky. 90 1499, 4795
v. Renicker, 17 Ind. App. 619 3519
v. Reynolds, 24 Ky. L. Rep. 1402 4707
v. Richmond, 23 Ky. L. Rep. 2394 1384
v. Ritchel, 148 Ky. 701 86, 1276, 1304, 1326, 3498
v. Roberts, 144 Ky. 820 3877, 3881
v. Roney (Ky.), 108 S. W. 343 1364
v. Roth, 130 Ky. 759 1261, 1267, 1276, 1277, 1311, 1318, 1343, 1534
v. Rowan, 4 Dana 606 474
v. Ryan, 64 Miss. 399 4036
v. Sanders, 7 Ala. App. 543 1365, 3450, 3519
v. Satterwhite, 112 Tenn. 185 1311
v. Schmidt, 128 Ky. 229 295
v. Schweitzer, 11 Ky. L. Rep. 310 4169
v. Scomp, 124 Ky. 330 3881, 3986
v. Scott, 141 Ky. 538 1304, 1508, 1537, 3449, 3450, 3501, 3502
v. Setser, 149 Ky. 162 1493, 4866, 4949
v. Sewell, 142 Ky. 171 1267, 1343
v. Sharp, 11 Ky. L. Rep. 811 (Ky. Super. Ct.) 1048
v. Sharp, 91 Ky. 411 1804
v. Shumaker, 21 Ky. L. Rep. 803 4949
v. Sights, 121 Ky. 203 4653
v. Simpson, 17 Ky. L. Rep. 989 3892
v. Simrall, 127 Ky. 55 4742, 4849, 4852, 4948
v. Smith, 135 Ky. 462 1267, 1272, 4816
v. Smith, 141 Ala. 335 474, 1325, 3736, 3813, 3826, 3829
v. Smith, 2 Duv. 556 1274, 1338
v. Snyder, 117 Ind. 435 3452, 4677
v. Sparks, 12 Ind. App. 410 1430, 3878, 3897
v. Spencer, 149 Ill. 97, aff'g 47 Ill. App. 503 3780
v. Spinks, 104 Ga. 692 3440
v. Spurling, 160 Ky. 819 3443

[REFERENCES ARE TO PAGES]

Louisville, etc., R. Co. v. Stacker, 86 Tenn. 343 4872, 4906
v. Stewart, 78 Miss. 600 3398
v. Stewart, 131 Ky. 665 4946
v. Stewart, 163 Ky. 164 4749
v. Stewart, 241 U. S. 261, aff'g 163 Ky. 823 5094, 5131, 5142, 5143
v. Stewart's Adm'x, 156 Ky. 550, rehearing 157 Ky. 642 4948, 5142, 5143
v. Storms, 15 Ky. L. Rep. 333 134
v. Strange's Adm'x, 156 Ky. 439 5052, 5128
v. Street, 164 Ala. 155 1497, 4867
v. Sullivan, 81 Ky. 624 3452
v. Summers, 60 C. C. A. 487, 125 Fed. 719 4944
v. Summers, 133 Ky. 684 3502
v. Sumner, 106 Ind. 55 175, 2590, 2605, 2614
v. Taylor, 96 Ky. 241 1961
v. Tegner, 125 Ala. 593 4867
v. Thomason, 6 Ala. App. 365 3464, 3503
v. Thompson, 18 B. Mon. 744 4122
v. Thompson, 144 Ky. 765 3387
v. Timmons, 116 Tenn. 29 77
v. Tippenhauer, 10 Ky. L. Rep. 401 4183
v. Trammell, 93 Ala. 350 4880
v. Trent, 16 Lea 419 3354
v. United States F. & G. Co., 125 Tenn. 658 1575
v. Wade, 11 Ky. L. Rep. 904 3904, 3905
v. Walker's Adm'r, 162 Ky. 209 5058, 5060
v. Wallace, 90 Tenn. 53 1093
v. Warfield, 6 Ga. App. 550 3418
v. Weathers, 163 Ala. 48 3477
v. Wene, 202 Fed. 887 113
v. Whipps, 118 Ky. 121 1449, 1961, 1962
v. Whitley County Court, 20 Ky. L. Rep. 1367 4064
v. Whitley County Court, 95 Ky. 215 4064
v. Whitley County Court, 100 Ky. 413 4064
v. Whitlow, 105 Ky. 1 4953
v. Whitman, 79 Ala. 328 3474, 3506, 3512
v. Whitsell, 125 Ky. 433 3400, 3877, 3881
v. Wilkins, 143 Ky. 572 109, 327, 1280, 4676
v. Wilkinson, 15 Ky. L. Rep. 92 (Ky. Super. Ct.) 3501
v. Williams, 20 Ind. App. 576 4666
v. Williams, 183 Ala. 138 4774, 4792, 4795, 4806
v. Wilsey (Ky. Super. Ct.), 9 Ky. L. Rep. 1008 3464, 3473, 3476
v. Wilson, 119 Ind. 352 3279, 3280
v. Wilson, 123 Ga. 62 342, 3347
v. Wilson, 132 Ind. 517 3281
v. Winkler, 162 Ky. 843 5082, 5085
v. Withlow, 105 Ky. 1 28
v. Wolfe, 128 Ind. 347 3465
v. Wood, 113 Ind. 544 110
v. Woodford, 152 Ky. 398 153, 509, 3392, 3418, 3433
v. Woods, 115 Ala. 527 4660
v. Wright, 134 Ind. 509 4932
v. Wurl, 62 Ill. App. 381 1281
Lounsbery v. Snyder, 31 N. Y. 514 548, 3129
Lounsbury v. Bridgeport, 66 Conn. 360 4757
Louth v. Thompson, 1 Pennew. (Del.) 149 4762, 4763
Love v. Detroit, etc., R. Co., 170 Mich. 1 27, 109, 4849, 4927
v. Gibson, 2 Fla. 598 2871
v. Love, 72 Kan. 658 701
v. Love, 98 Mo. App. 562 1315
v. Masoner, 6 Baxter 24 4971
v. Miller, 53 Ind. 294 2503
v. Moynehan, 16 Ill. 277 3832
v. Oldham, 22 Ind. 51 534
v. People, 94 Ill. App. 237 1611
v. Philadelphia & R. R. Co., 19 Phila. 304 1210
v. Rockwell, 1 Wis. 382 1792
v. Ross, 89 Iowa 400 2404, 2415, 2453
v. Shartzer, 31 Cal. 487 3695, 3711
Lovegrove v. Christman, 164 Pa. 390 696
Lovejoy v. Bailey, 214 Mass. 134 1073
v. Hutchins, 23 Me. 272 1624
v. Merchants' State Bank, 5 N. D. 623 4286, 4287, 4291
v. Michels, 88 Mich. 15 2216, 2217, 2298
v. Murray, 3 Wall. 1 425, 427, 437, 440, 2889, 4167
v. Robinson, 8 Ind. 399 550
v. Whitcomb, 174 Mass. 586 1491, 4504
Lovelace v. Miller, 150 Ala. 422 425, 462
Loveland v. Gardner, 79 Cal. 317 428
v. Shepard, 2 Hill 139 2788
Lovell v. German Ref. Church, 12 Barb. 67 1544
v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 274 3083, 3085, 3086
v. Shea, 60 N. Y. Super. Ct. 412 4235
v. Sherwin, 2 Eq. R. 320, 23 Eng. L. & Eq. 534 2211
v. Williams, 125 Mass. 442 662
Lovelock v. King, 1 M. & Rob. 60 2650, 2655
Lovett v. Cowman, 6 Hill 223 976
v. Eastern O. Co., 68 W. Va. 667 683, 809
v. German Ref. Church, 12 Barb. 67 1545
Loverin v. Baumgarner, 59 W. Va. 46 2769
Lovering v. Minot, 9 Cush. 151 1080
Lovick v. Atlantic C. L. R. Co., 129 N. C. 427 4836, 4841
v. Providence L. Ass'n, 110 N. C. 93 3084
Loving v. Groomer, 142 Mo. 1 2093
Low v. Archer, 12 N. Y. 277 2888
v. Blodgett, 21 N. H. 121 626
v. Cobb, 2 Sneed 18 1614
v. Forbes, 18 Ill. 568 764
v. Purdy, 2 Lans. 422 3706
v. Woodbury, 107 App. Div. (N. Y.) 298 2511
Low Moor I. Co. v. La Bianca, 106 Va. 83 4856
Lowe v. Blair, 6 Blackf. 282 782
v. Chicago, etc., R. Co., 89 Iowa 420 4950
v. Guthrie, 4 Okla. 287 1595, 1597, 1604
v. Harrison, 8 Mo. 350 1536
v. Hendrick, 86 Conn. 481 4391, 4398
v. Herald Co., 6 Utah 175 4530, 4549, 4568
v. Lowe, 111 Md. 113 2472
v. McDonald, 3 A. K. Marsh. 354 2124

[REFERENCES ARE TO PAGES]

Lowe v. Metropolitan St. R. Co., 145 Mo. App. 248 95
v. Nolte, 16 Ill. 475 927
v. O'Brien, 77 Wash. 677 3236
v. Peers, 4 Burr. 2225 833, 887, 972, 1552
v. Prospect Hill C. Ass'n, 58 Neb. 94 3839
v. Ring, 123 Wis. 107 336, 338, 1291, 4668
v. Ring, 123 Wis. 370 1114
v. Robb E. Co., 37 Nova Scotia 326 2695, 2699, 2714
v. Simmons W. Co., 39 Utah 395 2147, 2156, 2159
v. Sinklear, 27 Mo. 308 2466, 2540
v. Turpie, 147 Ind. 652 274, 281, 320, 2189
v. Walker, 77 Ark. 103 980
v. Yolo County C. W. Co., 157 Cal. 503 1348, 3804
Lowell v. Bickford, 201 Mass. 543 1815
v. Boston, etc., R. Co., 23 Pick. 24 295, 299, 307
v. County Com'rs, 146 Mass. 403 1438
v. Earle, 127 Mass. 546 2666
v. House of Good Shepherd, 14 Wash. 211 224
v. Parker, 10 Metc. (Mass.) 309 474, 481, 1607, 2898
v. Shea, 18 N. Y. 193 4238
v. Spaulding, 4 Cush. 277 453
Lowen v. Crossman, 8 Iowa 325 2577
Lowenberg v. Jefferies, 74 Fed. 385 1623
v. Jones, 56 Miss. 688 3301
v. Walley, 25 Can. Sup. Ct. 51 2962
Lowenstein v. Chappell, 30 Barb. 389 176, 178
v. Hargraves Mills, 141 App. Div. (N. Y.) 232 2284
v. Monroe, 55 Iowa 82 1690, 1694, 1695, 4194
v. Old Colony Life Ins. Co., 179 Mo. App. 364 3083
v. Seff, 6 Pa. Dist. 533 1248
Lowenthal v. McElroy, 181 Mo. App. 399 2875
v. Streng, 90 Ill. 74 1505
Lower v. Buchanan Bank, 78 Mo. 67 2824
Lowery v. Manhattan R. Co., 99 N. Y. 158 68, 144, 153
v. Rowland, 104 Ala. 420 501, 3836, 3837
v. Western U. Tel. Co., 60 N. Y. 198 3596, 3597
Loweth v. Smith, 12 M. & W. 582 391, 3845
Lowham's Est., In re, 30 Utah 436 4952
Lowman v. Foley, 14 New Zeal. 699 864, 868
v. Lowman, 69 S. C. 543 1079
Lowndes v. City Nat. Bank, 82 Conn. 8 1116
v. Huntington Water Works Co., 163 App. Div. (N. Y.) 37 3994
Lownsdale v. Grays Harbor B. Co., 54 Wash. 542 3701, 3703
v. Grays Harbor B. Co., 36 Wash. 198 3699
Lowrance v. Robertson, 10 S. C. 8 2123, 2127
Lowrey v. Barney, 2 Chip. 11 1558
v. Murrell, 2 Port. 282 648
v. Territory, 20 Hawaii 112 1090
Lowrie v. Oxendine, 153 N. C. 267 2472
Lowry v. Barelli, 21 Ohio St. 324 902
Lowry v. Hurd, 7 Minn. 356 555, 2209
v. Inman, 46 N. Y. 119 4953
v. State, 64 Ind. 421 1652, 1653
v. Western Bank, 7 Ala. 120 1151
v. Williams, [1895] 1 Irish 274 961
Lowther v. Commonwealth, 1 Hen. & Mun. 202 2098
Loxtercamp v. Lininger I. Co., 147 Iowa 29 2374, 2386, 2390, 2404
Loy v. Northern Pac. R. Co., 68 Wash. 33 3464
v. Reid, 11 Ala. App. 231 2647
Loyd v. Capps (Tex. Civ. App.), 29 S. W. 505 3228, 3229
Lozier v. Hannan, 12 Colo. App. 59 2347
Lubert v. Chauviteau, 3 Cal. 458 2956
Lubrano v. Atlantic Mills, 19 R. I. 129 4850
Luby v. Bennett, 111 Wis. 613 4603, 4608
Lucas v. Borough of Drummoyne, 16 New South Wales L. R. 55 2665
v. Cannon, 13 Bush 750 1482
v. Detroit City R. Co., 92 Mich. 412 1428
v. Flinn, 35 Iowa 9 334, 1306, 4657
v. Groning, 7 Taunt. 164 2958
v. Heaton, 1 Ind. 264 2238
v. Michigan Cent. R. Co., 98 Mich. 1 3476, 3482, 3501
v. Norfolk Southern R. Co., 165 N. C. 264 3312
v. Sheridan, 124 Wis. 567 4222, 4300
v. Spencer, 27 Ill. 15 985, 991
v. Trumbull, 15 Gray 306 480, 481, 4199, 4201, 4299
v. United R. Co., 154 Mo. App. 16 4735
v. Western U. Tel. Co., 131 Iowa 669 3594
v. Wilkinson, 1 Hurl. & N. 423 636, 679
Lucas & C. G. & W. Board, In re, [1909] 1 K. B. 16 4052
Luce v. Dorchester Ins. Co., 105 Mass. 297 54
v. Hoisington, 56 Vt. 436 244, 274, 4183, 4199
v. Hoisington, 54 Vt. 428 4173
v. Minard, 87 Vt. 177 381
Lucher v. Burger, 13 Ohio N. P. (N. S.) 161 1464
Lucier v. Larose, 66 N. H. 141 1493
Lucille, The, 169 Fed. 719 1458
Lucille Manor, The, 70 Fed. 233 2667
Luck v. Ripon, 52 Wis. 196 1375, 4709, 4714
Lucke v. Clothing C. T. & T.'s Assembly, 77 Md. 396 4553
Luckenbach v. Thomas, — Tex. Civ. App. —, 166 S. W. 99 1949
Lucker v. Liske, 111 Mich. 683 4675, 4687, 4749
Luckett v. Trippett, 2 B. Mon. 39 2211
Luckey v. Frantzkee, 1 E. D. Smith 47 3129, 3259
v. Western U. Tel. Co., 151 N. C. 551 3634
Lucking v. Gegg, 12 Bush 298 2839, 2840
Lucy v. Chicago, etc., R. Co., 64 Minn. 7 3467
Ludden v. Buffalo B. Co., 22 Ill. App. 415 539, 4287, 4288
Luddington v. Goodnow, 168 Mass. 223 1360
Luderes v. Hartford, L. & A. Ins. Co., 4 McCrary 149 3076
Ludlow v. Batson, 5 Ont. L. R. 309 4539
v. Dale, 62 N. Y. 617 2458

[REFERENCES ARE TO PAGES]

Ludlow v. Gilman, 18 Wis. 552 2209, 2212
v. McCarthy, 5 App. Div. (N. Y.) 517 3258, 3263
v. Peck-W. H. & V. Co., 116 Ky. 608 2254
v. Steffen, 19 Ky. L. Rep. 1671 4169, 4182
v. Yonkers, 43 Barb. 493 267, 3810
Ludlow L. Co. v. Kuhling, 119 Ky. 251 2606
Ludlow Valve Mfg. Co. v. City of Chicago, 181 Ill. App. 388 886
Ludvigson v. Superior S. Co., 147 Wis. 34 4794
Ludwig v. Blackshere, 102 Iowa 366 701
v. Huntzinger, 5 W. & S. 51 952
v. Meyre, 5 W. & S. 435 3400
Ludwigs v. City of Walla Walla, 83 Wash. 205 4031
Lueck v. Heisler, 87 Wis. 644 4602, 4608, 4614, 4637, 4648
Lueddle v. Hooper, 95 Tex. 172 1665
Luehrmann v. Laclede G. L. Co., 127 Mo. App. 213 161
Luessen v. Oshkosh E. L. & P. Co., 109 Wis. 94 1354, 1394, 4707, 4930, 4939
Luetgert v. Volker, 153 Ill. 385 1032
Luetzke v. Roberts, 130 Wis. 97 4401
Lufburrow v. Henderson, 30 Ga. 482 514, 537, 2456, 2578
Lufkin v. Hitchcock, 194 Mass. 231 1493
v. Mayall, 25 N. H. 82 2540
v. Zane, 151 Mass. 117 3845
Luft v. Lingane, 17 R. I. 420 1480, 1482, 4549
Lugenbeal v. Lamert, 42 Ohio St. 1 4285
Lughran v. Des Moines, 72 Iowa 382 3938
Luisi v. Chicago Great Western R. Co., 155 Iowa 458 4680
Luke v. Lyde, 2 Burr. 882 3294, 3297
Luken's App., 7 W. & S. 48 771
Lukens v. Freiund, 27 Kan. 664 2376, 2378
v. Nicholson, 4 Phila. 22 2095
Lukin v. Goodsall, 2 Peake 15 3835
Luling v. Atlantic Mut. Ins. Co., 30 How. Pr. 69 604, 606
Luling O. & Mfg. Co. v. Gohmert, 50 Tex. Civ. App. 606 2793
Lull v. Fox & W. I. Co., 19 Wis. 100 433, 3936
v. Stone, 37 Ill. 224 1845
Lum Ah Lee v. Ah Soong, 16 Hawaii 163 129, 244, 3798
Lumber Co. v. Railroad, 141 N. C. 171 1117, 3280, 3281
Lumbermen's M. Co. v. Gilchrist, 55 Fed. 677 3313
Lumbermen's Ins. Co. v. Preble, 50 Ill. 332 771
Lumley v. Gye, 2 El. & B. 216 115, 126, 4564
v. Wabash R. Co., 76 Fed. 66 769
Lumm v. Port Deposit, etc., Ass'n, 49 Md. 233 4382
Lumsden v. Leonard, 55 Ga. 374 2815
Lund v. Idaho, etc., R., 50 Wash. 574 3972, 3981
v. Tyler, 115 Iowa 236 460, 463, 4694
v. Tyngsboro, 11 Cush. 563 151
v. Tyngsborough, 9 Cush. 36 1421
Lundeen v. Great Northern R. Co., 128 Minn. 332 5094
Lunnergan v. New York Cent., etc., R. Co. 203 Mass. 460 109
Lundgreen v. Stratton, 79 Wis. 227 587
Lundvick v. Westchester F. Ins. Co., 128 Iowa 376 3044
Lundy v. Southern Bell Tel. & T. Co., 90 S. C. 25 4863
L'Union Musicale v. Chevalier, 109 Me. 548 2598, 2715
Lunn v. Gage, 37 Ill. 19 537, 547, 549, 3128, 3258
v. Guthrie, 115 Iowa 501 2927
v. Shermer, 93 N. C. 164 4392, 4410
Lunney v. Healey, 56 Neb. 313 2503
Lunscheon v. Wocknitz, 21 S. D. 285 4380
Lunsford v. Baskins, 6 Ala. 512 1766
v. Dietrich, 86 Ala. 250 4618, 4628
Lunt v. Philbrick, 59 N. H. 59 341, 4965, 4967
v. Wrenn, 113 Ill. 168 304, 2401
Lupe v. Atlantic, etc., R., 3 Mo. App. 77 3335
Lupton v. Coffel, 47 Ind. App. 446 1079
v. Underwood, 3 Boyce (Del.) 519 4974, 4976, 4978, 4979, 4981, 4983
v. White, 15 Ves. 432 361, 1415
Lurman v. Jarvie, 82 App. Div. (N. Y.) 37 10, 165
Lusch v. Huber Mfg. Co., 79 Neb. 45 4285
Luse v. Jones, 39 N. J. L. 707 429, 476, 1439, 2302, 4174, 4176, 4179, 4184
Lush v. Druse, 4 Wend. 313 1069, 1096, 1436, 2303, 2304, 2305, 3148
v. Falls, 63 N. C. 188 1495
v. Lambert, 15 Minn. 416 1228
Lushington, The, 7 Notes of Cases 361 2720
Lusk v. Briscoe, 65 Mo. 555 1364
v. Ramsay, 3 Munf. 417 2808
v. Smith, 21 Wis. 28 1106
Luske v. Hotchkiss, 37 Conn. 219 2483
v. Throop, 189 Ill. 127, aff'd 89 Ill. App. 509 1103
Luson v. Smith, 1 Nev. & Man. 304 1513
Lusted v. Chicago & N. R. Co., 71 Wis. 391 770
Luster v. State, 11 Humph. 169 1483
Lustig v. New York, etc., R., 65 Hun 547 4906, 4911
Lutes v. Alpaugh, 23 N. J. L. 165 1664, 1684
Luther v. Shaw, 157 Wis. 234 1267, 1305, 1315, 3662, 3671, 4964, 4957, 4969, 4973
v. Winnisimmet Co., 9 Cush. 171 3926
Luton v. Badham, 127 N. C. 96 2005
Lutt v. Sterrett, 26 Kan. 561 1797, 1801
Lutterman v. Romey, 143 Iowa 233 96, 162, 334
Luttrell v. Hazen, 3 Sneed 20 1330
Lutweiler P. E. Co. v. Ukiah W. & I. Co., 16 Cal. App. 198 2387, 2415
Luxemberg v. Keith & P. Am. Co., 64 N. Y. Misc. 69 342
Luxmore v. Robson, 1 B. & Ald. 584 3155
Lybe's App., 106 Pa. 626 7
Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302 3053
Lycoming G. & W. Co. v. Moyer, 99 Pa. 615 3946
Lycoming Ins. Co. v. Mitchell, 48 Pa. 367 836, 3006, 3049
v. Schollenberger, 44 Pa. 259 3019
Lyddon v. Dose, 81 Mo. App. 64 1277, 4774

[REFERENCES ARE TO PAGES]

Lydecker v. Nyack, 6 App. Div. (N. Y.) 90 2525
v. Valentine, 71 Hun 194 2309
Lyden v. McGee, 16 Ont. 105 4616
Lydian Monarch, The, 23 Fed. 298 3421
Lydiard v. Daily News Co., 110 Minn. 140 4573
Lydman v. De Haas, 185 Mich. 128 5149
Lydon v. Campbell, 204 Mass. 580 632
v. Sullivan, 31 Ky. L. Rep. 227 2214
Lyford v. Demerritt, 32 N. H. 234 17
v. Toothaker, 39 Me. 28 3734
Lyle v. Barker, 5 Bin. 457 4173
v. McCormick H. M. Co., 108 Wis. 81 4277, 4279
v. Murray, 4 Sandf. 590 2905, 2945
Lyles v. Perrin, 119 Cal. 264 1281
v. Perrin, 134 Cal. 417 1988, 2062
v. Western U. Tel. Co., 84 S. C. 1 3628
v. Western U. Tel. Co., 77 S. C. 174 3654, 3656
Lyman v. Babcock, 40 Wis. 503 917
v. Cartwright, 3 E. D. Smith, 117 691
v. Chicago City R. Co., 176 Ill. App. 27 4718, 4736, 4832
v. Clark, 9 Mass. 235 772
v. Conkey, 1 Metc. (Mass.) 317 1590, 1653
v. James, 87 Vt. 486 480, 4300
v. Lincoln, 38 Neb. 794 2663, 2676
v. Lull, 4 N. H. 495 2873, 2884, 2885
v. Lyman, 32 Vt. 79 572
v. Shenandoah S. Club, 39 App. Div. (N. Y.) 459 864
Lyman M. Law, The, 122 Fed. 816 2726
Lynch v. Baldwin, 69 Ill. 210 547, 548, 3124, 3258
v. Barr, Sneed 170 1398
v. Baxter, 4 Tex. 431 1949, 1957
v. Chicago, 152 Ill. App. 160 1532
v. Commonwealth, 16 S. & R. 368 1598
v. Debiar, 3 Johns. Cas. 302 1116
v. Grayson, 5 N. M. 487 66
v. Hancock, 14 S. C. 66 2844
v. Knight, 9 H. of L. Cas. 577, 5 L. T. Rep. (N. S.) 291 166, 334, 344, 3643, 3644, 3647, 4541, 4554, 4556, 4560
v. McGhan, 7 Cal. App. 132 4233
v. Metropolitan E. R. Co., 90 N. Y. 77 1336
v. Northern Pac. R. Co., 67 Wash. 113 1512
v. Nurdin, 1 Q. B. 29 70, 151
v. Rosemary Mfg. Co., 167 N. C. 98 4892
v. St. Louis, K. C. & C. Ry. Co., 180 Mo. App. 169 371, 4145, 4146
v. Southern Pac. Co., 24 Cal. App. 108 4821
v. Speed, 15 Daly 207 3233
v. Troxell, 207 Pa. 162 3886, 3890, 3912
v. Utica Ins. Co., 18 Wend. 236 579
v. White (Tex. Civ. App.), 73 S. W. 835 4230
v. Wright, 94 Fed. 703 2010, 2031, 2037, 2042
Lynch's Adm'r v. Central Vermont Ry. Co., — Vt. —, 95 Atl. 683 5070, 5079
Lynch's App., 12 W. N. C. 104 1084
Lynchard v. Yazoo & M. V. R. Co., 107 Miss. 46 3452
Lynchburg v. Mitchell, 114 Va. 229 3958
Lynchburg C. Mills v. Stanley, 102 Va. 590 4701
Lynchburg Nat. Bank v. Scott, 91 Va. 652 981
Lynchburg Tel. Co. v. Booker, 103 Va. 594 151
Lynd v. Picket, 7 Minn. 128 4166
Lynde v. Thompson, 2 Allen 456 848, 862, 889, 976
Lyndhurst, The, 92 Fed. 681 4987
Lyndon v. Miller, 36 Vt. 329 1588
Lynds v. Van Valkenburgh, 77 Kan. 24 1824
Lyne v. Western U. Tel. Co., 123 N. C. 129 3621, 3623
Lynn v. Bean, 141 Ala. 236 704, 713
v. Bruce, 2 H. Bl. 317 749
v. Seley, 29 N. D. 420 172
Lynn G. & E. Co. v. Meriden F. Ins. Co., 158 Mass. 570 3000
Lynn S. Co. v. Auburn-Lynn S. Co., 100 Me. 461 4486, 4487, 4488, 4491, 4494
v. Auburn-L. S. Co., 103 Me. 334 226, 4487, 4491, 4496
Lynnfield v. Peabody, 219 Mass. 322 4016
Lyon v. Atlantic Coast Line R. Co., 165 N. C. 143 3385
v. Bedgood, 54 Tex. Civ. App. 19 4660
v. Bertram, 20 How. 149 547, 2390, 2394
v. Bryant, 54 Ill. App. 331 515, 541
v. Clark, 8 N. Y. 148 1570
v. Donaldson, 34 Fed. 789 4450, 4451
v. Fishmongers' Co., 1 App. Cas. 662 3919
v. Gormly, 53 Pa. 261 4211, 4260, 4261
v. Green Bay, etc., R. Co., 42 Wis. 538 4003, 4027, 4053, 4101
v. Hammond, etc., R. Co., 167 Ill. 527 3987, 4134
v. Hancock, 35 Cal. 372 1318
v. Hersey, 32 Hun 253 1720, 1721, 1722, 1731
v. Katten, 80 Conn. 718 1448, 1459, 1989
v. Lancaster, 16 Ky. L. Rep. 92 1776
v. McDonald, 78 Tex. 71 4146
v. Manhattan R. Co., 142 N. Y. 298 1465
v. Miller, 24 Pa. 392 3114
v. Northrop, 17 Iowa 314 2843
v. Osgood, 58 Vt. 707 1640
v. Pease, 86 Ill. App. 251 1676
v. Plum, 75 N. J. L. 883 2753
v. United States Fidelity & Guaranty Co., 48 Mont. 591 1809
v. Worcester, 49 Ill. App. 639 2902
v. Yates, 52 Barb. 237 486
Lyons v. Barnum, 60 Misc. (N. Y.) 625 2061
v. Boston & L. R. Co., 181 Mass. 551 3813
v. Central C. & C. Co., 239 Mo. 626 3791
v. Chicago City R. Co., 171 Ill. App. 374 1512
v. Cleveland, etc., R. Co., 7 Ohio St. 337 4870
v. Erie R. Co., 57 N. Y. 489 326, 4682, 4787
v. Fairmont R. E. Co., 71 W. Va. 754 3739, 3768, 3796, 3866
v. Lyons, 101 Mo. App. 494 1638
v. Magagno, 7 Gratt. 377 1079
v. Metropolitan St. R. Co., 253 Mo. 143 1428, 4821
v. Merrick, 105 Mass. 71 123
v. New York City R. Co., 49 N. Y. Misc. 517 4718, 4757

[REFERENCES ARE TO PAGES]

Lyons v. Second Ave. R. Co., 89 Hun 374 138
v. Watt, 43 Colo. 238 107
Lyth v. Ault, 7 Ex. 669 753
Lythle v. Western U. Tel. Co., 165 N. C. 504 3555
Lytle v. Scottish Am. M. Co., 122 Ga. 458 883, 2029
Lyttle v. Goldberg, 131 Wis. 613 1511
Lytton v. Baird, 95 Ind. 349 1273, 4620, 4628, 4646
v. Marion Mfg. Co., 157 N. C. 331 4781

M

M. Kalbfleisch, The, 59 Fed. 198 5000, 5012, 5013
M. E. Luckenbach, The, 174 Fed. 265 4993
M. K. & T. R. Co. v. Weaver, 16 Kan. 456 1495
M. S. Bacon, The, v. Erie & W. T. Co., 3 Fed. 344 3304
Maack v. Schneider, 51 Mo. App. 92 760
Maas v. Chicago & N. W. R. Co., 156 Wis. 44 1448, 1449
Maasdam, The, 10 T. L. Rep. 30 2730
Mabardy v. McHugh, 202 Mass. 148 4381
Mabb v. Stewart, 133 Cal. 556 1309
v. Stewart, 147 Cal. 413 311
Maberley v. Robins, 5 Taunt. 625 1034
Mabin v. Webster, 129 Ind. 430 3688
Mabrey v. Cape Girardeau & G. R. Co., 92 Mo. App. 596 4705, 4706
Mabry v. City E. R. Co., 116 Ga. 624 341, 3476
Mabury L. Co. v. Stearns Mfg. Co., 32 Ky. Law Rep. 739 2403
McAbee v. Cribbs, 194 Pa. 94 2189
McAdams v. Cates, 24 Mo. 223 4372
v. Randolph, 42 N. J. L. 332 587
McAdory v. Louisville & N. R. Co., 94 Ala. 272 4875, 4878, 4919
McAdow v. Kansas City, Western Ry. Co. (Mo. App.), 164 S. W. 188, aff'd 240 U. S. 51 5062
McAfee v. Bending, 36 Ind. App. 628 2511
v. Crofford, 13 How. 447 65, 163, 1391, 4185, 4193
v. Dix, 101 App. Div. (N. Y.) 69 1101, 1538
McAffee v. Russell, 29 Miss. 84 1597
McAleer v. Good, 216 Pa. 473 4841, 4842
v. Horsey, 35 Md. 439 4379
McAlester v. Landers, 70 Cal. 79 532, 548, 3183, 3196, 3258
v. Suchy, 1 Ind. Ty. 666 1655, 1656
McAlexander v. Harris, 6 Munf. 465 460, 469, 4530
v. Lee, 3 A. K. Marsh. 483 1061
McAlister v. Chicago, etc., R. Co., 74 Mo. 351 140, 173, 3325
v. Jerman, 32 Miss. 142 985
McAllen v. Telegraph Co., 70 Tex. 243 3646
v. Western U. Tel. Co., 70 Tex. 243 3560, 3654
McAllester v. Sprague, 34 Me. 296 765, 778
McAllister v. Chambers, 71 Wash. 521 701
v. Clement, 75 Cal. 182 5, 1609
v. Commonwealth, 30 Pa. 536 1120
v. Dennin, 27 Mo. 40 773, 778
v. Detroit Free Press Co., 85 Mich. 453, 95 Mich. 164 4582
McAllister v. Dexter & P. R. Co., 106 Me. 371 3719, 3720, 3722
v. Irwin, 31 Colo. 254 2861
v. Kuhn, 96 U. S. 87, 1 Utah 273 4207
v. Pitts, 58 Neb. 424 2807
v. Reab, 4 Wend. 483, 8 Wend. 109 513, 518, 519, 534, 1008, 2455, 2828
v. Reel, 59 Mo. App. 70 4087
v. St. Louis, etc., R. Co., 107 Ark. 65 3873
v. Smith, 17 Ill. 328 1146, 1161, 1173, 1878
McAllister's App., 59 Pa. 204 871
McAlmont v. McClelland, 14 S. & R. 359 4513, 4514, 4524, 4527
McAlpin v. Lee, 12 Conn. 129 534
v. Woodruff, 11 Ohio St. 120 2134, 2147, 3185, 3196
McAlpine v. Kratka, 98 Minn. 151 1636
v. St. Clara F. Academy, 101 Wis. 468 2649, 2683
McAndrew v. Electric Tel. Co., 17 C. B. 3 3553
McAndrews v. Santee, 57 Barb. 193 2221
v. Thatcher, 3 Wall. 347 2734, 3036
v. Tippett, 39 N. J. L. 105 252, 375
McAneany v. Jewett, 10 Allen 151 37
McArdle v. Pittsburg R. Co., 41 Pa. Super. Ct. 162 4890, 4892
v. Swansea Harbor Trust, 8 B. W. C. C. 489 5190
McArthor v. Ogletree, 4 Ga. App. 429 295
McArthur v. Cornwall, App. Cas. 75 3699, 3703, 3739, 3740, 3828
v. Franklin, 16 Ohio St. 193 3728, 3730, 3731
v. Green Bay, etc., Co., 34 Wis. 139 549, 553
v. Howett, 72 Ill. 358 4316, 4357
v. Lane, 15 Me. 245 4351
v. Lord Seaforth, 2 Taunt. 257 2316, 4252
v. Martin, 23 Minn. 74 574, 2797
v. Sault News P. Co., 148 Mich. 556 4538
v. Seaforth, 2 Taunt. 257 4251, 4253
McAuley v. Birkhead, 13 Ired. 28 4967, 4969, 4971
v. Carter, 22 Ill. 53 2685, 2687
McAuliffe v. New York Cent., etc., R. Co., 164 N. Y. App. Div. 846 5059, 5068
McBean v. Kinnear, 23 Ont. 313 523
McBeth v. Craddock, 28 Mo. App. 380 1134
v. McIntyre, 57 Cal. 48 2893
McBlair v. Gibbes, 17 How. 232 20
McBoyle v. Reeder, 1 Ired. 607 234
McBrayer v. Cohen, 92 Ky. 479 1943, 1947
McBride v. Cameron, 12 New Zeal. L. R. 316 3806
v. Fallon, 65 Cal. 301 586
v. Farmer's Branch Bank, 7 Abb. Pr. 347 1693
v. McGinley, 31 Wash. 573 2472
v. McLaughlin, 5 Watts 365 461, 467, 1269, 1316, 4783
v. Marine Ins. Co., 7 Johns. 430 3025
v. Noble, 40 Colo. 372 720, 724
v. St. Paul City R. Co., 72 Minn. 291 4744
v. Scott, 132 Mich. 176 775
v. Sunset Tel. Co., 96 Fed. 81 3644
McBroom v. Governor, 6 Port. 32 2814

[REFERENCES ARE TO PAGES]

McBroom v. Scottish M. & L. I. Co., 153 U. S. 318 988
McCaa v. Elam D. Co., 114 Ala. 74 2355, 2369, 2377, 2428
McCabe v. Atchison, etc., R. Co., 154 Ill. App. 380 3345
v. Butte, 46 Mont. 65 1512
v. Knapp, 23 Iowa 308 4180
v. Morehead, 1 W. & S. 513 1656, 2381, 4338, 4350, 4352, 4354
v. Narragansett E. L. Co., 26 R. I. 427 4858, 4862, 4878, 4902
McCafferty v. Griswold, 99 Pa. 270 1986
v. Pennsylvania R. Co., 193 Pa. 339 4851
McCaffrey v. Carter, 125 Mass. 330 383
v. Hill, 3 New South Wales St. Rep. 303 4647
McCahill v. Kipp, 2 E. D. Smith 413 154
v. New York T. Co., 201 N. Y. 221 146, 4676
McCall v. Atchley, 256 Mo. 39 2494, 2495
v. Deuchler, 174 Fed. 133 865, 868
v. Jennings, 26 Utah 459 2258
v. McDowell, Deady 233 467, 4617, 4842
v. New York L. Ins. Co., 201 Mass. 223 3183, 3229
v. Phoenix Mut. L. Ins. Co., 9 W. Va. 237 3084
v. Sun Mut. Ins. Co., 66 N. Y. 505 3010
McCall Co. v. Icks, 107 Wis. 232 1098, 1099, 2240
McCalla v. Clark, 55 Ga. 53 827, 4287
v. Ely, 64 Pa. 254 936
v. Shaw, 72 Ga. 458 435
McCallum v. Lambie, 145 Mass. 234 4532
McCamant, Assigned Est. of, In re, 6 Delaware Co. Rep. 192, 12 Lancaster L. Rev. 251 1062
McCambridge v. Chicago, 178 Ill. App. 513 1472
McCammon v. Peck, 9 Ohio C. C. 589 2496
McCampbell v. Thornburg, 3 Head 109 4581, 4596
McCandless v. McWha, 22 Pa. 261 4785
McCandlish v. Newman, 22 Pa. 460 541, 2221
McCann v. Albany, 11 App. Div. (N. Y.) 378 860
v. Albany, 158 N. Y. 634 840
v. Clark, 166 Iowa 705 2979
v. Clarke County, 149 Iowa 13 13
v. Lewis, 9 Cal. 246 1060
v. McGuire, 83 Conn. 445 1492
v. Strang, 97 Wis. 551 3846, 3847
v. Ullman, 109 Wis. 574 1516, 2447
McCaraher v. Commonwealth, 5 W. & S. 21 1567
McCardell v. Williams, 19 R. I. 701 3236
McCardle v. McGinley, 86 Ind. 538 4609, 4615
McCarren v. McNulty, 7 Gray 139 2235
McCarten v. Smith, 163 App. Div. (N. Y.) 900 2046
McCarthy v. Boothe, 2 Cal. App. 170 1695
v. Central Dredging Co., 203 Fed. 965 2601
v. Chicago, etc., R. Co., 18 Kan. 46 4954
v. Claflin, 99 Me. 290 4858
v. Clarke, 115 Md. 454 1383
v. Ellers, 107 App. Div. (N. Y.) 219 2408, 2409
v. Henderson, 138 Mass. 310 521
McCarthy v. Howell, 2 Ill. 341 1853
v. Mayor, 96 N. Y. 1 2484
v. Niskern, 22 Minn. 90 1311, 1316, 4159
v. Nixon G. Co., 126 Ga. 762 2214, 2219
v. Railroad Co., 18 Kan. 46 4850
v. Spring Valley C. Co., 243 Ill. 185 4735
v. William H. Wood L. Co., 219 Mass. 566 5118
v. Young, 3 "The Argus" L. R. 89 (Australia) 2987
McCartney v. Buck, 8 Houst. 34 714, 728
v. Philadelphia, 22 Pa. Super. 257 1432, 3881
v. Titsworth, 119 App. Div. (N. Y.) 547 3837
McCarty v. Boise City C. Co., 2 Idaho 225 312, 3922
v. Coffin, 157 Mass. 478 3689
v. Ely, 4 E. D. Smith 375 3099, 3101
v. Frazer, 62 Mo. 263 1640
v. Gordon, 16 Kan. 35 705, 721
v. Heryford, 125 Fed. 46 3677, 3688
v. Houston, etc., R. Co., 21 Tex. Civ. App. 568 769
v. Kepreta, 24 N. D. 395 4351, 4354, 4357
v. Leggett, 3 Hill 134 1521, 1522, 2056, 2058, 2087
v. Moorer, 50 Tex. 287 2018
v. Piedmont Mut. Ins. Co., 81 S. C. 152 3008
v. Quimby, 12 Kan. 494 1136, 1435, 1437, 4350
v. Roots, 21 How. 432 2860
v. St. Louis T. Co., 192 Mo. 396 1494
v. Western U. Tel. Co., 116 Mo. App. 441 3578
McCaslin v. State, 44 Ind. 151 555
McCauley v. Chicago City R. Co., 163 Ill. App. 176 3507
v. Moses, 43 Ga. 577 2199
v. Norcross, 155 Mass. 584 72
v. Ward, 2 Marvel 183 977
McCausey v. Hock, 159 Mich. 570 266, 4180, 4198
McCausland v. Bell, 9 S. & R. 388 1252
McChesney v. Bell, 59 Ill. App. 84 780
v. Chicago, 213 Ill. 592 1065
v. Rogers, 8 N. J. L. 272 1543
v. Wilson, 132 Mich. 252 1301
McChord v. Fisher, 13 B. Mon. 193 1559
v. Ford, 3 T. B. Mon. 166 802
McClafferty v. Philp, 151 Pa. 86 4633, 4634, 4635, 4641, 4645
McClain v. Brooklyn City R. Co., 110 N. Y. 459 1428
v. Lewiston Interstate F. & R. Ass'n. 17 Idaho 63 122, 4659, 4702, 4711
v. Williams, 6 Yerg. 230 1835
McClair v. Austin, 17 Colo. 576 2689
McClanahan v. Caul, 63 W. Va. 418 3208, 3258
v. St. Louis, etc., R. Co., 147 Mo. App. 386 1416
McClannahan v. Porter, 10 Mo. 746 3719
McClarren v. Jefferson School Tp., 169 Ind. 140 4052
McClary v. Sioux City & P. R. Co., 3 Neb. 44 132, 139, 3332
McClaskey v. Barr, 79 Fed. 408 1798
McClatchey v. Anderson, 84 Neb. 783 2403, 2406

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McClay v. Worrall, 18 Neb. 44 60
McCleary v. Anthony, 54 Miss. 708 3742
v. Pittsburgh R. Co., 47 Pa. Super. Ct. 366 4862, 4941
McClellan v. Graves, 19 Md. 351 4147
v. Harris, 7 S. D. 447 2534
McClelland v. Bristow, 9 Ind. App. 543 2472
v. Moore, 48 Tex. 355 2116, 2117
v. Schwerd, 32 Pa. Super. Ct. 313 6, 3760, 3762, 3763
McClendon v. McKissack, 143 Ala. 188 361
v. Wells, 20 S. C. 514 1259, 1690,
McClennahan v. Smith, 76 Mo. 428 1360
McClenny v. Inverarity, 80 Kan. 569 4606
McClesky v. Howell C. Co., 147 Ala. 573 2280
McClintic-Marshall Const. Co. v. Board Chosen Freeholders Hudson Co., 83 N. J. Eq. 539 893, 2585
McClintock v. Crick, 4 Iowa 453 468
v. Cummins, 3 McLean 158 1152, 1878
v. Helberg, 168 Ill. 384, aff'g 64 Ill. App. 190 692
McCloskey v. Kreling, 76 Cal. 511 3935
v. Wingfield, 29 La. Ann. 141 2822
McClowry v. Chrogan, 31 Pa. 22 1987, 2003, 2006
v. Cloghan, 1 Grant's Cas. 307 3185
McCloy v. Arnett, 47 Ark. 445 3708, 3709
v. Vaughan, — Mich. —, 151 N. W. 667 4524
McClung v. Kelley, 21 Iowa 507 2371, 2376
v. Mabry, 2 Tenn. Cas. 91 765, 772
McCluny v. Jackson, 6 Gratt. 96 673
McClure v. Broken Bow, 81 Neb. 384 3847, 3877, 3880
v. Campbell, 42 Wash. 252 343, 371, 1511, 3820
v. Cole, 6 Blackf. 290 1242
v. Dunkin, 1 East 436 1036, 1038, 1561, 1563, 1568, 1571
v. Erwin, 3 Cow. 332 2874
v. Gamble, 27 Pa. 288 2098, 2124
v. Hall, 19 Wend. 25 1402
v. Hill, 36 Ark. 268 4174
v. King, 126 Ky. 675 2801
v. Lenz, 40 Ind. App. 56 2466, 2474
v. Lewis, 72 Mo. 314 2043
v. Philadelphia, etc., R. Co., 34 Md. 532 3464
v. Pyatt, 4 McCord 22 2539
v. Renaker, 21 Ky. L. Rep., 360 1705, 1707
v. Review P. Co., 38 Wash. 160 4509
v. Serist, 5 Ind. 31 2667
v. Sparta, 84 Wis. 269 107
v. Thorpe, 68 Mich. 33 3201
v. Williams, 5 Sneed 718 2228, 2242, 2248
McClure Co. v. Philipp, 170 Fed. 910 4535, 4590
McClurg v. Brenton, 123 Iowa 368 3833
v. Foyer, 15 Pa. 293 2787
v. Price, 59 Pa. 420 3122, 3123, 3124
McCluskey v. Cromwell, 11 N. Y. 593 2755, 2760
v. National L. Ass'n, 7 Hun 566, aff'd 149 N. Y. 616 622
McColl v. Western U. Tel. Co., 44 N. Y. Super. Ct. 487 3596
McCollum v. Hinckley, 9 Vt. 143 2808, 2814
McCollum v. Seward, 62 N. Y. 316 1097, 1102, 1419, 1436, 2303, 2478, 2479
McComb v. City of Chicago, 183 Ill. App. 243, aff'd 263 Ill. 510 4800
v. Gilkeson, 110 Va. 406 2061
McComber v. Kellerman, 162 Cal. 749 888
McCombie v. Bennett, 7 New South Wales L. R. (law) 157 4596
v. Davies, 6 East 538 4205
McCombs v. Pittsburg, 194 Pa. 348 3991
McConaghy v. Pemberton, 168 Pa. 121 172
McConathy v. Deck, 34 Colo. 461 1326, 4661
McConeghy v. Kirk, 68 Pa. 200 1869
McConey v. Wallace, 22 Mo. App. 377 2626
McConnel v. Hall, 3 P. & W. 53 1997
v. Kibbe, 29 Ill. 482, 33 Ill. 175 32, 35, 391, 413, 940, 1388
v. Wright [1903], 1 Ch. 546 1441, 4363, 4395, 4397, 4398, 4403, 4404, 4408
McConnell v. Barber, 86 Hun 360 1202
v. Corona City W. Co., 149 Cal. 60 243, 252, 1419, 2612, 2654, 2695
v. Downs, 48 Ill. 271 2131
v. Dunlap, Hardin 41 1989, 2029, 2047
v. Galbraith [1914], W. C. & Ins. Rep. 90 5173
v. Hampton, 12 Johns. 234 1311, 1314, 4840
v. Mackin, 22 App. Div. (N. Y.) 537 689
v. Poor, 113 Iowa 133 2872
v. Slappey, 134 Ga. 95 376, 3809
v. Southern R. Co., 144 N. C. 87 3334, 3389, 3390
v. Stettinius, 7 Ill. 707 670
v. Stubbs, 124 Ga. 1038 520, 546
v. Thomas, 3 Ill. 313 1238, 1241, 1242
v. United States Exp. Co., 179 Mich. 522 3382, 3457, 3483
McConnico v. Curzen, 2 Call 301 1108
McConnochin v. Kerr, 15 Fed. 545 693
McCook v. Bryan, 4 Okla. 488 1392
v. McAdams, 76 Neb. 1 1430, 3890
McCool v. Mahoney, 54 Cal. 491 424, 435
McCord v. Massey, 155 Ill. 123 2147, 2152, 2165
v. Nabours, 101 Tex. 494 4218
v. The Tiber, 6 Biss. 409 4989
v. Western U. Tel. Co., 39 Minn. 181 3584
McCord-C. C. Co. v. Levi, 21 Tex. Civ. App. 109 4383, 4392, 4608
McCormack v. Louisville & N. R. Co., 156 Ky. 465 2494
v. Lynch, 69 Mo. App. 524 1097, 2593
v. Showalter, 11 Ind. App. 98 3748
v. Ware, 13 Ky. L. Rep. 678 (Ky. Super. Ct.) 1871
McCormick v. Basal, 46 Iowa 235 2229
v. Blum, 4 Tex. Civ. App. 9 1926
v. Connolly, 2 Bay 401 2655
v. Crall, 6 Watts 207 1027
v. Detroit, etc., R. Co., 141 Mich. 17 1472
v. Elston, 16 Ill. 204 1014
v. Falls City Bank, 57 Fed. Rep. 107 1922
v. Hawkins, 169 Mich. 641 1489, 3067, 4521, 4550
v. Irwin, 35 Pa. 111 2798
v. Joseph, 77 Ala. 236 1279
v. Kansas City, etc., R. Co., 57 Mo. 433 4145

[REFERENCES ARE TO PAGES]

McCormick v. Louis Weber & Co., 187 Ill. App. 290 4614, 4628
v. McCormick, 7 Neb. 440 1073
v. Marcy, 165 Cal. 386 2094, 2097, 2131, 2144
v. Merritt, 131 Iowa 160 2209
v. Moss, 41 Ill. 352 1614
v. Pennsylvania Cent. R. Co., 4 E. D. Smith 181, 49 N. Y. 303 369, 1097, 1135, 3402, 3531, 4232
v. Peters, 24 Neb. 70 656
v. Rochester R. Co., 133 App. Div. (N. Y.) 760 1480
v. Sarson, 1 Sweeny 161 2230
v. Sarson, 45 N. Y. 256 535
v. Schtrenck (Tex. Civ. App.), 130 S. W. 720 531, 4783, 4784
v. Stowell, 138 Mass. 431 3241
v. Trotter, 10 S. & R. 94 1891
v. United States, 185 Fed. 748 1735
v. Vanatta, 43 Iowa 389 2436
v. Western U. Tel. Co., 79 Fed. 449, 25 C. C. A. 35 3609, 3613
McCormick H. Mach. Co. v. Arnold, 116 Ky. 508 2392
v. Breen, 61 Ill. App. 528 656
v. Colliver, 75 Iowa 559 1685
v. Cordsiemon, 101 Ill. App. 140 2556
v. Heath, 65 Mo. App. 461 2405
v. Jensen, 29 Neb. 102 2294
v. Laster, 70 Ill. App. 425 2745
v. Markert, 107 Iowa 340 2264
v. Regier, 54 Neb. 528 2755
v. Robinson, 60 Ill. App. 253 536, 570
McCormick's App., 55 Pa. 252 576
McCornick v. Swem, 36 Utah 6 1835, 1920, 1924, 1927
McCoslin v. David, 22 Tex. Civ. App. 53 1673
McCoullough v. Chicago, etc., R. Co., 160 Iowa 524 4905, 4913, 4920, 4945, 5922
McCowen v. Pew, 18 Cal. App. 482 1970
v. Pew, 147 Cal. 299 2042
McCown v. Quigley, 147 Pa. 307 2220
McCoy v. Artcher, 3 Barb. 323 2380
v. Board, 95 Ark. 345 8
v. Cornell, 40 Iowa 457 4313
v. Danley, 20 Pa. 89 37
v. Elder, 2 Blackf. 183 1397
v. Huffman, 8 Cow. 84 2465, 2540
v. Indianapolis G. Co., 146 Ind. 655 138
v. L. & N. R. Co., 146 Ala. 333 424
v. Lord, 19 Barb. 18 2094
v. Michigan Screw Co., 180 Mich. 454 5188, 5191
v. Milwaukee St. R. Co., 88 Wis. 56 4665, 4717
v. New York Cent., etc., R. Co., 119 App. Div. (N. Y.) 531 4801
v. Oldham, 1 Ind. App. 372 3237, 3243
v. Philadelphia, etc., R. Co., 5 Houst. 599 1268
v. Trucks, 121 Ind. 292 4968
v. World's Col. Expos., 186 Ill. 356, aff'g 87 Ill. App. 605 1036
McCracken v. Hair, 2 Speers 256 538, 2577
v. McCracken, 88 N. C. 272 2005
v. Paul, 65 Ark. 553 1542
v. Smathers, 122 N. C. 799 4677, 4683, 4691, 4748, 4786
v. Traction Co., 201 Pa. 384 4910
v. Webb, 36 Iowa 551 230
McCradey v. Brisbane, 1 N. & McC. 104 2057
McCrary v. Chicago & A. R. Co., 109 Mo. App. 567 1432, 1436
v. Parks, 18 Ohio St. 1 2871
v. Pritchard, 119 Ga. 876 1430, 4391, 4410
McCray v. Fairmont, 46 W. Va. 442 4109
v. Sharpe, 188 Ala. 375 4663
McCrea v. Longstreet, 17 Pa. 316 2373
v. Purmort, 16 Wend. 460 765, 2068
McCready v. Brisbane, 1 N. & McC. 104 2173
v. Dunlop, 2 F. 1027, 37 Sc. L. R. 779 5174
v. Lindenborn, 172 N. Y. 400 381
v. Phillips, 56 Neb. 446 977, 4384, 4420
v. Staten Island E. R. Co., 51 App. Div. (N. Y.) 338 1378, 1472
McCreary v. Cloud, 2 Bailey 343 3718, 3720
v. Fike, 2 Blackf. 374 1402
v. Pennsylvania C. Co., 141 U. S. 459 4463, 4465
McCreedy v. Hartford Ins. Co., 61 App. Div. (N. Y.) 583 3042
McCreery v. Day, 119 N. Y. 1 763, 764
McCrillis v. Thomas, 110 Mo. App. 699 2147, 2156
McCroskey v. Riggs, 12 Sm. & M. 712 1559, 1599
McCrossan v. Reilly, 34 Pa. Super. Ct. 628 4284
McCrubb v. Bray, 36 Wis. 333 3695, 3711
McCruden v. Jonas, 6 Pa. Dist. 146 1249
v. Rochester R. Co., 5 N. Y. Misc. 59 3775
McCuaig v. Lalonde, 23 Ont. App. 312 3175
v. Quaker City Ins. Co., 18 Up. Can. Q. B. 130 3025
Maccubbin v. Cromwell, 2 Har. & G. 443 3724
McCue v. Klein, 60 Tex. 168 145, 463, 4853
McCuen v. Ludlum, 17 N. J. L. 12 4502
McCuish v. Smail, 13 S. D. 397 1012, 1030
McCulloch v. McDonald, 91 Ind. 240 3425
v. McKee, 16 Pa. 289 2944
v. Vibbard, 51 Hun 227 524
M'Culloch v. Maryland, 4 Wheat. 316 5024
McCullough v. Aurora, etc., R. Co., 154 Ill. App. 208 1473
v. Baker, 47 Mo. 401 291, 2688, 2690
v. Clemow, 26 Ont. 467 1095
v. Cox, 6 Barb. 387 519
v. Franklin C. Co., 21 Md. 256 764
v. Greenfield, 133 Mich. 463 4838, 4842
v. Grishobber, 4 W. & S. 201 4606
v. Hayde C. Co., 82 Kan. 734 2598
v. Houar, 141 Iowa 342 3259
v. Illinois S. Co., 148 Ill. App. 566 4659, 4691, 4697
v. Manning, 132 Pa. 43 919
v. Missouri Pac. Ry. Co., — Kan. —, 146 Pac. 1005 3502
v. Moore, 111 Ill. App. 545 859, 888
v. Newlove, 27 Ont. 627 1032
v. St. Paul, etc., R. Co., 52 Minn. 12 3913
McCune v. Baltimore & O. R. Co., 154 Fed. 63 4442
v. Belt, 45 Mo. 174 709, 2860
v. Erfort, 43 Mo. 134 801
v. Hartman S. Co., 87 Ill. App. 162 1121
v. Ratcliff, 88 Kan. 653 2598
McCurdy v. Clark, 27 Mich. 445 733

[REFERENCES ARE TO PAGES]

McCurdy v. Middleton, 82 Ala. 131 620, 703, 735, 741
v. Rogers, 21 Wis. 197 2979, 2980, 2981
McCurry v. Gibson, 108 Ala. 451 862, 887
McCutchen v. Klaes, 26 Colo. App. 374 2195
McCutcheon v. Malin, 37 Tex. Civ. App. 240 119
McCutchin v. Taylor, 11 Lea 259 124
McDade v. Hoskins, 18 Vict. L. R. 417 4751
McDaneld v. Kimbrell, 3 G. Greene 335 815, 819
McDaniel v. Austin, 32 S. C. 601 2841
v. Barnes, 5 Bush 183 703, 704, 728, 737, 741
v. Crabtree, 21 Ark. 431 212, 215
v. Emanuel, 2 Rich. 455 163
v. Grace, 15 Ark. 487 556, 2198
v. Hughes, 3 East 367 692
v. Hutcherson, 136 Ky. 412 288, 291, 294, 1371, 2548, 2569
v. Lebanon Lumber Co., 71 Ore. 15 4871
v. Parks, 19 Ark. 671 2556, 2561
v. State, 118 Ind. 239 1624
v. Sullivan, 144 Ala. 583 4348
v. Upton, 45 Ill. App. 151 816, 817, 821
v. United R. Co., 165 Mo. App. 678 176, 209, 333
v. Whalen, 91 Kan. 488 4391
McDaniels v. Bank, 29 Vt. 230 626, 745, 749, 816
v. Gowey, 30 Wash. 412 884
v. Lapham, 21 Vt. 222 626, 749, 814
v. Reed, 17 Vt. 674 826
v. Robinson, 26 Vt. 316 161
McDermott v. Chicago & N. R. Co., 85 Wis. 102 4796
v. DeMeridor, 80 N. J. L. 67 1414, 2690
v. Evening Journal, 43 N. J. L. 488, 44 N. J. L. 430 1331
v. Grindol & Sons, Ill. Ind. Bd., Aug. 3, 1914 5173
v. Isbell, 4 Cal. 113 1560
v. Lycoming F. Ins. Co., 44 N. Y. Super. Ct. 221 3018
v. Mahoney, 139 Iowa 292 2500
v. Severe, 25 App. Cas. (D. C.) 276 4717
v. Severe, 202 U. S. 600 4673, 4833, 5089, 5092
McDoal v. Yeomans, 8 Watts 361 2787
McDoawall v. Great Western R. Co. [1903], 2 K. B. 331 129
McDole v. McDole, 106 Ill. 452 3108
McDonald v. Bauskett, 10 Rich 178 2875, 2892
v. Butler, 10 Ga. App. 845 3766, 3819, 3826, 4858
v. Champion I. & S. Co., 140 Mich. 401 1511, 4929
v. Chicago, etc., R. Co., 26 Iowa 124 4751
v. Christie, 42 Barb. 36 565, 1419, 1442
v. Clearwater S. R. Co., 164 Fed. 1007 2398, 2401
v. Daniels, 76 Kan. 388 4311
v. Edwards, 20 N. Y. Misc. 523 116
v. Franchere, 102 Iowa 496 1424
v. Harris, 75 Ill. App. 111 2745
v. Hodge, 5 Hayw. 86 2309, 2337
v. Illinois Cent. R. Co., 179 Ill. App. 242 3776, 3806
v. James, 47 How. Pr. 474 1722, 1728, 1743, 1747
McDonald v. Kansas City B. & N. Co., 149 Fed. 360 2231, 2403, 2415, 2423, 2428, 2432
v. Liggett, 146 Pa. 460 2458
v. Loewen, 145 Mo. App. 49 1247, 1687, 1692, 1710, 1712
v. McConkey, 57 Cal. 325 4270
v. Macdonald, 12 Rettie (Scotch) 1327 4974
v. MacDonald, 71 N. Y. Misc. 516 4313, 4314, 4334
v. McKinnon, 104 Mich. 428 4282
v. Magruder, 3 Pet. 470 2861
v. Maltz, 94 Mich. 172 2513
v. Meadows, 1 Met. (Ky.) 507 1642
v. Metropolitan St. R. Co., 164 Mo. App. 111 1512
v. Montague, 30 Vt. 357 356
v. Montana W. Co., 14 Mont. 88 3830
v. North, 47 Barb. 530 1136, 4307
v. Norton, 72 Iowa 652 4319
v. Nugent, 122 Iowa 651 4502
v. O'Shea, 58 Wash. 169 2890
v. People, 123 Ill. App. 346 1637
v. People, 222 Ill. 325 1131, 1639
v. Pickett, 2 Bailey 617 711
v. Place, 88 Vt. 80 695
v. Postal Tel. Co., 22 R. I. 131 4797
v. St. Louis T. Co., 108 Mo. App. 374 4739
v. St. Louis, etc., R. Co., 165 Mo. App. 75 1378, 3470, 3488
v. Scaife, 11 Pa. 381 1136, 4312, 4318
v. Schroeder, 28 Pa. Super. Ct. 128 3638, 4635, 4644
v. Schroeder, 214 Pa. 411 4633, 4637
v. Smith, 99 Minn. 42 2501
v. Snelling, 14 Allen 290 64, 143, 154, 2449
v. Sydney, 46 Nova Scotia 436 4871
v. Unaka T. Co., 88 Tenn. 38 2296
v. Walker, 40 N. Y. 551 1492
v. Whitney, 39 Fed. 466 4440
MacDonell v. Buffum, 31 How. Pr. 158 1611
McDonnel v. Elias B. Co., 16 App. Div. (N. Y.) 223 4826
McDonnell v. Buffalo Loan, etc., Co., 193 N. Y. 92 4221, 4222
v. Central D. Co., 170 Mich. 291 1506, 4907
v. Harding, 7 Sim. 178 2945
v. Minneapolis, etc., R. Co., 17 N. D. 606 51, 113, 4188
McDonough v. Gilman, 3 Allen 264 3842, 3844
v. Nowlin, 17 Cal. App. 45 2743, 2836
v. Reilly, 131 Ill. App. 553 4339
v. Williams, 77 Ark. 261 4395
v. Williams, 86 Ark. 600 1054, 1458
McDonough's Est., 19 Phila. 157 2474
McDougald v. Coward, 95 N. C. 368 4593
v. Dougherty, 11 Ga. 570 792
v. Hulet, 132 Cal. 154 3258
v. Southern Pac. R. Co., 162 Cal. 1 3853, 3878
Macdougall v. Knight, 25 Q. B. Div. 1 372
v. Maguire, 35 Cal. 274 550, 4593
McDowell v. Burwell, 4 Rand. 317 1582, 1608
v. Caldwell, 2 McCord Ch. 43 1642
v. Great Western R. Co., [1903] 2 K. B. 331, rev'g S. C., [1902] 1 K. B. 618 70
v. Hyman, 117 Cal. 67 3126, 3183
v. Keller, 4 Cold. 258 784, 1230, 1888

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McDowell v. Milroy, 69 Ill. 498 537, 556
v. Murdock, 1 Nott. & M. C. 237 4271
v. Oyer, 21 Pa. 417 1987
v. Preston, 104 Minn. 263 56, 106
v. Rissell, 37 Pa. 164 361
v. Volk, 164 App. Div. (N. Y.) 311 4390
McDuff v. Detroit Evening Journal Co., 84 Mich. 1 4540
McDuffee v. Portland R. Co., 52 N. H. 430 3285
McDugald v. McFadgin, 6 Jones 89 2456
Mace v. Ramsey, 74 N. C. 11 3317, 3367
v. Reed, 89 Wis. 440 1338
McEachern v. New York Life Ins. Co., 15 Ga. App. 222 3086, 3091
McEachron v. Randles, 34 Barb. 301 2242
McElderry v. Flannagan, 1 Har. & G. 308 3133, 3137
v. Jones, 67 Ala. 203 611
McElheny v. McKeesport & D. B. Co., 153 Pa. 108 4111
McElhone v. Wilkinson, 121 Iowa 429 1480
McElligott v. Randolph, 61 Conn. 157 4948
McElrath v. Dupuy, 2 La. Ann. 520 741
v. United States, 102 U. S. 426 538
v. Whetstone, 89 Ala. 623 1712
McElroy v. Goble, 6 Ohio St. 187 3847
v. Harnack, 213 Pa. 444 432
v. Iowa Cent. R. Co., 133 Iowa 544 3532
v. Kansas City, 21 Fed. 257 3953
v. Kansas City, etc., R. Co., 172 Mo. 546 4101
v. Mumford, 128 N. Y. 307 1788, 1789
v. Nashua, etc., R. Co., 4 Cush. 400 3467
v. Wathen, 3 B. Mon. 135 3719
McElthaney v. Gilliland, 30 Ala. 183 1601
McElvancy v. Smith, 76 Ark. 468 3189, 3202
McElwee v. Hutchinson, 10 S. C. 436 696
McEntyre v. McEntyre, 12 Ired. 299 2456
Macer v. Third Ave. R. Co., 47 N. Y. Super. 461 153, 4748
McEvoy v. Bock, 37 Minn. 402 375
v. Humphrey, 77 Ill. 388 60, 4777
McEwan v. McLeod, 9 Ont. App. 239 3314, 3315
v. Western Ins. Co., 1 Mich. N. P. 118 3059
McEwen v. Dillon, 12 Ont. 411 3237, 3241
v. Kerfoot, 37 Ill. 530 538, 2475
v. Loucheim, 115 N. C. 348 2970
Macey v. Indianapolis, 17 Ind. 267 12
Macey Co. v. New York, 144 App. Div. (N. Y.) 408 888
McFadden v. Crawford, 39 Cal. 662 1095, 1102
v. Follrath, 114 Minn. 85 664
v. Fortier, 20 Ill. 509 739
v. Henderson, 128 Ala. 221 2225, 2284
v. Metropolitan St. R. Co., 161 Mo. App. 652 433
v. Missouri, etc., R. Co., 41 Tex. Civ. App. 350 3937
v. Missouri Pac. R. Co., 92 Mo. 343 767, 3335
v. Ross, 108 Ind. 512 1673, 1676
McFadden v. St. Paul Coal Co., 183 Ill. App. 36, aff'd 263 Ill. 441 4854
v. Santa Ana, etc., R. Co., 87 Cal. 464 4763
v. Schill, 84 Tex. 77 4112
v. Shanley, 16 Ariz. 91 171, 2284
v. Thompson-S. Co., 116 App. Div. (N. Y.) 285 3908
v. Union Stock Yards & Transit Co., 185 Ill. App. 94 3345
v. Wetherbee, 63 Mich. 390 2272
McFaddin v. Sims, 43 Tex. Civ. App. 598 10, 3242
McFadin v. Rippey, 8 Mo. 738 3129, 3260
McFall v. Chicago, B. & Q. R. Co., 181 Mo. App. 244 3353
v. Wilson, 6 Blackf. 260 1403
McFarland v. Carver, 34 Mo. 195 533
v. Dawson, 125 Ala. 428 2464
v. Lewis, 3 Ill. 344 728
v. McClees (Pa.), 5 Atl. 50 2962
v. McCrees, 17 W. N. C. 547 2962
v. Newman, 9 Watts 55 2388
v. Oregon Elec. R. Co., 70 Ore. 27 4922, 4923
v. United States Mut. Acc. Ass'n, 124 Mo. 204 3081
MacFarlane, Matter of, 65 App. Div. (N. Y.) 93 1248
MacFarlane v. Allan-P. C. Co., 59 Wash. 154 2528
v. Howell, 91 Tex. 218 1797
McFetrich v. Woodrow, 67 N. H. 174 2780
McFetridge v. American F. Ins. Co., 90 Wis. 138 3050
McGahie v. Sprout, 111 App. Div. (N. Y.) 445 4793
McGann v. Hamilton, 58 Conn. 69 3768
McGar v. Bristol, 71 Conn. 652 1475
McGara v. Ake, 226 Pa. 228 416
McGarr v. National & P. W. Mills, 24 R. I. 447 4767
McGarrahan v. New York, etc., R. Co., 171 Mass. 211 4681, 4704, 4736
McGarrity v. Byinton, 12 Cal. 426 3710
McGarry v. Missouri Pac. R. Co., 36 Mo. App. 340 4636
McGarvey v. Independent Oil & Grease Co., 156 Wis. 580 5212
v. Roods, 73 Iowa, 363 2474
McGarvey's Guardian v. McGarvey's Adm'r, 163 Ky. 242 5094, 5109, 5114
McGary v. Hastings, 39 Cal. 360 2094, 2096, 2098, 2117, 2136, 2157
v. Lafayette, 4 La. Ann. 440 1333, 1350
McGaughey v. Jacoby, 54 Ohio St. 487 1639
v. McGaughey, 44 Pa. Super. Ct. 29 831
McGavoch v. Wood, 1 Sneed 181 2449
McGavock v. Chamberlain, 20 Ill. 219 4314
v. Woodlief, 20 How. 221 2501, 2506
McGaw v. Acker, 111 Md. 153 225, 287, 2907
v. O'Beirne, 126 La. 583 371
v. Ocean Ins. Co., 23 Pick. 405 3291, 3294, 3295
McGeary v. McGeary, 181 Mass. 539 1646
McGee v. Connor, 1 Utah 92 2780
v. Holland, 27 N. J. L. 86 1269
v. Metcalf, 12 Sm. & M. 535 2814
v. Overby, 12 Ark. 164 1531
v. Prouty, 9 Metc. (Mass.) 547 699
v. Russell, 49 Ark. 104 1019
v. Sodusky, 5 J. L. Marsh. 185 469

[REFERENCES ARE TO PAGES]

McGee v. Vanover, 148 Ky. 737 78, 80, 4666, 4671, 4680, 4684, 4687
v. Wineholt, 23 Wash. 748 274
McGeehe v. George, 38 Ala. 323 978
v. Jones, 10 Ga. 127 2199, 2211
v. McCarley, 91 Fed. 462 132
v. Posey, 42 Ala. 330 2309, 2328
v. Shafer, 9 Tex. 20 1494
v. Western U. Tel. Co., 169 Ala. 109 3609
McGettigan v. Potts, 149 Pa. 155 3763, 3916
McGhee v. McCarley, 103 Fed. 55 4867
v. Norfolk & S. R. Co., 147 N. C. 142 160
v. Willis, 134 Ala. 281 4947
McGibbon v. Tarbox, 144 App. Div. (N. Y.) 837 1076
McGiffin v. Baird, 62 N. Y. 329 2396
McGill v. Bank of United States, 12 Wheat. 511 1038
v. Chilowee L. Co., 111 Tenn. 552 4210
v. Fuller, 45 Wash. 615 340, 4618, 4624, 4629
v. Gargoula, (Misc.) 103 N. Y. Supp. 113 2501
v. Grand Trunk R. Co., 19 Ont. App. 245 3346
v. Pintsch C. Co., 140 Iowa 429 3881, 3888
v. Ware, 5 Ill. 21 985
McGillin v. Bennett, 132 U. S. 445 735
McGillis v. Hogan, 190 Ill. 176, 85 Ill. App. 194 2498
McGillivray v. Mimico R. E. S. Co., 28 Ont. 265 2166
v. Northern Counties Institute for the Blind, [1911] Ct. of Sess. Cas. 897, 4 B. W. C. C. 429, 48 Sc. L. R. 811 5183
McGinn v. Garber, 125 Iowa 533 2503
McGinnis v. Chicago, R. I. & P. R. Co., 200 Mo. 347 1331
v. Hardgrove, 163 Mo. App. 20 226, 388
v. Marlborough-Hudson Gas Co., 220 Mass. 575 4057
v. Missouri Pac. R. Co., 21 Mo. App. 399 3474, 3476
v. Noble, 7 W. & S. 454 2115, 2116
v. Pontiac, 1 Newb. 130 2733
v. Savage, 29 W. Va. 363 4316
v. Studebaker Corp., — Ore. —, 146 Pac. 825 227
v. The Pontiac, 5 McLean 359 2726
McGivern v. Stymest, 5 Allen 320 (N. B.) 3034
McGlashen v. Tallmadge, 37 Barb. 313 3127, 3139
McGlemery v. Keeler, 3 Blackf. 488 4513
McGlone v. Haugher, 56 Ind. App. 243 31
McGlothlin v. Wyatt, 1 Lea 717 1649
McGonigal v. Pittsburgh Rys. Co., 243 Pa. 47 1414
McGonnell v. Pittsburgh R. Co., 234 Pa. 396 1139, 1141, 4713, 4716
McGovern v. Bennett, 146 Mich. 558 2501, 2506
v. Lewis, 56 Pa. 231 2591, 2637
v. Philadelphia & R. Ry. Co., 235 U. S. 389, rev'g 209 Fed. 975 4856, 5097
McGowan, Matter of, 124 N. Y. 526 1082
McGowan v. Chicago, etc., R. Co., 91 Wis. 147 57
v. Duff, 14 Daly 315 1268
v. Interstate Con. St. R. Co., 20 R. I. 264 1493, 4796
McGowan v. Lynch, 151 Ala. 458 1492, 4214, 4218
v. Middleton, 11 Q. B. Div. 464 529
v. St. Louis O. & S. Co., 109 Mo. 518 4832, 4906
Macgowan v. Whiting, 9 Daly 86 537
v. Wilmington & Philadelphia Traction Co., — Del. Super. Ct. —, 92 Atl. 1015 4659, 4730, 4743
McGowen v. Myers, 60 Iowa 257 2148, 2149
v. Young, 2 Stew. 276 4284
v. Young, 2 Stew. & P. 160 4291
McGowin v. Dickson, 182 Ala. 161 1398, 2214
McGown v. Barnum, 42 N. Y. Misc. 585 1716, 1721
v. International & G. N. R. Co., 85 Tex. 289 1338, 1339, 4862, 4869
McGrath v. Cannon, 55 Minn. 457 376
v. Charleston & W. C. Ry. Co., 91 S. C. 552 3406
v. Gegner, 77 Md. 331 791, 801, 2231, 2275, 2299
v. Horgan, 72 App. Div. (N. Y.) 152 2626, 2642, 2666, 2668, 2674
v. Marchant, 117 Md. 472 2561
v. Snell, 162 Ill. App. 635 1794
v. Wilder, 77 Vt. 431 4351
McGraw v. Baltimore & O. R. Co., 18 W. Va. 361 140
v. Fletcher, 35 Mich. 104 2374
v. Gloversville, 32 App. Div. (N. Y.) 176 2461
v. Ocean Ins. Co., 23 Pick. 405 3289
v. O'Neil, 123 Mo. App. 691 1506
v. Sampliner, 107 Mich. 141 4302
McGregor v. Armill, 2 Iowa 30 1523
v. Balch, 17 Vt. 562 1779
v. Ball, 4 La. Ann. 389 2737
v. Board of Education, 107 N. Y. 511 3151, 3154
v. Dansken, 1 F. 536, 36 Sc. L. R. 393 5173
v. Equitable G. Co., 139 Pa. 230 3987
v. Ganlin, 4 Up. Can. Q. B. 378 1216
v. Kilgore, 6 Ohio 359 3387, 3389
v. Oregon R. & N. Co., 50 Ore. 527 3333
v. Penn, 9 Yerg. 74 2388
v. Rhode Island Co., 27 R. I. 85 1373, 1478, 4746
v. Thwaites, 3 B. & C. 24 4600
v. Western U. Tel. Co., 85 Mo. App. 308 3592
McGrew v. Governor, 19 Ala. 89 1611
v. Granite B. P. Co., 247 Mo. 549 3946
v. Missouri Pac. R. Co., 230 Mo. 496 3281
v. Norris (Tex. Civ. App.), 140 S. W. 1143 1482, 1485
v. St. Louis S. F. & T. R. Co., 32 Tex. Civ. App. 265 1467
v. Stone, 53 Pa. 436 129, 4679
McGroarty v. Lehigh Valley C. Co., 212 Pa. 53 1443, 1454
McGuckin v. Milbank, 152 N. Y. 297 2152, 2155, 2159
McGuffey v. Humes, 85 Tenn. 26 2099, 2102, 2104, 2134
McGuigan v. Delaware, etc., R. Co., 129 N. Y. 50 1464
McGuinness v. Hargiss, 56 Wash. 162 4566, 4567
v. Whalen, 16 R. I. 558 1946
McGuire v. Boyd C. & C. Co., 236 Ill. 69 3789
v. Brockman, 58 Mo. App. 307 830

[REFERENCES ARE TO PAGES]

McGuire v. Campbell, 58 Ill. App. 188 991
v. Ely, Wright 520 1545
v. Galligan, 53 Mich. 453 1135, 4234
v. Galligan, 57 Mich. 38 4265, 4285
v. Gerstley, 204 U. S. 489 5125
v. Gilbert, 180 Ill. 96 1807
v. Grant, 25 N. J. L. 356 6, 3762, 3913, 3916
v. Justices, 7 B. Mon. 340 1598
v. Kearney, 17 La. Ann. 295 2373
v. Neils L. Co., 97 Minn. 293 2649
v. Pierce, 9 Gratt. 167 1811
v. Post Falls L. & Mfg. Co., 23 Idaho 608 1431, 4168, 4186
v. Skelton, 36 Okla. 500 1600
v. Winston, 157 Ill. App. 222 2696, 2702
McGuirk v. O'Halloran, 149 Fed. 909 4601
McGunnagle v. Thornton, 10 S. & R. 251 3103
McGurk v. Huggett, 56 Mich. 187 2860
McHaney v. St. Louis, etc., R. Co., 149 Mo. App. 369 3414
McHard v. Whetcroft, 3 Har. & McH. 85 786, 1236
McHardy v. Wadsworth, 8 Mich. 349 524, 1838, 2827
McHenry v. Bulifant, 207 Pa. 15 2282
v. Croft, 163 Ill. App. 426 664
v. Marr, 39 Md. 510 3247
v. Parkersburg, 66 W. Va. 533 391, 3853, 3887
McHenry Coal Co. v. Sneddon, 98 Ky. 684 1277
Machette v. Wanless, 2 Colo. 180 4314
Machine Co. v. Chalkley, 143 N. C. 181 4210
v. Compress Co., 105 Tenn. 187 188, 194, 202, 204, 1474, 2626, 2635, 2644
v. Tobacco Co., 141 N. C. 284 226, 2623, 2636
McHose v. Earnshaw, 55 Fed. 584 4411
v. Fulmer, 73 Pa. 365 176, 204, 284, 316, 2287, 2295
McHoy v. Ryan, 27 Mich. 110 3128
McHugh v. Robinson, 71 Wis. 565 4311
v. Schlosser, 159 Pa. 480 55, 4716, 4872, 4906, 4910
Macias v. Sheriff, 43 La. Ann. 289 4169
McIlhargy v. Chambers, 117 N. Y. 532 1453
McIlvaine, The, 126 Fed. 434 5008
McIlvaine v. Holland, 5 Harr. 10 1673
v. Wilkins, 12 N. H. 474 1102
McIlvanie, The, 126 Fed. 434 5000
McIndoe v. Morman, 26 Wis. 588 1954
McInhill v. Odell, 62 Ill. 169 601
McIniffe v. Wheelock, 1 Gray 600 793, 794
McInnis v. Lyman, 62 Wis. 191 2056, 2060, 2065, 2088
McInroy v. Dyer, 47 Pa. 118 480
McIntire v. Clark, 7 Wend. 330 802, 1358
v. Cudahy P. Co., 179 Ala. 404 4509, 4539
v. Levering, 148 Mass. 546 4613
v. Linehan, 178 Mass. 263 1637
v. McIntire, 192 U. S. 116 1128
v. Mower, 204 Mass. 233 1130, 1637
v. Parker, 195 Mass. 155 1636
v. Sholty, 121 Ill. 660 1287
v. State, 5 Blackf. 384 3957
v. Westmoreland C. Co., 118 Pa. 108 428, 429
v. Young, 6 Blackf. 496 4514
Macintosh v. Dun, 7 New South Wales St. Rep. 8 4576
McIntosh v. Augusta & A. T. Co., 87 S. C. 181 3501
McIntosh v. Johnson, 8 Utah 359 868
v. Lawn, 47 Barb. 550 380
v. Likens, 25 Iowa 555 994, 2743
v. Long, 2 N. J. L. 274 422
v. Lown, 49 Barb. 550 384, 391
v. McLawn, 49 Barb. 554 3151
v. Oregon R. & N. Co., 17 Idaho 100 3334
v. Ropp, 233 Pa. 497 3788
v. Wales, 21 Wyo. 397 4602, 4623, 4628, 4629, 4633, 4635, 4640
McInturf v. Western U. Tel. Co., 81 Kan. 476 330, 1326, 3589, 3591, 3618
McIntyre v. Bransford (Ky.), 17 S. W. 359 4576
v. Giblin, 131 U. S. CLXXIV, Appx. 4662, 5089
v. Levering, 148 Mass. 546 4649
v. Murphy, 153 Mich. 342 3824, 4681
v. New York Cent. R. Co., 37 N. Y. 287 4692, 4859, 4874, 4889, 4900, 4906
v. New York Cent. R. Co., 43 Barb. 532 37
v. Orner, 166 Ind. 57 149
v. Parks, 3 Metc. (Mass.) 207 1155
v. Sholty, 121 Ill. 660 57
v. Stockdale, 27 Ont. L. R. 460 1989
v. Whitney, 139 App. Div. (N. Y.) 557, aff'd 201 N. Y. 526 4210, 4214, 4243, 4244
v. Williamson, 1 Edw. 34 769
McInvoy v. Dyer, 47 Pa. 118 4168, 4200, 4215, 4305
McIsaac v. Inverness R. Co., 40 Nova Scotia 579 3747, 3762
McJilton v. Love, 13 Ill. 486 1545
Mack v. Adler, 22 Fed. 570 726
v. Burt, 5 Hun 28 3101
v. Chicago, etc., R. Co., 123 Mo. App. 531 4656
v. Engel, 165 Mich. 540 1073
v. Jackson, 9 Colo. 536 1735, 1737
v. Patchin, 29 How. Pr. 20 2048, 3261
v. Patchin, 42 N. Y. 167 537, 547, 3185, 3187, 3189, 3258
v. Sloteman, 21 Fed. 109 2597, 2685
v. Snell, 140 N. Y. 193 2597
v. South Bound R. Co., 52 S. C. 323 86, 90, 4667
McKahan v. American Exp. Co., 209 Mass. 270 3340, 3387, 4297
McKain v. Baltimore & O. R. Co., 65 W. Va. 233 1329
Mackall, In re, 60 Wash. 655 1646
McKane v. O'Brien, 40 New Bruns. 392 1134
McKarren v. Boston & N. St. R. Co., 194 Mass. 179 1474
Mackay, In re, 107 Cal. 303 1084
v. Bryson, 5 Ired. 216 411
v. Davey, 28 Ont. L. R. 322 2447
McKay v. Barnett, 21 Utah 239 2527, 2533
v. Belknap Sav. Bank, 27 Colo. 50 976, 1148
Mackay v. Blackston, 6 New South Wales St. Rep. 248 389, 3112
v. Central R. Co., 4 Fed. 617 4954
v. Dick, L. R. 6 App. Cas. 251 2221
v. Dodge, 5 Ala. 388 2767
v. Ford, 5 H. & N. 792 11
v. Henderson, 24 Ky. L. Rep. 1484 125, 126
v. Lane, 5 Fla. 268 1101, 2415
v. Myers, 168 Mass. 312 814

[REFERENCES ARE TO PAGES]

Mackay v. New England D. Co., 92 Me. 454 4852, 4859, 4901, 4912, 4919, 4924, 4934
v. New England D. Co., 93 Me. 201 1501
v. Ohio River R. Co., 34 W. Va. 65 3464
v. Overton, 65 Tex. 82 1073
v. R'ley, 65 Cal. 623 2286
v. Western U. Tel. Co., 16 Nev. 222 3560
v. Wishert (Tex. Civ. App.), 152 S. W. 508 4321
Mackay Telegraph & Cable Co. v. Vaughan, 111 Ark. 504 3630
McKayer v. Melvin, 1 Ired. Eq. 73 1027
McKean v. Shannon, 1 Bin. 370 1599
McKee v. Bain, 11 Kan. 569 556, 2117, 2118
v. Brandon, 3 Ill. 339 1981
v. Campbell, 27 Mich. 497 297, 322, 2848
v. Chicago, etc., R. Co., 93 Neb. 294 3803
v. Hamilton, 33 Ohio St. 7 2832
v. Ingalls, 5 Ill. 30 4542
v. Jones, 67 Miss. 405 2447
v. Judd, 12 N. Y. 622 27
v. Miller, 4 Blackf. 222 764
v. Mouser, 131 Iowa 203 3676, 3679
v. Needles, 133 Iowa 195 2743
v. Nelson, 4 Cow. 355 1422
v. Phoenix Ins. Co., 28 Mo. 383 3084
v. St. Louis, etc., R. Co., 49 Mo. App. 174 3852, 3932
v. Stroup, 1 Rice, 291 711
McKeen v. Morse, 49 Fed. 253 814
McKeering v. Pennsylvania R. Co., 65 N. J. L. 57 4855
McKeever v. United States, 14 Ct. of Cls. 396 4442
McKeigue v. Janesville, 68 Wis. 50 1472, 1477, 4858, 4894, 4903
McKellar v. Bowell, 4 Hawks, 34 2822
v. Canadian Pac. R. Co., 14 Manitoba, 614 76
v. Couch, 34 Ala. 336 4604
Mackellar v. Farrell, 57 N. Y. Super. Ct. 398 1783, 1787
v. Sigler, 47 How. Pr. 20 3121
McKelvey v. McKelvey, 111 Tenn. 388 5
v. McLean, 34 Up. Can. C. P. 635 1674
v. Marsh, 63 App. Div. (N. Y.) 396 4840
McKelvin v. Loudon, 22 Ont. 70 105
McKenna v. Baessler, 86 Iowa 197 144
v. Citizens' N. G. Co., 198 Pa. 31 4718
v. Citizens' N. G. Co., 201 Pa. 146 4692
v. Corcoran, 70 N. J. Eq. 627 2844
v. George, 2 Rich. Eq. 15 2863
v. He'nlen, 128 Cal. 97 4634
v. North Hudson R. Co., 64 N. J. L. 106 1512
McKenna's Estate, 168 Cal. 339 1806
McKennan v. Sterrett, 6 Watts 162 1025
McKenney v. Carpenter, 42 Okla. 410 1366
v. Haines, 63 Me. 74 2294, 2318, 4221, 4239
McKenzie v. Allen, 3 Strobh. 546 462, 465, 4775, 4779, 4784
Mackenzie v. Clement, 144 Mo. App. 114 2144
McKenzie v. Farrell, 4 Bosw. 192 1356, 3260
McKenzie v. Gray, 143 Iowa 112 3675, 3676
Mackenzie v. Hyam, 8 New South Wales St. Rep. 587 4646
McKenzie v. Mathews, 59 Mo. 99 1744
v. Mitchell, 123 Ga. 72 10, 225, 291, 293
v. North Coast C. Co., 55 Wash. 495 4729
v. Porter, 40 Colo. 340 1559
v. Ray, 168 Cal. 618 699
v. Scott, 6 Bro. P. C. 280 2958
v. Underwood, 21 D. C. 126 2876
v. United Rys. Co. of St. Louis, 183 Mo. App. 312 4780
McKenzie's Sons & Co., J. H., v. Consolidated Lumber Co., 142 Ga. 375 2358
McKeon v. Byington, 70 Conn. 429 628
v. Chicago, etc., R. Co., 94 Wis. 477 1428, 1493
v. Citizens' R. Co., 42 Mo. 79 1338, 3503
v. New York, etc., R. Co., 75 Conn. 343 3754
v. Proctor & Gamble Mfg. Co., 76 Misc. (N. Y.) 599 4808
v. See, 4 Robert. 449 1369, 3839
v. Whitney, 3 Denio 452 3129, 3133
McKeown v. Toronto R. Co., 19 Ont. L. R. 361 4923
McKerall v. Atlantic C. L. R. Co., 76 S. C. 338 3321, 3322, 3345
McKern v. Calvert, 59 Mo. 243 4972
McKernan v. Detroit Citizens' R. Co., 138 Mich. 519 108
McKevitte v. Feige, 57 Mich. 374 569
Mackey v. Dillinger, 73 Pa. 85 4361
v. Fullerton, 7 Colo. 556 735
v. Harmon, 34 Minn. 168 2187
v. Hodgson, 9 Pa. 468 1224
McKey v. Lauflin, 48 Kan. 581 1656, 1661
Mackey v. Mackey, 43 Barb. 58 585
v. Olssen, 12 Ore. 429 2006
McKibbin v. Day, 71 Neb. 280 4376
v. Day, 74 Neb. 424 1502
v. Great Northern R. Co., 78 Minn. 232 3532
v. Peck, 39 N. Y. 262, 270 3287, 3297
v. Wisconsin Cent. R. Co., 100 Minn. 270 3532, 3535
Mackie v. Caines, 5 Cow. 547 1851
v. Davis, 2 Wash. (Va.) 219 1823
McKiel v. Porter, 4 Ark. 584 1891, 2331
McKiernan v. Lehmaier, 85 Conn. 111 4860
McKillop v. Burton, 82 Vt. 403 2095
McKim v. Bartlett, 129 Mass. 226 1652
v. Blake, 139 Mass. 593 1131
v. Haley, 173 Mass. 112 1636, 1640
Mackin v. Detroit-Timkin Axle Co., — Mich. —, 153 N. W. 49 5153
McKindley v. Drew, 69 Vt. 210, 71 Vt. 138 4419
McKindly v. Dunham, 55 Wis. 515 684
McKinley v. Blackledge, 2 Hayw. 28 943
v. Chicago, etc., R. Co., 44 Iowa 314 334, 340, 3472, 3474, 3475, 3478, 3495, 4662, 4794
v. First Nat. Bank, 118 Ind. 375 1489
v. Goodman, 67 Ill. App. 374 2547, 2563
v. Holliday, 10 Yerg. 477 2027
v. Irvine, 13 Ala. 681 2903
v. Warren, 218 Mass. 310 4407
v. Williams, 74 Fed. 94 2319, 2902, 2922
McKinney v. Blakely, 87 Ark. 405 1620

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v. Carson, 35 Utah 180 1364, 1368
v. Harvie, 38 Minn. 640 2007
v. Nashville, 102 Tenn. 131 4033, 4039, 4049
v. Neil, 1 McLean 540 140
v. School Dist., 20 Minn. 72 2458
v. Springer, 3 Ind. 59 356, 494, 542, 2667
v. Western S. Co., 4 Iowa 420 4757
McKinnie v. Lane, 230 Ill. 544 624
McKinnon v. Burrows, 3 Up. Can. Q. B. 590 2108
v. McEwan, 48 Mich. 106 245, 2616
v. Palen, 62 Minn. 188 1430
Mackinson v. Conlon, 55 N. J. L. 564 2663
McKinster v. Bank, 9 Wend. 46, aff'd 11 Wend. 473 2930, 2939
McKinstry v. Bras, 180 Ill. App. 648 1689
McKinzie v. Nevius, 22 Me. 138 737
McKissick v. Oregon S. L. R. Co., 13 Idaho 195 1444
Mackler v. Mississippi, etc., R. Co., 62 Mo. App. 677 2684
Macklin v. New Jersey S. Co., 7 Abb. Pr. 229 3530
McKnight v. Carmichael, 7 Tex. Civ. App. 270 4265
v. Chauncey, Selden's Notes (N. Y.) 97 1227
v. Denny, 198 Pa. 323 3772
v. Detroit & M. R. Co., 135 Mich. 307 1462, 2478, 2482
v. Devlin, 52 N. Y. 399 527
v. Dunlop, 4 Barb. 36 1008, 1108
v. McLean, 3 Brown Ch. 596 1561, 1572
v. Manufacturers' N. G. Co., 146 Pa. 185 3114
v. Minneapolis St. Ry. Co., 127 Minn. 207 371
v. Ratcliff, 44 Pa. 156 267
v. Taylor, 1 How. 168 948
v. Wichita, 83 Kan. 7 4034, 4043
MacKnight F. S. Co. v. Mayor, 160 N. Y. 72 2612, 2684
Mackworth v. Thomas, 5 Ves. 329 1563, 1564
McKyring v. Bull, 16 N. Y. 297 507, 509, 695, 1391, 1407, 4585
McLachlan v. Evans, 1 Y. & J. 380 594
McLain v. Nurnberg, 16 N. D. 144 1360
v. Parker, 229 Mo. 68 1117, 4389
v. Rutherford, Hempst. 47 1397
v. St. Louis & S. R. Co., 100 Mo. App. 374 412
McLamb v. Wilmington & W. R. Co., 122 N. C. 862 4910
McLane v. Abrams, 2 Nev. 199 962, 963, 965
v. Botsford E. Co., 136 Mich. 664 136, 139
v. McTighe, 89 Ala. 411 1685
v. Miller, 10 Ala. 856 566
v. Miller, 12 Ala. 643 2577, 2582
v. Pittsburg R. Co., 230 Pa. 29 4833
McLaren v. Fischer, 45 App. Div. (N. Y.) 13 2634
McLarren v. Thompson, 40 Me. 284 4362
Maclary v. Reznor, 3 Del. Ch. 445 765
McLaughlin v. Bangor, 58 Me. 398 4186
v. Bank, 20 Vict. L. R. 433 4223
v. Blake, 46 Pa. Super. 274 665
v. Campbell, 78 N. J. L. 541 2501, 2504
v. Corry, 77 Pa. 109 3489, 4725, 4748
v. Cowley, 131 Mass. 70 4573, 4579
v. Hebron Mfg. Co., 171 Fed. 269 4853
McLaughlin v. Hess, 164 Pa. 570 2231
v. McGovern, 34 Barb. 208 2769
v. McLaughlin, 22 N. J. Eq. 505 3724, 3725, 3727
v. Piatti, 27 Cal. 451 4311
v. San Francisco, etc., R. Co., 113 Cal. 590 3732
v. United Rys. of San Francisco, 169 Cal. 494 4861, 4893, 4896, 4898, 4900
v. United States, 36 Ct. of Cls. 138, 37 Ct. of Cls. 150 2642, 2657
v. Winner, 63 Wis. 120, 124 525
Maclay v. United States, 43 Ct. of Cls. 90 271, 3303, 3307, 3308
McLean v. Board, 7 Vict. L. R. (law) 239 4913
v. Chicago, etc., R. Co., 50 Minn. 485 3523
v. Dunn, 4 Bing. 722 2248
v. Fleming, 96 U. S. 245 4484, 4486, 4487
v. Lafayette Bank, 3 McLean 589 986
v. Lewiston, 8 Idaho 472 4795
v. Wedell, 31 Utah 468 2013
v. Wright, 137 Ala. 644 1705
v. Wright M. Co., 96 Mich. 479 41
McLean County C. Co. v. Lennon, 91 Ill. 561 3791
v. Long, 81 Ill. 359 3790, 4259
Macleay v. Tait, [1906] App. Cas. 24 4379
McLees v. Felt, 11 Ind. 218 1356
McLellan v. Crofton, 6 Me. 304 659, 1357, 1358
McLemore v. Mabson, 20 Ala. 139 2196, 2211
McLenahan v. McLenahan, 3 C. E. Green 101 3728
McLendon v. Frost, 57 Ga. 448 717
v. State, 92 Tenn. 520 1602
McLennan v. Farmers' Sav. Bank, 131 Iowa 696 716
v. Minneapolis & N. E. Co., 57 Minn. 317 4224
v. Prentice, 85 Wis. 427 2053, 2056, 2058, 2059, 2060, 2061, 2073, 2087, 2096
McLennon v. Fenner, 19 S. D. 492 1721, 1741, 1742
McLeod v. Boulton, 3 Up. Can. Q. B. 84 35
v. Capehart, 50 Minn. 101 4328
v. Despain, 49 Ore. 536 690
v. Genius, 31 Neb. 1 2656
v. McLeod, 73 Ala. 42 4648
v. Nimocks, 122 N. C. 437 1399, 1403
v. Pacific Tel. Co., 52 Ore. 22 3592, 3610
v. Russell. 59 Wash. 676 500
v. Spencer, 21 Okla. 165 3931
McLimans v. Lancaster, 63 Wis. 596 1499, 1501, 4797
v. Lancaster, 65 Wis. 240 1249, 1250
McLure v. Hart, 19 Ark. 119 569
v. Rush, 9 Dana 64 558
McMahan v. Bowe, 114 Mass. 140 3699, 3703
v. Sewickly Mut. F. Ins. Co., 179 Pa. 52 3050
McMahill v. McMahill, 69 Iowa 115 2044
McMahon v. Bennett, 31 App. Div. (N. Y.) 16 4548
v. Dubuque, 107 Iowa 62 3751, 4229
v. Fawcett, 2 Rand. 514 2865
v. Field, 7 Q. B. Div. 591 134, 185, 4680
v. German-Am. Nat. Bank, 111 Minn. 313 683
v. Kimball, 3 Blackf. 1 3728

[REFERENCES ARE TO PAGES]

McMahon v. McGraw, 26 Wis. 614 2903
v. Mayor, 22 App. Div. (N. Y.) 113 2461
v. Mayor, 33 N. Y. 642, 647 418
v. New York & E. R. Co., 20 N. Y. 463 1031, 1097, 2684, 2687
v. New York News P. Co., 51 App. Div. (N. Y.) 488 4544
v. Northern Cent. R. Co., 39 Md. 438 4662, 4670, 4714
v. St. Louis, etc., R. Co., 41 La. Ann. 827 3952, 3955
v. Sankey, 133 Ill. 636 1289
McMalkin v. Bates, 46 How. Pr. 405 2027
McMannomy v. Chicago, etc., R. Co., 167 Ill. 495 2479, 2491, 2497
McMannus v. Lee, 43 Mo. 206 435
McManus v. American W. Co., 126 App. Div. (N. Y.) 68 2340
v. Blackmarr, 47 Minn. 331 2013
v. Chicago, etc., R. Co., 138 Iowa 150 3333
v. Crickett, 1 East 106 1329, 3508, 3509
v. Fair S. & C. Co., 60 Mo. App. 216 3120
v. Rothschile, 25 Ont. L. R. 138 886
McMartin v. Insurance Co. of N. A., 55 N. Y. 222 3020
McMaster v. Dyer, 44 W. Va. 644 1289, 1302
v. State, 108 N. Y. 542 2693, 2704
McMasters v. Commonwealth, 3 Watts 292 3957
McMath v. Levy, 74 Miss. 450 3255
McMeekin v. Pittsburg R. Co., 229 Pa. 572 4757
v. Southern R. Co., 82 S. C. 468 294, 3373, 3375
McMichael v. Mason, 13 Pa. 214 483
McMicken v. Webb, 6 How. 292 2782
McMillan v. Birch, 1 Bin. 178 4053, 4534
v. Dana, 18 Cal. 339 1712
v. De Tamble, 93 Ill. App. 65 2387, 2393
v. Fox, 90 Wis. 173 2307
v. Grayston, 83 Mo. App. 425 703, 730, 741
v. Michigan, etc., R. Co., 16 Mich. 79 3414
v. Northport S. & R. Co., 49 Wash. 76 2480
v. Philadelphia Co., 1 Pa. Super. Ct. 648 3976
v. Quincy, 137 Ga. 63 2696
v. Reaume, 137 Mich. 1 4400
v. Ritchie, 3 T. B. Mon. 348 2098, 2102
v. Scott, 1 T. B. Mon. 150 1059
v. Solomon, 42 Ala. 356 3142
v. Spider Lake S. & L. Co., 115 Wis. 332 4855
v. Union P. B. Works, 6 Mo. App. 434 4662
v. Vanderlip, 12 Johns. 165 2229, 2525, 2543, 2666
v. Warren, 59 Fla. 578 1051
v. Columbia, 122 Mo. App. 34 3962
v. Elder, 160 Mo. App. 399 1288, 1316
McMillian v. Arthur, 98 N. Y. 167 2927
v. Wallace, 3 Stew. 185 1411
McMillin P. Co. v. Pittsburg, etc., R. Co., 216 Pa. 504 4012
McMillion v. Pigg, 3 Stew. 165 534
McMillon v. McMillon, 7 Lea 78 2822
McMorris v. Simpson, 21 Wend. 610 2922
McMuellen v. Williams, 5 Ont. App. 518 2405
McMullan v. Dickinson Co., 60 Minn. 156 2548, 2550, 2568
v. Dickinson Co., 63 Minn. 405 2558
McMullen v. Free, 13 Ont. 57 181, 2443
v. Hinkle, 39 Miss. 142 2808
v. Marlborough, 163 App. Div. (N. Y.) 73 3983
v. Ritchie, 64 Fed. 253 2805
v. Union Drawn S. Co., 47 Pa. Super. 570 6
v. United States, 167 Fed. 460 2754
v. Winfield B. & L. Ass'n, 64 Kan. 298 1569, 1584, 1586, 1592
McMullin v. Erwin, 69 Vt. 338 4843
McMurdock v. Kimberlin, 23 Mo. App. 523 1480, 1484
McMurphy v. Minot, 4 N. H. 251 3167
McMurray v. Basnett, 18 Fla. 609 1482, 1495
v. Day, 70 Iowa 671 3711, 3712
v. Taylor, 30 Mo. 263 658, 670
McMurria v. Powell, 120 Ga. 766 1804
McMurtry v. Blake, 45 Neb. 213 1988, 1999, 2010
McNabb v. Wixom, 7 Nev. 163 142
McNair v. Burns, 9 Watts 130 26
v. Collins, 27 Ont. L. R. 44 1460
v. Compton, 35 Pa. 23 355, 1987, 1989, 1999, 3188
McNairy v. McNairy, 1 Tenn. Cas. 329 1030, 1085, 1088, 1202
McNally v. Burleigh, 91 Me. 22 4549
v. Fitzgerald, [1914] W. C. & Ins. Rep. 7 5173
v. Shobe, 22 Iowa 49 1107
v. White, 154 Ind. 163 2061
McNamara, Succession of, 48 La. Ann. 45 2470
McNamara v. Clark, 85 Ill. App. 439 687
v. Clintonville, 62 Wis. 270 4679, 4680, 4710
v. Goldan, 194 N. Y. 315 1366
v. Harrison, 81 Iowa 486 2683
v. King, 7 Ill. 43 1269, 4781
v. McAllister, 150 Iowa 243 4977
v. Metropolitan St. R. Co., 133 Mo. App. 645 326
v. Pengilly, 58 Minn. 353 1956
v. Pengilly, 64 Minn. 543 1956
v. St. Louis T. Co., 182 Mo. 676 1267, 1279, 1343, 3506
v. Slavens, 76 Mo. 330 417
v. Washington T. Co., 35 App. D. C. 230 25
McNamara's Est., In re, 148 Mich. 346 640
McNamee v. Minke, 49 Md. 122 4608
McNatt v. McRae, 117 Ga. 898 559, 1282
McNaught v. Dodson, 49 Ill. 446 2238
McNaughter v. Cassally, 4 McLean 530 2238
McNaughton v. Borth, 136 Wis. 543 3793
v. Stephens, 8 Ga. App. 545 3243, 3247
v. Wahl, 99 Minn. 92 2387
McNay v. Stratton, 9 Ill. App. 215 1311, 1322
McNeal v. Blackburn, 7 Dana 170 452
McNear v. Leblond, 123 Fed. 384 3269
v. McOmber, 18 Iowa 12 1107
McNeely v. South Penn O. Co., 58 W. Va. 438 3838
McNeil v. Cape Girardeau, 153 Mo. App. 424 4703

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v. Fultz, 38 Can. Sup. Ct. 198 368
v. Garland, 27 Ark. 343 457
v. Lyons, 20 R. I. 672 1495
v. Mullin, 70 Kan. 634 463, 467
v. Postal Tel. C. Co., 154 Iowa 241 3594
M'Neil v. Richards, [1899] 1 Ire. 79 194
McNeil v. Watkins, 15 Ky. L. Rep. 780 953
McNeill v. Durham & C. R. Co., 138 N. C. 1 1049
v. Durham & C. R. Co., 135 N. C. 682 20
v. Reid, 9 Bing. 68 255
v. Richards, [1899] 1 Irish 79 284
McNellis v. Ætna Ins. Co., 176 Ill. App. 575 1089
McNetton v. Herb, 158 Mich. 525 4765
McNight v. Parsons, 136 Iowa 390 1826
McNitt v. Clark, 7 Johns. 465 838, 877, 881
McNulta v. Hendele, 92 Ill. App. 273 1503, 1514
McNulty v. Keyser O. B. Co., 112 Md. 638 2657
McNutt v. Dix, 83 Mich. 328 2902
v. Young, 8 Leigh 542 471, 4574
Macomber v. Bigelow, 123 Cal. 532, 126 Cal. 9 1032, 1093
v. Dunham, 8 Wend. 550 951
v. Nichols, 34 Mich. 212 13
v. Parker, 13 Pick. 175 2225, 2227
Macon v. Daley, 2 Ga. App. 355 3107, 3962, 4030
v. Dannenberg, 113 Ga. 1111 3882
v. Paducah St. R. Co., 23 Ky. L. Rep. 46 4731
v. Trowbridge, 38 Colo. 330 3113, 3114
Macon B. & R. Co. v. Ross, 133 Ga. 83 1461
Macon Con. St. R. Co. v. Barnes, 113 Ga. 212 4713, 4814, 4824
Macon K. Co. v. Leicester M. Co., 65 N. J. Eq. 138 2381
Macon R. & L. Co. v. Mason, 123 Ga. 773 1280, 1386, 4712
v. Streyer, 123 Ga. 279 4714
v. Vining, 120 Ga. 511 1466, 4718, 4833
Macon, etc., R. Co. v. Hasty, 10 Ga. App. 103 1140
v. Johnson, 38 Ga. 409 4906
v. Moore, 99 Ga. 229 1478, 4751
v. Moore, 125 Ga. 810 137
v. Stewart, 125 Ga. 88 1514
McParlin v. Boynton, 8 Hun 449 aff'd 71 N. Y. 604 535, 2222
McPeak v. Missouri Pac. R. Co., 128 Mo. 617 148
McPeek v. Western U. Tel. Co., 107 Iowa 356 55, 270, 3564, 3572
McPeters v. Phillips, 46 Ala. 496 1929, 4273, 4278
McPhail v. Commissioners, 119 N. C. 330 2465
McPhee v. United States F. & G. Co., 52 Wash. 154 1602
v. Wilson, 25 Up. Can. Q. B. 169 888, 893
McPhee's Est., 156 Cal. 335 1121
McPherson v. Acme L. Co., 70 Miss. 649 1679
v. Daniels, 10 B. & C. 263 4562, 4599, 4600
v. Guardian Ins. Co., Newf. Rep. (1884-96) 768 3048
v. James, 69 Ill. App. 337 784
McPherson v. Pittsburg R. Co., 50 Pa. Super. 233 1141
v. Robertson, 82 Ala. 459 918
v. Runyon, 41 Minn. 524 4609
v. Ryan, 59 Mich. 33 3676
v. St. Louis, etc., C. R. Co., 97 Mo. 253 4892
v. Talbott, 10 Gill & J. 499 2861
v. Wiswell, 19 Neb. 117 1983
Macpherson and City of Toronto, In re, 26 Ont. 558 4156
McPheters v. Kimball, 99 Me. 505 820
v. Moose River L. D. Co., 78 Me. 329 214
McPhillips v. Fitzgerald, 76 App. Div. (N. Y.) 15 3743
McQuade v. O'Neil, 15 Gray 52 1358
McQuaid v. Portland & V. R. Co., 18 Ore. 237 3982
McQuaide v. Stewart, 48 Pa. 198 563, 742
McQueen v. Burns, 1 Hawks 476 1156, 1877
v. Chouteau, 20 Mo. 222 2050
v. Fulghan, 27 Tex. 463 4555
v. Wilson, 51 Mo. App. 138 2464
McQuesney v. Hiester, 33 Pa. 435 3147
McQuesten v. Noyes, 6 N. H. 19 828
McQuinn v. Logue, 143 Mo. App. 232 3590
McQuown v. Law, 18 Ill. App. 34 1728
McRae v. Brown, 12 La. Ann. 181 306, 1719, 1727
Macrae v. Clarke, L. R. 1 C. P. 403 271, 410, 496, 1620
v. Goodman, 10 Jur. 555, 5 Moore, P. C. 315 1889
McRae v. Hill, 126 Ill. App. 349 172, 175, 178
v. Lonsby, 130 Fed. 17 4389
v. Malloy, 87 N. C. 196 1119
v. Mattoon, 10 Pick. 53 1905
v. Metropolitan St. R. Co., 125 Mo. App. 562 4653
v. Preston, 54 Fla. 190 3713
v. White (Tex. Civ. App.), 42 S. W. 793 3698
McRaven v. Forbes, 6 How. (Miss.) 569 978
McReynolds v. Burlington, etc., R. Co., 106 Ill. 152 3978, 3979, 3980, 4021
v. Kansas City, etc., R. Co., 110 Mo. 484 3957
v. McCord, 6 Watts 288 1414
MacRitchie v. Lake View, 30 Ill. App. 393 2612
Macrow v. Great Western R. Co., L. R. 6 Q. B. 612, 621 3530, 3533, 3535
McShane v. Howard Bank, 73 Md. 135 1574, 1592
McSherry Mfg. Co. v. Dowagiac Mfg. Co., 160 Fed. 948 4449, 4451, 4454, 4475
McSloy v. Ryan, 27 Mich. 110 549
McSorley v. Bullock, 62 Wash. 140 4210, 4292
McTague v. Dowst, 51 App. Div. (N. Y.) 206 4815
McTavish v. Carroll, 1 Md. Ch. 160 743
v. Carroll, 13 Md. 429 3814, 3815
v. Carroll, 17 Md. 1 213
McTighe v. McKee, 70 Ark. 293 1948
Macumber v. White River L. & B. Co., 52 Mich. 195 1353
McVay v. Brooklyn, etc., R. Co., 113 App. Div. (N. Y.) 724 158
McVeagh v. Atchison, etc., R. Co., 3 N. M. 327 3332
v. Bailey, 29 Ill. App. 606 4184

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McVeigh v. Minneapolis, etc., R. Co., 113 Minn. 450 4905, 4935
McVey v. Peddie, 69 Neb. 525 1560
McVicar v. Denison, 81 Mich. 348 1205
v. Royce, 17 Up. Can. Q. B. 529 2844
McVickar-G. Realty Co. v. Garth, 111 App. Div. (N. Y.) 924 3121
McWaters v. Draper, 5 T. B. Mon. 494 695
McWhorter v. Blumenthal, 136 Ala. 568 717
v. Sayre, 2 Stew. 225 1357
v. Standifer, 2 Port. 519 1052, 1358
McWilliams v. Bragg, 3 Wis. 424 467, 1268, 1307, 1319, 4776
v. Hoban, 42 Md. 56 1269, 4614, 4620, 4628
v. Jacobs, 128 Ga. 375 1064
v. Lake Shore, etc., R. Co., 146 Mich. 216 3467
v. Morgan, 70 Ill. 62 1780, 1792
v. Morgan, 75 Ill. 473 3747
v. New York, 134 Fed. 1015 2718
v. Norfleet, 63 Miss. 183 1651
v. Phillips, 71 Ala. 80 671, 677, 698
Macy v. Carter, 67 Mo. App. 323 1369
v. Peach, 2 Kan. App. 525 2581
Macy Co. v. New York, 144 App. Div. (N. Y.) 408 929
Madden v. Caldwell L. Co., 16 Idaho 59 1982, 1990, 2101, 2136
v. Cheshire Provident Inst., 77 Kan. 415 2905
v. Porterfield, 8 Jones 166 2478
Maddocks v. Stevens, 89 Me. 336 2147
Maddox v. Duncan, 143 Mo. 613 2781
v. Maddox, 135 Ky. 403 2025
v. Neuton, 4 Ala. App. 454 432
v. Rader, 9 Mont. 126 1038
v. Washburn-C. M. Co., 135 Ga. 539 2245
v. Western Union Tel. Co., 92 Kan. 619 318, 3613
Madere v. Alexandre, 126 La. 342 430
Mades v. Miller, 2 D. C. App. Cas. 455 1121
Madigan v. St. Louis T. Co., 117 Mo. App. 118 1309, 3502
v. Schaghticoke, 143 App. Div. (N. Y.) 887 4779
v. Wellington & M. R. Co., 2 New Zealand, L. R. 209 (Sup. Ct.) 3919
Madison v. American S. E. Co., 118 Wis. 480 860, 918
v. Danville M. Co., 64 Mo. App. 564 542
Madison County v. Bartlett, 2 Ill. 67 1041
v. Johnston, 51 Iowa 152 1653
v. Smith, 95 Ill. 328 1404
Madison Nat. Bank v. Farmer, 5 Dak. 282 4359
Madison Square Bank v. Pierce, 137 N. Y. 444 680
Madison, etc., R. Co. v. Briscoe, 18 B. Mon. 570 1807
Madisonville v. Rosser, 8 Ohio C. C. (N. S.) 387 2598
v. Rosser, 28 Ohio C. C. 834 2596
Madisonville, etc., R. Co. v. Cates, 138 Ky. 257 3893, 3923
v. Ross, 126 Ky. 138 3967
Madler v. Silverstone, 55 Wash. 159 884, 910
Madox v. Jackson, 3 Atk. 404 2840
Madsen v. Whitman, 8 Idaho 762 995
Maeder v. Carondelet, 26 Mo. 112 2095, 2096
Maffat v. Greene, 149 Mo. 48 2804
Maffet v. Quine, 93 Fed. 347 4095
Magdeburg General Ins. Co. v. Paulson, 29 Fed. 530 3387, 3436
Mageau v. Great Northern R. Co., 103 Minn. 290 417, 4853
Magee v. Brooklyn, 144 N. Y. 265 1955, 4096
v. Carmack, 13 Ill. 289 595, 648, 654
v. Holland, 27 N. H. L. 86 341, 1318, 1320, 4767, 4772
v. Lavell, L. R. 9 C. P. 107 835, 836, 919
v. Leggett, 48 Miss. 139 2801
Mager v. Hutchinson, 7 Ill. 266 1853, 1856
Magerstadt v. Harder, 95 Ill. App. 303 1676
Maggort v. Hansbarger, 8 Leigh 536 3151
Maggrath v. Church, 1 Caines 215 3025
Maghee v. Camden & A. R. Co., 45 N. Y. 514 142, 3340, 3415, 3425, 3426
Magill v. Young (Tex. Civ. App.), 153 S. W. 184 1806
Magilton v. Stevenson, 173 Pa. 560 1074
Magmer v. Renk, 65 Wis. 364 223, 4609, 4618, 4629
Magnaw v. Lambert, 3 Pa. 444 3165
Magner v. Knowles, 67 Ill. 325 1132
Magnes v. Sioux City N. & S. Co., 14 Colo. App. 219 2241, 2243
Magney v. Roberts, 129 Iowa 218 2793
Magnin v. Dinsmore, 56 N. Y. 163 3336
v. Dinsmore, 62 N. Y. 35 2907, 2954, 3282, 3283, 3400, 3406, 3412, 3413
Magninay v. Saudek, 5 Sneed 146 4957, 4963, 4965
Magnolia M. Co. v. Gale, 189 Mass. 124 354, 1501, 2921
Magnus v. Woolery, 14 Wash. 43 1625
Magnuson v. Burgess, 124 Minn. 374 4413
Magoffin v. Patton, 4 Rawle 113 1083, 1085
Magognos v. Brooklyn Heights R. Co., 128 App. Div. (N. Y.) 182 1280
Magouirk v. Western U. Tel. Co., 79 Miss. 632 3630
Magoun v. New England Ins. Co., 1 Story 157 3000
Magowan v. Rickey, 64 N. J. L. 402 4633, 4640, 4645
Magraw v. McGlynn, 26 Cal. 420 790
Magruder v. Admire, 4 Mo. App. 133 2864
v. Cumberland Tel. & T. Co., 92 Miss. 716 621
v. De Haven, 21 Ky. L. Rep. 580 699
v. Ericson, 146 Ky. 89 1017
v. Melvin, 12 Cal. 559 1805
v. Randolph, 77 N. C. 79 385
Maguire v. Dutton, 54 N. J. L. 597 4325, 4329
v. Howard, 40 Pa. 391 555
v. Kiesel, 86 Conn. 453 243, 246
v. Pan-American A. Co., 205 Mass. 64 1665, 1667, 1670, 1672
v. Riggin, 44 Mo. 512 2123
v. St. Louis T. Co., 103 Mo. App. 459 4664, 4747
v. Sheehan, 54 C. C. A. 642, 117 Fed. 819 4676
Mahaffey v. Beech Creek R., 163 Pa. 158 4020, 4021
v. New York Cent., etc., R. Co., 229 Pa. 285 3774
v. Rumbarger L. Co., 61 W. Va. 571 72
Mahan v. Sherman, 7 Blackf. 378 1857, 1866
v. Tydings, 10 B. Mon. 351 1762

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Mahanoy v. Comry, 103 Pa. 362 1043
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Maher v. Carman, 38 N. Y. 25 1805
v. Philadelphia T. Co., 181 Pa. 391 4851
v. Riley, 17 Cal. 415 2299, 2311
v. Wilson, 139 Cal. 514 4840, 4841
Mahiat v. Codde, 106 Mich. 387 3677, 3679
Mahler v. Newbaur, 32 Cal. 168 792
Mahlman v. Williams, 89 Ky. 282 1783
Mahnke v. Damon, 3 Iowa 107 1685
Mahnken v. Pelletreau, 93 App. Div. (N. Y.) 420 623
Mahon v. Gaither, 70 Ill. App. 434 1825
v. New York Cent. R. Co., 24 N. Y. 658 414, 3850, 3859
v. New York, etc., R. Co., 20 N. Y. 469 2441
Mahone v. Williams, 39 Ala. 202 732
Mahoney v. Ashton, 4 Har. & McH. 63 1461
v. Belford, 132 Mass. 393 4572, 4573
v. Dixon, 31 Mont. 107 1609
v. Dwyer, 84 Hun 34 70
v. Goldblatt, 163 Ill. App. 563 1279, 1289
v. Hartford I. Co., 82 Conn. 280 2464, 2654
v. Kansas City, 106 Mo. App. 39 321, 3887, 3888, 392?
v. Kent, 7 Misc. (N. Y.) 726 2979
v. Mahoney, 51 Cal. 118 1330
v. Robbins, 49 Ind. 146 1521
v. Roberts, 86 Ark. 130 434
v. Simms, 86 Misc. (N. Y.) 484 2094, 2096
Mahoning Valley R. Co. v. DePascale, 70 Ohio 179 356, 460
v. Van Alstine, 77 Ohio 395 4849, 4852, 5118
Mahurin v. Pearson, 8 N. H. 539 2820
Maier v. Brown, 17 Fed. 736 4465, 4473
v. Metropolitan St. R. Co., 176 Mo. App. 29 4912
Maigley v. Hauer, 7 Johns. 341 2067
Mail & Express Co. v. Life Pub. Co., 192 Fed. 899 4483
Mail & T. Pub. Co. v. Marks, 125 Iowa 622 623, 2524
Mailer v. Clayton, 1 West Aust. L. R. 3 1989, 2009
Maillard v. Duke of Argyle, 6 M. & G. 40 658
Mailler v. Express Propeller Line, 61 N. Y. 312 65, 225, 1143
Main, The, [1894] Prob. 320 3006
Main v. Dearing, 73 Ark. 470 2376
v. El Dorado D. G. Co., 83 Ark. 15 2376
v. Field, 13 Ind. App. 401 16
v. King, 10 Barb. 59 889
Main Jellico Mountain Coal Co. v. Young, 160 Ky. 397 1373
Main Street, In re, 163 App. Div. (N. Y.) 401 4066
Main Street Bank v. Planters' Nat. Bank of Richmond, 116 Va. 137 647
Main St. H. Co. v. Horton H. Co., 56 Kan. 448 2792
Maine v. Chicago, etc., R. Co., 109 Iowa 260 25
Maine Mut. M. Ins. Co. v. Stockwell, 67 Me. 382 1855
Maine R. G. Co. v. York, 89 Me. 54 2745, 2747, 2769
Mainwaring v. Brandon, 8 Taunt. 202 2969, 3196
Mainz v. Lederer, 21 R. I. 370 3664
Maiorano v. Baltimore & O. R. Co., 216 Pa. 402 4856
Mair v. Williams, 29 S. D. 322 2404
Mairs v. Baltimore & O. R. Co., 175 N. Y. 409 17, 124, 127
v. Manhattan R. E. Ass'n, 89 N. Y. 498 4171
Maisenbacker v. Society Concordia, 71 Conn. 369 1338, 4663
Maitland v. Greer, 8 Pa. Super. 461 2471, 2473
v. Martin, 86 Pa. 120 2975, 2977
Majestic, The, 166 U. S. 375, 60 Fed. 624 3416
Majestic H. Co. v. Eyre, 53 App. Div. (N. Y.) 273 3126, 3144
Major v. Donovant, 25 Ill. 262 2112
v. Hefley-Coleman Co., — Tex. Civ. App. —, 164 S. W. 445 40, 2420, 2434
v. McLester, 4 Ind. 591 542
v. Pulliam, 3 Dana 582 3827
Makely v. American Legion of Honor, 133 N. C. 367 3072, 3085
Makepeace v. Coates, 8 Mass. 451 580, 584
Malachy v. Soper, 3 Bing. N. C. 371 4565, 4566
Malaun v. Ammon, 1 Grant's Cas. 123 1999
Malcolm v. Louisville & N. R. Co., 155 Ala. 337 3459
Malcomson v. Reeves P. Co., 167 Fed. 939 2236
v. Wappoo Mills, 88 Fed. 680 13, 2308
Malden v. Fyson, 11 Q. B. 292 306, 2000
Male v. Wink, 61 Neb. 748 981
Malecek v. Tower Grove, etc., R. Co., 57 Mo. 17 1331
Maley v. Western U. Tel. Co., 151 Iowa 228 3627, 3660
Mali v. Lord, 39 N. Y. 381 1336
Malin v. McCutcheon, 33 Tex. Civ. App. 387 273
Maling, The, 110 Fed. 227 4987
Mall v. Portland, 35 Ore. 89 1065
Mallan v. Radloff, 17 C. B. (N. S.) 588 2376
Mallard v. Allred, 106 Ga. 503 1952
v. Curran, 123 Ga. 872 10
Malloon v. Barrett, 192 Mass. 552 2501
Mallory, Matter of, 13 N. Y. Misc. 595 2469
Mallory v. Globe-B. C. M. Co., 11 Ariz. 296 862, 929
v. Mackaye, 92 Fed. 749 2525, 2526, 2542
v. Morgan County, 131 Ga. 271 3983
v. Morton, 21 Barb. 424 583
Mallory C. Co. v. Elwood, 120 Iowa 632 2414
Mallough v. Barber, 4 Camp. 150 287, 2914, 2915
Malloy v. Bennett, 15 Fed. 371 1290, 1344, 1346, 4521, 4537, 4548, 4549
v. Chicago Tel. Co., 159 Ill. App. 556 4831
Malmstrom v. People's D. D. Co., 32 Nev. 246 3893, 3904, 3923
Malnati v. Thomas, 26 App. D. C. 277 1363
Malone v. Belcher, 216 Mass. 209 1295, 4613, 4618, 4628, 4631
v. Donnally, Minor 12 1358
v. Gates, 87 Mich. 332 2222
v. Hammond, 6 Ga. App. 114 436, 1514

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v. McClain, 3 Ind. 532 1793
v. Murphy, 2 Kan. 250 1308
v. Pittsburgh, etc., R., 152 Pa. 390 3457, 3461, 3489
v. Roy, 107 Cal. 518 959
v. Stewart, 15 Ohio 319 4505
v. Weil, 67 App. Div. (N. Y.) 169 268
Maloney v. King, 30 Mont. 158 1415
v. Love, 11 Colo. App. 288 3112
v. Winston, 18 Idaho 740 1510, 4793, 4797, 4802
Malony v. Brady, 18 N. Y. Supp. 757 2646
Malott v. Shimer, 153 Ind. 35 4859
v. Woods, 109 Ill. App. 512 1280
Maloy v. Holl, 190 Mass. 277 2150
Malsbary v. Jacobus, 88 Neb. 751 2186
Maltman v. Williamson, 69 Ill. 423 1031
Malueg v. Hatten L. Co., 140 Wis. 381 182, 2274
Mamer v. Renk, 65 Wis. 364 4623
Mamerow v. National L. Co., 206 Ill. 626 2744, 2773, 2792
Mamlock v. Fairbanks, 46 Wis. 415 4381
Mammerberg v. Metropolitan St. R. Co., 62 Mo. App. 563 4718
Man v. Drexel, 2 Pa. 202 3693
Manahan v. Smith, 19 Ohio St. 384 2189, 2190
Manaqua, The, 126 Fed. 208 693
Manaster v. Kioebge, 257 Ill. 431 1399
Manchester F. Assur. Co. v. Fitzpatrick, 120 Ill. App. 535 1103, 1238
Manchester F. Ins. Co. v. Feibelman, 118 Ala. 308, 329 3011
Manchester & O. Bank v. Cook, 49 L. T. Rep. 674 277
Manda v. Orange, 77 N. J. L. 285 3768
v. Sullivan County Club, 16 Misc. (N. Y.) 366 2543
Manderschid v. Dubuque, 25 Iowa 108 105
Mandery v. Mississippi, etc., B. Co., 105 Minn. 3 1433, 3766
Mandeville v. Courtright, 142 Fed. 97 449, 1343
v. Welch, 5 Wheat. 277, 288 378
Mandia v. McMahon, 17 Ont.App. 34 235, 2701
Mandorff v. Singer, 5 Watts 172 2814
Maneely v. McGee, 6 Mass. 143 659, 660, 661
Maneer v. Sanford, 15 Manitoba 181 1990, 2986
Maner v. Washington, 3 Strobh. Eq. 171 2212
v. Wilson, 16 S. C. 469 958
Manes T. Co., In re, 18 Ont. L. R. 572 369
Maney v. Chicago, etc., R. Co., 49 Ill. App. 105 21, 4852, 4876, 5118
v. Porter, 3 Humph. 347 2053
Manford v. Firth, 68 Ind. 83 2799
Mangalore, The, 23 Fed. 463 3395
Manger v. Grodnick, 3 Colo. App. 534 2545
Manget v. O'Neill, 51 Mo. App. 35 4549, 4595
Mangles v. Chosen Freeholders, 55 N. J. L. 88 3981, 4013, 4030, 4108, 4115
Mangold v. Isabelle F. Co., 31 Pa. Super. 275 296, 1948
v. Oft, 63 Neb. 397 467, 4784
Mangold S. & C. Co. v. Moore S. Co., 197 Fed. 20 2269
Mangum v. Ball, 43 Miss. 288 2927
Manhattan Co. v. United States Fidelity & Guaranty Co., 77 Wash. 405 2794
Manhattan G. L. Co. v. Ely, 39 Barb. 174 2767
Manhattan L. Ins. Co. v. Hennessy, 99 Fed. 64 3072
v. Smith, 44 Ohio St. 156 819
v. Wright, 126 Fed. 82 870
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v. O'Sullivan, 6 App. Div. (N. Y.) 571 4082
Manhattan S. Works v. Koehler, 45 Hun 150 2645, 3241, 3247
Manice v. Brady, 15 Abb. Pr. 173 884
Manier v. Western U. Tel. Co., 94 Tenn. 442 3556, 3585, 3596
Manistee I. Works Co. v. Shores L. Co., 92 Wis. 21 862
Manistee M. Co. v. Hobdy, 165 Ala. 411 4714
Manitoba, The, 122 U. S. 97 1143, 4986, 5011
Manitoba Free Press Co. v. Nagy, 39 Can. Sup. Ct. 340 4566, 4567
Manitoba & N. L. Co. v. Barker, 8 Manitoba 296 967
Manitou & P. P. R. Co. v. Harris, 45 Colo. 185 3774
Manitowoc C. P. Co. v. Manitowoc, etc., R. Co., 135 Wis. 94 3986
Manitowoc S. B. Works v. Manitowoc G. Co., 120 Wis. 1 2669, 2682
Manix v. Malony, 7 Iowa 81 1480
Maniz v. Lederer, 21 R. I. 370 3663
Mankel v. Belscamper, 84 Wis. 218 815
Manker v. Western U. Tel. Co., 137 Ala. 292 3608
Mankes v. Fishman, 163 App. Div. (N. Y.) 789 187
Manley v. Park, 68 Kan. 400 382, 1815
Manly Mfg. Co. v. Western U. Tel. Co., 105 Ga. 235 3616
Mann v. Boudoir C. Co., 54 Fed. 646 134
v. Brown, 71 Tex. 241 2752
v. Cross, 9 Iowa 327 1208
v. Curtis, 6 Robert. 128 627
v. Dempster, 181 Fed. 76 4507, 4522, 4542
v. Eckford, 15 Wend. 502 2894
v. Everston, 32 Ind. 355 2376
v. Everts, 64 Wis. 372 1634
v. Grove, 4 Heisk. 403 4325
v. Haley, 79 Vt. 66 760
v. Lawrence, 3 Bradf. Sur. 424 1023
v. Marsh, 2 Cal. 99 704
v. Mathews, 82 Tex. 98 2133
v. Nunn, 43 L. J. (C. P.) 241 3233
v. Roberts, 126 Wis. 142 807, 821, 1030
v. Smyser, 76 Ill. 365 1861
v. Sprout, 185 N. Y. 109 823
v. Taylor, 1 McCord 113 1061
v. Taylor, 78 Iowa 355 2314, 2341
v. Yazoo, 31 Miss. 574 1588
Mann B. C. Co. v. Dupre, 54 Fed. 646 3484, 3543
Mann-T. D. Co. v. Cheairs, 75 Ark. 596 2433
Mannie Swan, The, 145 Fed. 747 2716
Manning v. Albee, 11 Allen 520 4375, 4376, 4377
v. Cassidy, 80 Hun 127 1716
v. Ferguson, 103 Iowa 561 2801
v. Fitch, 138 Mass. 273 189
v. Grinstead, 121 Ky. 802 266, 306, 2877, 2885, 4190, 4191, 4195, 4314

[REFERENCES ARE TO PAGES]

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v. Laboree, 33 Me. 343 3717, 3727
v. Lowell, 173 Mass. 100 4141
v. Lunn, 2 C. & K. 13 808
v. Manning, 26 Kan. 98 1661
v. New Jersey S. L. R. Co., 80 N. J. L. 349 3969
v. School Dist., 124 Wis. 84 2666, 2667, 2668, 2677, 2682
v. Shreveport, 119 La. 1044 3951, 3964, 4030, 4107
Mannville Co. v. Worcester, 138 Mass. 89 3926
Manny v. Stockton, 34 Ill. 306 977
Mansell v. British Linen Co. Bank, [1892] 3 Ch. 159 1749
Mansemond T. Co. v. Rountree, 122 N. C. 45 1759
Manser v. Collins, 69 Kan. 290 4662
v. Sims, 157 Ala. 167 664
Mansfield v. Bell, 24 Pa. Super. Ct. 447 4172
v. Dorland, 2 Cal. 507 591
v. Hunt, 19 Ohio C. C. 488 3891, 3938
v. Morgan, 140 Ala. 567 2463
v. New York, etc., R. Co., 114 N. Y. 331 1093, 1094, 1097, 1142
v. Tenney, 202 Mass. 312 319, 395
Mansfield, etc., Co. v. McEnery, 91 Pa. 185 4874, 4895, 4906
Manson v. Baillie, 2 Macq. H. of L. Cas. 80 2471
v. Boston, 163 Mass. 479 4098
Mansur-T. I. Co. v. Smith, 65 Ill. App. 319 1281, 1311, 4164
v. Tissier A. & H. Co., 136 Ala. 597 868, 883, 910, 917
v. Willet, 10 Okla. 383 (code rule) 2244
Mantee County S. Bank v. Weatherby, 144 Ala. 655 2792
Manter v. Truesdale, 57 Mo. App. 435, 443 4372
Manteufel v. Wetzel, 133 Wis. 619 8
Manton v. Gammon, 7 Ill. App. 201 2229
Mantonya v. Emerich O. Co., 172 Ill. 92, aff'g 69 Ill. App. 62 431, 4286
Mantorville R. & T. Co. v. Slingerland, 101 Minn. 488 4107, 4109, 4110, 4116, 4117
Mant-y-glo & Blania I. Co. v. Grave, 12 Ch. Div. 738 4254
Mantz v. Buchanan, 1 Md. Ch. 202 3728
v. Goring, 4 Bing. N. C. 451 3151, 3152
Manuel v. Campbell, 3 Ark. 324 2698
Manufacturers' A. S. Co. v. Galbraith, 196 Fed. 472 171, 2778
Manufacturers' F. Co. v. White, 228 Ill. 187 4701
Manufacturers' Nat. Bank v. Perry, 144 Mass. 313 1116
Manufacturers' N. G. Co. v. Leslie, 22 Ind. App. 677 3978, 4019
Manufacturers' & M. S. & L. Co. v. Odd Fellows' Hall Ass'n, 48 Pa. 446 1614
Manufacturers' & Traders' Bank v. Dare Co., 67 Hun 44 1715
Manufacturing Co. v. Barney, 45 N. H. 40 1780
v. Morris, 105 Tenn. 654 1407, 4941
Manville v. Western U. Tel. Co., 37 Iowa 214 3549, 3553, 3565, 3580, 3583, 3601, 3919
Manville C. Co. v. Babcock, 28 R. I. 496 4422
Manwell v. Thomson, 2 C. & P. 303 4963
Many v. Sizer, 6 Gray 141 1765
Manzer v. Phillips, 139 Mich. 61 4671, 4675, 4765, 4766, 4777, 4778, 4782
Mapes v. Weeks, 4 Wend. 659 4568, 4577, 4600
Mapps v. Sharpe, 32 Ill. 13 985, 991
Marble v. Keyes, 9 Gray 221 383
v. Moore, 102 Mass. 443 2225
v. Worcester, 4 Gray 395 103
Marbourg v. Smith, 11 Kan. 554 4602, 4609
Marburg v. Marburg, 26 Md. 8 615
Marbury v. Kentucky U. L. Co., 62 Fed. 335 2774
Marbury L. Co. v. Lamont, 169 Ala. 33 3735, 3813
v. Stearns Mfg. Co. (Ky.), 107 S. W. 200 2307, 2376
v. Stearns Mfg. Co., 32 Ky. L. Rep. 739 2432, 2454
March v. Allabough, 103 Pa. 335 842, 860, 883
v. Portsmouth, etc., R. Co., 19 N. H. 372 4027
Marchand v. Haber, 16 N. Y. Misc. 319 3833
v. York, 10 Ky. L. Rep. 777 (Ky. Super. Ct.) 1691, 1705
Marcum v. Burgess, 67 Ala. 556 1621
Marcus v. Berstein, 117 N. C. 31 4602
v. Liner, 85 Misc. (N. Y.) 368 2579
v. Myers, 11 T. L. Rep. 327 240, 285, 2588
v. Smith, 17 Up. Can. C. P. 416 1941
v. Stein (Misc.), 84 N. Y. Supp. 970 4178
Marcus Hook, The, 135 Fed. 744 2726, 2734
Marcy v. Fries, 18 Kan. 353 491, 3925, 3929
Mardis v. Sims, 140 Ala. 388 4162
Mare v. Kupfer, 34 Ill. 286 596, 1890
Marengo County v. Matkin, 144 Ala. 574 1718, 1734
Maret v. Sanders, 141 Ky. 366 1794, 1795
Marfield v. Douglass, 1 Sandf. 360, rev'd 3 N. Y. 70 2950
v. Goodhue, 3 N. Y. 62 2950
Margaret J. Sandford, The, 37 Fed. 148 5003, 5006
Margraf v. Muir, 57 N. Y. 155 1987, 1989
Margrane v. St. Louis & S. R. Co., 183 Mo. 119 1381
Marguard v. Wheeler, 52 Cal. 445 1490, 1526
Marie Anne, The, 48 Fed. 742 2729, 2733
Marie Palmer, The, 173 Fed. 569 1448, 5000, 5003, 5012
Marien v. Walsh, 64 Ore. 583 4711
Marietta C. Co. v. Henderson, 121 Ga. 399 12, 3974
Marietta Glass Mfg. Co. v. Bennett, — Ind. App. —, 106 N. E. 419 4698
Marietta I. Works v. Lottimer, 25 Ohio St. 621 962, 963, 1051
Marine v. Lyon, 62 Fed. 153 1039
Marine Bank v. Chandler, 27 Ill. 325 1891
v. Fulton Bank, 2 Wall. 252 2944
v. Rushmore, 28 Ill. 463 820, 822
Marine Coal Co. v. Pittsburgh, M. & Y. R. Co., 246 Pa. 478 3961, 3963, 4018, 4034, 4035
Marine Ins. Co. v. Tucker, 3 Cranch 357 3010
v. United Ins. Co., 9 Johns. 186 3294
Marine & F. Ins. Co. v. Tincher, 30 Ill. 399 1891

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Marinin S., The, 28 Fed. 664 3436
Marion B. Soc. v. Commonwealth, 31 Pa. 82 2563
Marion W. Co. v. Marion, 121 Iowa 306 730
Mariska, The, 47 C. C. A. 115, 107 Fed. 989 4987
Mark v. Hudson River B. Co., 103 N. Y. 28 208
v. Williams C. Co., 204 Mo. 242 553, 559, 569, 2339, 2374, 2404, 2420
Markel v. Moudy, 11 Neb. 213 4377, 4379, 4407
v. Spitler, 28 Ind. 488 748
Marker v. Dunn, 68 Iowa 720 4587
v. Garcia, 5 Philip. Isl. 557 1417
v. Miller, 9 Md. 338 463, 465, 4782
Market v. Manhattan R. Co., 87 Hun 213 4081
Markey v. Louisiana & M. R. Co., 185 Mo. 348 4807
Markham v. Herrick, 82 Mo. App. 327 3686
v. Jaudon, 41 N. Y. 235 2313, 2966, 4243, 4246
v. Merrett, 7 How. (Miss.) 437 3718
v. Middleton, 2 Str. 1259 2072
v. Russell, 12 Allen 573 4510, 4514, 4589
v. Stevenson B. Co., 51 App. Div. (N. Y.) 463, aff'd 169 N. Y. 593 3166
v. Stevenson B. Co., 111 App. Div. (N. Y.) 178 3155, 3166
Markland v. Crump, 1 Dev. & B. 94 2130
Markland M. & Mfg. Co. v. Kimmel, 87 Ind. 560 2755
Markle v. Hatfield, 2 Johns. 453 645, 2383
Markley v. Western U. Tel. Co., 159 Iowa 557 3634, 3656
Markoe v. American S. Co., 44 App. Div. (N. Y.) 285, aff'd 167 N. Y. 602 1788
v. Tiffany, 26 App. Div. (N. Y.) 95, aff'd 165 N. Y. 565 4224
Markowitz v. Greenwall T. C. Co. (Tex. Civ. App.), 75 S. W. 74 2693
v. Lindeman, 164 App. Div. (N. Y.) 679 32
v. Metropolitan St. R. Co., 31 N. Y. Misc. 175 4694
Marks v. Chicago Y. Club, 121 Ill. App. 308 1720
v. Columbia Y. Club, 219 Ill. 417 1720
v. Culmer, 6 Utah 419 1327, 3749, 3751, 3833
v. Delaglio, 27 N. Y. Misc. 652 3125, 3126
v. Hastings, 101 Ala. 165 4613, 4616, 4622, 4648
v. Long Island R. Co., 14 Daly 61 4694
v. Mason Co., 73 Wash. 437 4794
v. Massachusetts B. & Ins. Co. (N. Y. Misc.), 117 N. Y. Supp. 1019 1705
v. Robinson, 82 Ala. 69 735
v. Rochester R. Co., 41 App. Div. 66 160
v. Ryan, 63 Cal. 607 3256
v. Townsend, 97 N. Y. 590 4603
Markt v. Davis, 46 Mo. App. 272 3852
Marland v. Royal Ins. Co., 71 Pa. 393 2914
Marlatt v. Clary, 20 Ark. 251 297, 303, 309, 2395, 2399
v. Elliott, 69 Kan. 477 2503
Marlatte v. Weickgenant, 147 Mich. 266 1267, 4271, 4631
Marlborough v. Sisson, 31 Conn. 332 388
Marler v. Springfield, 65 Mo. App. 301 1466
Marley v. Smith, 4 Kan. 155 696
Marlin v. Sipprell, 93 Minn. 271 2501
Marling v. Mommensen, 127 Wis. 363 686
Marmaud v. Melledge, 123 Mass. 173 3014
Marney v. State, 13 Mo. 7 1614
Maroney v. Minneapolis & St. L. Ry. Co., 123 Minn. 480 326
Marpessa, The, [1906] Prob. Div. 95 1436
Marquart v. La Farge, 5 Duer 559 3214
Marquess v. La Baw, 84 Ind. 550 1646
Marquette, The, 1 Brown 364 2718
Marquette County v. Ward, 50 Mich. 174 1786
Marquette, etc., R. Co. v. Langton, 32 Mich. 251 3388
Marqueze v. Sontheimer, 59 Miss. 430 1690, 1693, 1698, 4184
Marquis v. Lauretson, 76 Iowa 23 2688
v. Willard, 12 Wash. 528 1602
Marquis of Bute v. Thompson, 13 M. & W. 487 3116
Marr v. Barrett, 41 Me. 403 2925
v. Lewis, 31 Ark. 203 574
v. Prather, 3 Metc. (Ky.) 196 2329
v. Ray, 151 Ill. 340 1069, 3097, 3098
v. Western U. Tel. Co., 85 Tenn. 529 3546, 3566, 3614
Marre, Estate of, 127 Cal. 128 1120
Marriage v. Marriage, 1 C. B. 761 1555
Marrin v. Graver, 8 Ont. 39 3189, 3218, 3219
Marriot v. Hampton, 7 T. R. 269 638
Marriott v. Western U. Tel. Co., 84 Neb. 443 3564, 3572
v. Williams, 152 Cal. 705 435, 467, 1217
Marron v. Great Northern R. Co., 46 Mont. 593 3802, 3804, 3805
Marrone v. Ehrat, 175 Ill. App. 649 530, 1107, 1403
Marrowbone Coal & Coke Co. v. Coleman, 156 Ky. 425 1935
Marrs v. Southwick, 2 Port. 351 1012
v. Union F. Co., 39 Fed. 468 4466
Marryatts v. White, 2 Stark. 101 727, 742
Mars v. Delaware & H. C. Co., 54 Hun 625 159
Marschall v. Laughran, 47 Ill. App. 29 4905
Marschuetz v. Wright, 50 Wis. 175 674
Marsden v. Cambridge, 114 Mass. 490 4014
Marsellis v. Thalhimer, 2 Paige 36 29
Marsh v. Bennett, 22 Ill. 313 1829, 1859
v. Billings, 7 Cush. 322 4486, 4496
v. Butterworth, 4 Mich. 575 3122
v. Cavanaugh, 15 Wash. 282 1986
v. Dunckel, 25 Hun 167 2820
v. Falker, 40 N. Y. 562, 573 4385
v. Fraser, 37 Wis. 152 1101, 1105, 1107
v. Giles, 211 Pa. 17 158
v. Great Northern P. Co., 101 Me. 489 56, 143
v. Harrington, 18 Vt. 150 2863
v. Hayford, 80 Me. 97 2832
v. Holbrook, 3 Abb. App. Dec. 176 2458
v. Irwin, 168 Ill. 50 3719
v. Johnston, 125 App. Div. (N. Y.) 97 1990
v. Jones, 40 Ch. Div. 563 1034, 1035

[REFERENCES ARE TO PAGES]

Marsh v. Koons, 78 Ohio 68 124
v. Lasher, 13 N. J. Eq. 253 976
v. McPherson, 105 U. S. 709, 716 459, 547, 2278, 2368, 2405, 2410, 2429
v. Oneida Cent. Bank, 34 Barb. 298 714
v. Pedder, 4 Camp. 257 667
v. Phillips, (Tex. Civ. App.) 144 S. W. 1160 863
v. Pike, 1 Sandf. Ch. 210 2841
v. Pike, 10 Paige 595 2797
v. Rulesson, 1 Wend. 514 2524
v. Seymour, 97 U. S. 348 4474
v. Smith, 49 Ill. 399 4842
v. Taylor, 43 N. J. Eq. 1 1080, 1083
v. Thompson, 102 Ind. 272 1956
v. Usk H. Co., 73 Wash. 543 112, 432, 2449, 4812
v. Webber, 13 Minn. 109, 16 Minn. 418 2446, 4371, 4413
v. Western U. Tel. Co., 65 S. C. 430 3618, 3622
Marshall, Ex parte, 1 Atk. 262 297
Marshall v. American Tel. & T. Co., 16 Pa. Super. Ct. 615 3774, 4003, 4004, 4015
v. Anderson, 1 B. Mon. 198 3718
v. Atkins (Tex. Civ. App.), 127 S. W. 1148 866, 867, 888
v. Bahnsen, 1 Ga. App. 485 2478, 2480, 2481
v. Bailey, 27 Tex. 686 1710
v. Baltimore & O. R. Co., 16 How. 314 2494
v. Berridge, 19 Ch. Div. 233 3219
v. Betner, 17 Ala. 832 170, 223, 1314, 4190, 4601, 4631, 4642
v. Buchanan, 35 Cal. 264 4429
v. Canadian C. & Mfg. Co., 160 Ill. App. 114 2573
v. Clark, 78 Conn. 9 2274, 2278, 2295, 2340
v. Cohen, 44 Ga. 489 3839
v. Consolidated J. M. Co. 119 Mo. App. 270 4858
v. Dalton P. Mills, 82 Vt. 489 270
v. Dobler, 97 Md. 555 1778
v. Dudley, 4 J. J. Marsh. 244 1051, 1059
v. Ferguson, 23 Cal. 65 2309, 2333
v. Ferguson, 94 Mo. App. 175 2901, 2907
v. Ferguson, 101 Mo. App. 653 2907
v. Franklin F. Ins. Co., 176 Pa. 628 3084, 3086
v. G. A. Stowers Furniture Co., — Tex. Civ. App. —, 167 S. W. 230 728, 735
v. Gantt, 15 Ala. 682 2405
v. Garver, 6 Barb. 394 3036
v. Golden Fleece, etc., Co., 16 Nev. 156, 179 874
v. Grosse C. Co., 184 Ill. 421 3108, 3110
v. Hann, 17 N. J. L. 425 538, 2576, 2577
v. Hudson, 9 Yerg. 57 2835
v. Keach, 227 Ill. 35 2382, 2384
v. Livingston, 77 Ga. 21 1658, 1666
v. McConnell, 1 Litt. 419 2098, 2102, 2104
v. Mackintosh, 14 T. L. Rep. 458 (1898) 2595
v. Minter, 43 Miss. 666 1570, 1737
v. Moore, 36 Ill. 321 574, 576
v. Moseley, 21 N. Y. 280 3131, 3132, 3145
v. Nagel, 1 Bailey 308 708
Marshall v. New York Cent. R. Co., 45 Barb. 502 1437, 3389, 3429
v. Peck, 1 Dana 612 2377, 2385
v. Piles, 3 Bush 249 368
v. Pinkham, 52 Wis. 572 4485
v. Poole, 13 East 98 1880
v. Saginaw Valley T. Co., 157 Mich. 541 1471
v. Schricker, 63 Mo. 308 1142, 1143
v. State, 105 Me. 103 1040
v. Taylor, 98 Cal. 55 4965, 4968, 4969
v. Ulleswater S. N. Co., L. R. 7 Q. B. 166 396
v. Wabash R. Co., 171 Mich. 180 4745
v. Wood, 16 Ala. 806 1101, 2048, 2405, 2409, 2415, 2421
Marshall C. Co. v. Eckman, 153 Ky. 704 4797
Marshall I. Bank v. Child, 76 Minn. 173 698
Marshall M. Co. v. Chicago & A. R. Co., 126 Mo. App. 455 3433
Marshall & M. G. Co. v. Kansas City, etc., R. Co., 176 Mo. 480 3425, 4298
Marsteller v. Crapp, 62 Ind. 359 1102
Marston v. Bigelow, 150 Mass. 45 947
v. Hobbs, 2 Mass. 439 2054, 2058, 2060
v. Singapore R. Co., 163 Mass. 296 2030
Mart v. Oliver, 246 Ill. 316 2037
Martachowski v. Orawitz, 14 Pa. Super. Ct. 175 51, 4378, 4392, 4410, 4429, 4430
Martens v. Reilly, 109 Wis. 464 427, 442
Martin v. Adams, 104 Mass. 262 2226
v. Atkinson, 7 Ga. 228 2012, 2119
v. Bailey, 1 Allen 381 1675
v. Baker, 5 Blackf. 232 2057, 2188
v. Baldwin, 7 Ala. 923 2860
v. Baltimore, 109 Md. 260 2501
v. Baltimore & O. R. Co., 41 Fed. 125 783
v. Beckwith, 4 Wis. 219 1013
v. Berwind-W. C. M. Co., 114 Fed. 553 3114, 3116
v. Bliss, 57 Hun 157 2512
v. Bolenbaugh, 42 Ohio St. 508 2893, 2898
v. Bott, 17 Ind. App. 444 790, 823
v. Boyd, 11 N. H. 385 2779
v. Brown, 75 Ala. 442 541
v. Bunker-C. L. Co., 167 Mo. App. 381 2301, 2346, 2351
v. Chambers, 214 Fed. 769 636, 637
v. Chicago & M. E. R. Co., 220 Ill. 97 4039
v. Chicago, etc., R. Co., 47 Mo. App. 452 3878
v. Chicago, etc., R. Co., 81 Kan. 344 3842
v. Columbia & G. R. Co., 32 S. C. 592 3447
v. Commonwealth, 6 J. J. Marsh. 549 1538, 1540
v. Corscadden, 34 Mont. 308 1385, 4613, 4628, 4634, 4635, 4647, 4649
v. Cowles, 2 Dev. & Batt. 101 2131
v. Deetz, 102 Cal. 55 212
v. Delaware, etc., R. Co. (Misc.), 141 N. Y. Supp. 942 3395
v. Draher, 5 Watts, 544 711
v. Eagle D. Co., 41 Ore. 448 4377, 4386

[REFERENCES ARE TO PAGES]

Martin v. Ede, 103 Cal. 157 728, 1032
v. Evans, 14 Phila. 122 599
v. Everett, 11 Ala. 375 2556
v. Farrell, 66 App. Div. (N. Y.) 177 443
v. Fillmore County, 44 Neb. 719 4119
v. Foster, 38 Ala. 68 1645
v. Franklin, 4 Johns. 125 616
v. Franklin F. Ins. Co., 38 N. J. L. 140 2898
v. Frantz, 127 Pa. 389 749
v. Garlock, 82 Kan. 266 1267
v. Gilbert, 119 N. Y. 298 1684
v. Goble, 1 Camp. 320 3885
v. Good, 95 U. S. 90, 97 2780
v. Gordon, 24 Ga. 533 2061, 2066, 2127
v. Great Northern R. Co., 16 C. B. 179 161
v. Hardesty, 27 Ala. 458 4649
v. Hawks, 15 Johns. 405 591
v. Hertz, 224 Ill. 84, 118 Ill. App. 297 1667, 1673
v. Hill, 42 Ala. 275 3243, 3246
v. John Lovibond & Sons, Ltd., [1914] 2 K. B. 227, W. C. & Ins. Rep. 76 5198
v. Kanouse, 17 How. Pr. 146 591
v. Kansas City, etc., R. Co., 77 Miss. 720 4952
v. Kansas City, etc., R. Co. (Tex. Civ. App.), 139 S. W. 615 3430
v. Kelly, 59 Miss. 664 1798
v. Kennedy, 2 B. & P. 69, 71 372
v. Leslie, 93 Ill. App. 44 1311, 1318, 1322
v. Long, 3 Mo. 391 2060
v. McCormick, 4 Sandf. 366 2013
v. Manhattan R. Co., 63 Hun 350 4083
v. Manufacturers' A. Ind. Co., 151 N. Y. 94 3000
v. Martin, 1 Sm. & M. 176 1184, 1879
v. Martin, 6 Watts 67 1081, 1083, 1085
v. Martin, 7 Md. 368 3129
v. Martin, 14 N. J. L. 125 (1833) 3722
v. Martin, 43 Ore. 119 1120
v. Martin, 108 Wis. 284 2471, 2473
v. Martin & W. Co., 75 N. J. Eq. 257 4494
v. Martin's Est., 108 Wis. 284 2465
v. Missouri Pac. R. Co., 58 Kan. 475 4850, 4852
v. Morelock, 32 Ill. 485 1485
v. New York, etc., R. Co., 62 Conn. 331 72, 1407
v. Oberle, 85 Misc. (N. Y.) 35 2598, 2648
v. Orr, 96 Ind. 491 2814, 2821
v. Oslin, 94 Ga. 658 4232
v. Paine, 69 Minn. 482 4506
v. Payne, 9 Johns. 387 4958, 4960, 4963
v. Pittsburgh R. Co., 238 Pa. 528 4788
v. Porter, 5 M. & W. 351 364, 365, 2036, 3747, 3786, 3790, 4259, 4260
v. Porter, 150 Ill. App. 411 1430, 3836
v. Prince, 12 Ind. App. 213 2460
v. Pugh, 23 Wis. 184 697
v. Roehm, 92 Ill. App. 87 2369
v. St. Louis, 139 Mo. 246 4150, 4157
v. Schwertley, 155 Iowa 347 3932
v. Seaboard A. L. R., 70 S. C. 8 182, 226, 294, 374
v. Seaboard A. L. R. Co., 148 N. C. 259 444
Martin v. Sherwood, 74 Conn. 475 1472, 1473
v. Silliman, 53 N. Y. 615 1091, 1103
v. Southern Pac. Co., 130 Cal. 285 4743, 4758, 4763
v. Southern R. Co., 89 S. C. 32 3455, 3496, 3505
v. Sunset Tel. & T. Co., 18 Wash. 260 3575
v. Taylor, 1 Wash. C. C. 1 918
v. Tellotte, 115 La. 769 1721, 1722
v. Tyler, 4 N. D. 278 3946, 3956
v. United States, 2 T. B. Mon. 89 612
v. Western U. Tel. Co., 1 Tex. Civ. App. 143 3558
v. Wright, 6 Q. B. 917 2749
v. Wright, 13 Wend. 460 2471
v. Wright, 21 Ga. 504 1989, 2008
Martin Co. v. Martin & W. Co., 75 N. J. Eq. 257 4488
Martin-B. Co. v. Henderson, 9 Tex. Civ. App. 130 4284
Martin County Nat. Bank v. Bird, 92 Minn. 110 585
Martin R. Co. v. Cooke (Misc.), 138 N. Y. Supp. 99 3111
Martindale v. Brock, 41 Md. 571 2835
v. Smith, 1 Q. B. 389 2225
v. Wilson-C. Co., 134 Pa. 348 2467
Martindale Clothing Co. v. Spokane & Eastern Trust Co., 79 Wash. 643 3235
Martinez v. Thompson, 80 Tex. 568 3162, 3166
v. Vigil, 19 N. M. 306 4209
Martinsburg & P. R. Co. v. March, 114 U. S. 549 2235
Martland v. Bekins V. & S. Co., 19 Cal. App. 283 4321
Martyn v. Western Pac. R. Co., 21 Cal. App. 589 1094, 2214
Marvin v. Bell, 41 Vt. 607 1557
v. Brewster, 56 N. Y. 671 1546
v. McRae, 1 Cheves 61 1115
v. Pardee, 64 Barb. 353 3749
v. Prentice, 94 N. Y. 295 224, 2001, 4398
v. Stone, 2 Cow. 781 643
v. Vedder, 5 Cow. 671 637
Marx v. Leinkauff, 93 Ala. 453, 460 1694
v. Louisiana W. R. Co., 112 La. 1085 3473
v. McMorran, 136 Mich. 406 2464, 2485
v. Press P. Co., 134 N. Y. 561 4570
v. White Co. (Misc.), 148 N. Y. Supp. 262 760
Mary's Case, 9 Coke 111 3515
Mary Belle Roberts, The, 2 Sawyer 1 3423
Mary E. Dana, The, 17 Fed. 353 2728
Mary E. Long, The, 7 Fed. 364 2727
Mary Eveline, The, 14 Blatch. 497 4998
Mary J. Vaughan, The, 2 Benc. 47 1143
Mary K. Campbell, The, 40 Fed. 906 735
Mary N. Bourke, The, 145 Fed. 909 1146, 2575
Mary S. Lewis, The, 126 Fed. 848 4991, 5007, 5008
Mary Steele, The, 2 Low. 370 5003
Marye v. Strouse, 6 Sawyer 205 1011
Maryland v. Wayman, 2 Gill & J. 279 1570
Maryland A. House Co. v. Glenn, 108 Md. 377 2500
Maryland Co. v. Simpers, 96 Md. 1 1941
Maryland C. Co. v. Omaha E. L. & P. Co., 157 Fed. 514 2876, 2879
Maryland C. & C. Co. v. Quemahoning C. Co., 176 Fed. 303 2417

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Maryland F. & Mfg. Co. v. Newman, 60 Md. 584 1925
Maryland I. Co. v. Arctic I. M. Mfg. Co., 79 Md. 103 2599, 2630, 2631
Maryland & P. R. Co. v. Tucker, 115 Md. 43 3501
Maryland & W. R. Co. v. Hiller, 8 App. Cas. (D. C.) 289 4118
Maryland, etc., R. Co. v. Brown, 109 Md. 304 4720
Marzetti v. Williams, 1 B. & Ad. 415 35, 39, 277, 876, 2907
Marziou v. Pioche, 8 Cal. 522 709
Mascotte, The, 72 Fed. 684 4986
Mashburn & Co. v. Dannenberg Co., 117 Ga. 567 1532, 4219, 4387
Mashiter v. Buller, 1 Camp. 84 3302
Maskell v. Barker, 99 Cal. 642 4606
Maskery v. Lancashire Shipping Co., Ltd. [1914], W. C. & Ins. Rep. 290 5195
Mason v. Alabama I. Co., 73 Ala. 270 284, 294, 372
v. Alexander, 44 Ohio St. 318 1077
v. Blaireau, The, 2 Cranch 239 2737
v. Boston, 163 Mass. 479 4028
v. Caldwell, 10 Ill. 196 1935
v. Callender, 2 Minn. 350 870, 876, 958, 968, 1204
v. Chappell, 15 Gratt. 572 2428
v. Citizens' F. & M. Ins. Co., 10 W. Va. 572 3021
v. Commissioners, 80 Ohio St. 151 8
v. Commissioners, 104 Ga. 35, 48 1583
v. Cooksey, 51 Ind. 519 2075
v. Croom, 24 Ga. 211 817, 820
v. Decker, 72 N. Y. 595 2235
v. Dewis (Ky.), 71 S. W. 434 344
v. Ellsworth, 32 Me. 271 334, 4662
v. Franklin, 3 Johns. 202 1868, 2930
v. Gardiner, 4 Bro. Ch. 436 978
v. Graham, 23 Wall. 261 4459, 4465, 4471
v. Harper's Ferry B. Co., 20 W. Va. 223 4077, 4078
v. Hawes, 52 Conn. 12 47, 1314
v. Howes, 122 Mich. 329 4250
v. Jouett, 2 Dana 107 781
v. Kellogg, 38 Mich. 132 2114, 2122, 2131
v. Kennebec, etc., R. Co. v. Loeb, 31 Me. 215 4145
v. Knowlson, 1 Hill 218 580, 588
v. Lawing, 10 Lea 264 2025, 2026
v. Lord, 20 Pick. 447 2871
v. Luce, 116 Cal. 232 1920, 1924, 1926
v. Mason, 4 N. H. 110 4518
v. Mason, 35 Wis. 321 4518
v. Massa, 122 Mass. 477 1490, 1491
v. Moyers, 2 Rob. (Va.) 606 3258
v. Nashville, etc., R. Co., 135 Ga. 741 460, 464, 3466
v. Nichols, 22 Wis. 360 2769
v. Payne, Walk. Ch. 459 571, 572
v. Pierce, 142 Ill. 331 978
v. Pierron, 63 Wis. 239, 244 2799
v. Pierron, 69 Wis. 585 2852
v. Postal Tel.-C. Co., 74 S. C. 557 1439
v. Pritchard, 12 East 227 2746, 2748, 2749
v. Raplee, 66 Barb. 180 4374, 4392
v. Richards, 12 Iowa 74 1683
v. St. Louis, etc., R. Co., 75 Mo. App. 1 4707
v. Searles, 56 Iowa 532 979
v. Sieglitz, 22 Colo. 320 435
v. Southern R., 58 S. C. 70 4916
v. Sudam, 2 Johns. Ch. 172 828, 829
v. Sumner, 22 Md. 312 1674, 1676
Mason v. Thompson, 9 Pick. 280 161
v. Thornton, 74 Ark. 46 4406
v. Union Pac. Ry. Co., 7 Utah 77 5120
v. Wait, 5 Ill. 127 1828
v. Waite, 17 Mass. 560 1134
v. Wickersham, 4 W. & S. 100 753
v. Wolkwich, 150 Fed. 699 432
Mason City, etc., R. Co. v. Wolf, 148 Fed. 961 3951, 3952, 3953, 3960, 3963, 3984, 3985, 3994
Mason & H. Co. v. Gage, 119 Mich. 361 2796
Masonic Sav. Bank v. Bangs, 10 Ky. L. Rep. 743 1074
Masons' Fraternal Acc. Ass'n v. Riley, 65 Ark. 261 3081
Massachusetts Ben. Ass'n v. Miles, 137 U. S. 689 959, 1247
Massachusetts B. L. Ass'n v. Robinson, 104 Ga. 256 673
Massachusetts Bonding & Insurance Co. v. Pittsburg, 170 Cal. 767 5146, 5150, 5212
v. Realty Trust Co., 142 Ga. 499 2742
Massachusetts Hospital v. Provincial Ins. Co., 25 Up. Can. Q. B. 613 607
Massachusetts L. Ins. Co. v. Carpenter, 2 Sweeny 734 2945
Massachusetts L. & T. Co. v. Vitchburg R. Co., 143 Mass. 318 3426
Massachusetts, etc., R. Co. v. Boston, etc., R. Co., 121 Mass. 124 236, 4072
Massee v. Williams, 207 Fed. 222 459, 470
Massena Sav. Bank v. Garside, 151 Iowa 168 4623
Massey v. Fain, 1 Ala. App. 424 1449, 4210
v. Taylor, 5 Cold. 447 2526
v. Toronto P. Co., 11 Ont. 362 1512
v. Sabastian, 4 Bibb 433 1761
v. State Nat. Bank, 11 Tex. Civ. App. 280 3108, 3110
Massillon E. & T. Co. v. Shirmer, 122 Iowa 699 2404, 2455
Massillon I. & S. Co. v. Wiegand, 15 Ohio C. C. (N. S.) 417 4796
Massman v. Steiger, 79 N. J. L. 442 2227, 2228, 2236
Mast v. Sapp, 140 N. C. 533 27, 396
v. Shaw, 140 N. C. 533 407
v. Superior D. Co., 154 Fed. 45 4440, 4447, 4454
Mastad v. Swedish Brethren, 83 Minn. 40 156
Masteller v. Stickney, 100 Minn. 236 1506
Masten v. Cummings, 24 Wis. 623 709
Masters v. Ibberson, 8 C. B. 100 1818
v. Lee, 39 Neb. 574 4532
v. Warren, 27 Conn. 293 3474, 3643, 3647, 4662
Masterson v. Chicago & N. R. Co., 102 Wis. 571 3520
v. Goodlett, 46 Tex. 402 2311, 2314
v. Hagan, 17 B. Mon. 325 3693, 3699, 3702
v. Heitmann, 38 Tex. Civ. App. 476 1824, 2229, 2598
v. Mount Vernon, 58 N. Y. 391, 396 4194, 4694
v. New York Cent., etc., R. Co., 84 N. Y. 247 108
v. Short, 3 Abb. Pr. (N. S.) 154 13
Masterton v. Mayor, 7 Hill 61 182, 196, 246, 274, 284, 291, 374, 409, 1365, 1456, 2260, 2293, 2305, 2350, 2441, 2451, 2531, 2689, 2695, 2696, 2697, 2705, 2712, 2920, 3252

[REFERENCES ARE TO PAGES]

Masterton v. Mount Vernon, 58 N. Y. 391 228
Mastoras v. Chicago, M. & St. P. Ry. Co., 217 Fed. 153 171
Masury v. Westwater, 94 Ill. App. 30 2754
Matheis v. Mazet, 164 Pa. 580 1268, 1310, 1316, 4974, 4975
Matheney v. Beasley, 130 Ga. 713 2902
v. Godin, 130 Ga. 713 2510
Matheny v. Bohn, 164 Ill. 495 2479
v. Mason, 73 Mo. 677 2396
v. Stewart, 108 Mo. 73, 78 1981, 2097, 2100, 2139, 2140, 2144
Mather v. American Exp. Co., 138 Mass. 55 3370, 3398
v. Butler County, 28 Iowa, 253 315, 323, 476
v. Kinike, 51 Pa. 425 595, 606
Mathes v. McCarthy, 195 N. Y. 40 2404
Mathesius v. Brooklyn Heights R. Co., 96 Fed. 792 2548, 2561
Matheson v. Equitable M. Ins. Co., 118 Mass. 209, 211 3027
v. Kansas City, etc., R. Co., 61 Kan. 667 4955
v. Kelly, 24 Up. Can. C. P. 598 802
v. Southern R., 79 S. C. 155 1281, 3322, 3411
Mathew v. Sherwell, 2 Taunt. 439 4278
v. Wabash R. Co., 115 Mo. App. 468 4676
Mathews v. Aiken, 1 N. Y. 595 636, 2797, 2798
v. Cribbett, 11 Ohio St. 330 3663
v. Davis, 6 Humph. 324 2005
v. Howard Ins. Co., 11 N. Y. 9 3000
v. Livingston, 86 Conn. 263 342, 434, 3189, 3202, 4236, 4267
v. Martin, 177 Mo. App. 379 2983
v. Mathews, 154 N. Y. 288 2004
v. Morrison, 13 R. I. 309 1789
v. Phelps, 61 Mich. 327 2749, 2750
v. St. Louis, etc., R. Co., 121 Mo. 298, 336 489
v. Saurin, 31 L. R. Ir. 181 2841
v. Sharp, 99 Pa. 560 863, 899
v. Switzler, 46 Mo. 301 706
v. Sylvester, 15 Ohio C. C. (N. S.) 237 2094
v. Wallace, 104 Mo. App. 96 2557
Mathewson v. Davis, 191 Ill. 391 1117, 1120, 1121, 1124
v. Lydiate, Cro. Eliz. 408, 470 775
Mathias v. Superior I. Co., 70 Pa. 160 1210
Mathis v. Bryson, 4 Jones 509 749
v. Thomas, 101 Ind. 119 806, 819
v. Western F. Mfg. Co., 72 Wash. 206 1507
v. Western U. Tel. Co., 94 Ga. 338 3555
Mathison v. Minneapolis St. Ry. Co., 126 Minn. 286 5150, 5152, 5155, 5157, 5212
Mathot v. Triebel, 102 App. Div. (N. Y.) 426 1399
Mathre v. Devendorf, 130 Iowa 107 47, 4765
v. Story City D. Co., 130 Iowa 111 334, 445, 4765
Matin v. Price, Minor 68 1537
Matlock v. Mutual L. Ins. Co., 180 Pa. 360 631
v. Reppy, 47 Ark. 148 4374, 4379, 4392, 4398
v. Scheurman, 51 Ore. 49 1826
Matney v. Chicago, etc., R. Co., 75 Mo. App. 233 3387
Matson v. Buck, 5 Cow. 499 4577, 4578, 4581
v. Dennis, 10 Jur. (N. S.) 461, 12 Week. Rep. 926 756
v. Matson, 105 Me. 152 338, 1511
v. Oberne, 25 Ill. App. 213 580
Matsuda v. Hammond, 7 Wash. 120 1506
Matterhorn, The, 128 Fed. 863 4993
Mattern v. McCarthy, 73 Neb. 228 243
Matteson v. Holt, 45 Vt. 336 2390
v. Munro, 80 Minn. 340 4159, 4166
v. New York Cent. R. Co., 35 N. Y. 487, 493 4722, 4757
v. New York Cent., etc., R. Co., 40 Pa. Super. Ct. 234 3762
v. New York, etc., R. Co., 62 Barb. 364 3487
Matthews v. Adams, 84 Md. 143 1072, 1073
v. Bliss, 22 Pick. 48 4379
v. Chicopee Mfg. Co., 3 Robert. 711 765, 769, 773, 778, 783
v. Coe, 49 N. Y. 57 2954, 4247
v. Cross, Cro. Jac. 323 4556
v. Durgee, 45 Barb. 69 3729
v. Hall, 21 W. Va. 510 2833
v. Huntley, 9 N. H. 146 4531
v. Lamberton, 184 Mich. 493 4744
v. Lee, 25 Miss. 417 1559
v. Lindsay, 20 Fla. 962 820, 827
v. Matthews, 133 N. Y. 679 1990
v. Mauldin, 142 Ala. 434 1645
v. Missouri Pac. R. Co., 26 Mo. App. 75 4769, 4770
v. Missouri Pac. R. Co., 142 Mo. 645 1444, 1458, 3751, 3752, 3767
v. Montgomery, 25 Miss. 150 1605
v. Norman, 42 Ind. 176 1918
v. Ormerd, 140 Cal. 578 977, 979
v. Paine, 47 Ark. 54 1145
v. Spokane, 50 Wash. 107 4797
v. Terry, 10 Conn. 455 461, 465
v. Warner, 29 Gratt. 570 350, 4863, 4865, 4917
Matthewson v. Perry, 37 Conn. 435 4960
Matthias v. Minneapolis, St. P. & S. S. M. R. Co., 125 Minn. 224 3973
Mattice v. Wilcox, 147 N. Y. 624 4504, 4588
Mattingly v. Cotton, 2 Flip. 288, Fed. Cas. No. 9, 294 2733
v. Darwin, 23 Ill. 618 1354
v. Houston, 167 Ala. 167 343, 1325, 3635, 3820, 3826, 4218
v. Manhattan Oil Co., 96 Neb. 742 2525
v. Mathews, 14 Ky. L. Rep. 300 (Ky. Super. Ct.) 2241, 2244
v. Sutton, 19 W. Va. 19 2830
Mattis v. Philadelphia T. Co., 6 Pa. Dist. 94 4785
v. St. Louis, etc., 138 Mo. App. 61 3803
Mattison v. Lake Shore, etc., R. Co., 2 Ohio N. P. 276 4534
Mattocks v. Chicago & A. Ry. Co., 187 Ill. App. 529 5051, 5072
Mattoon v. Pearce, 12 Mass. 406 1664, 1672, 1676, 1680, 4338
Mattox v. Craig, 2 Bibb 584 2337
Mattson v. Eureka Cedar Lumber & Shingle Co., 79 Wash. 266 766, 770
v. Minnesota, etc., R. Co., 95 Minn. 477 108, 110, 151
Matulys v. Philadelphia & R. C. & I. Co., 201 Pa. 70 3913, 3916
Matzger v. Page, 62 Wash. 170 797
Mauch v. Hartford, 112 Wis. 40 1475
Mauch Chunk, The, 139 Fed. 747 4914

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Maudlin v. American S. & L. Ass'n, 63 Minn. 358 868, 875
Mauerman v. St. Louis, etc., R. Co., 41 Mo. App. 348 4692, 4770
Maughan v. Estate of Burns, 64 Vt. 316 1361
Maughlin M. Co. v. Hamilton, 61 Wash. 66 1738
Mauk v. Brundage, 68 Ohio 89 1328, 4506, 4508, 4525, 4546
v. Hearst, 160 Cal. 143 4546
Maul v. Drexel, 55 Neb. 446 4212, 4226, 4228
Mauldin v. Ball, 104 Tenn. 597 4608, 4646, 4648
v. Seaboard A. L. R., 73 S. C. 9 1431
Maule v. Ashmead, 20 Pa. 482 548, 3182
Maule C. Co. v. Partenheimer, 155 Ind. 100, 109 418
Maumee Valley R. & L. Co. v. Montgomery, 81 Ohio 426 444
Maunsell v. Massareene, 5 T. R. 87 1397, 1398
Maupai v. Jackson, 139 App. Div. (N. Y.) 524 1997
Mauran v. Bullus, 16 Pet. 528 2745, 2767
v. Warren, 2 Low. 53 2902
Maurice v. Hunt, 80 Ark. 476 2481
v. Partridge, 14 East 599 1619
Mauritz v. New York, etc., R. Co., 23 Fed. 765 3532, 3533, 3536
Mauzy v. Flint, 42 Ind. App. 386 2094, 2097, 2101
Maverick v. Gibbs, 3 McCord 315 569
v. Lewis, 3 McCord 130 3122
Maw v. Coast L. Co., 19 Idaho 396 4793
v. Jones, 23 Q. B. Div. 107 2570
Mawson v. Leavitt, 16 N. Y. Misc. 289 869
Maxey v. Carter, 10 Yerg. 521 2835
v. Ridcout, 173 Fed. 172 2873
Maxfield v. Bierbauer, 8 Minn. 480 2212
Maxon v. Gates, 136 Wis. 270 1451, 1452, 1981, 2007, 2010
Maxted v. Fowler, 94 Mich. 106 2387, 2405, 4377
Maxville v. Western U. Tel. Co., (Tex. Civ. App.) 140 S. W. 464 3609
Maxwell v. Allen, 78 Me. 32 848, 862, 919
v. Connor, 1 Hill Eq. 14 2795
v. De Valinger, 2 Pennewill, 504 701
v. Goodwin, 93 Fed. 665 4477
v. Jameson, 2 B. & Ald. 51 2844
v. Kennedy, 50 Wis. 645 471, 1322, 4529
v. Massachusetts T. Ins. Co., 206 Mass. 197 2512
v. Parnell, Irish Rep. 1 Com. L. 234 2989
v. Pike, 2 Me. 8 1630
v. Speth, 9 Ga. App. 745 323, 1280, 4195, 4199
Maxwell-C. D. Co. v. Singley (Tex. Civ. App.) 152 S. W. 827 2880, 2890
May, In re, 4 Jurist (N. S.), 1169 2488
May v. Anderson, 14 Ind. App 251 4565, 4566
v. Boston, 158 Mass. 21 4104
v. Breunig (N. Y. Misc.), 120 N. Y. Supp. 98 293, 2588, 2595, 2695
v. Brown, 3 B. & C. 113 4584, 4593
v. Conn, 23 Ont. L. R. 102 2225
v. Crawford, 142 Mo. 390 844, 909
v. Crawford, 150 Mo. 504 884, 909
v. Diaz, 42 Ala. 383 3129
May v. Dyer, 57 Ark. 441 4372, 4393, 4402
v. Georger, 21 Misc. (N. Y.) 622, rev'g 20 Misc. (N. Y.) 659 2597
v. Gloucester, 174 Mass. 583 2542
v. Green, 75 Ala. 162 1121
v. Gunther, 20 Misc. (N. Y.) 659 2597
v. Hahn, 22 Tex. Civ. App. 365 1495
v. Ivie, 68 Tex. 379 2204
v. Jameson, 11 Ark. 368 4357
v. Le Claire, 11 Wall. 217 4421
v. May, 19 Fla. 373 2849
v. New York, etc., Soc., 14 Daly 389 4419
v. Northern Pac. R. Co., 32 Mont. 522 1465
v. Poluhoff, 65 N. Y. Misc. 546 293, 307
v. Rice, 108 Mass. 150 3123
v. Roberts, 46 Mich. 160 4374
v. Ullrich, 132 Mich. 6 1076
v. Waniger, — Tex. Civ. App. —. 164 S. W. 1106 2821
v. West Jersey & S. R. Co., 62 N. J. L. 67 4859, 4872, 4890, 4903
v. Western U. Tel. Co., 157 N. C. 416 56, 165, 168, 1304, 1343, 3820, 3826, 4757
May's Est., In re, 218 Pa. 64 1952, 2898
Maybank v. Rogers, 88 S. C. 572 2274
Mayberry v. Cliffe, 7 Cold. 117 4317, 4331, 4339, 4347
v. Hunt, 34 New Bruns. 628 718
v. Lilly M. Co., 112 Tenn. 564 2214, 2226, 2228, 2237, 2242, 2244
v. Northern Pac. R. Co., 100 Minn. 79 437, 2858
Maybin v. Coulon, 4 Dall. 298 1852
Maye v. Tappan, 23 Cal. 306 364, 3703, 3790, 4259, 4346
Mayer v. Duke, 72 Tex. 445 1310, 1314, 1689, 1694, 1702
v. Frobe, 40 W. Va. 246 1264, 1268, 1289
v. Isaac, 6 M. & W. 605 2746, 2748
v. McCraken, 245 Ill. 551 1119
v. Mordecai, 1 S. C. 398 658
v. Morehead, 106 Ga. 434 3139
v. Roche, 77 N. J. L. 681 1905
v. Thompson H. B. Co., 104 Ala. 611 2995
v. Trobe, 40 W. Va. 246 1302
v. Walter, 64 Pa. 283 15, 4604, 4608
Mayer B. Co. v. Kennedy, 230 Pa. 98 2236, 2238
Mayer & Schmidt v. Wooten, 46 Tex. Civ. App. 327 2069, 2097, 2102, 2105, 2113, 2127, 2133, 2134, 2143
Mayers v. Smith, 121 Ill. 442 4766
Mayfield v. Moore, 53 Ill. 428 2562
Mayflower, The, Brown's Adm. 376 5003
Mayhew v. Crickett, 2 Swanst. 185 2816
v. Phoenix Ins. Co., 23 Mich. 105 758
v. Thatcher, 6 Wheat. 129 1397
Mayhood v. Pleasant Valley C. Co., 8 Utah 85 4818
Mayler v. Avliffe, Cro. Jac. 134 1531
Maynard v. Beardsley, 7 Wend. 560 460, 465, 468, 4530, 4593, 4595, 4783
v. Briggs, 26 Vt. 94 2490
v. Firemen's Ins. Co., 34 Cal. 48 1332
v. Hall, 92 Wis. 565 977, 978, 1160
v. Hunt, 5 Pick. 240 826, 1230

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Maynard v. Marshall, 91 Ga. 840 1194
v. May, 16 Ky. L. Rep. 690 4423
v. Maynard, 49 Vt. 297 317, 476, 4413
v. Newman, 1 Nev. 271 595, 1541
v. Northampton, 157 Mass. 218 4033
v. Oregon R. Co., 43 Ore. 63 1376
v. Oregon R. Co., 46 Ore. 15 1384, 4671, 4779
v. Pease, 99 Mass. 555 284, 287, 2921, 2948, 4250
v. Richards, 166 Ill. 466 1075
v. Royal Worcester C. Co., 200 Mass. 1 227, 2555, 2562
Mayo v. Davidge, 44 Hun 342 529
v. Goldman, 57 Tex. Civ. App. 475, 509 4503, 4508
v. India Mut. Ins. Co., 152 Mass. 172 3015
v. Latham, 159 Mich. 136 2235
v. Leighton, 101 Me. 63 746
v. Samples, 18 Iowa 306 4529
v. Springfield, 138 Mass. 70 3765
v. Wahlgreen, 9 Colo. App. 506 4366, 4375
Mayo's Est., In re, 60 S. C. 401 4852
Mayor, In re, 84 App. Div. (N. Y.) 455 4088
Mayor, Matter of The, 39 App. Div. (N. Y.) 589 3996, 4045
Mayor, Matter of The, 24 App. Div. 7 4105
Mayor v. Ætna Ind. Co., 4 Ga. App. 722 842, 918
v. Brady, 151 N. Y. 611 299
v. Calhoun, 103 Ga. 675 1522
v. Dannenberg, 113 Ga. 1111 3922
v. DeVore, 169 Ala. 237 1716
v. Dwinell, 29 Vt. 298 2390, 2392
v. Ewing, 116 Ala. 576 4095
v. Garrett, 120 Md. 608 4107, 4110
v. Harris, 75 Ga. 761 491
v. Henley, 1 Bing. N. C. 222 16
v. Higgins, 81 Miss. 376 3964, 4099
v. Horn, 2 Harr. 190 1582
v. Kelly, 98 N. Y. 467 2756
v. Lewis, 92 Ala. 352 334, 1349
v. Mabie, 13 N. Y. 151 537, 547, 548, 3182, 3257, 3258, 3261
v. Muzzy, 33 Mich. 61 2460, 2499
v. Patten, 4 Cranch 317 704, 714, 722
v. Pentz, 24 Wend. 675 1423
v. Pickles, [1895] App. Cas. 587 7, 14
v. Potomac E. & C. Co., 132 Ga. 849 888
v. Purcell, 3 Munf. 243 1101
v. Ransom, 23 How. 487 4447
v. Second Ave. R. Co., 102 N. Y. 572 2589, 2599, 3162
v. Sikes, 94 Ga. 30 3878
v. Small, 108 Ga. 309, 323 3901
v. Smith & S. B. Co., 80 Md. 458 2620, 4136
v. Stembridge, 139 Ga. 692 1138
Mayor of London & T's Contract, In re, [1894] 2 Ch. 524 1970
Mayrant v. Columbia, 77 S. C. 281 144, 3841
v. Columbia, 82 S. C. 273 491, 3929
Mayronne v. Keegan, 117 La. 661 107
Mays v. Cincinnati, 1 Ohio St. 268 1066
v. Lewis, 4 Tex. 38 1523, 1525
v. Railroad Co., 64 Tex. 272 3514
Maysville v. Stanton, 12 Ky. L. Rep. 586 3878
Maysville, etc., R. Co. v. Connor, 16 Ky. L. Rep. 635 3756
v. Herrick, 13 Bush 127 1277
Maysville, etc., R. Co. v. Warnock, 10 Ky. L. Rep. 937 (Ky. Super. Ct.) 3794, 3827
Maywood v. Logan, 78 Mich. 135 547, 3125, 3250
Maze v. Miller, 1 Wash. C. C. 328 767
Mazuzan v. Mead, 21 Wend. 285 2784, 2785
Mazyck v. McEwen, 2 Bailey 28 1605
Meacham v. Fitchburg R. Co., 4 Cush. 291 3956, 4107, 4108, 4124
Mead v. Altgeld, 136 Ill. 298 2052
v. Degolyer, 16 Wend. 632 2230
v. Kalberg, 70 Wash. 517 188, 1740
v. Mali, 15 How. Pr. 347 4386
v. Pittsburg, 194 Pa. 392 3964, 3990, 3991, 4032
v. Rat Portage L. Co., 93 Minn. 342 2230
v. Stratton, 87 N. Y. 493 57
v. Thompson, 78 Ill. 62 430
v. Wheeler, 13 N. H. 351 853, 855, 876, 967, 975
v. York, 6 N. Y. 449 637
Meade v. Brothers, 28 Wis. 689 2926
v. Missouri, K. & T. R. Co., 183 Mo. App. 353 3333
v. St. Louis Mut. L. Ins., 51 How. Pr. 1 3083
v. Smith, 16 Conn. 346 1482
v. Stratton, 87 N. Y. 493 59
Meader v. Stone, 7 Metc. (Mass.) 147 3736
Meaders v. Gray, 60 Miss. 400 962
Meador v. Rhyne, 11 Rich. 631 580, 581, 583
Meadowcraft v. Walsh, 15 Mont. 544 1815
Meager v. Smith, 4 B. & Ad. 673 822
Meagher v. Driscoll, 99 Mass. 281 222, 343, 1296, 3474, 3650, 3735, 3819
v. Hoyle, 173 Mass. 577 1935
v. Puckett, 19 Ky. L. Rep. 879 1968
Meagley v. Hoyt, 88 Hun 328 2370, 2379
Meaher v. Pomeroy, 49 Ala. 146 3099
Mealey v. Bemidji L. Co., 118 Minn. 427 290
v. Finnegan, 46 Minn. 507 1959
Means v. Brickell, 2 Hill 657 2202
v. Means, 88 Ind. 196 2405
v. Milliken, 33 Pa. 517 424, 1958
v. Smith, Tappan 60 630
Meardon v. Iowa City, 148 Iowa 12 4120
Mears v. Cornwall, 73 Mich. 78 41, 4296, 4298
v. Nichols, 41 Ill. 207 534, 557
v. Williamson, 37 Me. 556 2226
Mease v. Stevens, 1 N. J. L. 433 954
Meason v. Kaine, 67 Pa. 126 1942, 1943
v. Phillips, Addison 346 2337
Meason's Est., 4 Watts 341 1062
Meaux v. Pittman, 35 La. Ann. 360 1727
Mecartney v. Smith, 10 Kan. App. 580 3818
Mechanics' Bank v. Hazard, 13 Johns. 353 636
v. Houston, 11 W. N. C. 388 (Pa. Sup. Ct.) 753
v. Minthorne, 19 Johns. 244 1409, 1873
Mechanics' F. Ins. Co. v. Nichols, 16 N. J. L. 410 3020
Mechanics' Ins. Co. v. Hodge, 46 Ill. App. 479 3047
v. Hoover D. Co., 182 Fed. 590 3045
Mechanics' Sav. Bank v. Thompson, 58 Minn. 346 2875

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Mechanics' & T.'s Bank v. Seitz, 150 Pa. 632 2809
Mechanics' & T.'s Ins. Co. v. McLain, 48 La. Ann. 1091 259, 638
Meck v. Nebraska Tel. Co., 96 Neb. 539 4908
Mecklem v. Blake, 22 Wis. 495 39, 2057, 2085, 2173, 2174
Medairy v. McAllister, 97 Md. 488 434, 4158
Medart P. Co. v. Dubuque T. & R. M. Co., 121 Iowa 244 510, 535, 542
Medaugh v. Wright, 27 Ind. 137 4517
Medbury v. Hopkins, 3 Conn. 472 1145
v. New York & E. R. Co., 26 Barb. 564 2367, 3349
v. Watrous, 7 Hill 110 2465, 2540
v. Watson, 6 Metc. (Mass.) 246 4369, 4374, 4375, 4378, 4606
Mediana, The, [1899] Prob. 127 5002
Medical College v. Rushing, 1 Ga. App. 468 4163
Mediterranean & N. Y. S. Co. v. Mackay, [1903] 1 K. B. 297 3301
Medley v. Tandy, 85 Ky. 566 2821
v. Watson, 6 Metc. (Mass.) 257, 258 4433
Medway Nav. Co. v. Romney, 9 C. H. (N. S.) 575 35
Mee v. Montclair, 83 N. J. L. 274 1117
Meech v. Smith, 7 Wend. 315 1008, 2986
v. Stoner, 19 N. Y. 26 27
Meehan v. Adirondack Elec. Power Corp., 88 Misc. (N. Y.) 235 4928
v. Edwards, 92 Ky. 574 3733, 3774
v. Forrester, 52 N. Y. 277 4225, 4421
Meek v. Bearden, 5 Yerg. 467 2094
v. Union Pac. R. Co., 95 Kan. 111 31
v. Wendt, 21 Q. B. Div. 126 [1888] 2989
Meeker v. Gardella, 1 Wash. 139 1525, 3104
v. Hurd, 31 Vt. 639 2465, 2466
v. Lehigh Valley R. Co., 236 U. S. 412 3313
v. Manina, 162 Ill. 203 684
v. Meeker, 16 Conn. 383 2068
Meekin v. Brooklyn Heights R. Co., 164 N. Y. 145 4852, 4854, 4869
Meekins v. Railroad Co., 134 N. C. 217 4907
Meeks v. Bowerman, 1 Daly 99 3260
v. St. Paul, 64 Minn. 220 1498
v. Simon, 2 N. Y. Misc. 241 4296
Meers v. McDowell, 23 Ky. L. Rep. 461 70
Megary v. Funtis, 5 Sandf. Ch. 376 698
Meggison v. Maine & Sons Co., 160 Iowa 541 4929
Meggott v. Wild, 1 Ld. Raym. 287 722
Meguire v. Corwine, 101 U. S. 108 18
Mehegan v. Boyne City G. & A. R. Co., 178 Mich. 694 4854
Mehlberg v. Tisher, 24 Wis. 607 660, 670
Mehurin v. Stone, 37 Ohio St. 49 2682
Meibus v. Dodge, 38 Wis. 300 1276
Meidel v. Anthis, 71 Ill. 241 1269, 1274, 1289, 1305, 1323, 3643, 4675
Meier v. Shrunk, 79 Iowa 22 1377
Meighan v. Birmingham T. Co., 165 Ala. 591 1261, 1310, 1439
v. Pennsylvania T. Co., 165 Ala. 591 1350
Meigs v. Keach, 1 Wash. Tv. 305 1655
v. Lister, 23 N. J. Eq. 199 3839
Meily v. St. Louis, etc., R. Co., 215 Mo. 567 4742
Meinert v. Bottcher, 60 Minn. 204 1552, 1555
Meisenbach v. Southern C. Co., 45 Mo. App. 232 2464
Meisenbacker v. Society Concordia, 71 Conn. 369, 378 1302
Meixell v. Kirkpatrick, 29 Kan. 679 4273, 4290
Melanson v. Lavigne, 37 New Bruns. 539 4835
Melcher v. Beeler, 48 Colo. 233 4508, 4509
v. Merryman, 41 Me. 601 3735
Melendy v. Chicago, etc., R. Co., 132 Ill. App. 431 3841, 3849, 3872
Melick v. Knox, 44 N. Y. 676 2765, 2768
Mell v. Moony, 30 Ga. 413 537
Melledge v. Boston I. Co., 5 Cush. 158 659, 660, 661
Mellendy v. Austin, 69 Ill. 15 710
Mellersh v. Brown, 45 Ch. Div. 225 1033
v. Keen, 28 Beav. 453 2323
Mellick v. Pennsylvania R. Co., 203 Pa. 457 3890
Mellish v. Arnold, Bunb. 51 1481, 1482
v. Simeon, 2 H. Black. 378 617, 1868, 1896, 1897
Mellon v. Fulton, 22 Okla. 636 2489, 2492
Mellon's App., 32 Pa. 121 2115
Mellor v. Missouri Pac. R. Co., 105 Mo. 455, 464 4705
v. Pilgrim, 3 Ill. App. 476 3876
v. Pilgrim, 7 Ill. App. 306 38
Mellville v. Hayden, 3 B. & Ald. 593 2745, 2749
Mellwitz v. Manhattan R. Co., 17 N. Y. Supp. 112 1374
Melone v. Sierra R. Co., 151 Cal. 113 4661, 4719, 4730, 4745
Meloon v. Read, 73 N. H. 153 437, 4210
Melroy v. Kemmerrer, 218 Pa. 381 759
Melson v. Travis, 133 Ga. 710 718
v. Western U. Tel. Co., 72 Mo. App. 111 3560
Melton v. Snow, 24 Okla. 780 997
Melville v. DeWolf, 4 El. & B. 844 2529, 2662
v. Mound City, 185 Mo. App. 522 3961, 3982
v. Winslow, 10 Me. 397 4340
Melzner v. Northern Pac. R. Co., 46 Mont. 162 4848
Memmer v. Carey, 30 Minn. 458 385
Memmert v. McKeen, 112 Pa. 315 2146, 2150
Memphis v. Bolton, 9 Heisk. 508 4119
v. Brown, 20 Wall. 289 272
Memphis C. G. & E. Co. v. Letson, 135 Fed. 969 4908
Memphis Cotton Oil Co. v. Tolbert, — Tex. Civ. App. —, 171 S. W. 309 5151, 5152, 5158, 5159, 5163, 5168
Memphis News Pub. Co. v. Southern R. Co., 110 Tenn. 684 3310
Memphis St. R. Co. v. Berry, 118 Tenn. 581 1511, 4905
v. Graves, 110 Tenn. 232 3473
v. Shaw, 110 Tenn. 467 1318, 3506
Memphis Tel. Co. v. Hunt, 16 Lea 456 1280
Memphis & C. P. Co. v. Nagel, 97 Ky. 9 1345, 3475, 3501
Memphis, etc., P. Co. v. The H. C. Yaeger, 4 Fed. 927 5003
Memphis, etc., R. Co. v. Buckley, 99 Ark. 422 4921, 4925

[REFERENCES ARE TO PAGES]

Memphis, etc., R. Co. v. Carley, 39 Ark. 246 1536
v. Dow, 120 U. S. 287 1020
v. Hicks, 5 Sneed 427 3936
v. Organ, 67 Ark. 84 3755, 3756
v. Walker, 2 Head 467 1928, 2329
v. Whitfield, 44 Miss. 466 334, 1269, 3467, 3487
Menasha W. W. Co. v. Spokane Int. R. Co., 19 Idaho 586 1393
Mendel v. Boyd, 3 Neb. (Unof.) 473 502, 683, 2797
v. Fink, 8 Ill. App. 378 564, 3250
v. Leader, 136 Ga. 442 2192
Mendell v. Willyoung, 42 N. Y. Misc. 210 294, 2690
Mendelsohn v. Anaheim L. Co., 40 Cal. 657 3513
Mendenhall v. Davis, 52 Wash. 169 2528, 2529
v. North Carolina R. Co., 123 N. C. 275 4906
Mendizabal v. New York Cent., etc., R. Co., 89 App. Div. (N. Y.) 386 4819
Menetone v. Athawes, 3 Burr. 1592 2609
Mengal B. Co. v. Moore, 114 Tenn. 596 361
Mengel v. Williamson, 50 Pa. Super. 100 2061, 2090
Mengel B. Co. v. Ferguson, 124 Tenn. 433 2097, 2112, 2134, 2135, 2139, 2143
Mengell v. Mohnsville W. Co., 224 Pa. 120 4130, 4151, 4152
Menges v. Milton P. Co., 96 Mo. App. 611 886
v. Wertman, 1 Pa. 218 1193
Menihan Co. v. Hopkins, 129 Tenn. 24 376, 2541, 2556
Menkens v. Menkens, 23 Mo. 252 4273
Menninger v. Taylor, 30 Ohio C. C. 717 4776
Menominee, The, 125 Fed. 530 4991
Menot v. Cumberland County Com'rs, 28 Me. 125 4093
Mensing v. Wright, 86 Kan. 98 266
Mentel v. Hippely, 165 Pa. 558 4602
Mentzer v. Burlingame, 71 Kan. 581 2859
v. Burlingame, 78 Kan. 219 2853
v. Cleaver, 13 Ky. L. Rep. 301 3621
v. McIlvoy, 21 Ky. L. Rep. 1393 3621
v. Western U. Tel. Co., 93 Iowa 752 332, 351, 355, 3621, 3641, 3652
Menz L. Co. v. McNeeley, 58 Wash. 223 2279, 2282
Menzies v. Fairburn, 113 App. Div. (N. Y.) 119 834
Meola v. Quincy M. Co., 174 Mich. 305 4879, 4913
Mequet v. Silverman, 52 La. Ann. 1369 4550
Mercantile Ins. Co. v. Holthaus, 43 Mich. 432 3020
Mercantile S. Co. v. Tyser, 7 Q. B. Div. 73 2999
Mercantile T. Co. v. Hensey, 27 App. D. C. 210 833, 2596
v. South Park R. Co., 94 Ky. 271 2054, 2056, 2060, 2061, 2065, 2117, 2144
Mercedes, The, 108 Fed. 559 430, 4990, 5017
Mercer v. Cincinnati N. R. Co., 151 Mich. 566 3470
v. Clark, 3 Bibb 224 1830
v. Hall, 2 Tex. 284 534
Mercer v. Irving, 1 E. B. & E. 563 838, 887, 922
v. Jones, 3 Camp. 476 4273, 4275
v. Tift, 79 Ga. 174 718
v. Vose, 67 N. Y. 56 1097, 1099, 1436
v. Walmsley, 5 Har. & J. 27 3825, 4957
Mercer County v. Coovert, 6 W. & S. 70 2755
v. Hacket, 1 Wall. 83 1210
v. Wolff, 237 Ill. 74 4141, 4142
Mercer Electric Mfg. Co. v. Connecticut Electric Mfg. Co., 87 Conn. 691 700
Mercer St., In re, 55 Wash. 116 4112
Merceron v. Dowson, 5 B. & C. 479 3132
Merces v. Beall, 4 Leigh 189 739, 1051
Merchant v. Pielke, 10 N. D. 48 4614, 4615, 4620, 4647
Merchants' Bank v. Cordevoille, 4 Rob. (La.) 506 2816
v. Griswold, 9 Hun 561 1163
v. Rawls, 21 Ga. 289 2945
Merchants' Collection Agency v. Goncevic, 23 Cal. App. 216 1095, 1514
Merchants' D. & T. Co. v. Merriam, 111 Ind. 5 3425
Merchants' D. T. Co. v. Bloch, 86 Tenn. 392 3335, 3385
Merchants' Exch. Nat. Bank v. Commercial Warehouse, 49 N. Y. 635 980
Merchants' G. Co. v. Ladogac Co., 89 Ark. 591 1452
Merchants' I. & C. S. Co. v. Bargholt, 129 Ky. 60 1493
Merchants' Ins. Co. v. Buckner, 98 Fed. 222 4505, 4506, 4565
v. Herber, 68 Minn. 420 708
Merchants' Loan & Trust Co. v. Hulette, 187 Ill. App. 161 1806
Merchants' M. T. Co. v. Corcoran, 4 Ga. App. 654 4663
Merchants' Mut. Ins. Co. v. Butler, 20 Md. 41 3000, 3290
Merchants' Mut. Tel. Co. v. Hirschman, 43 Ind. App. 283 1510, 3881
Merchants' Nat. Bank v. Armstrong, 65 Fed. 932 4370, 4388
v. Bales, 148 Ala. 279 4334
v. Bangs, 102 Mass. 291 2226
v. Camp, 110 Ga. 780 685
v. Citizens' State Bank, 93 Iowa 650 2769
v. Commercial W. Co., 49 N. Y. 635 2826
v. Good, 21 W. Va. 455 669
v. McDonald, 63 Neb. 363 4326, 4359, 4360
v. Procter, 1 Cin. Super. Ct. 1 634
v. Sevier, 14 Fed. 662 1922
v. Southwick, 67 How. Pr. 324 1168
v. Taylor, 66 Vt. 574 4401
v. Spates, 41 W. Va. 27 1869
v. Thoms, 28 Weekly L. Bul. 164, (Cincinnati Super. Ct.) 4370, 4387
v. Whitmer, 171 Mo. App. 352 1197
v. Williams, 110 Md. 334 4206, 4210, 4222, 4239, 4285, 4292
Merchants' Nat. Bank of Cedar Rapids v. Cressey, 164 Iowa 721 2755
Merchants' Sav. Bank v. Moore, 5 Kan. App. 362 1243
Merchants' S. Co. v. Armitage, L. R. 9 Q. B. 99 1095, 3288
Merchants' State Bank v. State Bank, 94 Wis. 444 2929, 2931
Merchants' & Farmers' Bank v. Calmes, 82 Miss. 603 2750

[REFERENCES ARE TO PAGES]

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Merchants' & Mechanics' Sav. Bank v. Fraze, 9 Ind. App. 161 2370
Merchants' & Miners' T. Co. v. Corcoran, 4 Ga. App. 654 4652, 4752, 4793, 4800
v. Eichberg, 109 Md. 211 3341, 3431
v. Moore, 124 Ga. 482 3418, 4207, 4230
Merchants' & P.'s Bank v. Trustees Masonic Hall, 62 Ga. 271 4273, 4275
Merchants' & P.'s O. Co. v. Burns, 96 Tex. 573 4881
v. Kentucky Ref. Co., 69 Fed. 218 1309
Merchants' & T. Bank v. Farmers' & M. Nat. Bank, 60 N. Y. 40 2954
Mercia v. Burget, 36 Ind. App. 453 887
Merck v. American Freehold L. M. Co., 79 Ga. 213, 233 871, 1201
Mercur v. Vose, 67 N. Y. 56 2478
Meredith v. Banks, 6 N. J. L. 408 1214
Meredith M. Ass'n v. American T. D. Co., 66 N. H. 539 3106
v. American T. D. Co., 67 N. H. 450 3097
Merest v. Harvey, 5 Taunt. 442 163, 1269, 1296, 3827
Merges v. Ringler, 24 N. Y. Misc. 317 2052
Merguire v. O'Donnell, 103 Cal. 50 4431
Meriam v. Bacon, 5 Metc. (Mass.) 95 691
v. Brown, 128 Mass. 391 4054
Merica v. Burget, 36 Ind. App. 453 423
Meriden, City of, In re, 88 Conn. 427 3961, 3963, 4001
Meriden S. P. Co. v. Flory, 44 Ohio St. 430 2821
Meridian v. Higgins, 81 Miss. 376 3879, 3928
Meriwether v. Knapp, 120 Mo. App. 354 4548
v. Knapp, 211 Mo. 199 4509
v. Knapp, 224 Mo. 617 4520
Merle v. Wells, 2 Camp. 413 2748, 2750
Merle & H. Mfg. Co. v. Hicks, 178 Ill. App. 403 2478
Merlette v. North & East River S. Co., 13 Daly 114 2582
Meroney v. Atlanta B. & L. Ass'n, 116 N. C. 882 1159, 1161
v. Atlanta Nat. B. & L. Ass'n, 112 N. C. 842 1161
Merrell v. Tice, 104 U. S. 557 4478
Merrells v. Phelps, 34 Conn. 109 1642
Merrett v. Farmers' Ins. Co., 42 Iowa 11 3064
Merriam v. Field, 24 Wis. 640 2386
v. Field, 39 Wis. 578 2371, 2376
v. Rockwood, 47 N. H. 81 2818
v. Wolcott, 3 Allen 258 1870, 2383
v. Woodcock, 104 Mass. 326 568
Merriam Co. v. Ogilvie, 170 Fed. 167 4490
v. Saalfield, 198 Fed. 369 4488, 4493
Merrick v. Brainard, 38 Barb. 574 3424
v. Gofon, 20 N. Y. 93 3301
v. Trustees of Bank, 8 Gill 59 423
v. Webster, 3 Mich. 268 3425
v. Wiltse, 37 Minn. 41 2390, 2405, 2435
Merrick Mfg. Co. v. Quintard, 107 Mass. 127 535
Merrihew v. Chicago City R. Co., 92 Ill. App. 346 4849
Merrill v. Aden, 19 Vt. 505 1835
Merrill v. Coates, 101 Minn. 43 1329
v. Curtis, 57 Me. 152 1358
v. Dobble, 12 Ill. App. 85 42
v. Everett, 38 Conn. 40 570
v. Fame, 4 Taunt. 329 3182
v. Gore, 29 Me. 346 2221, 2684
v. Grinnell, 30 N. Y. 594 3529
v. Hampden, 26 Me. 234 161
v. Hexter, 52 Ore. 138 820
v. How, 24 Me. 126 481
v. Ithaca, etc., R. Co., 16 Wend. 586 2666, 2709
v. Los Angeles G. & E. Co., 158 Cal. 499 143, 4673
v. McIntire, 13 Gray 157 1557
v. Merrill, 103 Cal. 287 2018
v. Muzzy, 11 Wash. 16 1922
v. Nightingale, 39 Wis. 247 2391, 2428, 2429, 4382
v. Pacific T. Co., 131 Cal. 582 3534, 3535
v. Parker, 24 Me. 89 2226
v. St. Louis, 12 Mo. App. 466 4657
v. Sax, 141 Iowa 386 2902
v. Taylor, 72 Tex. 293 1838
v. Wedgewood, 25 Neb. 283 4360
v. Western U. Tel. Co., 68 Me. 97 3593
v. Willis, 51 Nev. 162 3111
Merrill C. Co. v. Nickells, 66 Mo. App. 678 4327
Merrills v. Law, 9 Cow. 65 976
Merrils v. Tariff Mfg. Co., 10 Conn. 384 4192
Merrimack County Bank v. Brown, 12 N. H. 320 727, 732
Merriman v. Great Northern Exp. Co., 63 Minn. 543 3425
v. McCormick H. M. Co., 96 Wis. 600 2520, 2687, 2711
v. McCormick H. M. Co., 101 Wis. 619 2520
v. Pine City L. Co., 23 Minn. 314 2894
Merrinane v. Miller, 148 Mich. 412 1310, 1499
v. Miller, 157 Mich. 279 448, 1477, 1532, 1561
Merritt v. Adams County Land & Investment Co., 29 N. D. 496 187
v. Benton, 10 Wend. 116 1814
v. Closson, 36 Vt. 172 3129
v. Crane, 126 Ill. App. 337 1103
v. Haas, 106 Minn. 275 2771, 2791
v. Hunt, 4 Ired. Eq. 406 2212
v. Judd, 14 Cal. 59 3255
v. Lambert, 7 Paige 344 826, 2489
v. Morse, 108 Mass. 270 2137
v. Packer, 1 N. J. L. 496, 533 3847
v. Thompson, 10 How. Pr. 428 823
v. Wittich, 20 Fla. 27 2294
Merritt & C. D. & W. Co. v. Chubb, 113 Fed. 173 2738
v. Greene, 147 Fed. 317 2462
v. Morris & C. D. Co., 137 Fed. 780 2716, 2733
Merriwether v. Bell, 139 Ky. 402 3746, 4210
Merrow v. Huntoon, 25 Vt. 9 543, 2667
Merry v. Allen, 39 Iowa 235 758
Merryfield v. Jones, 2 Curt. C. C. 306 1719
Merryman v. Criddle, 4 Munf. 542 1101
Merryweather v. Nixan, 8 T. R. 186 432
Merschel v. Louisville & N. R. Co., 121 Ky. 620 151
Mersey Docks & H. Board v. The Marpessa [1907], App. Cas. 241 5002

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Mertens v. Mueller, 122 Md. 313 4619
Mervine v. Sailor, 52 Pa. 18 594
Merwin v. Austin, 58 Conn. 22 627, 2830
Merzbach v. Mayor, 10 N. Y. Misc. 131 2460
Meserole v. Linn, 34 App. Div. (N. Y.) 33 3141
Meserve v. Ammidon, 109 Mass. 415 2276
v. Clark, 115 Ill. 580 1792
Meservey v. Snell, 94 Iowa 222 2056, 2136
Meshbresher v. Channellene O. & Mfg. Co., 107 Minn. 104 125
Meshke v. Van Doren, 16 Wis. 319 305, 662, 1695
Meskill & C. River R. Co. v. Luedinghaus, 78 Wash. 366 3965, 4019, 4020, 4032, 4035
Messenger v. Manhattan R. Co., 129 N. Y. 502 4084
v. Murphy, 33 Wash. 353 4284
v. Pate, 42 Iowa 443 125
v. Pennsylvania R. Co., 36 N. J. L. 407, 410 3284
v. Pratt, 3 Lans. 234 2379
Messer v. Bailey, 31 N. H. 9 4352
v. Oestrich, 52 Wis. 684 2150
v. Walton, 42 Tex. Civ. App. 488 3788
v. Woodman, 22 N. H. 172 2225, 2227
Messick v. Dawson, 2 Harr. 50 376
Messman v. Ihlenfeldt, 89 Wis. 585 4633, 4635, 4636, 4639
Messmer v. Henry W. Boettger Silk Finishing Co., 160 App. Div. (N. Y.) 519 2526
Messmore v. New York S. & L. Co., 40 N. Y. 422 192, 1366, 2343, 2344, 2441
Mestaer v. Gillespie, 11 Ves. 621 1978, 2052
Metallic C. C. Co. v. Fitchburg R. Co., 109 Mass. 277 101, 4185, 4678
Metcalf v. Baker, 56 N. Y. 662 412, 1499
v. Central Vermont R. Co., 78 Conn. 614 1406
v. Collinson, 95 Minn. 238 1370, 4212
v. Stryker, 31 N. Y. 255 1619
v. Watertown, 68 Fed. 859 1254
Metcalfe v. Dean, Cro. Eliz. 189 1482
v. Fowler, 6 M. & W. 830 1999
Methodist Church v. Barker, 18 N. Y. 463 1760
Metler v. Easton, etc., R. Co., 36 N. J. L. 222 1063, 4150, 4151
Metropolitan Acc. Ass'n v. Froiland, 161 Ill. 30 1359
Metropolitan Bank v. Times-D. Pub. Co., 121 La. 547 1970
v. Van Dyek, 27 N. Y. 400 607
Metropolitan C. Co. v. Billings, 202 Mass. 457 2218
v. Boutell T. & T. Co., 196 Mass. 72 3315
Metropolitan L. Co. v. Elison, 72 Kan. 199 3071
Metropolitan S. Co. v. Garden City B. & T. Co., 114 Ill. App. 318 56, 277, 279
Metropolitan Shirt Waist Co. v. Kamioner (Misc. [N. Y.]), 138 N. Y. Supp. 1067 760
Metropolitan T. Co. v. Truax, 67 N. Y. Misc. 588 995
Metropolitan, etc., R. Co. v. Dickinson, 161 Ill. 22 4131
Metropolitan, etc., R. Co. v. Fortin, 107 Ill. App. 157 4653
v. Goll, 100 Ill. App. 323 3951, 3952, 3969
v. Hudson, 51 C. C. A. 283, 113 Fed. 449 4679
v. Johnson, 159 Ill. 434 4127
v. Johnson, 90 Ga. 500 4727
v. Johnson, 91 Ga. 466 4759, 4760
v. Kennedy, 27 C. C. A. 136, 82 Fed. 158 338, 4712
v. Kneeland, 120 N. Y. 134 4277, 4401, 4426
v. Siegel, 161 Ill. 638 4011, 4092
v. Springer, 171 Ill. 170 3946, 3976, 4119
v. Stickney, 150 Ill. 362 3957, 3969, 4019, 4109, 4112
v. Walsh, 197 Mo. 392 3962, 4098, 4137
v. White, 166 Ill. 375 4109
Metrovich v. Jovovich, 58 Cal. 341 1709, 1710
Mette v. Dow, 9 Lea 93 2112, 2126, 2128, 2133
Mettler v. Moore, 1 Blackf. 342 2238, 2329, 2330
Metz v. Metropolitan St. R. Co., 82 App. Div. (N. Y.) 168 4718
v. Second Ave. R. Co., 2 Robert. 356 1499
v. Soule, 40 Iowa 236 755, 758
Metzger v. Brincat, 154 Ala. 397 226, 3209
v. Metzger, 35 App. D. C. 389 695, 1539
Metzner v. Graham, 66 Mo. 653 1620
Meux v. Eastern R. Co., [1895] 2 Q. B. 387 3531
Mewes v. Crescent P. L. Co., 170 Pa. 364 2620
Mewhirter v. Hatten, 42 Iowa 288 4757, 4758
Mewman v. McGregor, 5 Ohio 349 2682
Mexican Cent. R. Co. v. De Rosear (Tex. Civ. App.), 109 S. W. 949 3533, 3538
v. Gehr, 66 Ill. App. 173 4836, 4837, 4840
Mexican National R. Co. v. Mussette, 86 Tex. 708, 7 Tex. Civ. App. 169 70, 1784, 1785
v. Slatter, 53 C. C. A. 239, 115 Fed. 593 4954
Meyer v. Bohlfing, 44 Ind. 238 4513
v. Brooks, 29 Ore. 203 1048
v. Buckley, 22 Cal. App. 96 1032, 1093
Meyer v. City of Rosedale, 84 Kan. 302 3767
v. English, 83 Neb. 163 3810
v. Estes, 164 Mass. 457 28, 860
v. Everett P. & P. Co., 184 Fed. 945, 193 Fed. 857 2379, 2403, 2409, 2455
v. Fagan, 34 Neb. 184 1693, 1694, 4191, 4195
v. Hallock, 2 Robert. 284 2661
v. Harris, 61 N. J. L. 83 3843
v. Hart, 23 App. Div. (N. Y.) 131 4891
v. Haven, 70 App. Div. (N. Y.) 529 170, 171, 2642, 2647
v. Johnson, 122 Ill. App. 87 1134, 1238, 1247
v. King, 72 Miss. 1 70, 129, 145
v. McAllister, 24 Cal. App. 16 2302
v. Meyers, 141 Ala. 343 2472
v. Nassau E. R. Co., 152 App. Div. (N. Y.) 709 4821

[REFERENCES ARE TO PAGES]

Meyer v. Parsons, 129 Cal. 653 2220
v. Phoenix Ins. Co., 95 Mo. App. 721 4212
v. Press P. Co., 46 N. C. Super. Ct. 127 4512
v. Purcell, 214 Ill. 62 308
v. Richards, 163 U. S. 385 1870, 1872
v. St. Louis & S. R. Co., 108 Mo. App. 220 1498
v. St. Louis, etc., R. Co., 54 Fed. 116 3467, 3469
v. Standard Tel. Co., 122 Iowa 514 3774, 3776
v. Zoll, 119 Ky. 480 27
Meyer B. D. Co. v. McKinney, 137 App. Div. (N. Y.) 541 284, 2696, 2701, 2702
Meyers v. Block, 120 U. S. 206 1738
v. Johnson, 186 Ill. App. 37 3099
v. Malcolm, 6 Hill 295 4598
v. Martinez, 172 Ala. 641 1129
v. Merrillion, 118 Cal. 352 18
Meyers' Est., 179 Pa. 157 947, 1093
Meylert v. Gas Consumers' B. Co., 26 Abb. N. C. 262 259, 2570
Meysenburg v. Schlieper, 48 Mo. 426 1749
Meza v. Pfister, 54 Wash. 7 1503, 2556
Miami Exp. Co. v. Bank of United States, 5 Ohio 260 740, 1216
Miami P. Co. v. Port Royal, etc., R. Co., 38 S. C. 78 3384
v. Port Royal, etc., R. Co., 47 S. C. 324 3301, 3384
Miami & M. T. Co. v. Baily, 37 Ohio St. 104 1462, 1466
Miamisburg T. & C. Co. v. Wohlhuter, 71 Minn. 484 2380, 2405, 2406
Miano v. Empire State S. Co., 153 App. Div. 423 2893, 2899
Mica I. Co. v. Commercial M. Co., 157 Fed. 92 1714, 1716
Michael v. Hart, [1902] 1 K. B. 482 2966, 4251
v. Hart, 17 T. L. Rep. 761 [1901], aff'd 2 K. B. 867 2966
v. Jones, 84 Mo. 578 2983
v. Matheis, 77 Mo. App. 556, 562 4539
Michaelis v. Wolf, 136 Ill. 68 2683
Michaels v. New York Cent. R. Co., 30 N. Y. 564 142
Michalistschke v. Wells, Fargo & Co., 118 Cal. 683 3414
Michaux v. Brown, 10 Gratt. 612 1050
Michel v. Supervisors, 39 Hun 47 3882
Michigan Cent. R. Co. v. Burrows, 33 Mich. 6 2636, 3332
v. Campau, 35 Mich. 468 4853
v. Coleman, 28 Mich. 440 4761
v. Osmus, 129 Ill. App. 79 3387
v. Vreeland, 227 U. S. 59, rev'g 189 Fed. 495 4860, 4861, 5024, 5093, 5095, 5101, 5102, 5103, 5106, 5107, 5112, 5121
Michigan City v. Phillips, 163 Ind. 449 4795
Michigan L. Co. v. Warpe L. Co., 53 Wash. 604 2270
Michigan L. & I. Co. v. Deer Lake Co., 60 Mich. 143 3789, 3829
Michigan Mut. L. Ins. Co. v. Coleman, 118 Tenn. 215 264
Michigan P. Co. v. Detroit, 34 Mich. 201 2671
Michigan State Bank v. Peck, 28 Vt. 200 2767
Michigan Y. & P. Co. v. Busch, 143 Fed. 929 514, 2693, 2695, 2701, 2702
Michigan, etc., R. Co. v. Caster, 13 Ind. 164 3389
v. Curtis, 80 Ill. 324 3332
v. Heaton, 37 Ind. 448 3335
v. Oehm, 56 Ill. 293 3534
Michkolls v. College of Physicians & S., 7 Cal. App. 233 2565
Mickelson v. Fischer, 81 Wash. 423 326
Mickie v. Lawrence, 5 Rand. 571 3149
Mickle v. Cross, 10 Md. 352 1117
v. Douglas, 75 Iowa 78 3257
Mickles v. Hart, 1 Denio 548 39
v. Miles, 1 Grant 320 4203
Middendorf v. Schreiber, 150 Mo. App. 530 1359
Middle States L. B. & C. Co. v. Hagerstown M. & U. Co., 82 Md. 506 816
v. Miller, 104 Va. 464 1164
Middlebrook v. Slocum, 152 Mich. 286 2464
Middleditch v. Kalaniaole, 18 Hawaiian 272 1723
Middlekamp v. Bessemer I. Co., 46 Colo. 102 3840, 3853
Middlekauff v. Barrick, 4 Gill 290 2212
v. Smith, 1 Md. 329 252, 3247
Middlesex & B. St. R. Co. v. Egan, 131 C. C. A. 53, 214 Fed. 747, aff'g 212 Fed. 562 4661
Middlestadt v. Waupaca S. & P. Co., 93 Wis. 4 3839
Middleton v. Bryan, 3 M. & S. 155 1666, 4338, 4352
v. Colwell, 4 Bush 392 1583
v. Findley, 25 Cal. 76 2506
v. Magnay, 2 Hem. & Mill. 233 2050
v. Moore, [1897] 2 Ch. 169 1088
v. Nichols, 62 N. J. L. 636 4960, 4964
v. Texas Power & Light Co., — Tex. Civ. App. —, 178 S. W. 956, rev'd — Tex. —, 185 S. W. 556 5146, 5150, 5152, 5153, 5155, 5156, 5157, 5159, 5160, 5163, 5164, 5165, 5166, 5167, 5168, 5171
v. Thompson, 1 Spear 67 2130, 2399
v. Thompson, 163 Pa. 112 2501
v. Western U. Tel. Co., 183 Ala. 213 3627
Middletown v. Ætna Ind. Co., 97 App. Div. (N. Y.) 344 2793
v. Bankers' & M. Tel. Co., 32 Fed. 254 2494
Middleworth v. Lowery, 89 App. Div. (N. Y.) 418 1412
Midereich v. Rank, 40 Ind. App. 393 757
Midgeley v. Slocomb, 2 Abb. Pr. (N. S.) 275 578, 674
Midgett v. Vann, 158 N. C. 128 1720, 1723
Midgley v. Lovelace, Carthew 289 2124
Midland C. Co. v. Toledo, F. & M. Co., 154 Fed. 797 4311
Midland Ins. Co. v. Smith, 6 Q. B. Div. 561 17
Midland Nav. Co. v. Dominion E. Co., 6 Ont. L. R. 432 3320
Midland R. Co. v. Trevarthen, 1 Colo. App. 152 4095
Midland S. Co. v. Citizens' Nat. Bank, 34 Ind. App. 107 1824, 1905
Midland S. & L. Co. v. Solomon, 71 Kan. 185 1162
Midland Val. R. Co. v. Ennis, 109 Ark. 206 5125
v. Hale 86 Ark. 483 3430
v. Hoffman C. Co., 91 Ark. 180 3318
v. Larson, 41 Okla. 360 1429
v. Lemoyne, 104 Ark. 327 5132

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Miekley v. General Roofing Mfg. Co., 179 Ill. App. 493 3877, 3886
Mielenz v. Ouasdorf, 68 Iowa 726 4585
Mifflin B. Co. v. Juniata County, 144 Pa. 365 4077, 4078, 4079, 4141
v. Stone, 74 Ill. App. 129 4969
v. Stone, 175 Ill. 261 4964
Migliaccio v. Smith F. Co., 151 Iowa 705 1483, 1499
Mihalyik v. Klein, 22 Pa. Super. Ct. 193 4605, 4836
Mikesill v. Chaney, 6 Ind. 52 4349
Milage v. Woodward, 186 N. Y. 252 2547, 2561, 2566
Milbourne v. Robison, 132 Mo. App. 198 1481, 1482
Milburn v. Beach, 14 Mo. 104 4165, 4179
v. Belloni, 39 N. Y. 53 252, 294, 2439
v. Fowler, 27 Hun 568 3917
v. Thirty-five Thousand Boxes, etc., 57 Fed. 236 3302, 3309
Milburn W. Co. v. Evans, 30 Minn. 89 2914
v. Nisewarner, 90 Va. 714 2387
Mildmay v. Methuen, 3 Drew. 91 1114
Miles v. Bacon, 4 J. J. Marsh. 451 1019, 2835, 2836, 2861
v. Bowers, 49 Ore. 429 1104
v. Coleman Nat. Bank, 37 Tex. Civ. App. 73 2876
v. Commercial B. Co., 4 New South Wales St. Rep. 223 278
v. Edwards, 6 Mont. 180 1721, 1733
v. Harrington, 8 Kan. 425 468, 4512
v. Janvrin, 196 Mass. 431 3250, 3251
v. Linnell, 97 Mass. 298 2787
v. Miller, 12 Bush 134 2275
v. New Zealand Alford Est. Co., 32 Ch. Div. 266 757
v. Ogden, 54 Wis. 573 703, 725
Miles v. Vanhorn, 17 Ind. 245 4529, 4531
v. Walker, 66 Neb. 728 4647
Miles's Est., 2 Pa. Dist. 103 1121
Milford v. Bangor R. & E. Co., 104 Me. 233 170, 183
v. Holbrook, 9 Allen 17 3234
v. May, 1 Doug. 55 1868
Milheim v. Baxter, 46 Colo. 155 3182, 3189, 3213, 3220
Milhous v. Atlantic C. L. R. Co., 75 S. C. 351 3532, 3537
v. Southern R., 72 S. C. 442 3471, 3505
Miliken v. Chapman, 75 Me. 306, 317 1870
v. Tufts, 31 Me. 497 736
Milk v. Waite, 18 Abb. New. Cas. 236 2885
Milks v. Rich, 50 N. Y. 269 1869
Mill v. Roulliard, — Iowa —, 149 N. W. 875 37
Millar v. Humphries, 2 A. K. Marsh. 446 363, 4256
v. Taylor, 4 Burr 2396 4477
v. Thompson, 1 Wend. 447 4962, 4963
Millard v. Baldwin, 3 Gray 484 416
v. Brown, 35 N. Y. 297 465
v. Hewlett, 19 Wend. 301 2540
v. Jenkins, 9 Wend. 298 15
v. Miller, 39 Colo. 103 436
v. Missouri, etc., R. Co., 20 Hun 191 3534
v. Webster City, 113 Iowa 220 3738, 3739, 3766
Milledgeville W. Co. v. Fowler, 129 Ga. 111 1416
Miller v. Aldrich, 123 Ill. App. 464 2303, 2404
Miller v. Aris, 1 Selw. N. P. 103 2993
v. Ashcraft, 98 Ky. 314 4840
v. Asheville, 112 N. C. 759 4118, 4152
v. Baltimore & O. R. Co., 89 App. Div. (N. Y.) 457 330, 3439, 3451, 3485
v. Baltimore & O. S. R. Co., 78 Ohio St. 309 81, 93
v. Bank, 5 Whart. 503 1016
v. Barber, 66 N. Y. 558 4377, 4382, 4392
v. Beal, 26 Ind. 234 2482
v. Beck, 108 Iowa 575 425, 440, 774
v. Berkey, 27 Pa. 317 2816
v. Beverlys, 4 Hen. & Munf. 415 1121, 1127
v. Billington, 194 Pa. 452 1203
v. Boone County, 95 Iowa 5 4824
v. Boot & S. Co., 26 Mo. App. 57 2561
v. Brown, 3 Mo. 127 4613
v. Brown S. Co., 89 S. C. 530 4576, 4596
v. Bryden, 34 Mo. App. 602 4327, 4334
v. Burch, 19 Ky. L. Rep. 629 1366
v. Burroughs, 4 Johns. Ch. 436 951, 952
v. Butler, 6 Cush. 71 4564, 4565
v. Cavanaugh, 99 Ky. 377 949
v. Chicago, etc., R. Co., 65 Fed. 305 25
v. Chicago, etc., R. Co., 85 Neb. 458 3334
v. Collyer, 36 Barb. 250 1941
v. Cosmic C., T. & S. Co., 109 Md. 11 2545, 2547
v. Craig, 6 Beav. 433 1071
v. Delaware, etc., R. Co., 58 N. J. L. 428 1494
v. Delaware River Transp. Co., 85 N. J. L. 700 334, 4693
v. Donovan, 13 Idaho 735 1722, 1730
v. Dorsey, 149 Mo. App. 24 4502, 4510, 4544, 4592
v. Downer, etc., Co., 104 Mass. 64 2448
v. Eagle Ins. Co., 2 E. D. Smith 268 3071
v. Easton, etc., R. Co., 37 N. J. L. 222 4097
v. Edison E. Co., 184 N. Y. 17 3883
v. Edison E. I. Co., 33 N. Y. Misc. 664 3882
v. Elder, 7 Ohio C. C. 97 1117
v. Fano, 134 Cal. 103 4837
v. Fenton, 11 Paige 18 781
v. Ferry, 50 Hun 256 1693
v. Finley, 26 Mich. 249 1828
v. Ford, 1 N. J. Eq. 358 978
v. Foutz, 2 Yeates 418 1664
v. Fox, 111 Tenn. 336 774
v. Freeborn, 4 Robert. 608 565
v. Frey, 49 Neb. 472 4677
v. Friedheim, 82 Ark. 592 2754
v. Fulton, 4 Ohio 433 3734
v. Gaither, 3 Bush 152 534, 549
v. Gardner, 49 Iowa 234 1920
v. Garling, 12 How. Pr. 203 4321
v. Garrett, 35 Ala. 96 306, 1670, 1727
v. Georgia R. & B. Co., 88 Ga. 563 3309
v. Gettysburg Bank, 8 Watts 192 677
v. Gill, 4 Ala. 359 1636
v. Gleason, 18 Ohio C. C. 374 1289
v. Goddard, 34 Me. 102 2524
v. Hahn, 23 App. Div. (N. Y.) 48 2697, 2701
v. Hall, 18 S. C. 141 961, 1206
v. Halsey, 14 N. J. L. 48 2115, 2121

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Miller v. Hammers, 93 Iowa 746 1289, 1310
v. Hancock, [1893] 2 Q. B. 177 3233
v. Hanover & M. W. Co., 240 Pa. 393 3760
v. Hartford & S. O. Co., 41 Conn. 112, 130 2084, 2088, 2157
v. Haskell, 179 Mass. 312 2474
v. Hayes, 34 Iowa 496 502, 3687
v. Henderson, 10 S. & R. 590 1865
v. Henry, 84 Pa. 33 3696
v. Highland D. Co., 87 Cal. 430 3938
v. Hoc, 1 Fla. 189 1485
v. Hull, 4 Denio 104 984
v. Ingram, 56 Miss. 510 3706
v. Irby, 63 Ala. 477 643, 644
v. Jacobs, 3 Watts 477 576
v. Janett, 63 Tex. 82 4194, 4211, 4227, 4267
v. Kansas City Western Ry. Co., — Mo. App. —, 168 S. W. 336 5060
v. Kelly, Abb. Adm. 564 2721, 2722
v. Kelly C. Co., 239 Ill. 626 144
v. Kelsey, 100 Me. 103 1651
v. Kempner, 32 Ark. 573 976
v. Kern County, 150 Cal. 797 1065
v. Kerr, 2 McCord 285 4599
v. King, 21 App. Div. (N. Y.) 192 3450
v. King, 88 Hun 181 3443
v. Kingsbury, 28 Ill. 532, 128 Ill. 45 2895
v. Kirby, 74 Ill. 242 1269
v. Lai, 77 N. J. L. 135 4633
v. Lamar, 43 Miss. 383 2197
v. Law, 44 Ill. App. 630 2404
v. Letherington, 6 H. & N. 278, 7 C. B. (N. S.) 954 3036
v. Lewiston Nat. Bank, 18 Idaho 124 2783
v. Life Ins. Co., 12 Wall. 285 627
v. Lloyd, 181 Ill. App. 230 1502, 2493
v. Long, 3 A. K. Marsh. 334 2212
v. Luckey, 132 Ga. 581 1444, 3774
v. Lux, 100 Cal. 609 1122, 1131
v. Lyons, 113 Va. 275 4239
v. McCaffrey, 9 Pa. 245 2650
v. McCormick H. Mach. Co., 84 Ill. App. 571 1119
v. McKinney, 5 Lea 93 597
v. Macoupin County, 7 Ill. 50 1586, 1588, 1614
v. Mansfield, 112 Mass. 260 3309, 3310
v. Mariner's Church, 7 Me. 55 177, 314, 476, 2558, 3243
v. Mason City, etc., R. Co., 132 Iowa 412 2666, 2683
v. Melchor, 13 Ired. 439 3692
v. Metz, 103 Wis. 220 2000, 2005, 2018
v. Michel, 13 Ind. App. 190 3121
v. Miller, 23 Me. 22 737
v. Miller, 81 Kan. 397 1494
v. Miller, 122 Mo. App. 693 4980
v. Miller K. Co., 23 N. Y. Misc. 404 2874
v. Milligan, 48 Barb. 30 4643
v. Mintun, 73 Ark. 183 1475
v. Montgomery, 31 Ill. 350 637, 712
v. Monumental S. & L. Ass'n, 57 W. Va. 437 731
v. Moore, 3 Humph. 189 1614
v. Moore, 83 Ga. 684 2379, 2390
v. Morris, 55 Tex. 412 3151
v. Moulton, 77 Wash. 325 910
v. Myers, 46 Cal. 535 3694
v. Neale, 137 Wis. 426 3773, 3774
Miller v. Newark, 35 N. J. L. 460 3990, 4086
v. Nichols, 1 Bailey 226 1561
v. Ocean S. Co., 6 N. Y. St. Rep. 664 4653
v. Parish, 8 Pick. 384 4502
v. Parker, 133 Ga. 187 979
v. Patch Mfg. Co., 101 App. Div. (N. Y.) 22 2409
v. Pearce, 86 Vt. 322 4975, 4976, 4978
v. Perkerson, 128 Ga. 465 2851
v. Phillips, 44 Wash. 226 1955
v. Pratz, 179 Ill. App. 204 699
v. Public Service Ry. Co., 84 N. J. L. 174 5200
v. Race, 1 Burr. 452 651, 1884
v. Rambo, 66 N. J. L. 191 3768
v. Rambo, 73 N. J. L. 726 1267, 3826
v. Rankin (Pa.), 11 Atl. 615 899
v. Rhoades, 20 Ohio St. 494 2891
v. Rhode Island Co. (R. I.), 82 Atl. 787 4698
v. Richardson, 88 Hun 49 2470, 2479
v. Richardson, [1915] 3 K. B. 76, W. C. & Ins. Rep. 381 5202
v. Ridgeley, 22 Fed. 889 2780
v. Rinaldo, 21 N. Y. 470 3250
v. Rosier, 31 Mich. 475 502, 3670, 3679, 3687
v. Ryan, 13 Ohio C. C. 278 1785
v. Ryder, 145 Wis. 526 1103
v. Sadowsky, 138 Mich. 502 4728
v. St. Louis, etc., R. Co., 90 Mo. 389 3254
v. St. Louis, etc., R. Co., 162 Mo. 424 4150
v. Schloss, 159 App. Div. (N. Y.) 704 768
v. Sealy Oil Mill & Mfg. Co., — Tex. Civ. App. —, 166 S. W. 1182 2547, 2554, 2558, 2561, 2564
v. Shackleford, 4 Dana 271 1523
v. Shelburn, 15 N. D. 182 2025
v. Smith, 1 Mason 437 534
v. Smith, 112 Mass. 470 1436, 1445, 2303
v. Smythe, 92 Ga. 154 3233
v. Smythe, 122 Ky. 699 1742
v. Snyder, 149 Mo. App. 97 697
v. State, 35 Ind. App. 379 2760
v. Stern, 25 N. Y. Misc. 690 2288
v. Stewart, 9 Wheat. 681 1582, 2752, 2756
v. Sullivan, 77 Kan. 252 3236, 3248
v. Tiffany, 1 Wall. 298 1162
v. Trevilian, 2 Rob. (Va.) 1 1216
v. Uhlman, 198 Fed. 233 3195
v. Van Tassel, 24 Cal. 458 2380, 2387
v. Vaughan, 78 Ala. 323 1789
v. W. G. Hewes, The, 1 Woods 363 4819
v. Walker, 158 Ill. App. 276 1959
v. Ward, 2 Conn. 494 2648
v. Weeks, 22 Pa. 89 1360
v. Wellman, 75 Mich. 353 3736, 3778
v. Western U. Tel. Co., 157 Mo. App. 580 3600, 3614
v. White, 7 Blackf. 491 1866
v. Whitson, 40 Mo. 101 1136, 4350
v. Wilson, 24 Pa. 114 388, 390, 410, 2910
v. Windsor W. Co., 148 Pa. 429 4000, 4006, 4933
v. Winslow, 70 Wash. 401 1066
v. Wissert, 38 Okla. 808 4372, 4380
v. Woodfall, 8 El. & Bl. 493 3016
v. Woodman, 14 Ohio 518 3725
v. Yockey, 49 Colo. 303 2666

[REFERENCES ARE TO PAGES]

Miller v. Zander, 85 Misc. (N. Y.) 499 2272, 2393, 2403
v. Zeimer, 12 Daly 126 4398
Miller-B. L. Co. v. Stewart, 166 Ala. 657 1332, 1343
Miller's App., 31 Pa. 337 1089
Miller's App., 35 Pa. 481 578
Miller's Estate, In re, 243 Pa. 328 701
Millert v. Augustinian College, 36 Pa. Super. Ct. 511 2556
Millet v. Snowden, 17 Fed. Cas. 374 4480
Millett v. Fowle, 8 Cush. 150 4046
v. Hayford, 1 Wis. 401 452, 453, 1660
v. Swift, 138 Ky. 408 1057
Millette v. New York, W. & B. R. Co., 169 N. Y. App. Div. 126 5069, 5106
Millhiser v. Marr, 130 N. C. 510 689
Milligan v. Cooke, 16 Ves. 1 1978
v. Marshall, 38 Pa. Super. 60 594, 797
v. Nelson, 188 Ill. 139 1730
Millikan v. Hunter, 180 Ind. 149 1989
Milliken v. Brown, 1 Rawle 391 749, 752
v. Long, 188 Pa. 411 4964, 4967, 4972
v. Pratt, 125 Mass. 374 1155
v. State, 7 Blackf. 77 1582
v. Thorndike, 103 Mass. 382 4384
v. Western U. Tel. Co., 110 N. Y. 403 3564
Milliken I. Co. v. United States, 40 Ct. of Cls. 81 226, 228
Millikin v. Smoot, 71 Tex. 759 383
Milling v. Becker, 96 Pa. 182 3111
v. Sulphur T. & L. Co., 119 La. 585 4618
Millington v. Loring, 6 Q. B. Div. 190 3666
v. O'Dell, 35 Ind. App. 225 3099
Millirons v. Dillon, 100 Ga. 656 2404
Millisack v. Moore, 76 Mo. App. 528 1077
Millmore v. Boston E. R. Co., 198 Mass. 370 4703, 4705
Millot v. Lovett, 2 Dane's Abr. 461 2537
Mills v. Allen, 7 Jones 564 1606
v. Armstrong, 13 App. Cas. 1 107
v. Atlantic C. L. R. Co., 85 S. C. 463 1498
v. Barney, 22 Cal. 240 1869
v. Bell, 3 Call 277 2110
v. Brooklyn, 32 N. Y. 489 12
v. Bunke, 59 App. Div. (N. Y.) 39 70, 102, 122
v. Catlin, 22 Vt. 98 2077, 2089, 2187
v. Chicago & N. W. Ry. Co., 183 Ill. App. 53 3390, 4220
v. County Com'rs, 4 Ill. 53 4076
v. East London Union, L. R. 8 C. P. 79 3155
v. Flynn, 149 Iowa 477 4524, 4544, 4563, 4565, 4573, 4574, 4535, 4580
v. Forbes, 12 How. Pr. 466 1762
v. Fowkes, 5 Bing. N. C. 455 714, 720, 721, 736
v. Fox, 4 E. D. Smith 220 884
v. Garrison, 3 Keyes 40 378
v. Geer, 111 Ga. 275 3694, 3713, 3714
v. Gleason, 21 Cal. 274 1658
v. Hackett, 65 Tex. 580 1669
v. Hall, 9 Wend. 315 16, 3933, 3935
v. Harding, 11 Ky. L. Rep. 308 3198
v. Heeney, 35 Ill. 173 1241
v. Hunt, 20 Wend. 431 2979
v. Hyde, 19 Vt. 59 2864
Mills v. Jefferson, 20 Wis. 50 1206, 1209
v. Joiner, 20 Fla. 479 2473, 2548
v. Jones, 9 La. Ann. 11 1727
v. Kellogg, 7 Minn. 469 703, 706
v. Knudson, 54 Wash. 614 4391
v. Larrance, 120 Ill. App. 83 4797
v. Larrance, 217 Ill. 446 1287, 4158
v. Metropolitan St. R. Co., 157 Mo. App. 529 1276
v. Paul (Tex. Civ. App.), 30 S. W. 558 2592, 2654, 2685
v. Saunders, 4 Neb. 190 2151, 2153
v. Southern Ry., 90 S. C. 366 3367, 3424
v. Spencer, 1 Holt 535, 3 Eng. C. L. 177 4577
v. Taylor, 85 Mo. 111 1324, 4974
v. Trustees, etc., 119 Md. 510 2046
v. Van Voorhees, 20 N. Y. 412 3728
v. Warner, 167 Mich. 619 461, 467
v. Wilmington City R. Co., 1 Marvel 269 1465
Millsaps v. Chapman, 76 Miss. 942 1920
Millspaugh v. Potter, 62 App. Div. (N. Y.) 521 4981
Milltown L. Co. v. Carter, 5 Ga. App. 344 3774, 4219, 4232, 4257
Milne v. Moreton, 6 Bin. 353 1154
v. Rempublicam, 3 Yeates 102 1019, 1043
v. Gery, 14 Ves. 400 2221
Milnes v. Vanhorn, 8 Blackf. 198 542
Milske v. Steiner M. Co., 103 Md. 235 2658
Milsom v. Hayward, 9 Price 134 1034, 1482
Miltenberger v. Beacom, 9 Pa. 198 3064
v. Cooke, 18 Wall. 421 657
Miltimore v. Bottom, 66 Vt. 168 1661, 1668, 1670
Milton v. Blackshear, 8 Fla. 161 1030, 1032
v. De Yampert, 3 Ala. 648 2780
v. Hudson River S. Co., 37 N. Y. 214 314
v. Johnson, 79 Minn. 170 2961
v. Missouri Pac. R. Co., 193 Mo. 46 1329
v. Rowland, 11 Ala. 732 2390
Milward v. Hibbert, 3 Q. B. 120 3036
Milwaukee v. Ritzow, 158 Wis. 376 5207
v. Littlewood, 20 L. J. (Ex.) 2 1561
v. United States F. & G. Co., 144 Wis. 603 1559, 1596
Milwaukee County v. Ehlers, 45 Wis. 281 1590
Milwaukee T. Co. v. Fidelity & C. Co., 92 Wis. 366 2759
v. Milwaukee, 151 Wis. 224 3956, 3962, 4032, 4144
v. Van Valkenburgh, 132 Wis. 638 962
Milwaukee, etc., R. Co. v. Arms, 91 U. S. 489 47, 1265, 1276, 1309, 3503, 3507
v. Eble, 3 Pin. 334 1422, 4026, 4097, 4115
v. Finney, 10 Wis. 388 3513
v. Kellogg, 94 U. S. 469 52, 54, 68, 129, 144
Mimms v. Betts, 9 Ga. 718 2696, 2701, 2705
Mimnaugh v. Partlin, 67 Mich. 391 561, 566
Mims v. McDowell, 4 Ga. 182 2838, 2843
Minard v. Beans, 64 Pa. 411 936, 1025, 1965
Minds v. Pennsylvania R. Co., 228 Pa. 575 3312
Mine & Smelter S. Co. v. Parke, 107 Fed. 881 1103, 1243

[REFERENCES ARE TO PAGES]

Mine Hill, etc., R. Co. v. Lippincott, 86 Pa. 468 1485, 2614
Mine S. Co. v. Columbia M. Co., 48 Ore. 391 2370, 2373, 2379, 2415, 2422, 2433
Miner v. Blume, 64 App. Div. (N. Y.) 511 2368
v. Bradley, 22 Pick. 457 376, 2394
v. Clark, 15 Wend. 425 311, 2131
v. Coburn, 4 Allen 136 1623
v. New York Cent., etc., R. Co., 123 N. Y. 242 4018
v. Paris Exch. Bank, 53 Tex. 559 871, 1921
v. Rodgers, 65 Mich. 225 1789
v. Tagert, 3 Bin. 204 2914
Miners' Co-op. Ass'n v. The Monarch, 2 Alaska 383 3313
Mineral Wells v. Russell, 30 Tex. Civ. App. 232 3880
Minesinger v. Kerr, 9 Pa. 312 470, 4580
Mingus v. Daugherty, 87 Iowa 56 2808, 2810
Minick v. Troy, 19 Hun 253 4700, 4727, 4761
Minkwitz v. Steen, 36 Ark. 260 4314
Minnaugh v. Partlin, 67 Mich. 391 519
Minneapolis B. Co. v. City Bank, 74 Minn. 98 3110
Minneapolis Co-op. Co. v. Williamson, 51 Minn. 53 3121
Minneapolis H. Works v. Bonnallie, 29 Minn. 373 546, 558, 569, 2390, 2405, 2415
Minneapolis T. Co. v. Mather, 181 N. Y. 205 2914
Minneapolis T. M. Co. v. McDonald, 10 N. D. 408 2238
v. Regier, 51 Neb. 402 4603, 4614, 4619, 4620
Minneapolis & N. R. Co. v. Woodworth, 32 Minn. 452 4029
Minneapolis, etc., E. T. Co. v. Freidnshuh, 108 Minn. 492 4033
v. Harkins, 108 Minn. 478 3964, 4107
Minneapolis, etc., R. Co. v. Beckwith, 129 U. S. 26 1265
v. Bombolis, 241 U. S. 211, aff'g 128 Minn. 112 5130, 5131
v. Industrial Comm. of Wisconsin, 153 Wis. 552 5179, 5185
Minnear v. Gay, 217 Mass. 403 2964
Minnesota Belt Line R. & T. Co. v. Gluck, 46 Minn. 463 1434
Minnesota L. O. Co. v. Montague, 65 Iowa 67 2913
Minnesota R. Co. v. Doran, 15 Minn. 230 4127
Minnesota, etc., R. Co. v. Doran, 17 Minn. 188 4019
Minnie, The, 26 Fed. 860 4995, 5009
Minnie E. Kelton, The, 181 Fed. 237 2726, 2738
Minocks v. Pope, 117 N. C. 315 1672
Minor v. Beveridge, 141 N. Y. 399 2954, 2971, 4244
v. Clark, 15 Wend. 427 2399
v. Fike, 77 Kan. 806 759
v. Mead, 3 Conn. 289 1634
v. Mechanics' Bank, 1 Pet. 73 423, 424, 1534, 1592
v. Rogers Coal Co., 25 Mo. App. 78 692
v. Sharon, 112 Mass. 477 3260
Minot v. Doherty, 203 Mass. 37 4660
v. Sawyer, 8 Allen 78 991, 995
Minreman v. Fox, 43 Wash. 43 126
Minter v. Bradstreet Co., 174 Mo. 444 4509, 4512, 4531, 4532
v. Branch Bank, 23 Ala. 762 2814
Minter v. Pacific R. Co., 41 Mo. 503 3534
Minturn v. Columbian Ins. Co., 10 Johns. 75 3009, 3026
Mirandona v. Burg, 51 La. Ann. 1190 2345, 2351
Mires v. Summerville, 85 Mo. App. 183, 114 Mo. App. 128 4380
Mirick v. Hoppin, 118 Mass. 587 3122
Mirrielees v. Wabash R. Co., 163 Mo. 470 4730
Mischke v. Baughn, 52 Iowa 528 2112, 2127
Misner v. Bullard, 43 Ill. 470 1719
Mississippi M. Co. v. Smith, 69 Miss. 299 3852
Mississippi Mills v. Meyer, 83 Tex. 433 4201, 4285, 4306
Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215 3041
Mississippi O. Co. v. Smith, 95 Miss. 528 1479, 4938
Mississippi R. Co. v. Green, 9 Heisk. 588 2308
Mississippi River B. Co. v. Ring, 58 Mo. 491 4030, 4033, 4110
Mississippi Valley T. Co. v. Hofius, 20 Wash. 272 1206
Mississippi & Rum River B. Co. v. Prince, 34 Mich. 71 252, 2635
Mississippi, etc., R. Co. v. Archibald, 67 Miss. 38 147, 3924, 3925
v. Crawford, 96 Miss. 401 1399
v. Hardy, 88 Miss. 732 4753
v. Hattiesburg Traction Co., — Miss. —, 67 So. 897 4075
v. Kennedy, 41 Miss. 671 3365, 3532, 3533, 3537
v. McClendon, 106 Miss. 671, 64 So. 460 1262, 3828
v. Magee, 93 Miss. 196 3849, 3851, 3941
v. Robinson, 106 Miss. 896 4914
v. Turnage, 95 Miss. 854 1471, 1473
v. Wymond C. Co., 93 Miss. 73 1519
Missouri-Am. E. Co. v. Hamilton-B. S. Co., 165 Fed. 283 761
Missouri Cent. L. Co. v. Stewart, 78 Mo. App. 456 737
Missouri F. Co. v. Cochran, 8 Fed. 463 2232, 2290
Missouri R. Co. v. Haines, 10 Kan. 439 399
Missouri R. E. Syndicate v. Sims, 121 Mo. App. 156 289
v. Sims, 179 Mo. 679 979
Missouri River Co. v. Richards, 8 Kan. 76 2500
Missouri River P. Co. v. Hannibal, etc., R. Co., 79 Mo. 478 3920
Missouri Valley B. & I. Co. v. Ballard, 53 Tex. Civ. App. 110 4718
Missouri Valley L. Ins. Co. v. Kelso, 16 Kan. 481 3090
Missouri & I. C. Co. v. Consolidated C. Co., 127 Mo. App. 320 759
Missouri & K. Tel. Co. v. Vandervort, 71 Kan. 101 1141
Missouri, etc., R. Co. v. Aiken, 71 Tex. 373 4659
v. Allen, 39 Tex. Civ. App. 236 312, 3323, 3388, 3393
v. Allen, 53 Tex. Civ. App. 433 4745
v. Aycock, — Tex. Civ. App. —, 135 S. W. 198 3388, 4785
v. Bailey, 53 Tex. Civ. App. 295 4823
v. Ball, 25 Tex. Civ. App. 500 3484, 3498
v. Beasley, 106 Tex. 171 4693
v. Beasley, — Tex. Civ. App. —, 162 S. W. 950 4692

[REFERENCES ARE TO PAGES]

Missouri, etc., R. Co. v. Behee, 2 Tex. Civ. App. 107 4509
v. Belcher (Tex. Sup. Ct.), 35 S. W. 6 200
v. Belcher, 89 Tex. 428 3323, 3370, 3377
v. Belew, 22 Tex. Civ. App. 264 1505, 4730
v. Bennett's Estate, 5 Kan. App. 231 5118
v. Brown, 41 Okla. 70 3799
v. Byas, 9 Tex. Civ. App. 572 1356
v. Byrd, 40 Tex. Civ. App. 315 3452, 3471
v. Carpenter, 52 Tex. Civ. App. 585 3423, 3433
v. Cass County, 76 Neb. 396 4059, 4063
v. Cherry, 44 Tex. Civ. App. 232 1379
v. Clark, 60 Neb. 406 1093
v. Coker (Tex. Civ. App.), 163 S. W. 218 1376
v. Collins, 106 Ark. 353 4658
v. Couch (Tex. Civ. App.), 122 S. W. 67 3798, 3799, 3800, 3803, 3834
v. Crews, 54 Tex. Civ. App. 548 4178, 4181
v. Crowell L. & G. Co., 51 Neb. 203 3281
v. De Bord, 21 Tex. Civ. App. 691 3390
v. Denahy, — Tex. Civ. App. —, 165 S. W. 529 5064
v. Dickson (Tex. Civ. App.), 153 S. W. 933 90, 3473, 3485, 3519
v. Dickson, 40 Tex. Civ. App. 550 4692
v. Doyal (Tex. Civ. App.), 142 S. W. 610 1381
v. Dwyer, 36 Kan. 58 1518, 4802
v. Edling, 18 Tex. Civ. App. 171 1377
v. Edwards, 78 Tex. 307 3392
v. Elliott, 184 U. S. 530 1723
v. Evans, 16 Tex. Civ. App. 68 4928
v. Fagan, 72 Tex. 127 3387
v. Farwater, 33 Tex. Civ. App. 116 3483
v. Fesmire, — Tex. Civ. App. —, 150 S. W. 201 5041
v. Flood, 35 Tex. Civ. App. 197 4703, 4791
v. Flood (Tex. Civ. App.), 70 S. W. 331 4790
v. Foote, — Okla. —, 149 Pac. 223 187
v. Fort Scott, 15 Kan. 435 410, 2604
v. Fowler, 61 Kan. 320 4643
v. Fox, 56 Neb. 746 1422
v. Fox, 60 Neb. 531 1247
v. Fry, 79 Kan. 21 3349
v. Fry, 74 Kan. 546 3350
v. Gilbert (Tex. Civ. App.), 131 S. W. 1145 3893
v. Gilbert, 58 Tex. Civ. App. 467 3894
v. Glass, 46 Tex. Civ. App. 126 3471
v. Golson, — Tex. Civ. App. —, 133 S. W. 456 3388
v. Goode, 7 Tex. Civ. App. 245 3761
v. Graham, 12 Tex. Civ. App. 54 3847, 3879
v. Graham, — Tex. Civ. App. —, 168 S. W. 55 1472, 1476, 4752
v. Groseclose, 50 Tex. Civ. App. 525 4618, 4644, 4646, 4647
v. Groseclose (Tex. Civ. App.), 134 S. W. 736 4613, 4615, 4624
v. Hagan, 42 Tex. Civ. App. 133 4682
v. Hailey, — Tex. Civ. App. —, 156 S. W. 1119 3414, 3536
Missouri, etc., R. Co. v. Haines, 10 Kan. 439 4002
v. Hancock, 26 Okla. 254 3417
v. Hannig, 91 Tex. 347 4779
v. Harriman, — Tex. Civ. App. —, 128 S. W. 932 3334, 3388, 3418
v. Harriman Bros., 227 U. S. 657 3338, 3420
v. Harris, — Tex. Civ. App. —, 138 S. W. 1085 3322, 3387
v. Hawk (Tex. Civ. App.), 69 S. W. 1037 1482
v. Hawkins, 50 Tex. Civ. App. 128 54, 1480, 3487, 3515
v. Haynes, 1 Kan. App. 586 3777
v. Hays, 15 Neb. 224 3980, 4103
v. Hazlett, 35 Okla. 12 3343, 3364, 3370
v. Henderson (Tex. Civ. App.), 148 S. W. 822 4908, 4934, 4941
v. Hennesey, 20 Tex. Civ. App. 316 136, 138
v. Henry, 75 Tex. 220 4919
v. Hogan, 42 Tex. Civ. App. 133 323
v. Holman, 15 Tex. Civ. App. 16 4739
v. Hopkins, 52 Tex. Civ. App. 166 3367, 3404
v. Hopson, 15 Tex. Civ. App. 126 770
v. Horton, 28 Okla. 815 4768, 4769, 4770
v. Humes, 115 U. S. 512 1265
v. Hurdle (Tex. Civ. App.), 142 S. W. 992 4860
v. Interstate Chemical Co., — Tex. Civ. App. —, 169 S. W. 1120 2375
v. Jarrard, 65 Tex. 560 488, 4728
v. Jarrell, 38 Tex. Civ. App. 425 3408
v. Jenkins, 35 Tex. Civ. App. 429 3363
v. Jones, 75 Tex. 151 4816
v. Kaiser, 82 Tex. 144 3474, 3482
v. Kansas City & I. A. L., 189 Mo. 538 569
v. Kirkland, 11 Tex. Civ. App. 528 4811
v. Kirkpatrick, — Tex. Civ. App. —, 165 S. W. 500 3535
v. Kyser, 38 Tex. Civ. App. 355 3347
v. Lacy, 13 Tex. Civ. App. 391 1783
v. Larussi, 161 Fed. 66 4952
v. Lasater, 53 Tex. Civ. App. 51 4753
v. Lee, 70 Tex. 496 4921, 4925, 4932, 4933
v. Lehmberg, 75 Tex. 61 4889
v. Lenahan, 39 Okla. 283 5132
v. Lewis, 24 Neb. 848 4954
v. Lightfoot, 48 Tex. Civ. App. 120 405, 1530, 3473, 3483, 3527
v. Linton, — Tex. Civ. App. —, 109 S. W. 942 1364, 1423, 3382
v. Linton, — Tex. Civ. App. —, 126 S. W. 678 1423, 3382, 3629
v. Linton (Tex. Civ. App.), 141 S. W. 129 1471, 3381
v. Liveright, 7 Kan. App. 772 3532
v. Lycan, 57 Kan. 635 3778
v. Lyde, 57 Tex. 505 4779
v. McCormick, — Tex. Civ. App. —, 160 S. W. 429 326
v. McCutcheon, 33 Tex. Civ. App. 557 1380
v. McDowell, 78 Kan. 686 3761, 3778
v. Mackey, 33 Kan. 298 4802
v. McLaughlin, 73 Kan. 248 4913, 4944, 4945
v. McLean, 55 Tex. Civ. App. 130 3322, 3388, 3432
v. McWherter, 59 Kan. 345 425, 774

[REFERENCES ARE TO PAGES]

Missouri, etc., R. Co. v. Malone, 59 Tex. Civ. App. 254 3893
v. Malone, — Tex. Civ. App. —, 126 S. W. 936 3899
v. Maples, — Tex. Civ. App. —, 162 S. W. 426 766
v. Martino, 2 Tex. Civ. App. 634 3521, 4762, 4763
v. Merritt, 46 Tex. Civ. App. 130 3890
v. Mitchell, 47 Tex. Civ. App. 307 3528
v. Mitchell, — Tex. Civ. App. —, 166 S. W. 126 1440
v. Moffatt, 60 Kan. 113 4910
v. Mooney, — Tex. Civ. App. —, 181 S. W. 543 5065
v. Morgan (Tex. Civ. App.), 138 S. W. 216 3468, 3476, 3484, 3526
v. Morgan, — Tex. Civ. App. —, 163 S. W. 992 757
v. Murray (Tex. Civ. App.), 150 S. W. 217 3751
v. Neiser, 54 Tex. Civ. App. 460 1444, 1457, 3774
v. Nesbit, 40 Tex. Civ. App. 209 4691, 4704
v. Nesbit, 43 Tex. Civ. App. 630 4801
v. Nevin, 31 Kan. 385 3317, 3387
v. Owen, 8 Kan. 409 4093
v. Parker, 20 Tex. Civ. App. 470 4825
v. Patton (Tex. Civ. App.), 35 S. W. 477 1048
v. Perry, 46 Tex. Civ. App. 374 3840, 3879, 3905
v. Peru-Van Zandt I. Co., 73 Kan. 295 3368, 4210, 4284
v. Pettit, 54 Tex. Civ. App. 358 1442, 1457
v. Phillips, 97 Ark. 54 3780
v. Pitkin (Tex. Civ. App.), 158 S. W. 1035 1806
v. Porter, 112 Mo. 361 3963, 3964, 3997, 4006, 4020, 4031
v. Raney, 44 Tex. Civ. App. 517 56, 146, 302, 3497
v. Reasor, 28 Tex. Civ. App. 302 4734
v. Redus, 55 Tex. Civ. App. 205 4801
v. Rentz, — Tex. Civ. App. —, 162 S. W. 959 5057, 5085
v. Rich, 51 Tex. Civ. App. 312 1391, 3399
v. Richards, 8 Kan. 101 1419
v. Richardson, 57 Neb. 617 3150
v. Richmond, 73 Tex. 568 4531, 4553
v. Ricketts, 45 Kan. 617 3803
v. Rines, 37 Tex. Civ. App. 618 3389
v. Riverhead Farm, 53 Tex. Civ. App. 643 3893, 3895
v. Roe, 77 Kan. 224 4034, 4125
v. Rogers, 91 Tex. 52 108
v. Rounds (Tex. Civ. App.), 136 S. W. 269 1481
v. St. Clair, 21 Tex. Civ. App. 345 4752, 4753
v. Scammon, 41 Kan. 521 383
v. Schilling, 32 Tex. Civ. App. 417 326
v. Schmuck, 69 Kan. 272 3965, 4037
v. Schmuck, 79 Kan. 545 3963, 3967, 4125
v. Smith, 6 Ind. Terr. 99 3472, 3473, 3520
v. Smith, 98 Tex. 47 766
v. Smith, — Tex. Civ. App. —, 172 S. W. 750 4819
v. Smith, 154 Mo. 300 1724
v. Sneed, 85 Ark. 293 3337
v. Snowden, 44 Tex. Civ. App. 509 4934
v. Starr, 22 Tex. Civ. App. 353 4256
v. Stogner, — Tex. Civ. App. —, 163 S. W. 319 3477
Missouri, etc., R. Co. v. Tarwater (Tex. Civ. App.), 75 S. W. 937 3476
v. Texas Pac. R. Co., 41 Fed. 311 4658
v. Tipton, 61 Neb. 49 3774
v. Tonahill, 16 Tex. Civ. App. 625 4726
v. Trinity County L. Co., 1 Tex. Civ. App. 553 3284, 3353
v. Truskett, 2 Indian Terr. 633 3346, 3347, 3400, 3403
v. Wade, 73 Kan. 359 1493, 4662
v. Wallace, 53 Tex. Civ. App. 127 4858, 4860
v. Ward, — Tex. Civ. App. —, 169 S. W. 1035 3432
v. Ward, 111 Ark. 102 3341
v. Wasson Bros., 59 Tex. Civ. App. 239 3397
v. Weaver, 16 Kan. 456 4730
v. Webb, 20 Tex. Civ. App. 431 3342, 3387, 3428
v. Wells, 22 Tex. Civ. App. 255 3405, 3426
v. West, 38 Okla. 581 4871, 4874, 4900
v. Western Automatic Music Co., — Tex. Civ. App. —, 161 S. W. 380 3387
v. Wetz, 38 Tex. Civ. App. 563 312
v. Witherspoon (Tex. Civ. App.), 38 S. W. 833 3318
v. Witherspoon, 18 Tex. Civ. App. 615 3410
v. Word, 51 Tex. Civ. App. 206 3399
v. Wulf, 226 U. S. 570, aff'g 192 Fed. 919 5024, 5124, 5126, 5131, 5141
Mitchell v. Allen, 25 Hun 543 778
v. Baker, 208 Pa. 377 2260
v. Barry, 26 Up. Can. Q. B. 416 38
v. Billingsley, 17 Ala. 391 3779
v. Boyer, 160 App. Div. (N. Y.) 565 684
v. Bradstreet Co., 116 Mo. 226 4506, 4532
v. Branham, 104 App. 480 18
v. Brewster, 28 Ill. 163 779
v. Broadway & Seventh Ave. R. Co., 70 Hun 387 4826
v. Burch, 36 Ind. 529 4321
v. Chicago, etc., R. Co., 138 Iowa 283 3488, 4692, 4695, 4696
v. Clarke, 71 Cal. 163 1363
v. Cook, 29 Barb. 243 791, 819, 1235
v. Corbin, 91 Ala. 599 4198
v. Cornell, 44 N. Y. Super. 401 233
v. Cragg, 10 M. & W. 367 749
v. Dall, 2 H. & G. 159 419, 704, 711, 713
v. Darley Main C. Co., 14 Q. B. Div. 125 394, 402, 415, 3760
v. Davies, 51 Minn. 168 4623
v. Davis, 73 W. Va. 352 2585
v. Denbro, 3 Blackf. 259 1710
v. De Witt, 25 Tex. Supp. 180 2857
v. Doggett, 1 Fla. 371 1192
v. Donanski, 28 R. I. 94 4603
v. Dougherty, 90 Fed. 639 2684
v. Ehle, 10 Wend. 595 1481
v. Freedley, 10 Pa. 198 3692, 3696
v. Gambill, 140 Ala. 316 460, 467
v. Georgia & A. R. Co., 111 Ga. 760 4209
v. Gibson, 14 Ark. 224 1540
v. Giessendorff, 44 Ind. 358 1538
v. Gile, 12 N. H. 390 2673
v. Gregory, 1 Bibb 449 784
v. Harmony, 13 How. 115 14, 1255
v. Hawley, 79 Cal. 301 1725, 1732

[REFERENCES ARE TO PAGES]

Mitchell v. Hazen, 4 Conn. 495 2060, 2076, 2187
v. Heisen, 169 Ill. App. 531 429
v. Henderson, 63 N. C. 643 1541
v. Hewitt, 5 Sm. & M. 361 1887
v. King, 6 C. & P. 237 807, 808, 811
v. Laurens, 7 Rich. 109 1556, 1598
v. Louisville & N. R. Co., 194 Ill. App. 77 5117
v. Lyman, 77 Ill. 525 992
v. McKinnon, 65 Mich. 683 928
v. McLeod, 127 Iowa 733 4311
v. Malone, 77 Ga. 301 4842
v. Millbank, 6 T. R. 199 1532
v. Mitchell, 1 Md. 55 3692
v. Mitchell, 54 Minn. 301 4162
v. Moore, 87 Ark. 166 531
v. Murphy, 131 La. 1040 4624
v. Oldfield, 4 T. R. 123 580, 590
v. Pickney, 127 Iowa 696 2447
v. Pillsbury, 5 Wis. 407 2147
v. Porter, 3 Blackf. 499 1555
v. Printup, 68 Ga. 675 656
v. Read, 84 N. Y. 556 255, 2328
v. Roberts, 17 Fed. 776 826, 827
v. Rochester R. Co., 151 N. Y. 107 80, 91, 165, 344, 3642, 4686, 4688
v. St. Paul German F. Ins. Co., 92 Mich. 594 3044, 3057
v. Silver Lake Lodge, 29 Ore. 294 4606, 4608
v. Southwestern R., 75 Ga. 398 4608
v. Spurrier L. Co., 31 Okla. 834 2663, 2669
v. Stanley, 44 Conn. 312 2182
v. Sullian, 30 Kan. 231 1715
v. Tacoma R. M. Co., 13 Wash. 560 4825
v. Thorne, 134 N. Y. 536 1356
v. Thornton, 21 Gratt. 164 4110, 4119
v. Toale, 25 S. C. 238 2564
v. Union L. Ins. Co., 45 Me. 104 3071
v. United R. Co., 125 Mo. App. 1 460, 467, 1280, 1506
v. United States Exp. Co., 46 Iowa 214 3385
v. Vermont C. M. Co., 67 N. Y. 280 801
v. Vogt Mach. Co., 3 Ga. App. 542 291, 1835, 3189, 3192, 3196
v. Waring, 4 J. J. Marsh 233 1890
v. Warner, 5 Conn. 497 2056, 2058, 2092, 2094, 2146, 2148
v. Weir, 19 App. Div. (N. Y.) 183 3433
v. Weir, 45 N. Y. Supp. 1085 3343, 3345
v. West (Iowa), 93 N. W. 380 3882
v. Western U. Tel. Co., 5 Tex. Civ. App. 527 3604
v. Western U. Tel. Co., 12 Tex. Civ. App. 262 118, 3573, 3584
v. Wheeler, 122 Iowa 368 727, 2793
v. White Plains, 91 Hun 189 3746
v. Williamson, 6 Md. 210 2814
Mitchell C. & C. Co. v. Pennsylvania R. Co., 181 Fed. 403 3312
Mitchell-Taylor Tie Co. v. Whitaker, 158 Ky. 651 2235
Mitchell & McNeeley v. Davis, 73 W. Va. 403 931
Mitchell, etc., Co. v. Beeson, 47 Wash. 648 2778
Mitcher v. Rochester R. Co., 151 N. Y. 101, rev'g 77 Hun 607 77
Mitchiner v. Western U. Tel. Co., 75 S. C. 182 3613
Mitchinson v. Western U. Tel. Co., 75 S. C. 182 3654
Mitchum v. Stanton, 49 Cal. 302 1663
Mithen v. Jeffery, 174 Ill. App. 602 4808
Mix v. Boland Co., 153 App. Div. (N. Y.) 435 4423
v. Hamburg-A. S. Co., 85 App. Div. (N. Y.) 475 4911
v. Kepner, 81 Mo. 93 4190, 4327, 4351, 4352
v. La Fayette, etc., R. Co., 67 Ill. 319 3964, 4124
v. McCoy, 22 Mo. App. 488 468, 4588
v. Madison Ins. Co., 11 Ind. 117 1170, 1879
v. Miller, 57 Cal. 356 1095
v. North American Co., 12 Pa. Dist. 446 4521, 4524, 4548
v. Singleton, 86 Ill. 194 1788
v. State Bank, 13 Ind. 521 1152
v. Woodward, 12 Conn. 262 4517
Mixer v. Coburn, 11 Metc. (Mass.) 561 533, 2373
v. Howarth, 21 Pick. 205 2228
Mixon v. Coffield, 2 Ired. 301 3131
v. Miles, 92 Tex. 318 4421, 4422
Mizak v. Carborundum Co., 132 N. Y. Supp. 1104 1465
Mize v. Glenn, 38 Mo. App. 98 35, 38,
v. Jackson, 17 Ky. L. Rep. 750 1398, 1404
v. Rocky Mountain Bell Tel. Co., 38 Mont. 521 56, 143, 4873
Mizell v. McDonald, 25 Ark. 38 1404
Moakley v. Riggs, 19 Johns. 69 2787
Moale v. Baltimore, 5 Md. 314 4097
Moberly v. Alexander, 19 Iowa 162 532, 3260, 4420
v. Preston, 8 Mo. 466 4577
Mobila, The, 147 Fed. 882 1442, 4994
Mobile Auto Co. v. R. W. Sturges & Co., — Miss. —, 66 So. 205 2309, 2393
Mobile F. Com. Co. v. Little, 108 Ala. 399 1685, 1699
Mobile L. & P. Co. v. Walsh, 146 Ala. 295 4717
Mobile R. Co. v. Gilmer, 85 Ala. 422 2619
Mobile, etc., R. Co. v. Ashcraft, 48 Ala. 15 1269, 1312
v. Bay Shore L. Co., 165 Ala. 610 3425
v. Carpenter, 104 Miss. 706 1474
v. George, 94 Ala. 199 4657, 4690
v. Gilmer, 85 Ala. 422 389, 1961, 2605
v. Greenwald, 104 Miss. 426 1523
v. Hester, 122 Ala. 249 3965, 3977
v. Holliday, 79 Miss. 294 1460
v. Jurey, 111 U. S. 584 1093, 3389, 3403, 3424
v. Kranfield, 92 Miss. 494 3528
v. Moerlein B. Co., 146 Ala. 404 129
v. Moreland, 104 Miss. 312 3501
v. Postal Tel. C. Co., 76 Misc. 731 4067
v. Postal Tel. C. Co., 120 Ala. 21 4067
v. Ridley, 114 Tenn. 727 149
v. Riley, 119 Ala. 260 3965
v. Robbins C. Co., 94 Miss. 351 3436
v. Seals, 100 Ala. 368 1332, 1343
v. Smith, 153 Ala. 127 1276
v. Watly, 69 Miss. 145 4862, 4931
Mobley v. Davega, 16 S. C. 73 961
v. Lott, 127 Ga. 572 1981, 1989
Mocerf v. Stirman, 16 Ky. L. Rep. 587 1693, 1694
Mockbee v. Gardner, 2 Harr. & G. 176 2381, 2382
Modawell v. Hudson, 80 Ala. 265 1652
Mode v. Penland, 93 N. C. 292 449
Modern v. Superintendents of Poor of Van Buren County, 183 Mich. 120 1502

[REFERENCES ARE TO PAGES]

Modern S. S. Co. v. English C. Co., 129 Wis. 31 2642, 2643, 2686
v. Van Buren County, 126 Iowa 606 536, 538, 2589, 2601
Modern Woodmen Acc. Ass'n v. Shryock, 54 Neb. 250 3081
Modesto Creamery v. Stanilaus Creamery Co., 168 Cal. 289 4488
Moe v. Chesrown, 54 Minn. 118 33
Moellering v. Evans, 121 Ind. 195 3762, 3913, 3916, 3917
Moellman v. Gieze-H. L. Co., 134 Mo. App. 485 4705, 4731
Moers v. Michigan United R. Co., 158 Mich. 659 4769
Moet v. Couston, 33 Beav. 578 4490
Moffat v. City & County of Denver, 57 Colo. 473 4057
v. Davitt, 200 Mass. 452 2236, 2240, 2301
v. Denver, — Colo. —, 143 Pac. 577 3975
v. Strong, 9 Bosw. 57 3124, 3125
Moffatt v. Fisher, 47 Iowa 473 4626
Moffatt C. Co. v. Union Pac. R. Co., 113 Mo. App. 544 139
Moffett v. Baltimore & O. R. Co., 220 Fed. 39 5093, 5094, 5107, 5121, 5128
v. Trent, 66 N. J. Eq. 143 3722
Moffitt v. Garrett, 23 Okla. 398 1712
v. Hereford, 132 Mo. 513 1458
Moffitt-W. D. Co. v. Byrd, 92 Fed. 290, rev'g 1 Ind. Ty. 612 2275, 2299, 2341, 2347
Moggridge v. Jones, 14 East 486 1951
Mogollon G. & C. Co. v. Stout, 14 N. M. 245 313, 3774, 3898
Mogul S. Co. v. McGregor, 21 Q. B. Div. 544, 23 Q. B. 598, 17 App. Cas. 25 3280
Mohawk, The, 8 Wall. 153 3294, 3297
Mohawk Bank v. Broderick, 10 Wend. 304 671
Mohelsky v. Hartmeister, 68 Mo. App. 318 4966, 4970
Mohlen's App., 5 Pa. 418 733
Mohn v. Stoner, 14 Iowa 115, 11 Iowa 30 816, 825, 1229
Mohr v. Williams, 95 Minn. 261 3, 1494
Mohr H. Co. v. Dubey, 136 Mich. 677 2236
Mohry v. Hoffman, 86 Pa. 358 4960
Moies v. Bird, 11 Mass. 436 2769
Moilanen v. Washington I. Co., 176 Mich. 505 4851
Molby v. Johnson, 17 Mich. 382 537
Molecek v. Tower Grove R. Co., 57 Mo. 17 1269
Moline S. Co. v. Beed, 52 Iowa 307 2264
Moline W. P. Co. v. Waters, 10 Ill. App. 159 1363
Moline W. P. & Mfg. Co. v. Nichols, 26 Ill. 90 2474
Moliter v. Wabash R. Co., 180 Mo. App. 84 5066, 5125
Moll v. Sanitary Dist., 228 Ill. 633 4102, 4150, 4153
v. Sanitary Dist., 131 Ill. App. 155 1238, 4156
Mollie Gibson Con. M. M. Co. v. Sharp, 5 Colo. App. 321 4939
Mollie Mohler, The, 2 Biss. 505 3385
Momence S. Co. v. Grove, 100 Ill. App. 98 4802
Momsen v. Atkins, 105 Wis. 557 1016
v. Noyes, 105 Wis. 565 2830, 2831
Monad Engineering Co. v. Stewart, 2 Boyce (Del.) 35 2346
Monaghan v. Cox, 155 Mass. 487 4648
Monaghan v. Northwestern F. Co., 140 Wis. 457 4746, 4809
Monahan v. Colgin, 4 Watts 436 2068
v. Fitzgerald, 164 Ill. 525 2606
v. Smith, 19 Ohio St. 384 2159
Monarch Mfg. Co. v. Omaha, etc., R. Co., 127 Iowa 511 3941
Mondamin Meadows D. Co. v. Brudi, 163 Ind. 642 863, 889
Mondel v. Steel, 8 M. & W. 858 494, 516, 546, 1847, 2271
Mondon v. Western U. Tel. Co., 96 Ga. 499 3593
Mondou v. New York, etc., R. Co., 223 U. S. 1, rev'g 82 Conn. 373 4852, 5022, 5024, 5116
Monell v. Burns, 4 Denio 121 2525, 2544
v. Colden, 13 Johns. 395 4392
Moneys, etc., In re, 170 Fed. 470 2732
Moneyweight Scale Co. v. David, 180 Mich. 8 1502
v. McCormick, 109 Md. 170 1380, 4633, 4635, 4637, 4647
Monitor Mut. F. Ins. Co. v. Buffum, 115 Mass. 343 3415
Monize v. Begaso, 190 Mass. 87 4742
Monk v. Beal, 2 Allen 585 2743
v. Cooper, 2 Ld. Raym. 1477 3138
v. Huskinson, 4 Russ. Ch. 122 1026
v. Packard, 71 Me. 309 3847
Monmouth Park Ass'n v. Wallis I. Works, 55 N. J. L. 132 861, 862, 869, 886, 893
Monnet v. Merz, 127 N. Y. 151 2961, 2970, 2978
Monnett v. Potts, 10 Ind. App. 191 3117
v. Sturges, 25 Ohio St. 384 962
Monnier v. New York Cent. & H. R. Co., 70 App. Div. (N. Y.) 405 3465, 3475
Monongahela N. Co. v. United States, 148 U. S. 312 4108, 4118
Monongahela River Con. C. & C. Co. v. Hardsaw, 169 Ind. 147 4778, 4832
v. Schinnerer, 196 Fed. 375 4990
Monongahela W. Co., In re, 223 Pa. 323 3959, 4080
Monroe v. Anderson, 58 Fed. 398 4436
v. Atlanta, 70 Ga. 611 4111
v. Chaldeck, 78 Ill. 429 821
v. City of Woburn, 220 Mass. 116 4149
v. Connecticut River L. Co., 68 N. H. 89 313
v. Fohl, 72 Cal. 568 739
v. Lattin, 25 Kan. 351 313
v. Taylor, 8 Hare 51 1026
Monson v. Meyer, 93 Ill. App. 94, aff'd 190 Ill. 105 741
v. Meyer, 190 Ill. 105, aff'g 92 Ill. App. 127 705, 740
v. Rouse, 86 Mo. App. 97 4839
Monson & B. Mfg. Co. v. Fuller, 15 Pick 554 3750
Montague v. Aggarn, 164 Ill. App. 596 1102
v. Hanson, 38 Mont. 376 4726
v. Stelts, 37 S. C. 200 677, 722, 1926
Montana C. & C. Co. v. Cincinnati C. & C. Co., 69 Ohio 351 1905
Montana M. Co. v. St. Louis M. & M. Co., 183 Fed. 51 4210, 4225
Montana R. Co. v. Freeser, 29 Mont. 210 3970, 4003, 4014, 4025
v. Warren, 6 Mont. 275, 12 Pac. 641 4033, 4036, 4132
Montclair R. Co. v. Benson, 36 N. J. L. 557 4097
Monte Alegro, The, 9 Wheat. 616 2382

[REFERENCES ARE TO PAGES]

Monteflore v. Lloyd, 15 C. B. (N. S.) 203 2767
Monteflori v. Monteflori, 1 Wm. Black. 363 4373
Monteith v. Merchants' D. Co., 1 Ont. 47, 9 Ont. App. 282 3326, 3352, 3361, 3366
v. Parker, 36 Ore. 170 622, 1044
Monteleone v. Royal Ins. Co., 47 La. Ann. 1563 3013
Montelius v. Atherton, 6 Colo. 224 1431, 2328
Montenegro-Riehm Music Co. v. Beuris, 160 Ky. 557 4213
Montesano v. Blair, 12 Wash. 188 224
Montezuma County v. Wheeler, 39 Colo. 207 1040
Montgomerie v. Ivers, 17 Johns. 38 2972
Montgomerie's B. Co. v. Blyth, 26 Vict. L. R. 612 4254, 4365
Montgomery v. Arkansas C. S. & I. Co., 93 Ark. 191 314
v. Boucher, 14 Up. Can. C. P. 45 962, 964
v. Deeley, 3 Wis. 709 4502
v. Gilbert, 24 Mont. 121 1722
v. Glasscock (Ky.), 121 S. W. 668 1365, 1368
v. Hanover Nat. Bank, 79 Miss. 443 1358
v. Hunt, 99 Ga. 499 1825
v. Knox, 23 Fla. 595 4506, 4543, 4576
v. Lansing City R. Co., 103 Mich. 46 1376, 4683
v. Lindsay, 44 Pa. Super. Ct. 516 2970
v. Locke, 72 Cal. 75 3779
v. Maddox, 89 Ala. 181 3953
v. Page, 29 Ore. 320 2856
v. Schenck, 82 Hun 24 673
v. Scott, 34 Wis. 338 4742
v. Seaboard A. L. R., 73 S. C. 503 4722
v. Shirley, 159 Ala. 239 763, 1522, 4735
v. Somers, 50 Ore. 259 1430
v. Southern Pac. R. Co., 64 Ore. 597 5048, 5067
v. The T. P. Leathers, 1 Newb. 421 2722, 2724, 2734
v. Townsend, 80 Ala. 489 3953, 3955, 4018
v. Townsend, 84 Ala. 478 3955
v. Western U. Tel. Co., 50 Mo. App. 591 3555
v. Wilson, 48 Vt. 616 486, 4201
Montgomery County v. Schuylkill B. Co., 110 Pa. 54 4071, 4077
Montgomery County Agricultural Soc. v. Harwood, 126 Ind. 440 2305, 2328, 3211
Montgomery County Bank v. Albany City Bank, 7 N. Y. 459 2929
Montgomery D. & S. Co. v. Atlantic L. Co., 206 Mass. 144 2876, 2885, 4383, 4389
Montgomery I. Works Co. v. Capital City Ins. Co., 162 Ala. 420 1250
Montgomery Light & Traction Co. v. King, 187 Ala. 619 1499
v. Riverside Co., 8 Ala. App. 509 1278
Montgomery-Moore Mfg. Co. v. Leith, 162 Ala. 246 1444
Montgomery St. R. Co. v. Hastings, 138 Ala. 432 1433, 1434, 4170, 4187
v. Smith, 146 Ala. 316 4737
Montgomery T. Co. v. Knable, 158 Ala. 458 1482, 1493, 1502, 4794, 4802
Montgomery, etc., R. Co. v. Culver, 75 Ala. 587 3529
v. Mallette, 92 Ala. 209 334, 4657, 4676, 4729, 4794
v. Varner, 19 Ala. 185 1431
Monticello, The, 81 Fed. 211 2730
Monticello, The v. Mollison, 17 How. 152 5014
Montieth v. Parker, 36 Ore. 170 635
Montignam v. E. V. Crandall Co., 34 App. Div. (N. Y.) 228 4228, 4267
Montmorency Road v. Rock, 41 Ind. 264 4025
v. Stockton, 43 Ind. 328 399
Montreal St. R. Co. v. Boudreau, 36 Can. Sup. Ct. 329 3874
Montriou v. Jefferys, 2 C. & P. 113 2577
Montross v. Alexander, 152 Mich. 513 59, 4778
v. Eddy, 94 Mich. 100 2513
Monts v. Witmer, 3 Gill & J. 118 1391
Monture v. Regling, 140 Wis. 407 1448
Montville v. Haughton, 7 Conn. 543 1559
Monument Bank v. Globe Works, 101 Mass. 57 1331, 1332
Mood v. Western U. Tel. Co., 40 S. C. 524 1363
Moody, In re, [1895] 1 Ch. 101 1084
Moody v. Baker, 5 Cow. 351 156, 4562
v. Caulk, 14 Fla. 50 4240
v. Drown, 58 N. H. 45 4275
v. Keener, 7 Port. 218 26
v. Leavitt, 2 N. H. 171 658
v. Leverich, 14 Abb. Pr. (N. S.) 145 2568
v. McClelland, 39 Ala. 45 3916
v. McDonald, 4 Cal. 297 1282, 1338
v. McTaggart, 29 Pa. Super. 465 2248
v. Mahurin, 4 N. H. 296 790
v. Osgood, 50 Barb. 628, 60 Barb. 644 4737, 4779
v. Pierano, 4 Cal. App. 411 1353
v. Rowland, 46 Tex. Civ. App. 412 2394
v. Sindlinger, — Colo. —, 149 Pac. 263 476
v. State, 84 Ind. 433 1643, 1653
v. Whitney, 34 Me. 563 362, 363, 364, 365
v. Whitney, 38 Me. 174 3788, 3790, 4259, 4262, 4263
Moon v. Interurban St. R. Co. (N. Y. Misc.), 85 Supp. 363 1258
v. Martin, 122 Ind. 211 757
v. Raphael, 2 Bing. N. C. 310 4266
v. St. Louis T. Co., 247 Mo. 227 4724
v. Story, 2 B. Mon. 354 1710, 1711
Moone v. Smith, 6 Ga. App. 649 156
Mooney v. Chicago, 239 Ill. 414 424, 4854, 5118
v. Hudson River R. Co., 1 Sweeny 325 1501
v. Kennett, 19 Mo. 551 1529
v. Union Pac. R. Co., 60 Iowa 346 4953
v. York I. Co., 82 Mich. 263 2463
Moore, Ex parte, 2 Bro. Ch. 597 1901
Moore v. Aldrich, 25 Tex. Sup. 276 4211
v. Anderson, 30 Tex. 224 857
v. Appleton, 26 Ala. 633 432
v. Atchison, etc., R. Co., 26 Okla. 682 1338, 3512, 3513
v. Atlantic C. L. R. Co., 85 S. C. 19 3323
v. Baird, 30 Pa. 138 1823
v. Baylis, 56 Hun 647 3824
v. Beaman, 112 N. C. 558 979
v. Beck, 71 N. J. L. 7 4543
v. Beiseker, 147 Fed. 367 820, 1968

[REFERENCES ARE TO PAGES]

Moore v. Bevier, 60 Minn. 240 692, 693
v. Board of Regents, 215 Mo. 705, 930. 2668. 2687
v. Bowmaker, 7 Taunt. 97 1654
v. Bowman, 47 N. H. 494 361
v. Brown, 46 Tex. Civ. App. 523 802, 2025
v. Burchfield, 1 Heisk. 203 1495
v. Camden & T. R. Co., 74 N. J. L. 498 2, 1332
v. Carter, 146 Pa. 492 2656, 2682
v. Caruthers, 17 B. Mon. 669 537
v. Central R., 47 Iowa 688 334, 4720
v. Chattanooga E. R. Co., 119 Tenn. 710 432
v. Clay, 24 Ala. 235 468
v. Colt, 127 Pa. 289 848, 860, 918, 922
v. Cord, 14 Wis. 213 1236
v. Crose, 43 Ind. 30 3827
v. Cross, 17 How. Pr. 385 1853
v. Cummings, 87 S. C. 166 3827
v. Davidson, 18 Ala. 209 1146, 1878
v. Drinkwater, 1 F. & F. 144 4161
v. Duke, 84 Vt. 401 1281, 1291, 1326, 1328, 3737, 3821, 3826
v. Durnam, 63 N. J. Eq. 96 835
v. Durnan, 70 N. J. Eq. 1 1058
v. Eillis, 89 Wis. 108 1448
v. Ellsworth, 3 Conn. 483 1956
v. Fenwick, 1 Gilmer 214 1555
v. Fisher, 117 Minn. 339 1267, 4668
v. Fitchburg R. Co., 4 Gray 465 1347, 3512
v. Fleming, 34 Ala. 491 2309, 2329, 2331
v. Folsom, 14 Minn. 340 2781
v. Frankenfield, 25 Minn. 540 2126
v. Fredericks, 24 Cal. App. 536 50, 1985
v. Frowd, 3 Myl. & Cr. 45 2471
v. Fryman, 154 Iowa 543 432, 4389
v. Fuller, 2 Jones 205 1199
v. Gray, 22 La. Ann. 289 730, 737
v. Gray, 26 Ohio St. 525 2814
v. Hall, 3 Q. B. Div. 178 3885
v. Hallum, 1 Lea 511 1753, 1763
v. Harton, 1 Port. 15 1719, 1758
v. Harvey, 50 Vt. 297 3107
v. Holland, 16 S. C. 15 1048
v. Hopkins, 83 Cal. 270 3674
v. Horne, 153 N. C. 413 57, 1287
v. Hudson River R. Co., 12 Barb. 156 2333
v. Hylton, 1 Dev. Eq. 433 870, 998
v. Irwin, 89 Ark. 289 2502
v. Juvenal, 92 Pa. 484 384
v. Kalamazoo, 109 Mich. 176 4691, 4708. 4785
v. Kelley, — Tex. Civ. App. —, 162 S. W. 1034 2511
v. Kiff, 78 Pa. 96 739
v. Kime, 43 Neb. 517 786
v. King, 57 Hun 224 2380, 2431
v. Kline, 26 Colo. App. 334 840, 860, 861, 2585, 2602
v. Koger, 113 Mo. App. 423 2374
v. Kopner, 7 Neb. 291 4350
v. Kopplin (Tex. Civ. App.), 135 S. W. 1033 3936
v. Lachmund, 59 Ore. 565 1746, 1749, 1750
v. Lancaster, 212 Pa. 642 4095
v. Lanier, 52 Fla. 353 111, 152
v. Lassiter, 16 Lea 630 1786
v. Leader P. Co., 8 Pa. Super. Ct. 152 4508
v. Lindsay, 31 Tex. Civ. App. 613 1601
Moore v. Linneman, 143 Ky. 231 34, 39, 1354
v. Logan, 5 Up. Can. C. P. 294 2231
v. Love, 3 Jones 215 411, 414
v. Lowrey, 74 Miss. 413 2878
v. McKie, 5 Sm. & M. 238 2066
v. McNairy, 1 Dev. 319 509
v. Manchester Liners, Ltd., [1910] App. Cas. 498 5187
v. Mandlebaum, 8 Mich. 433 2903
v. Mank, 3 Ill. App. 114 4575
v. Maxey, 152 Ill. App. 647 1324, 4538, 4542, 4567
v. Meagher, 1 Taunt. 39 4554, 4556
v. Metropolitan St. R. Co., 84 App. Div. (N. Y.) 613 4186, 4187
v. Moberly, 7 B. Mon. 299 2867
v. Moore, 4 Hawks 358 2855, 2866
v. Moore, 5 N. Y. 256 2903
v. Moore, 25 Beav. 8 496, 1619
v. Moore, 165 Pa. 464 1070
v. Moore's Estate, 35 Vt. 98 5101
v. Morris, 20 Ill. 255 596, 1891
v. Mountcastle, 72 Mo. 605 292, 2569
v. New York, 4 Sandf. 456 3716
v. New York E. R. Co., 24 Abb. New Cas. 7 1484
v. New York E. R. Co., 130 N. Y. 523 4084
v. Norman, 52 Minn. 83 635, 807, 811
v. Orr, 10 Ind. App. 89 2464
v. Patton, Donegon & Co., 2 Port. 451 1052, 1101
v. Pendergrast, 6 J. J. Marsh. 534 1061
v. Peterson, 64 Iowa 423 2821
v. Platte County, 8 Mo. 467 918
v. Potter, 155 N. Y. 481 2243, 2244, 2247
v. Pullen, 116 N. C. 284 1079
v. Pye, 10 Kan. 247 1594
v. Rawson, 185 Mass. 264 285, 1459
v. Recek, 163 Ill. 17 4375
v. Remington, 34 Barb. 427 2970
v. Ryder, 65 N. Y. 438 1822
v. St. Louis, etc., R. Co., 117 Mo. App. 384 1357
v. St. Louis, etc., R. Co. (Tex. Civ. App.), 146 S. W. 1070 1442
v. St. Louis T. Co., 226 Mo. 689 1364
v. Schultz, 31 Md. 418 1693, 4159
v. Smith, 6 Ga. App. 647, 7 Ga. App. 675 19
v. Stadden, Wright 88 627
v. Staser, 6 Ind. App. 364 1917
v. Steljes, 69 Fed. 518 3250
v. Taylor, 42 Hun 45 2688
v. Texas, 1 Tex. 563 1357
v. Topliff, 107 Ill. 241 2841
v. Townsend, 76 Minn. 64 144, 3936
v. Tracy, 7 Wend. 229 1360
v. United States, 17 Ct. of Cls. 17 2704
v. United States F. & G. Co., 52 Tex. Civ. App. 286 1690, 1696
v. Vail, 17 Ill. 185 2096
v. Voughton, 1 Stark. 487 1013
v. Wabash R. Co., 157 Mo. App. 53 4755, 4756
v. Williams, 115 N. Y. 586 2029, 2195
v. Wood, 12 Abb. Pr. 393 4231
Moore F. Co. v. Sloane, 166 Ill. 457, aff'g 64 Ill. App. 581 2393, 2404
Moore S. Co. v. Boston I. Co., 210 Mass. 364 55, 213
Moore's Est., 228 Pa. 516 1075
Moore's Est., 211 Pa. 348 1128

[REFERENCES ARE TO PAGES]

Moorehead v. Davis, 92 Ind. 303 2396
v. Hyde, 38 Iowa 382 368, 2309, 2326
v. West Branch Bank, 3 W. & S. 550 703, 705, 711
Moorer v. Andrews, 39 S. C. 427 1744
v. Wait, 3 Wend. 104 2037
Moorman v. Parkerson, 131 La. 204 2322
Moorsom v. Bell, 2 Camp. 616 3307
Moose v. Marks, 116 N. C. 785 705
Moot v. Business Men's Ass'n, 157 N. Y. 201 1954
Moragne v. Moragne, 143 Ala. 459 3700
Morales v. San Juan L. & T. Co., 4 Porto Rico Fed. 361 4862, 4923
Moran v. Abbey, 58 Cal. 167 637
v. Abbey, 63 Cal. 56 637
v. Central R. Co. of New Jersey, — N. J. L. —, 96 Atl. 1023 5040
v. Dake D. Co. (Misc.), 134 N. Y. Supp. 995 4743
v. Dawes, Hopk. Ch. 365 4428, 4429
v. Hagerman, 69 Fed. 427 1050
v. Hollings, 125 Mass. 93 350
v. New York City R. Co., (Misc.) 94 N. Y. Supp. 302 4706, 4713
v. Standard Oil Co., 211 N. Y. 187 2452
Moran B. & N. Mfg. Co. v. Midland Valley R. Co., 120 Mo. App. 626 3425
Moran Mfg. & C. Co. v. St. Paul, 65 Minn. 300 1044
Morange v. Edwards, 1 E. D. Smith 414 1712
Moravec v. Grell, 78 App. Div. (N. Y.) 146 4267
Moravia v. Levy, 2 D. & E. 483n 658
Morbeck v. State, 28 Ind. 86 1578
v. State, 22 Ind. 128 1579
More v. Arnfield, 15 Pa. Super. Ct. 140 2597
v. Bonnet, 40 Cal. 251 2540, 2543
v. Burger, 15 N. D. 345 4222
v. Devoe, 22 Hun 208 3107
v. Howland, 4 Denio 264 2768
v. Knox, 52 App. Div. (N. Y.) 145 259, 265
v. Rand, 60 N. Y. 208 533
v. Shepard, 133 App. Div. (N. Y.) 471 2472
Morehead v. Anderson, 125 Ky. 77 1446, 2485
v. Citizens' D. Bank, 130 Ky. 414 2781, 2782, 2793
Morehouse v. Baker, 48 Mich. 335 532
v. Comstock, 42 Wis. 626 2371, 2376
v. Mathews, 2 N. Y. 514 1420, 1431
v. Northrop, 33 Conn. 380 696
Moreland v. Lawrence, 23 Minn. 84 958
v. Metz, 24 W. Va. 119 2098, 2113, 2186
Moreley v. Dunbar, 24 Wis. 183 412, 464
Morenus v. Crawford, 15 Hun 45 448
v. Crawford, 51 Hun 89 60
Moret v. Mason, 106 Mich. 340 4256
Morethouse v. Bradley, 80 Conn. 611 2667
Morey v. Hoyt, 62 Conn. 542 4312
v. Morning Journal Ass'n, 123 N. Y. 207 4507, 4524, 4574, 4587
Morford v. Ambrose, 3 J. J. Marsh. 688 1107, 2525, 2664
v. Mastin, 6 T. B. Mon. 609 2667
Morgan v. Albert Lea, 129 Minn. 59 3771, 3961, 3969, 3974, 3982
v. Barnhill, 118 Fed. 24 1311, 4529, 4868
v. Bell, 3 Wash. 554 1986, 1997
v. Bell, 41 Kan. 345 1486
Morgan v. Bennett, 44 App. Div. (N. Y.) 323 4591
v. Bliss, 2 Mass. 111 118
v. Boyer, 39 Ohio St. 324 2749
v. Brach, 104 Minn. 247 423
v. Bross, 64 Ore. 63 126, 4835
v. Butterfield, 3 Mich. 615 782
v. Chester, 4 Conn. 387 436
v. Curley, 142 Mass. 107 4668, 4690
v. Dallas County, 103 Iowa 57 4739
v. Duffy, 94 Tenn. 686 4605, 4637, 4646
v. Fallenstein, 27 Ill. 31 1858
v. Gamble, 230 Pa. 165 2596
v. Gilbert, 2 Flip. 645, 2 Fed. 835 3838
v. Griffith, 7 Mod. 380 1655
v. Haley, 107 Va. 331 2095, 2097, 2131, 2136, 2143
v. Hannas, 13 Abb. Pr. (N. S.) 361 2471
v. Hardy, 17 Q. B. Div. 770 3163
v. Hart, 9 B. Mon. 79 1542, 1548
v. Hefler, 68 Me. 131 284
v. Hendrie, 34 Colo. 25 2395
v. Hodge, 145 Wis. 143 4364, 4369, 4375
v. Insurance Co., 4 Dall. 455 3299
v. Jones, 8 Ex. 620 961
v. Kendall, 124 Ind. 454 4664, 4682, 4748
v. Kidder, 55 Vt. 367 484, 4296
v. Kiser, 105 Ga. 104 1926
v. Langford, 126 Ga. 58 559, 1267
v. Lexington Herald Co., 138 Ky. 637 40, 4576
v. Lingen, 8 L. T. Rep. (N. S.) 800 4532
v. Long, 29 Iowa 434 1581
v. McCaslin, 114 Ill. App. 427 2555
v. McKee, 77 Pa. 228 376
v. Mason, 4 E. D. Smith 636 2506
v. Michigan A. L. R. Co., 57 Mich. 430 739
v. Negley, 53 Pa. 153 1748
v. New Orleans, etc., R., 2 Woods 244 1147
v. Oronogo Circle M. Co., 160 Mo. App. 99 4870
v. Powell, 3 Q. B. 278 364, 2036, 3786, 3790, 4259
v. Price, 4 Ex. 615 3009
v. Reynolds, 1 Mont. 163 4311, 4314
v. Richardson, 1 Camp. 40n 557, 1835
v. Ross, 74 Mo. 318 4964, 4969, 4972
v. Russell (1909), 1 K. B. 357 1979
v. St. Louis, etc., R. Co., 106 Ark. 74 2460
v. Smith, 5 Hun 220 547, 3258, 3261
v. Smith, 11 Ill. 194 1843, 1845, 1846, 2148, 2198
v. Smith, 70 N. Y. 537 2823, 2868
v. Southern Pac. Co., 95 Cal. 501 4657, 4704, 4795, 4825, 4864, 4929
v. Stearns, 40 Cal. 434 1989
v. Sutlive, 148 Iowa 318 231, 239
v. Tarbell, 28 Vt. 498 724, 737
v. Thompson, 72 N. J. L. 244 1824
v. United States, 169 Fed. 242 3789, 3792
v. United States Ins. Co., 1 Wheat. 219 3022
v. Varick, 8 Wend. 587 3692, 3695
v. Yarborough, 5 La. Ann. 316 3686
Morgan Co. v. Selman, 6 Ga. 440 1784
Morgan Park v. Gahan, 136 Ill. App. 515 888
Morgan's App., 39 Mich. 675 4053
Morgantown Mfg. & Trading Co. v. Andrews, 165 N. C. 285 2745

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Moriarty v. Galt, 23 Ill. App. 213 1728
v. Porter, 22 N. Y. Misc. 536 180
Morin v. Ottawa E. R. Co., 18 Ont. L. R. 209 335, 1498, 4652
v. St. Paul, etc., R. Co., 30 Minn. 100 4086, 4093, 4101
Morisette v. Howard, 62 Kan. 463 4334
Morison v. American Tel. & T. Co., 155 App. Div. (N. Y.) 744 3775
Moritz v. Herskovitz, 46 Wash. 192 2250
Morley v. Bird, 3 Ves. 631 756
v. Gaisford, 2 H. Black. 442 3508
v. Lake Shore, etc., R. Co., 146 U. S. 168 1047
v. Metamora, 78 Ill. 394 1586
v. Roach, 116 Ill. App. 534 4210
v. St. Joseph, 112 Mo. App. 671 1238
Morning Journal Ass'n v. Duke, 128 Fed. 657 4529, 4530, 4545, 4574, 4587
v. Rutherford, 51 Fed. 513 4544
Morning Union Co. v. Butler, 151 Fed. 188 4510
Mornyer v. Cooper, 35 Iowa 257 1818
Moroney v. Hellings, 110 Cal. 219 3263
Morrell v. Ins. Co., 33 N. Y. 429 3068
v. Irving F. Ins. Co., 33 N. Y. 429 2590, 3068
v. Lawrence, 203 Mo. 363 2463, 2480
v. Long Island R. Co., 15 Daly 127 2590
v. Sylvester, 1 Me. 248 1559
v. Trenton F. & L. Ins. Co., 10 Cush. 282 3071
Morrill, In re, 2 Sawyer 356 2843
Morrill v. Aden, 19 Vt. 505 1826, 1827
v. Baggott, 157 Ill. 240 748
v. Blackman, 42 Conn. 324 4377
v. Daniel, 47 Ark. 316 1669
v. Hoyt, 83 Tex. 59 1920
v. Morrill, 53 Vt. 74 2867
v. Palmer, 68 Vt. 1 4374
v. Wallace, 9 N. H. 111 2388
v. Weeks, 70 N. H. 178 273, 869, 877, 1076
Morrin v. Manning, 205 Mass. 205 4207
Morris, Ex parte, 9 Wall. 605 1542
Morris v. Allen, 14 N. J. Eq. 44 1019, 1071, 1073
v. Allen, 17 Cal. App. 684 1363, 4351
v. Anderson, — Tex. Civ. App. —, 52 S. W. 677 1662, 1671, 4318
v. Baird, 72 W. Va. 1 962
v. Baker, 5 Wis. 389 4356
v. Barker, 4 Harr. 520 470, 4525, 4576
v. Barrett, 24 Ohio St. 201 2774
v. Bell County, 20 Ky. L. Rep. 1912 1042
v. Bradley, 20 N. D. 646 2913
v. Buckley, 11 S. & R. 168 2206
v. Carr, 77 Ark. 228 1058
v. Chicago B. & Q. R. Co., 45 Iowa 29 3081
v. Chicago, etc., R. Co., 26 Fed. 23 4946
v. Chicago, etc., R. Co., 45 Iowa 29 4662, 4693, 4725
v. Chicago, etc., R. Co., 65 Iowa 727 4952
v. Cleasby, 4 M. & S. 566 2957
v. Coleman County, — Tex. Civ. App. —, 28 S. W. 380 4026, 4101
v. Colorado M. R. Co., 48 Colo. 147 16
v. Cooper, 35 Kan. 156 1653
v. Courtney, 120 Cal. 63 2061, 4380, 4396
Morris v. Duane, 1 Bin. 90 4599
v. Duncan, 126 Ga. 467 339, 1350
v. Eufaula Nat. Bank, 106 Ala. 383 656, 671
v. Eufaula Nat. Bank, 122 Ala. 580 671
v. Francis, 75 Kan. 580 2511
v. Grand Ave. R. Co., 144 Mo. 500 4733
v. Ham, 47 Ark. 293 1957
v. Harris, 9 Gill 19 554, 2112
v. Harveys, 75 Va. 726 668
v. Hazel, 1 Boyce (Del.) 324 3801
v. Hockaday, 94 N. C. 286 1166
v. Hokosona, 26 Colo. App. 251 2598, 2668, 2682
v. Hollis, 2 Harr. 4 586
v. Hoyt, 11 Mich. 9 1029, 1204
v. Hulme, 71 Kan. 628 2853
v. Hunt, 1 Chit. 544 2488
v. Indianapolis (Ind.), 94 N. E. 705 12
v. Kettle, 57 N. J. L. 218 3123, 3124
v. Knight, 14 Pa. Super. Ct. 324 3837
v. Lachman, 68 Cal. 109 4569, 4586
v. Lackawanna, etc., R. Co., 228 Pa. 198 78, 95, 3481
v. Langdale, 2 B. & P. 284 157
v. Letchworth, 167 Mo. App. 553 2030
v. Lucker, 158 Mich. 518 2754
v. McCoy, 7 Nev. 399 876, 881
v. Miller, 83 Neb. 218 463, 1470
v. Morris, 9 Heisk. 814 1649, 1650
v. Oakford, 9 Pa. 498 636
v. Olwine, 22 Pa. 441 578
v. Owens, 3 Strobh. 199 2061
v. Petero, 4 Hawaii 23 2131, 2136
v. Phelps, 5 Johns. (N. Y.) 56 2076, 2090
v. Price, 2 Blackf. 457 1705
v. Redfield, 23 Vt. 295 2474
v. Reyman, 55 Ind. App. 112 620, 636
v. Robinson, 3 B. & C. 196 4209
v. Rowan, 17 N. J. L. 304 303, 2098, 2134, 2137, 2140, 2142
v. St. Louis & S. F. R. Co., 184 Mo. App. 65 3481, 3519, 4829
v. St. Paul City R. Co., 105 Minn. 276 348, 1424, 4685
v. Scott, 21 Wend. 281 4601
v. Shew, 29 Kan. 661 4159
v. Smith, 51 Tex. Civ. App. 357 1240, 4232
v. Stokes, Mart. & Hayw. 4 1907
v. Summerl, 2 Wash. C. C. 203 456, 2914
v. Supplee, 208 Pa. 253 2282
v. Taliaferro, 75 Ill. App. 182 2547
v. Tarin, 1 Dall. 147 1903
v. Terrell, 2 Rand. 6 2027
v. Tillson, 81 Ill. 607 3125
v. Tinker, 60 Pa. 466 3704, 3705, 3711
v. Vulgamott, 158 Ill. App. 434 42
v. Wallace, 3 Pa. 319 1120
v. Western U. Tel. Co., 94 Me. 423 18, 227
v. Wibaux, 159 Ill. 627 1181, 1182, 2219, 2231, 2232, 2237, 2240, 2243, 2244, 2247
v. Williford, — Tex. Civ. App. —, 70 S. W. 228 1431, 4169, 4191
v. Winchester R. A. Co., 73 Conn. 680 1374, 4708
Morris C. & B. Co. v. Ryerson, 27 N. J. L. 457 3842, 3843
v. Van Vorst, 21 N. J. L. 100 1592

[REFERENCES ARE TO PAGES]

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Morris & E. R. Co. v. Orange, 63 N. J. L. 252 4060
Morrisania Sav. Bank v. Bauer, 3 N. Y. L. Bull. 102 952
Morrisey v. Hughes, 65 Vt. 553 413
Morison v. American Tel. & T. Co., 115 App. Div. (N. Y.) 744 397, 3775
v. Arons, 65 Minn. 321 2792
v. Beckwith, 4 T. B. Mon. 76 572, 2211
v. Berkey, 7 S. & R. 238 2846, 2875
v. Bradley, 5 Cal. 503 2465
v. Cole, 30 Mich. 102 2956
v. Crawford, 7 Ore. 473 1702, 4306
v. Cummings, 26 Vt. 486 2679
v. Davis, 20 Pa. 171 139, 140, 3332
v. European, etc., R. Co., 2 Pugs. (N. B.) 295 3537
v. Galloway, 2 Har. & J. 461 2514, 2696
v. I. & V. Florio S. Co., 36 Fed. 569 3350, 3395
v. Illinois Cent. R. Co., 165 Ill. App. 415 3455
v. Jacoby, 114 Ind. 84 820
v. Jewell, 34 Me. 146 556, 2198
v. Kansas City, etc., R. Co., 27 Mo. App. 418 156
v. Kurtz, 15 Ill. 193 576
v. Lawrence, 181 Mass. 127 94
v. Long Island R. Co., 3 App. Div. (N. Y.) 205 4704
v. Lovejoy, 6 Minn. 319 549, 2343, 2697
v. McAtee, 23 Ore. 530 244, 407, 413, 1477, 2546, 2552, 2595
v. Mining Co., 143 N. C. 250 2464
v. Northern Pac. R. Co., 34 Wash. 70 437, 4715
v. Ogdensburgh, etc., R. Co., 52 Barb. 173 2902
v. Ornbaum, 30 Mont. 111 1920
v. Pere Marquette R. Co., 28 Ont. L. R. 319 126
v. Press P. Co., 59 N. Y. Super. 216 4544
v. Richardson, 194 Mass. 370 863, 888, 913
v. Robinson, 31 Pa. 456 3709, 3710
v. Salmon, 2 M. & G. 385 4485, 4486
v. Smith, 81 Ill. 221 656
v. Taylor, 21 Ala. 779 2865
v. Thompson, L. R. 9 Q. B. 480 2902
v. Underwood, 20 N. H. 369 2056, 2082, 2084, 2085, 2087, 2157
v. Western U. Tel. Co., 24 Tex. Civ. App. 347 3628
v. Winn, Hardin 480 422
v. Yancey, 23 Mo. App. 670 1657
Morrison Mfg. Co. v. Fargo S. & T. Co., 16 N. D. 256 1031
Morrissett v. Wood, 123 Ala. 384 2463
Morrissey v. Chicago, etc., R. Co., 38 Neb. 406 8
v. Morrissey, 180 Mass. 480 1030
Morro Castle, The, 168 Fed. 555 3415
Morrow v. Baird, 114 Tenn. 552 2092, 2095, 2123
v. Board of Education, 7 S. D. 553 2474
v. Frankish, 4 Boyce (Del.) 534 700, 1017
v. Gaffney Mfg. Co., 70 S. C. 242 1386
v. Hanson, 9 Ga. 398 530
v. Missouri Pac. R. Co., 140 Mo. App. 200 253, 266, 3340, 3368, 3371
Morrow v. Murphy, 120 Mich. 204 2521
v. National Life Ass'n, 184 Mo. App. 308 3077
v. Payton, 8 Leigh 54 644
v. Pike County, 189 Mo. 610 1030
v. Pryor, 125 Mo. App. 344 4311
v. Rainey, 58 Ill. 357 601
v. Smith, 4 B. Mon. 99 1411
Morrow T. Co. v. Heard, 11 Ga. App. 187 1806
v. Robinson, 8 Ga. App. 409 1454
Morse v. Auburn, etc., R. Co., 10 Barb. 621 334, 3472
v. Buffalo Ins. Co., 30 Wis. 534 1805
v. Chase, 4 Watts. 456 422
v. Chesapeake & O. R. Co., 117 Ky. 11 78, 4686
v. Chicago, etc., R. Co., 81 Neb. 745 3847, 3897
v. Crawford, 17 Vt. 499 1461
v. Goddard, 13 Metc. (Mass.) 177 3121, 3123, 3125
v. Hovey, 9 Paige 197 2825, 2826
v. Huntington, 40 Vt. 488 2822
v. Hutchins, 102 Mass. 439 2405, 2410, 4392, 4393, 4394, 4409
v. Moore, 83 Me. 473 538, 2371, 2372
v. Pacific R. Co., 93 Ill. App. 33 1061
v. Pesant, 2 Keyes 16 3302, 3303
v. Potter, 4 Gray 292 2676
v. Press P. Co., 63 App. Div. (N. Y.) 61 4589
v. Rice, 36 Neb. 212 1113
v. Richmond, 41 Vt. 435 161
v. Shattuck, 4 N. H. 229 765, 2060, 2066
v. Shaw, 124 Mass. 59 4378
v. Sherman, 106 Mass. 430 2225, 2228
v. Swits, 19 How. Pr. 275 101, 4369
v. Times R. P. Co., 124 Iowa 707 227, 4505, 4509, 4512, 4533, 4540, 4541, 4563, 4596
v. Union S. Y. Co., 21 Ore. 289 2374
Morse D. D. & R. Co. v. Seaboard T. Co., 161 Fed. 99 931
Mors-le-Blanch v. Wilson, L. R. 8 C. P. 227 298, 302, 310, 2969
Morsman v. Rockland, 91 Me. 264 104
Morss v. Elmendorf, 11 Paige 277 2047
v. Stone, 5 Barb. 516 4359
v. Union F. Co., 39 Fed. 468 4451
Mortimer v. Brunner, 6 Bosw. 653 3129
v. Cradock, 7 Jurist 45 1414
v. Dirks, 57 Wash. 402 2678
v. Marder, 93 Cal. 172 4223
v. Otto, 206 N. Y. 89 40, 175
Mortland v. Himes, 8 Pa. 265 775
v. Smith, 32 Mo. 225 1625
Mortlock v. Buller, 10 Ves. 292 1978, 2052
Morton v. Dillon, 90 Va. 592 2802
v. Gloster, 46 Me. 520 2493
v. Harrison, 52 N. Y. Super. 305 2674
v. Hart, 88 Tenn. 427 2915, 2986
v. Haynes, 162 Mich. 366 3260
v. Knipe, 128 App. Div. (N. Y.) 94 4509
v. Monckton, 11 T. L. Rep. 242 4836
v. Parker, 17 Ohio C. C. 715 4394
v. Ridgway, 3 J. J. Marsh. 254 2024
v. Rutherford, 18 Wis. 398 1192
v. Smith H. Co., 152 App. Div. (N. Y.) 738 4905
v. Webb, 7 Vt. 123 418
v. Western U. Tel. Co., 53 Ohio St. 431 3642
v. Witte, 147 App. Div. 94 172, 2011

[REFERENCES ARE TO PAGES]

Morvah Consols.-T. M. Co., In re, 2 Ch. Div. 1 4254
Morwick v. Walton, 18 Manitoba 245 4389, 4432
Mosby v. Larue, 143 Ky. 433 2404
v. St. Louis Mut. Ins. Co., 31 Gratt. 629 1195
v. Taylor, Gilmer 172 943
v. United States, 194 Fed. 346 692, 2592
Moscarelli v. Wakefield, 54 Pa. Super. Ct. 368 2492
Moseley v. Hanford, 10 B. & C. 729 1857, 1866
v. Hunter, 15 Mo. 322 2157, 2159
v. Jamison, 68 Miss. 336 4796
v. Rambo, 106 Ga. 597 992
v. Smith, 21 Tex. 441 977
Mosely v. Baker, 2 Sneed 362 4342
v. Miller, 13 Bush. 408 4417
v. Norman, 74 Ala. 422 590
Moses v. Autuono, 56 Fla. 499 476, 918, 1362, 1364, 3189, 3196
v. Banker, 2 Sweeny 267 2230
v. Bierling, 61 N. Y. 462 2506
v. Boston, etc., R. Co., 24 N. H. 71 3335, 3414
v. Central Park, etc., R. Co., 3 N. Y. Misc. 322 1481, 1482
v. Mathews, 95 Neb. 672 4877, 4890
v. Mead, 1 Denio 378 2371, 2373, 2377, 2379
v. Morris, 20 Kan. 208 4311
v. Noble, 86 Ala. 407 735
v. Sanford, 11 Lea 731 4020, 4076
v. Stevens, 2 Pick. 332 2465, 2540
v. United States, 166 U. S. 571 2872
v. Wallace, 7 Lea 413 2091
Mosher v. Chapin, 12 Wis. 453 871
v. Hotchkiss, 3 Abb. App. Dec. 326, 3 Keyes 161 2789
v. Joyce, 51 Fed. 441 4466, 4470
v. Mosher, 15 Me. 371 3717
v. Russell, 44 Hun 12 4749
Mosier v. Caldwell, 7 Nev. 363 7
v. Oregon N. Co., 39 Ore. 256 3913
v. Stoll, 119 Ind. 244 4581, 4583
Mosiman v. Occidental Mut. B. Ass'n, 82 Kan. 670 725
Moskovitz v. Lighte, 68 Hun 102 4938
Mosler S. Co. v. Maiden Lane S. D. Co., 199 N. Y. 479, 138 App. Div. (N. Y.) 905 884, 886, 931
Moss v. Adams, 4 Ired. Eq. 42 741
v. Burlington, 60 Iowa 438 106
v. Exchange Bank, 102 Ga. 808 18, 3569, 3601
v. Harwood, 102 Va. 386 4506
v. Pardridge, 9 Ill. App. 490 4786
v. Pettengill, 3 Minn. 217 2808
v. Tompkins, 69 Hun 288, aff'd 144 N. Y. 659 237
Moss Point L. Co. v. Harrison County, 89 Miss. 448 3836
Moss T. Co. v. Phelps, 143 Ky. 839 317, 2239
Mosse v. Salt, 32 Beav. 269 1013
Mostyn v. Fitzsimmons, [1902] 1 K. B. 512 3113
v. Mostyn, L. R. 5 Ch. 457 2489
Mote v. Chicago, etc., R. Co., 27 Iowa 22 1107, 1136, 3400, 3535
Mothersill v. Voliva, 158 Ill. App. 16 4549
Motley v. Harris, 1 Lea 577 2801
v. Southern F. & W. Co., 122 N. C. 347 4168
Motlow v. Johnson, 151 Ala. 276 1117
Motsinger v. Miller, 59 Kan. 573 936
Mott v. Baxter, 13 Colo. App. 63 2533
Mott v. Chew, 137 Fed. 197 175, 3329
v. Hicks, 1 Cow. 513 2848, 2885
v. Hopper, 116 La. 629 3734
v. Hudson River R. Co., 1 Robert. 593 101
v. Lewis, 52 App. Div. (N. Y.) 558 3759, 3761
v. Mott, 11 Barb. 127 887, 922
v. Palmer, 1 N. Y. 564 2056, 2059, 2061
v. Penoyar, 153 Mich. 273 2687, 2691
v. Rowland, 85 Mich. 561 1163
Mott Haven C. Docks, In re, 196 N. Y. 175 4151
Mottram v. Mills, 2 Sandf. 189 773, 782
Mouat L. Co. v. Wilmore, 15 Colo. 136 1458
Mould v. The New York, 40 Fed. 900 4991
Moulding v. Wilhartz, 169 Ill. 422, 67 Ill. App. 659 1558, 1583, 2747, 2872
Moule v. Garrett, L. R. 7 Ex. 101, 41 L. J. (Ex.) 62 302, 310, 2885
Moulthrop v. Hyett, 105 Ala. 493 245
Moulton v. Kolodzik, 97 Minn. 423 820, 2025
v. Newburyport W. Co., 137 Mass. 163 4033, 4131
v. Richardson, 49 N. H. 75 1734
v. St. Paul, etc., R. Co., 31 Minn. 85 3412
v. Sanford, 51 Me. 127 103
v. Trask, 9 Metc. (Mass.) 577 2529, 2662
Moultrie v. Cook, 11 Ga. App. 649 1479, 4675
Moultrie Rep. Co. v. Hill, 120 Ga. 730 2455, 4219, 4223, 4233, 4270
Mount v. Chapman, 9 Cal. 297 1060
v. Tremont Lumber Co., 121 La. 64 5100
Mt. Adams, etc., R. Co. v. Isaacs, 18 Ohio C. C. 177 4720
v. Wysong, 2 Ohio Dec. 65 4737
Mount Airy M. & G. Co. v. Runkles, 118 Md. 371 846, 865, 887, 925
Mt. Holly W. Co. v. Mt. Holly Springs, 10 Pa. Super. Ct. 162 748
Mount Hope C. Ass'n v. Weidenmann, 139 Ill. 67 2549, 2550
Mt. Mansfield H. Co. v. Bailey, 64 Vt. 151 1883
Mt. Pleasant Bank v. Conway, 18 Ohio 234 1616
Mount Pleasant Mfg. Co. v. Cape Fear, etc., R. Co., 106 N. C. 207 3280, 3281
Mt. Sterling v. Crummy, 73 Ill. App. 572 321
v. Givens, 17 Ill. 255 4094
Mt. Vernon v. Hoehn, 22 Ind. App. 282 4795
Mt. Vernon B. Co. v. Teschner, 108 Md. 158 1436, 1452
Mt. Washington R. Co., Petition of, 35 N. H. 146 4020, 4107
Mountain v. Day, 91 Minn. 249 4400, 4407
v. Fisher, 22 Wis. 93 2465, 2540
Mountain City M. Co. v. Cobb, 124 Ga. 937 226
v. Wood, 11 Ga. App. 486 2404
Mountford v. Cunard S. S. Co., 202 Mass. 345 3451
v. Gibson, 4 East 441 482
v. Willes, 2 B. & P. 337 1033, 1034
Mountney v. Andrews, Cro. Eliz. 237 633
Mountrail County v. Wilson, 27 N. D. 277 3959
Mounts v. Murphy, 126 Ky. 803 1661, 1664

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Mountz v. Apt, 51 Colo. 491 5
v. Apt, 119 Colo. 150 1442
Mousler v. Harding, 33 Ind. 176 468
Mouys v. Leake, 8 T. R. 411 1851
Moving Picture Co. of America v. Scottish Union & Nat. Ins. Co. of Edinburgh, 244 Pa. 358 3142
Mowatt v. McClelan, 1 Wend. 173 2993
Mowbray v. Merryweather, [1895] 1 Q. B. 857, [1895] 2 Q. B. 640 194, 295, 2430
Mower v. Kip, 6 Paige 88 1563, 1568, 1571
v. Shannon, 178 Ala. 469 1509
Mowry v. Boston, 173 Mass. 425 4104
v. Cheney, 43 Iowa 609 4757
v. Home L. Ins. Co., 9 R. I. 346 3071
v. Saunders, 33 R. I. 45 1874
v. Smith, 9 Allen 67 4783
v. Western U. Tel. Co., 51 Hun 126 3549, 3566, 3601
v. Whipple, 8 R. I. 360 4634
v. Whitney, 14 Wall. 434 4456
v. Whitney, 14 Wall. 620 1069, 4450, 4466, 4468, 4475
v. Wood, 12 Wis. 413 4271, 4282
Moyer v. Cantieny, 41 Minn. 242 2477, 2497
v. Fletcher, 56 Mich. 508 1121
v. Gordon, 113 Ind. 282 1369, 3199, 3202, 3205, 4164, 4168
v. Moyer, 49 Pa. 210 471, 4529, 4530, 4572
v. Pine, 4 Mich. 409 469
Moylan v. Moylan, 49 Wash. 341 1116
Moyle v. Drake, 141 Mass. 238 4602
Moynahan v. Moore, 9 Mich. 9 791, 807, 827
Moyse v. Northern Pac. R. Co., 41 Mont. 272 1477, 4729
Moyses v. Schendorf, 142 Ill. App. 293 886
v. Schendorf, 238 Ill. 232 835, 862
Mucke v. Solomon, 79 Conn. 277 2907, 2928
Mucklar v. Cross, 32 N. J. L. 423 1195
Muckle v. Rochester R. Co., 79 Hun 32 1334
Mudd v. Rogers, 102 Ky. 280 4540
Muddock v. Blackwood, [1895] 1 Ch. 58 4483
Mudge v. Adams, 37 Tex. Civ. App. 186 188, 2588
Mudgett v. Day, 12 Cal. 139 2944
Muehlbach v. Missouri, etc., R. Co., 166 Mo. App. 305 868
Mueller v. Barge, 54 Minn. 314 2865
v. Bethesda S. Co., 88 Mich. 390 245, 261
v. Cavour, 107 Wis. 599 1045
v. Chicago, etc., R. Co., 75 Minn. 109 3518
v. Detroit United R., 162 Mich. 313 1384
v. Dobschuetz, 89 Ill. 176 2822
v. Kline, 27 Ill. App. 473 887
v. Kuhn, 59 Ill. App. 353 4659, 4732
v. McGregor, 28 Ohio St. 265 1202
v. Northwestern University, 195 Ill. 236 1014
v. St. Louis, etc., R. Co., 31 Mo. 262 3746, 3762
v. Wiebracht, 47 Mo. 468 711
Mueller F. Co. v. Cascade F. Co., 145 Fed. 596 1416, 4386
Muench v. Heinemann, 119 Wis. 441 4695
Muenchow v. Roberts, 77 Wis. 520 1947, 1981, 1989, 2008
Muenster v. Fields, 89 Tex. 102 480, 4216, 4297, 4300
Muffatt v. Parsons, 1 Marsh. 55, 5 Taunt. 307 794
Mug v. Ostendorf, 49 Ind. App. 71 507, 1414, 2547
Mugge v. Erkman, 161 Ill. App. 180 3895, 3898
v. Jackson, 53 Fla. 323 361
Muggridge v. Eveleth, 9 Metc. (Mass.) 233 4173
Muhl v. Michigan Southern R. Co., 10 Ohio 272 418
Muhle v. New York, etc., R. Co., 86 Tex. 459 4146
Muhlig v. Fiske, 131 Mass. 110 2190
Muir v. Hamilton, 152 Cal. 634 1824
v. Missouri, etc., R. Co., 168 Mo. App. 542 3347
v. Schenck, 3 Hill 228 579, 691
Muirhead v. Kirkpatrick, 21 Pa. 237 677
Mulberger v. Koenig, 62 Wis. 558 552
Mulcahey v. Givens, 115 Ind. 286 57
Mulcairns v. Janesville, 67 Wis. 24 1477, 4882
Mulchahey v. Washburn C. W. Co., 145 Mass. 281 4851
Mulderig v. Wilkes-Barre Times, 215 Pa. 470 4509
Muldoon v. Lynch, 66 Cal. 536 848, 858
v. Rickey, 103 Pa. 110 10, 4606
v. Seattle City R. Co., 7 Wash. 528, 10 Wash. 311 21
Muldowney v. Illinois, etc., R. Co., 36 Iowa 462 334, 3474, 4662
Mulford v. Clewell, 21 Ohio St. 191 60, 4675
v. Estudillo, 23 Cal. 94 2808
v. Hiers, 13 N. J. Eq. 13 3724
v. Pearce, 14 Blatch. 141 4470
Mulhado v. Brooklyn City R. Co., 30 N. Y. 370 1468
Mulheran v. Gillespie, 13 Wend. 349 639
Mulherin v. Stansell, 70 S. C. 568 703
Mulholland v. Troutman, 10 Ky. L. Rep. 263 (Ky. Super. Ct.) 1805
Mullally v. Dingman, 62 Neb. 702 1030
v. Townsend, 119 Cal. 47 1710, 1711
Mullan v. Wisconsin Cent. Co., 46 Minn. 474 3467
Mullen v. Cook, 69 W. Va. 456 1990, 1995
v. D. Y. Stewart & Co., Ltd., [1908] Ct. of Sess. Cas. 991, 45 Sc. L. R. 729, 1 B. W. C. C. 204 5196
v. Eastern T. & B. Co., 108 Me. 498 1449, 4387, 4391
v. Ensley, 8 Humph. 428 4300
v. Lake Drummond C. & W. Co., 130 N. C. 496 4145
v. Morris, 2 Pa. 85 1146, 1878, 1881
v. Morris, 5 Pa. 87 1152
v. Morris, 43 Neb. 596 1561, 1568, 1569
v. Old Colony R. Co., 127 Mass. 86 4382
v. Quinlan, 195 N. Y. 109 4222, 4243
Mullenary v. Burton, 3 Cal. App. 263 1031
Muller v. Bohlens, 2 Wash. C. C. 378 2957, 2958
v. Eno, 14 N. Y. 597 1435, 2296, 2298, 2301, 2302, 2371, 2390, 4410
v. Fern, 35 Iowa 420 1744
v. Gillick, 66 Mo. App. 500 2670, 2671
v. Hale, 138 Cal. 163 4785
v. Ocala F. & M. Works, 49 Fla. 189 2626
v. Palmer, 144 Cal. 305 2025

[REFERENCES ARE TO PAGES]

Muller v. Pondir, 55 N. Y. 325 457
v. Rosenblath, 157 App. Div. (N. Y.) 513 4381, 4389
v. Southern Pac. Branch R. Co., 83 Cal. 240 4033, 4097, 4119, 4135
Mullerleile v. Brandt, 64 Wash. 280 405, 2420
Mullett v. Challis, 16 Q. B. 239 1628
v. Mason, L. R. 1 C. P. 559 357, 2398, 2447, 4370
Mulliday v. Machir, 4 Gratt. 1 3150
Mulligan v. Augusta, 115 Ga. 337 3850
v. Hollingsworth, 99 Fed. 216 658
v. Smith, 32 Colo. 404 1102, 2472
Mullin v. Flanders, 73 Vt. 95 4676
v. Spangenberg, 112 Ill. 140, 145 1315, 1316, 1317, 4781
Mullooly v. Hautau, 1 New Zeal. L. R. 151 721
Mulloy v. Backer, 5 East 316 3294
Multer v. Knibbs, 193 Mass. 556 4980
Mulvane v. Tullock, 58 Kan. 622 1721, 1724, 1728, 1732
Mulvany v. Rosenberger, 18 Pa. 203 2388
Mulvehall v. Milward, 11 N. Y. 343 4960, 4963
Mulvey v. King, 39 Ohio St. 491 554
Mumford v. McPherson, 1 Johns. 414 2386
v. Starmont, 139 Mich. 188 4836
Muncie N. G. Co. v. Allison, 31 Ind. App. 50 4003, 4103
Muncie P. Co. v. Hacker, 37 Ind. App. 194 4655, 4742
v. Keesling, 166 Ind. 479 3881, 3941, 3943
v. Martin, 164 Ind. 30 3881
Muncie & P. T. Co. v. Hall, 173 Ind. 292 4034
Mundal v. Minneapolis, etc., R. Co., 92 Minn. 26 4637, 4644
Munday v. Landry, 51 La. Ann. 303 4782
Munden v. Harris, 153 Mo. App. 652 4505, 4508, 4547
Mundy v. Culver, 18 Barb. 336 869, 886, 889, 925
v. Louisville & N. R. Co., 67 Fed. 633 2683, 2685
v. Stevens, 61 Fed. 77 2823
v. United States, 35 Ct. of Cls. 265 858
Munford v. McVeigh, 92 Va. 446 995
v. Rice, 6 Munf. 81 1583
Munger v. Baker, 65 Barb. 539 3818, 3819
v. Jacobson, 99 Ill. 349 1176
Munich v. Valdez, 3 Porto Rico Fed. 251 1494
Munier v. Zachary, 138 Iowa 219 481, 3166, 4298
Munk v. Kanzler, 26 Ind. App. 105 823
v. Watertown, 67 Hun 261 3905
Munkwitz v. Chicago, etc., R. Co., 64 Wis. 403 4040
Munn v. Burch, 25 Ill. 35 876
v. Commission Co., 15 Johns. 43 1873, 2783
v. Eckford, 15 Wend. 502 2191
Munn & Co. v. Americana Co., 82 N. J. Eq. 443 1102, 2328, 2648
Munns v. Dupont, 3 Wash. C. C. 31 4601, 4635
Munro v. Butt, 8 El. & Bl. 738 2663, 2666
v. Dredging, etc., Co., 84 Cal. 515 350
Munro v. Pacific Coast D. & R. Co., 84 Cal. 515 383, 3738, 4864, 4935, 4939, 5120
v. Waller, 28 Ont. 574 3171
Munroe v. Adamo, 136 Ky. 252 523
v. Allaire, 2 Caines 320 1556
v. Armstrong, 179 Mass. 165 4267
v. Pritchett, 16 Ala. 785 4383
v. Stickney, 48 Me. 462 38
v. Taylor, 191 Mass. 483 2506
Munsell v. Lewis, 4 Hill 635 27
Munson, In re, 29 Hun 325 4149
Munson v. McGregor, 49 Wash. 276 1449, 1990, 2009
v. Plummer, 58 Iowa 736 1544
v. Plummer, 59 Iowa 136 1128
v. Sith W. Mach. Co., 118 App. Div. (N. Y.) 398 1093, 2466, 2627
v. Straits of Dover S. S. Co., 102 Fed. 926 211
Munster v. New Orleans R. & H. Co., 131 La. 128 1338
Munter v. Bande, 1 Mo. App. 484 1328
v. Rogers, 50 Ala. 283 602, 1541
Muntz v. A Raft of Timber, 15 Fed. 555 2716, 2724
Murdoch, Assignment of, 129 Mo. 488 1128
Murdoch v. Milner, 84 Mo. 96 2903
v. Will, 1 Dall. 341 1656
Murdock v. Boston & A. R. Co., 133 Mass. 15 185
v. Boston & A. R. Co., 137 Mass. 293 3450, 3521
v. Ford, 17 Ind. 52 733
v. New York & B. Desp. Exp. Co., 167 Mass. 549 4720
v. Phillips Academy, 12 Pick. 244 2525
v. Walker, 43 Ill. App. 590 55, 143
Murdouch v. Tuten, 76 S. C. 502 434, 4324
Mure, Ex parte, 2 Cox 63 2816
Murphy, In re, 218 Mass. 278 5200
Murphy v. Atlanta & C. A. L. Ry. Co., — S. C. —, 87 S. C. 15 5081
v. Booth, 36 Utah 285 1267, 4628
v. Braker, 89 Hun 387 4404
v. Branch Bank, 5 Ala. 421 423
v. Central Park R. Co., 48 N. Y. Super. Ct. 96 1338, 3514
v. Century B. Co., 90 Mo. App. 621 3209
v. Chicago, etc., R. Co., 140 Iowa 332 111, 149
v. Citizens' Bank, 82 Ark. 131 977
v. Cleveland, Town of, — Miss. —, 63 So. 572 4812
v. Ernst, 46 Neb. 1 4601
v. Evans, 11 Ind. 517 1353
v. Exchange Nat. Bank, 76 Neb. 573 2236
v. Fond du Lac, 23 Wis. 365 3, 3736
v. Gay, 37 Mo. 535 534, 2388
v. Gross, 118 Minn. 311 4920
v. Hobbs, 7 Colo. 541 1301, 1305
v. Hobbs, 8 Colo. 17 4295, 4299
v. Hughes, 1 Pennew. (Del.) 250 4690, 4748
v. Larson, 77 Ill. 172 1321, 4647
v. Little, 69 Vt. 261 814
v. Lowell, 128 Mass. 396 3738
v. McGraw, 74 Mich. 318 321, 2393, 2436
v. Matthews, 43 Pa. Super. Ct. 286 3875
v. Meridian, 103 Miss. 110 4030
v. Murphy, 1 S. D. 316 1482
v. Murphy, 145 Cal. 482 1055

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Murphy v. New York Cent., etc., R. Co., 88 N. Y. 445 4858, 4914
v. New York City R. Co., 58 N. Y. Misc. 237 4172
v. New York, etc., R. Co., 29 Conn. 496 1271
v. Omaha, 33 Neb. 402 1046
v. Pitt C. Co., 52 Pa. Super. 316 294, 2704
v. Price, 48 Mo. 247 2056, 2095
v. Richardson, 28 Pa. 288 2208
v. St. Louis, 8 Mo. App. 483 2231
v. Ship Suliote, 5 Fed. 99 2716, 2723, 2727, 2729
v. Sommerville, 7 Ill. 360 1557
v. Southern Pac. Co., 31 Nev. 120 1461, 1467, 3527, 4675, 4676, 4681
v. United States F. & G. Co., 100 App. Div. (N. Y.) 93 835, 2592
v. Wells-F. & Co. Exp., 99 Minn. 230 3418
v. Western & A. R., 23 Fed. 637 3468, 3474, 3499, 3506
v. Willow Springs B. Co., 81 Neb. 219 4929
v. Wilson, 44 Mo. 313 432
Murray v. Aetna Ins. Co., 4 Biss. 417 3290
v. Aiken, etc., M. Co., 39 S. C. 457 1574, 1783, 1802
v. Barnhart, 117 La. 1023 888
v. Bethune, 1 Wend. 191 1411
v. Blatchford, 1 Wend. 583 770
v. Burling, 10 Johns. 172 480, 4196, 4197, 4215, 4272, 4305
v. Butte, 35 Mont. 161 392, 3889
v. Carlin, 67 Ill. 286 534
v. Carothers, 1 Metc. (Ky.) 71 2981
v. Chicago, etc., R. Co., 152 Iowa 732 4652, 4729
v. Denholm & Co., [1911] S. C. 1087, 48 Sc. L. R. 896 5199
v. Doud, 63 Ill. App. 247 1097
v. Doud, 167 Ill. 368 2237
v. Earl of Stair, 2 B. & C. 82 1555
v. Ellis, 112 Pa. 485 1936
v. Farthing, 6 Mo. 251 2372
v. Galbraith, 86 Ark. 50 4509
v. Galbraith, 95 Ark. 199 4508, 4542
v. Gale, 5 Abb. Pr. (N. S.) 236, 52 Barb. 427 602
v. Gouverneur, 2 Johns. Cas. 441 3708
v. Griffiths, 48 N. Y. Misc. 398 2462
v. Harrison, 47 Barb. 484 800
v. Hudson River R. Co., 47 Barb. 196 1512, 3529
v. Insurance Co., 2 Wash. C. C. 186 3009
v. Interurban St. R. Co., 118 App. Div. (N. Y.) 35 4724
v. Judah, 6 Cow. 484 671, 2383, 2937
v. Kennedy, 15 La. Ann. 385 2981
v. Lardner, 2 Wall. 110 1210
v. Louisville & N. R. Co., 132 Ky. 336 4956
v. Lovejoy, 2 Cliff. 191 437, 4209
v. Mace, 41 Neb. 60 4169, 4185, 4191
v. McMackin, 4 Yerg. 41 1927
v. Meredith, 25 Ark. 164 2416
v. Missouri Pac. R. Co., 101 Mo. 236 4719, 4737
v. Mumford, 2 Cow. 400 1805
v. Nickerson, 90 Minn. 197 821
v. O'Brien, 56 Wash. 361 785, 817, 1229
Murray v. O'Donohue, 109 App. Div. (N. Y.) 696 2547, 2555
v. Okanogan L. S., etc., Co., 12 Wash. 259 4220
v. Oliver, 3 Ore. 539 1209
v. Omaha Transfer Co., 95 Neb. 175 4877
v. Pannaci, 130 Fed. 529, 65 C. C. A. 153 3826, 3827
v. Pate, 6 Dana 335 1928
v. Pennington, 3 Gratt. 91 3257
v. Postal Tel. & C. Co., 210 Mass. 188 3546, 4223
v. Putnam (Tex. Civ. App.), 130 S. W. 631 2415, 2428, 2432
v. Putnam (Tex. Civ. App.), 154 S. W. 245 3810
v. Roosevelt, Anth. 101 803
v. Royal Ins. Co., 11 Brit. Col. 213 1502
v. Scully, 259 Mo. 57 3716, 3729
v. Smith, 4 Daly 277 2370
v. Stanton, 99 Mass. 345 2305
v. United States, 55 Fed. 829, aff'g 52 Fed. 172 2717
v. Usher, 117 N. Y. 542 4923
v. Ware, 1 Bibb 325 1017
v. Windley, 7 Ired. 201 1236
Murrell v. Fysh, 1 Cab. & E. 80 306
v. Pacific Exp. Co., 54 Ark. 22 3342, 3364, 3370
v. Smith, 152 Mo. App. 95 56, 143
v. Studstill, 104 Ga. 604 2471, 2473
v. Whiting, 32 Ala. 54 3272, 3278
Murry v. Buell, 74 Wis. 14 1509
Murtagh v. Thompson, 28 Neb. 358 1209
Murtaugh v. New York, etc., R. Co., 49 Hun 456 4659
Murten v. Garbe, 93 Neb. 589 4581
Murtha v. Donohoo, 149 Wis. 481 288, 2470
Musanti v. State, 73 N. Y. Misc. 534 4086, 4092, 4093
Muse v. Swayne, 2 Lea 251 922
Muser v. Holland, 17 Blatch. 412 3412
v. Lewis, 50 N. Y. Super. Ct. 431 4297
v. Magone, 155 U. S. 240 1418
Musgrave v. Beckendorff, 53 Pa. 310 2318, 4248
v. Dickson, 172 Pa. 629 2801
v. Parry, 2 Vern. 710 29
Musgrove v. Gibbs, 1 Dall. 216 761
v. Morrison, 54 Md. 399 1004
Musial v. Kudik, 87 Conn. 164 2156, 2157
Music v. Big Sandy, etc., R. Co., 163 Ky. 628 3961, 3965, 3966, 4107, 4137
Musick v. Beebe, 17 Kan. 47 1637
v. Latrobe, 184 Pa. 375 4657
Muskegon C. R. Co. v. Keystone Mfg. Co., 135 Pa. 132 2259, 2260
Muskogee El. T. Co. v. Mueller, 39 Okla. 63 4792, 4834
v. Reed, 35 Okla. 334 4750, 4793
Musolf v. Duluth Edison E. Co., 108 Minn. 369 775, 781
Musselman v. Barker, 26 Neb. 737 3663, 3669, 3677
v. Galligher, 32 Iowa 383 417, 4762
v. McElhenney, 23 Ind. 4 990
Musselman's App., 62 Pa. 81 2328
Mussen v. Price, 4 East 147 2229
Mustang R. C. & L. Co. v. Hissman, 49 Colo. 308 1416, 3761
Mustard v. Union Nat. Bank, 86 Me. 177 1226

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Mutton v. Peat, [1899] 2 Ch. 556 736
Mutual B. Ins. Co. v. Brown, 80 Mo. App. 459 2741, 2764
Mutual Ben. L. Ins. Co. v. Daniels, 67 Neb. 91 1877
Mutual Ins. Co. v. Chambliss, 131 Ga. 60 273
Mutual L. Ins. Co. v. Allen, 212 Ill. 134 4279
v. Chambliss, 131 Ga. 60 1447, 1514
v. Owen, 111 Ark. 554 3082
Mutual Nat. Bank v. Rotge, 28 La. Ann. 933 665
Mutual Reserve Fund L. Ass'n v. Ferrenbach, 144 Fed. 342 3085, 3087
Mutual Reserve L. Ins. Co. v. Jay, 50 Tex. Civ. App. 165 1058
Mutual Safety Ins. Co. v. Cohen, 3 Gill. 459 3010
Muzzy v. Shattuck, 1 Denio 233 1576, 1578
My Laundry Co. v. Schmeling, 129 Wis. 597 209
Myer v. Davies, 17 Ill. App. 228 1366
v. Hart, 40 Mich. 517 858, 1922
v. Reedy, 115 N. C. 538 2792
v. Wheeler, 65 Iowa 390 2294, 2390
Myerle v. United States, 31 Ct. of Cls. 105 2688
v. United States, 33 Ct. of Cls. 1 226
Myers v. Appleton, 45 Ind. 160 1645
v. Baptist Soc., 38 Vt. 614 2514
v. Bender, 46 Mont. 497 188, 1032, 2495, 4042
v. Bolton, 157 N. Y. 393 1032
v. Burns, 35 N. Y. 269, 33 Barb. 401 316, 537, 547, 549, 565, 3162, 3189, 3236, 3237, 3239, 3240, 3246, 3247, 3257, 3258
v. Byington, 34 Iowa 205 806
v. Charlotte, 146 N. C. 246 1426, 3951, 4133
v. Chicago, etc., R. Co., 152 Iowa 330 4946
v. Chittyna Exploration, 20 Cal. App. 418 4230, 4239, 4266
v. Crockett, 14 Tex. 257 2497
v. Curry, 22 Up. Can. Q. B. 470 4572
v. Daubenbiss, 84 Cal. 1 436
v. Davis, 26 Barb. 367 457
v. Drake, 10 Watts 110 2279
v. Erie R. Co., 44 App. Div. (N. Y.) 11 1383
v. Estell, 47 Miss. 4 514, 532, 564, 2197
v. Fadden, 159 Mich. 424 3260
v. Fear, 21 Okla. 498 3260
v. Kiowa County, 60 Kan. 189 1558, 1583
v. Malcolm, 6 Hill 292 16, 100, 3933, 4525
v. Meinrath, 101 Mass. 366 18
v. Munson, 65 Iowa 423 2181, 2182, 2188
v. Petty, 153 N. C. 462 1826
v. Radford, 167 Mich. 135 1093
v. Ralston, 57 Wash. 47 918, 925
v. Ruddy, 154 Ill. App. 438 3119, 3121
v. Sanders, 8 Dana 65 3693
v. San Francisco, 42 Cal. 215 4831
v. Schuylkill River East Side R. Co., 19 Phila. 468 4151
v. Smith, 27 Md. 91 2399, 2401
v. South Bethlehem, 149 Pa. 85 4146, 4147
v. Southern R., 64 S. C. 514 3447
Myers v. Turner (Tenn. Ch. App.), 52 S. W. 332 4424
v. United States, 1 McLean 493 1582, 1588
v. Welles, 5 Hill 463 658
Myers-G. N. Co. v. Grossman, 167 Mo. App. 722 899
Myers, R. S., Co. v. Griswold, 77 Neb. 487 2578, 2579
Myers, T., Co. v. Keeley, 58 Mo. App. 491 288
Mygatt v. Wilcox, 45 N. Y. 406 1097, 1102, 1103
Myhra v. Chicago, etc., R. Co., 62 Wash. 1 4654, 4699
Myles v. Myles, 6 Bush 237 2469
Mynard v. Syracuse, etc., R. Co., 71 N. Y. 180 3336
Myrberg v. Baltimore & S. M. & R. Co., 25 Wash. 364 1466
Myres v. Parker, 6 Ohio St. 501 1785, 1788
Myrick v. Dame, 9 Cush. 248 421
v. Purcell, 99 Minn. 457 371
Myrtle Tunnel, The, 146 Fed. 324 2716, 2735
Mystic M. Co. v. Chicago, etc., R. Co., 131 Iowa 10 476, 3405
Mystic Workers v. United States F. & G. Co., 152 Ill. App. 223 2767

N

N. & K. Turnpike Co. v. Harris, 8 Humph. 558 2576
N. & W. R. Co. v. Wysor, 82 Va. 250 3499
Nachbour v. Wilner, 34 Ill. App. 237 3098
Nachod v. Hindley, 52 N. Y. Misc. 232 2791
Nadau v. White River L. Co., 76 Wis. 120 4803
Naderhoff v. Benz, 25 N. D. 165 1399
Nading v. Denison & P. S. R. Co., 22 Tex. Civ. App. 173 225, 313, 1495, 3878
v. Howe, 23 Ind. App. 690 2902, 2921
Naef v. Potter, 226 Ill. 628 1818
Nagel v. Missouri Pac. R. Co., 75 Mo. 653 156, 3643, 4942
Nagle v. Keller, 141 Ill. App. 444 1328, 4946
v. Mattison, 34 Pa. 48 1261
v. Newton, 22 Gratt. 814 2052
Naglee v. Ingersoll, 7 Pa. 185 1067, 3147
Nagognos v. Brooklyn Heights R. Co., 128 App. Div. (N. Y.) 182 1311
Nagy v. Manitoba Free Press Co., 16 Manitoba 619 1458, 4567
Nahant v. United States, 136 Fed. 273 4065
Nahn v. Register N. Co., 120 Ky. 485 3199
Nahte v. Hansen, 106 Minn. 365 431
Nailer v. Stanley, 10 S. & R. 450 574
Nailor v. Kearney, 1 Cranch. C. C. 112 1557
v. Ponder, 1 Marvel 408 4508, 4524, 4543, 4576
Nakagawa v. Okamoto, 164 Cal. 718 840, 841
Nalle v. Ventress, 19 La. Ann. 373 1182
Nalley v. Carroll County, 135 Ga. 835 3936
Naltner v. Dolan, 108 Ind. 500 1120
Nance v. Cash, 143 Ky. 358 4644
v. Gregory, 6 Lea 343 980
v. Metcalf, 19 Mo. App. 183 4211

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Nangan v. Atterton, L. R. 1 Ex. 239 151
Nansemond T. Co. v. Rountree, 122 N. C. 45 1715, 1735, 1737, 1742
Nanson v. Maffra, 7 Vict. L. R. (law) 364 3850
Nantucket Bank v. Stebbins, 6 Duer 341 676
Nantz v. Lober, 1 Duv. 304 817
Napier v. McLeod, 9 Wend. 120 770
v. Schneider, 12 East 420 1897, 1901
v. Spielmann, 127 App. Div. (N. Y.) 711 2696, 2702
Napton v. Leaton, 71 Mo. 358 3708
Narr v. Norman, 113 Mo. App. 533 2410
Narragansett, The, Olcott, 246 5007
Narragansett, The, Olcott, 388 267
Narramore v. Cleveland, etc., R. Co., 96 Fed. 298 22
Nash v. Ashton, Skin. 42 2535
v. Benedict, 25 Wend. 645 4598
v. Classon, 163 Ill. 409, aff'g 55 Ill. App. 356 1439, 1452
v. El Dorado County, 24 Fed. 252 959
v. Hamilton, 3 Abb. Pr. 35 585
v. Hermosilla, 9 Cal. 584 857, 918
v. Hodgson, 6 De G., M. & G. 474 721
v. Hoxie, 59 Wis. 384 2697
v. Larson, 80 Minn. 458 4314
v. Meggett, 89 Wis. 493 1210
v. Minnesota Title, Ins. & T. Co., 163 Mass. 574 4300, 4385, 4393, 4405, 4418
v. Skinner, 12 Vt. 219 424
v. Sullivan, 32 Minn. 189 3698, 3699, 3705
v. Thousand Islands S. Co., 123 App. Div. 148 254, 259
Nashotah M. Co. v. Dyer, 21 Colo. App. 446 2704
Nashua I. & S. Co. v. Brush, 91 Fed. 213 296, 298, 308, 309, 476, 2374, 2417, 2427
v. Worcester & N. R., 62 N. H. 159 2430
Nashua Sav. Bank v. Burlington E. L. Co., 100 Fed. 673 4389, 4408
Nashua & L. R. Co. v. Boston & L. R. Co., 61 Fed. 237 1254
Nashville v. Comar, 88 Tenn. 415 3866, 3876
v. Sutherland, 94 Tenn. 356 225, 3887, 4003
Nashville Ins. & T. Co. v. Alexander, 10 Humph. 378 4328
Nashville L. Co. v. Barefield, 93 Ark. 353 361, 4347
Nashville L. Ins. Co. v. Mathews, 8 Lea 499 3090, 3091
Nashville R. Co. v. Chumley, 6 Heisk. 325 539, 540
Nashville R. & L. Co. v. Trawick, 118 Tenn. 273 1502, 1534
Nashville Syrup Co. v. Coca Cola Co., 215 Fed. 527 4491
Nashville T. Co. v. Fourth Nat. Bank, 91 Tenn. 336 2830
Nashville & C. R. Co. v. Prince, 2 Heisk. 580 350, 4849, 4875, 4906
v. Smith, 6 Heisk. 174 350
Nashville & N. R. Co. v. Gormley, 33 Ky. L. Rep. 802 4188
Nashville, etc., R. Co. v. Alabama, 128 U. S. 96 5024
v. Banks, 156 Ky. 609 5053, 5066, 5084, 5091
v. Bean, 128 Ky. 758 1542
v. Blackmon, 7 Ala. App. 530 1266, 3477, 3507
Nashville, etc., R. Co. v. C. V. Truitt Co., 14 Ga. App. 767 3338, 3339
v. Eakin, 6 Cold. 582 4954
v. Flake, 114 Tenn. 671 3468
v. Garth, 155 Ala. 311 1441
v. Griffin, 104 Tenn. 81 3501
v. Harris, 2 Tenn. Cas. 13 2755
v. Heikens, 112 Tenn. 378 429, 3138, 3142, 3741, 3834
v. Henry, 158 Ky. 88 5035, 5073, 5079, 5084, 5086, 5091
v. Hubble, 139 Ga. 300 4757
v. Jackson, 6 Heisk. 271 3329
v. Karthaus, 150 Ala. 633 2910, 4214
v. Lillie, 112 Tenn. 331 3539
v. Miller, 120 Ga. 453 488, 4664, 4705
v. O'Bryan, 104 Tenn. 28 1277, 1316
v. Smith, 6 Heisk. 174 1495, 3528, 4786, 4831
v. Sprayberry, 8 Baxter 341 4954
v. Stevens, 9 Heisk. 12 4859
v. Stone, 112 Tenn. 348 3333, 3428
v. Witherspoon, 112 Tenn. 128 4832
v. Wood, 171 Ala. 382 2116
Nason v. Directors of Poor, 126 Pa. 445 1578
v. Fowler, 70 N. H. 291 664
v. West, 31 N. Y. Misc. 583 218
Nason Mfg. Co. v. Stephens, 127 N. Y. 602 2657
Nassoiy v. Tomlinson, 148 N. Y. 326 758, 814
Natchez, The, 78 Fed. 183 5011, 5012
Natchez Ins. Co. v. Buckner, 4 How. (Miss.) 63 3006
Natchez, etc., R. Co. v. Currie, 62 Miss. 506 3736, 3755
v. Lambert, 99 Miss. 310 3459
Nathan v. Brand, 167 Ill. 607 2491
v. Dierssen, 164 Cal. 607 3699, 3706
Nathaniel Hooper, The, 3 Sumn. 542, Fed. Cas. 10,032 540, 3295
Nation Union Fire Ins. Co. v. Denver & R. G. R. Co., 44 Utah, 26 373
National A. F. A. Co. v. New Orleans, etc., R. Co., 115 La. 633 2459
National Art Co. v. Ellery — Misc. (N. Y.) —, 145 N. Y. Supp. 277 748
National Bank v. Bangs, 106 Mass. 441 2383, 2384
v. Bigler, 83 N. Y. 51 665, 703, 2892
v. Buckwalter, 214 Pa. 289 420
v. Deering, 91 U. S. 29 977
v. Dorset M. Co., 61 Vt. 106 2781
v. Graham, 100 U. S. 699 1331
v. Green, 33 Iowa 140 1905
v. Grimm, 109 N. C. 93 656
v. Heard, 65 Ga. 189 1053
v. Kirby, 108 Mass. 497 1883
v. Marietta, etc., R. Co., 20 Ohio St. 259 3531
v. New Bedford, 155 Mass. 313 1451
v. Phelps, 97 N. Y. 44 2756
v. Woolsey, 31 App. Div. (N. Y.) 61 2749
National B. Co. v. Nolan, 70 C. C. A. 436, 138 Fed. 6 4780
National Bank of Com. v. American Exch. Bank, 151 Mo. 320 657
National Bank of Illinois v. Banker, 58 Ill. App. 343 1804
National Co. v. Belcher, 68 Fed. 665 4437
National C. Co. v. Cincinnati G. & C., C. & M. Co., 168 Mich. 198 2348, 2404
v. Hudson River W. P. Co., 118 N. Y. App. Div. 65 327, 2593, 2599, 2600

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v. Powar, 137 Ky. 156 1280, 4831
National C. C. Co. v. Duvall, 150 Ky. 192 4654
National C. O. Co. v. Young, 74 Ark. 144 2377
National C. R. Co. v. Agnes, 43 App. Div. 605 4327
v. Bonneville, 119 Wis. 222 628
v. Richards, 159 Mich. 128 4358
v. Salling, 173 Fed. 22 4509
v. Schmidt, 48 App. Div. (N. Y.) 472 2237
National C. T. Co. v. Malden & M. G. L. Co., 189 Mass. 234 2280
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National Council Knights & Ladies of Security v. Sealey, — Tex. Civ. App. —, 162 S. W. 455 1501
National D. Bank v. Mawson, 46 Pa. Super. 85 697, 719
National Docks, etc., R. Co. v. Pennsylvania R., 54 N. J. Eq. 142 4150, 4154
v. United Cos., 53 N. J. L. 217 3968, 4074
National Exch. Bank v. Gay, 57 Conn. 224 2756
v. McLoon, 73 Me. 498 378
v. Sibley, 71 Ga. 726 38
National F. Co. v. Green, 50 Colo. 307 146, 1502, 4738
National F. Ins. Co. v. Sackett, 11 Paige 660 976
National F. O. Co. v. Citizens' Ins. Co., 106 N. Y. 535 3057
National Fibre Board Co. v. Lewiston & A. E. L. Co., 95 Me. 318 265, 266, 3815
National Folding-Box P. Co. v. Elsas, 86 Fed. 917 4451
v. Elsas, 81 Fed. 197 4436, 4476
v. Robertson's Est., 125 Fed. 524 4451, 4476
National Hollow B. B. Co. v. Bakewell, 224 Mo. 203 416
National Hose Importing Co. v. Novak, 95 Iowa 596 2416
National L. Ins. Co. v. Hall, 34 Okla. 395 1000
v. McDermott, 186 Ill. App. 157 659
National L. & I. Co. v. Rockland Co., 94 Fed. 335 2468, 2500
National Lancers v. Lovering, 30 N. H. 511 1101
National Loan & Bldg. Ass'n v. Lichtenwalner, 100 Pa. 100 2789
National M. E. B. Co. v. Gotham, 125 App. Div. (N. Y.) 101 2381, 2397, 2399, 2402
National M. & T. Co. v. Standard S. Mach. Co., 181 Mass. 275 820, 2592
National Mahaiwe Bank v. Hand, 80 Hun 584 3177
v. Peck, 127 Mass. 298 2809
National Mechanics' Banking Ass'n v. Conkling, 90 N. Y. 116 2756
National Metal W. S. Co. v. Bredin, 186 Fed. 490 4446, 4449, 4454, 4465
National Mut. B. & L. Ass'n v. Ashworth, 91 Va. 706 1164
National Mut. Ins. Co. v. Home Ben. Soc., 181 Pa. 143 3091
National Nassau Bank of New York v. I. M. Ludington's Sons, 164 App. Div. (N. Y.) 466 312
National O. Co. v. Rankin, 68 Kan. 679 2371
National Oak L. Co. v. Armour-C. P. Co., 99 Ky. 667 536
National Park Bank v. Goddard, 9 N. Y. Misc. 626 362
v. Seaboard Bank, 114 N. Y. 28 736, 1872
National Provincial Bank v. Marshall, 40 Ch. Div. 112 839
National R. & B.'s S. Co. v. Parmalee, 9 Ga. App. 725 319, 1418, 2432
National Revere Bank v. Morse, 163 Mass. 383 1825
National S. Co. v. Long, 79 Ark. 523 2792
v. Long, 125 Fed. 887 2796
v. Mabry, 139 Ala. 217 4620, 4633, 4647
v. United States, 129 Fed. 70 1595, 1612, 4284
v. Walker, 127 Iowa 518 2793
National Soc. v. American S. Co., 56 N. Y. Misc. 627 1725
National Surety Co. v. Berggren, 126 Minn. 188 2797
v. Schafer, 57 Colo. 56 1764
National Union v. Keefe, 263 Ill. 453 3085
National W. Co. v. Kansas City, 62 Fed. 853 4070
National W. & S. Co. v. Toomey, 144 Mo. App. 516 1436, 2280
National & P. W. Mills v. Frankfort M. A. & P. Ins. Co., 28 R. I. 126 2879
Nations v. Harris (Tex. Civ. App.), 151 S. W. 334 3944
Nau v. Standard O. Co., 154 Ill. App. 421 1510
Naugle v. State, 11 Ind. 284 1652
Nauman v. Big Tarkio D. Dist., 113 Mo. App. 575 4148
v. Ullman, 102 Wis. 92 2406
v. Zoehrlaut, 21 Wis. 466 2482
Nava v. Northwestern Tel. Ex. 112 Minn. 199 1332
Navailles v. Dielman, 124 La. 422 147
Navarino v. Dubrap, 66 N. J. L. 620 4605
Nave v. Berry, 22 Ala. 382 3150, 3151
v. Gross, 146 Ill. App. 104 2404
v. Home Mut. Ins. Co., 37 Mo. 430 3012
v. McGrane, 19 Idaho 111 2575
Naye v. Noezel, 50 N. J. L. 523 3153
Naylor v. Lane, 66 How. Pr. 400, 18 J. & S. 97 591
v. Parker (Tex. Civ. App.), 139 S. W. 93 2008, 2010
v. Schenck, 3 E. D. Smith, 135 566
Naynant v. Dodson, 12 Iowa 22 1709
Naysmith v. City of Auburn, 95 Neb. 582 4015, 4142
Neaffie v. Hart, 4 Lans. 4 2271
Neafie v. Hoboken P. & P. Co., 72 N. J. L. 340 1138, 4547
v. Hoboken P. & P. Co., 75 N. J. L. 564 4535, 4588
Neagle v. Herbert, 73 Ill. App. 17 2683
Neal v. Allison, 50 Miss. 175 739, 743
v. Buffington, 42 W. Va. 327 2801
v. Davis, F. & M. Works, 131 Ga. 701 1432
v. Finley, 136 Ky. 346 791, 819
v. Freeman, 85 N. C. 441 1118
v. Hanson, 60 Me. 84 2898
v. Jefferson, 212 Mass. 517 188, 227, 251, 3189, 3190, 3209, 3211, 3232

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v. Lea, 64 N. C. 678 2833
v. Lewis, 2 Bay 204 1529
v. New Orleans, etc., Ass'n, 100 Tenn. 607 1164
v. Pender-H. H. Co., 122 N. C. 104 202, 2342, 2352
v. Singleton, 26 Ark. 491 1498
v. Taylor, 56 Ark. 521 1758
Neal-Blun Co. v. Rogers, 141 Ga. 808 1594
Neal's Est., 14 Pa. Dist. 227 952, 960
Neale v. Newland, 4 Ark. 506 2843
v. Smith, 61 Ark. 564 2590
v. Wyllie, 3 B. & C. 533 302, 3159
Nearing v. Hathaway, 128 App. Div. (N. Y.) 745 4364, 4430
Neary v. Bostwick, 2 Hilt. 514 758
v. Northern Pac. R. Co., 41 Mont. 480 4873, 4874
Nebenzahl v. Townsend, 61 How. Pr. 353 4603
Neblett v. McGraw, 41 Tex. Civ. App. 239 888
Nebo Con. C. & C. Co. v. Lynch, 141 Ky. 711 3840
Nebraska, The, 3 Bene. 261 4998
Nebraska City v. Campbell, 2 Black 590 3493, 4692, 5088
Necker v. Bates, 118 Iowa 545 4648
Neder v. Zimmer, 6 Dema. 180 1083
Neeb v. Hope, 111 Pa. 145 1291, 4518
v. McMillan, 98 Iowa 718 4212, 4329
Needham v. Grand Trunk R. Co., 38 Vt. 294 4851, 4954
v. Halverson, 22 N. D. 594 1442, 2446, 2448, 4382
v. Wellesley, 139 Mass. 372 1044
Needham P. & O. Co. v. Hollingsworth, 91 Tex. 49 1452
Needler v. Guest, Aleyn 9 2541
Neel v. Clay, 48 Ala. 252 2328
v. Smith, — Iowa —, 147 N. W. 183 4168
Neeley v. Cameron, 71 W. Va. 144 1432
v. McFadden, 2 S. C. 169 611
v. Rembert, 71 Ark. 91 2029
Neely v. Ft. Worth, etc., R. Co., 96 Tex. 274 129
v. McCormick, 25 Pa. 255 4173
v. Thompson, 68 Kan. 193 746
v. Williams, 149 Fed. 60 813, 1229, 2157
v. Woodward, 7 Heisk. 495 612
Neff v. Cameron, 213 Mo. 350 109, 1499
v. Clute, 12 Barb. 466 2331, 4392, 4401
v. Heimer, — Tex. Civ. App. —, 163 S. W. 140 1229
v. McNeeley, 1 Neb. (Unof.) 416 2373
v. Pennoyer, 3 Sawyer 495 3715
Neff's App., 9 W. & S. 36 2811
Neftelberger v. Garner, 125 App. Div. (N. Y.) 420 2500
Negley v. Cowell, 91 Iowa 256 3740, 3791
v. Farrow, 60 Md. 158 4514, 4518, 4587
v. Lindsay, 67 Pa. 217 1943
v. Morgan, 46 Pa. 281 3136
Negley Ave., Opening of, 146 Pa. 456 3990
Negus, Ex parte, 7 Wend. 499, 7 T. R. 97, 2 M. R. 181 2189, 2894
Negus, In re, 7 Wend. 499 2875, 2893
Neher v. Hansen, 12 Cal. App. 370 4380, 4403
Nehr v. Dobbs, 47 Neb. 863 4641
Nehrling v. Herold Co., 112 Wis. 558 4503
Neiderlander v. Starr, 50 Kan. 770 2500
Neiderstein v. Cusick, 126 App. Div. (N. Y.) 409 487, 3194
Neidig v. Whiteford, 29 Md. 178 728
Neil v. Bank, 50 Ohio St. 193 1048, 1051
v. Cunningham S. Co., 160 Mo. App. 513 2406, 2411
v. Idaho, etc., R. Co., 22 Idaho 74 478, 1500, 5061
v. Ridge, 220 Mo. 233 1065
Neiler & Warren v. Kelley, 69 Pa. 403 2331, 2964, 4207, 4249, 4271
Neill v. Brooklyn E. R. Co., 13 N. Y. Misc. 403 1465
v. Neill, 31 Miss. 36 1155
v. Wilson, 146 N. C. 242 4855
Neilon v. Marinette & M. P. Co., 75 Wis. 579 4817
Neilson v. Betts, L. R. 5 H. of L. 1 4474
v. Chicago, etc., R. Co., 58 Wis. 516 3970, 4003
v. Commercial Ins. Co., 3 Duer 455 3000
v. Emerson, 2 Bay 439 1529
v. Fry, 16 Ohio St. 552 772
v. Jarvis, 17 Ky. L. Rep. 694 1776
Neiner v. Chicago City Ry. Co., 181 Ill. App. 449 1428
Neis v. O'Brien, 12 Wash. 358 2214
Neiser v. Thomas, 46 Mo. App. 47 1721
Neiswanger v. Squier, 73 Mo. 192 3255, 4211, 4217
Nekoosa-Edwards Paper Co. v. Industrial Comm. of Wisconsin, 154 Wis. 105 5192
Nell's App., 3 Penny. (Pa.) 66 365
Nellis v. Cramer, 86 Wis. 337 4573
v. McCarn, 35 Barb. 115 1419, 1420, 1457
Nelson, In re, 217 Mass. 467 5201
Nelson v. Armour P. Co., 76 Ark. 352 2377, 2378, 2389
v. Atlanta, 138 Ga. 252 3968, 4032, 4101, 4102, 4108, 4114, 4117, 4130
v. Belmont, 21 N. Y. 36 2734, 3036
v. Big Blackfoot M. Co., 17 Mont. 553 3769, 3776
v. Bostwick, 5 Hill. 37 1556
v. Branford L. & W. Co., 75 Conn. 548 1478, 4948
v. Bridges, 2 Beav. 239 2036
v. Buick Motor Co., 183 Ill. App. 323 476
v. Carrington, 4 Munf. 332 2047
v. Cartmel, 6 Dana 7 1105
v. Chicago, etc., R. Co., 30 Minn. 74 74, 76
v. Churchill, 117 Wis. 10 3773, 3782
v. Cook, 17 Ill. 443 435
v. Crawford, 122 Mich. 466 78, 129, 167, 345
v. Danielson, 82 Ill. 545 4605
v. Dubois, 13 Johns. 175 2769, 2781
v. Evans, 1 Dev. 9 4576
v. Everett, 29 Iowa 184 871, 1920
v. Felden, 7 Rich. Eq. 394 1055
v. First Nat. Bank, 69 Fed. 798 2811, 2814
v. Galveston, etc., R. Co., 78 Tex. 621 30
v. Gibe, 162 Mich. 410 2045
v. Gjestrum, 118 Minn. 284 4407
v. Gray, 2 G. Greene 397 1555
v. Great Northern R. Co., 28 Mont. 297 3334, 3336, 3414
v. Halvorson, 117 Minn. 255 1317, 1328, 4842
v. Hatch, 70 App. Div. (N. Y.) 206 291
v. Hiatt, 38 Neb. 478 2322

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v. Hirschberg, 70 Ark. 39 2238
v. Hudson River R. Co., 48 N. Y. 498 21
v. Johnson, 25 Mo. 430 533
v. Kellogg, 162 Cal. 621 4835, 4840, 4842
v. King, 25 Tex. 655 4282
v. Lake Shore, etc., R. Co., 104 Mich. 582 1446, 1477, 4889, 4890
v. Leichtenmeyer, 49 Mo. 56 4359
v. Masterton, 2 Ind. App. 524 2470
v. Matthews, 2 Hen. & Munf. 164 2061, 2110
v. Metropolitan St. R. Co., 113 Mo. App. 459 4702, 4731, 4735, 4759
v. Minneapolis, etc., R. Co., 41 Minn. 131 76
v. Mississippi, etc., B. Co., 99 Minn. 484 1435, 3762
v. Morgan, 2 Mart. (La.) 256 2947
v. Munch, 28 Minn. 314 2805
v. Nugent, 106 Wis. 477 443
v. Omaha, etc., St. R. Co., 158 Iowa 81 3892
v. Oregon R. & N. Co., 13 Ore. 141 1498, 1808
v. Oren, 41 Ill. 18 816, 820
v. Overman, 19 Ky. L. Rep. 161 2272
v. Plimpton F. P. E. Co., 55 N. Y. 480 3314
v. Robson, 17 Minn. 284 797, 819
v. St. Louis, etc., R. Co., 49 Kan. 165 313
v. Snoyenbos, 155 Wis. 590 474, 4844
v. Staff, Cro. Jac. 422 4556
v. Stange, 140 Wis. 657 1504
v. State, 32 Ind. App. 88 60, 99, 146
v. Stephenson, 5 Duer 538 3288, 3289, 3290
v. Stewart, 174 Mich. 127 1037
v. Suffolk Ins. Co., 8 Cush. 477 3000
v. United R. Co., 176 Mo. App. 423 4719
v. Wallace, 48 Mo. App. 193 4545, 4576
v. Webster, 72 Neb. 332 2799
v. Wellington, 5 Bosw. 178 676
v. West Duluth, 55 Minn. 497 1498, 3762
v. Western S. N. Co., 52 Wash. 177 4733
v. Western S. Co., 61 Wash. 672 4652, 4672
v. Wilson, 157 Iowa 80 188
v. Winchell, 203 Mass. 75 4488, 4490, 4491
v. Woodruff, 1 Black 156 3289
Nelson County v. Bardstown, 123 Ky. 836 1807
Nelson Mfg. Co. v. Shreve, 104 Mo. App. 474 1523
Nelson & A. C. & C. Mfg. Co. v. Armstrong, 93 Minn. 449 1563
Nemrow v. Assembly C. & S. Co., 121 App. Div. (N. Y.) 481 3214
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Neppach v. Oregon & C. R. Co., 26 Ore. 374 1461, 1990
Neptune, The, 1 Hagg. Adm. 237 2723
Nesbit v. Garner, 75 Iowa 314 108
Nesbitt v. Helser, 49 Mo. 383 2969
v. Moore, 39 S. C. 351 4279
v. St. Paul L. Co., 21 Minn. 491 364, 3788, 4256
Nessle v. Reese, 29 How. Pr. 382 889
Nesson v. Millen, 205 Mass. 515 1853
Nestor v. Fall River, 183 Mass. 265 4740
Nether Holme, The, 50 Fed. 434 3306
Netherland-Am. S. N. Co. v. Hollander, 8 C. C. A. 169, 59 Fed. 417 4755, 4771
Nethery v. Nelson, 51 Wash. 624 3788, 3789
Neto, The, 51 Fed. 819 2729
Nettie L. Tice, The, 110 Fed. 156 4987
Nettlehorst v. Mordaunt, 173 Ill. App. 42 4688
Nettles v. Barnett, 8 Port. 181 27
v. Harrison, 2 McCord 230 1495, 3528
v. South Carolina R. Co., 7 Rich. 190 3342
Nettleton v. Caryl, 14 Pa. Super. 443 1966
v. Ramsey County L. & L. Co., 54 Minn. 395 2781, 2800, 2802
Nettograph Mach. Co. v. Brown, 28 Okla. 436 1828
Neu v. McKechnie, 95 N. Y. 632 59, 60, 1289
Neubacher v. Perry, 57 Ind. App. 362 760
Neuer v. Metropolitan St. R. Co., 143 Mo. App. 402 3506
Neuerberg v. Gaulter, 4 Ill. App. 348 418
Neufeld v. Rodeminski, 144 Ill. 83 4635, 4637, 4645, 4647
Nevada County v. Hicks, 38 Ark. 557 864
v. Hicks, 50 Ark. 416 1040, 1050
Nevada County & S. C. Co. v. Kidd, 37 Cal. 282 1355
Nevada & M. R. Co. v. De Lissa, 103 Mo. 125 2620
Nevers L. Co. v. Fields, 151 Ala. 367 1476, 4910
Neves v. Costa, 5 Cal. App. 111 4835
Neville v. Frary, 88 Conn. 50 1501
v. Northcutt, 7 Cold. 294 1525
v. Southern R. Co., 126 Tenn. 96 3469, 3470
v. Williams, 7 Watts 421 1654
Neville Road Case, 8 Watts 172 4094
Nevin v. Pullman P. C. Co., 106 Ill. 222 3542
Nevins v. Bay State S. Co., 4 Bosw. 225 3531, 3534
v. Nevins, 68 Kan. 410 1379, 4980, 4981, 4983
v. Peoria, 41 Ill. 502 3904, 3948
New v. Young, 148 Ala. 253 3711
New Albany v. Lines, 21 Ind. App. 380 3852
New Amsterdam Cas. Co. v. Mesker, 128 Mo. App. 183 757
New Bank v. Kleiner, 112 Wis. 287 4434
New Bedford Inst. v. Bank, 9 Allen 175 2867
v. Hathaway, 134 Mass. 69 2799, 2869
New Bell Jellico Coal Co. v. Oxendine, 155 Ky. 840 766
New Bern v. Wadsworth, 151 N. C. 309 4055
New Brighton v. Peirsol, 107 Pa. 280 4096
New Britain v. New Britain Tel. Co., 74 Conn. 326 858, 886
New Brunswick S. & C. T. Co. v. Tiers, 24 N. J. L. 697 3385
New Camelia, The, 105 Fed. 637 2727
New Castle v. Grubbs, 171 Ind. 482 52, 4720
New Castle R. Co. v. Brumback, 5 Ind. 543 4119

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New Ellerslie F. Club v. Stewart, 123 Ky. 8 436
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New England Exp. Co. v. Maine Cent. R. Co., 57 Me. 188 3285
New England F. & C. Co. v. Bryant, 64 Minn. 256 1683
New England I. Co. v. Gilbert E. R. Co., 91 N. Y. 153 378, 2584
New England M. S. Co. v. Vader, 28 Fed. 265 1163
New England Mut. L. Ins. Co. v. Randall, 42 La. Ann. 260 2792, 2806
New England T. Co. v. Abbott, 162 Mass. 148 2222
New Hamburg Mfg. Co. v. Webb, 23 Ont. L. R. 44 2415, 2455
New Hampshire I. Factory v. Richardson, 5 N. H. 294 2522
New Hampshire Sav. Bank v. Colcord, 15 N. H. 119 2804, 2811
New Harbor P. Co. v. The Charles P. Chouteau, 5 Fed. 463 2721
New Haven v. Fresenius, 75 Conn. 145 1133
v. National S. E. Co., 79 Conn. 482 840, 932
New Haven Bank v. Miles, 5 Conn. 587 1561, 1809
New Haven County v. Trinity Parish, 82 Conn. 378 4150
New Haven Eastern P. B. Co., 78 Conn. 689 2429
New Haven S. Co. v. Mayor, 36 Fed. 716 5005, 5010
New Haven S. S. M. Co. v. New Haven, 72 Conn. 276 5, 4150
New Haven T. Co. v. Doherty, 75 Conn. 555 2927
New Haven & N. Co. v. Hayden, 117 Mass. 433 212, 298, 306, 2009, 3196
v. Vanderbilt, 16 Conn. 420 65, 4186
New Holland T. Co. v. Lancaster County, 71 Pa. 442 1552
New Home S. M. Co. v. Bothane, 70 Mich. 443 786
v. Seago, 128 N. C. 158 1568, 1569
New Iberia E. Co. v. McIlhenny, 132 La. 149 4534
New Iberia S. Co. v. Lagarde, 130 La. 387 2346
New Jersey Exp. Co. v. Nichols, 3 Vroom (N. J. L.) 166, aff'd 4 Vroom (N. J. L.) 434 5088
v. Nichols, 33 N. J. L. 434 412, 3488, 4693, 4714, 4720
New Jersey P. Co. v. Schaeffer, 159 Fed. 171 434
New Jersey S. Co. v. Brockett, 121 U. S. 637 1331, 3468
New Jersey S. & C. F. Co. v. Board of Education, 58 N. J. L. 646 33, 35
New Jersey Soc. v. Knoll, 77 N. J. L. 138 1542
New Jersey Steam Nav. Co. v. Merchants' Bank, 6 How. 344 3333
New Jersey, etc., R. Co. v. Tutt, 168 Ind. 205 1461, 3976, 3980, 4002, 4014, 4025, 4103, 4133
New Kanawha C. M. Co. v. Wright, 163 Ind. 529 2508
New London Bank v. Lee, 11 Conn. 112 673
New Market Co. v. Embry, 20 Ky. L. Rep. 1130 231, 2351
New Milford W. Co. v. Watson, 75 Conn. 237 3759, 3959, 3989, 4022
New Monckton Collieries, Ltd. v. Keeling [1911] A. C. 648, 80 L. J. K. B. 1205, 105 L. T. 337, 72 T. L. R. 551, 55 Sol. J. 687, 4 B. W. C. C. 332 5200
New Nat. T. Co. v. Dulaney, 86 Ky. 516 1728
New Orleans v. Fisher, 91 Fed. 574 1045
v. Gaines, 15 Wall. 624 3699, 3706, 3711
v. Warner, 175 U. S. 120 959, 968, 1112
New Orleans C. Co. v. American C. Co., 124 La. 19 4486
New Orleans & C. R. Co. v. Schneider, 8 C. C. A. 571, 60 Fed. 210 1523, 4827
New Orleans & N. P. & N. Co. v. Louisville Underwriters, 45 Fed. 370 3031
v. Shackelford, 87 Miss. 610 3532, 3535
New Orleans, etc., Co. v. Allbritton, 38 Miss. 242 170, 1314, 3467, 3515, 4190
v. Bailey, 40 Miss. 395 1333, 1344, 3506, 3507
v. Burke, 53 Miss. 200 1311, 1344, 1346
v. Echols, 54 Miss. 264 312
v. Hurst, 36 Miss. 660 355, 1327, 1344, 3452, 3501, 3506
v. Martin (Miss.), 62 So. 228 1725
v. Meridian W. W. Co., 72 Fed. 227 190
v. Moore, 40 Miss. 39 3535
v. Statham, 42 Miss. 607 3501
v. Tyson, 46 Miss. 729 3349, 3363
New Providence v. McEachron, 33 N. J. L. 339 1578, 1579
New Reservoir, Matter of, 1 Sheldon (Buffalo Super. Ct.) 408 4091
New Sharon C. Co. v. Knowlton, 132 Iowa 672 1322, 4605, 4609, 4621
New Street, In re, 63 N. Y. Misc. 495 4118
New York, In re, 56 N. Y. Misc. 306 3995
In re, 190 N. Y. 350 4118, 4119
In re, 196 N. Y. 255 3954
In re, 198 N. Y. 84 4139
In re, 89 App. Div. (N. Y.) 490 3955
In re, 101 App. Div. (N. Y.) 527 4092
In re (Misc.), 119 N. Y. Supp. 1054 3958
New York v. Brown, 179 N. Y. 303 3105
v. Corn, 133 App. Div. (N. Y.) 1 299
New York Academy of Music v. Hackett, 2 Hilt. 217 3129, 3209, 3247
New York B. N. Co. v. Hamilton B. N., etc., Co., 180 N. Y. 280 4466
v. Kidder P. Mfg. Co., 192 Mass. 391 1094, 2454
New York Continental J. F. Co. v. Wynkoop, 29 App. D. C. 594 3841, 3907
New York E. J. P. Co. v. Simon, 147 Fed. 224 4530
New York, G., etc., Co. v. Flynn, 55 N. Y. 653 4312
New York L. Ins. Co. v. Chittenden, 134 Iowa 613 760
v. Cutler, 3 Sandf. Ch. 176 572
v. Easton, 69 Ill. App. 479 1856
v. McDearmon, 133 Mo. App. 671 2754
v. Manning, 3 Sandf. Ch. 58 951
v. Neal, 114 La. 652 3077
v. Pope, 139 Ky. 567 274

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v. Vanderbilt, 12 Abb. Pr. 458 580
v. Van Meter, 137 Ky. 4 748
New York M. C. Co. v. City Homes I. Co., (Misc.) 88 N. Y. Supp. 233 2605
New York Market G's Ass'n v. Adams D. G. Co., 115 App. Div. (N. Y.) 42 171, 1418
New York Nat. Bank v. Metropolitan E. R. Co., 108 N. Y. 660 401
New York Nat. Exch. Bank v. Reed, 232 Ill. 123 376, 416, 1715
New York News Pub. Co. v. National S. Co., 148 N. Y. 39 2336, 2514
New York Rubber Co. v. Rothery, 132 N. Y. 293 2, 38
New York S. & T. Co. v. Lipman, 83 Hun 569 1715
v. Lombard I. Co., 73 Fed. 537 1222, 2791
New York State Bank v. Fletcher, 5 Wend. 85 655, 761, 2798
New York State M. Ins. Co. v. Protection Ins. Co., 1 Story 458 308, 3093
New York T. Co. v. French, 154 Pa. 273 2914
v. Garside, 85 C. C. A. 285, 157 Fed. 521 1383, 4758
New York & B. Bridge, Matter of, 18 App. Div. (N. Y.) 8 3965
In re Trustees of, 137 N. Y. 95 1005, 1063, 4150
New York & B. Exp. Co. v. Traders' & M. Ins. Co., 132 Mass. 377 3000, 3004
New York & B. T. Line v. Baer, 118 Md. 73 3430
New York & C. M. Co. v. Fraser, 130 U. S. 611 2415, 2433, 3237, 3248
New York & C. S. Co. v. Harrison, 16 Fed. 688 2982
New York & W. P. T. Co. v. Dryburg, 35 Pa. 298 3555
New York etc., Co. v. Hagler, — Tex. Civ. App. —, 169 S. W. 1064 3082
New York, etc., R. Co., In re, 6 Hun 149 4126
In re, 27 Hun 116 4049
In re, 29 Hun 1 4039
In re, 29 Hun 646 4083
In re, 35 Hun 306 4021
In re, 35 Hun 633 4045
In re, 37 Hun 317 4053
In re, 49 Hun 539 3946, 4108
In re, 49 N. Y. 414 3146
In re, 151 App. Div. (N. Y.) 50 4049, 4055, 4131, 4134
Matter of, 76 Hun 384 4105
v. Albany Steam Trap Co., 161 App. Div. (N. Y.) 329 4012
v. Ansonia L. & W. P. Co., 72 Conn. 703 1097, 1140
v. Arnot, 27 Hun 151 4044
v. Bell, 101 N. Y. 685 4125
v. Bennett, 50 Fed. 496 3463
v. Bridgeport T. Co., 65 Conn. 410 4075
v. Carr, 238 U. S. 260, aff'g 157 N. Y. App. Div. 941 5044, 5067, 5068
v. Cella, 88 Conn. 515 3711
v. Cohasset Water Co., 216 Mass. 291 4059
v. Estill, 147 U. S. 591 1136, 3283, 3387, 3391, 3392, 3400, 3403, 4189
New York, etc., R. Co. v. Fifth Nat. Bank, 135 U. S. 432 5
v. Fraloff, 100 U. S. 24 3529, 3533, 3534
v. Hamlin, 170 Ind. 20 152
v. Hastings-on-Hudson, 9 App. Div. (N. Y.) 256 1716
v. Jones, 94 Md. 24 3896
v. Marshall, 120 App. Div. (N. Y.) 742 4002
v. Mills, 160 App. Div. (N. Y.) 6 4034, 4048
v. Mushbrush, 11 Ind. App. 192 4939
v. National P. Ins. Co., 20 Barb. 468 3093
v. New Haven, 81 Conn. 581 4025, 4029
v. Newbold, 166 App. Div. (N. Y.) 193 3999
v. Niebel, 214 Fed. 952 1505, 5074, 5083, 5086, 5111, 5141
v. Peninsula Produce Exchange, 122 Md. 215 3357
v. Pierce, 35 Hun 306 3997
v. Randall, 102 Ind. 453 3099
v. Rhodes, 171 Ind. 521 40, 4059, 4062
v. Robbins, 38 Ind. App. 172 109
v. Roe, 4 Ohio C. C. (N. S.) 284 4871, 4874
v. Roe, 25 Ohio C. C. 628 4899
v. Roper, 176 Ind. 497 1093, 1136
v. Schaffer, 17 Ohio C. C. 77 4534
v. Schuyler, 34 N. Y. 30 4404
v. Siebrecht (Misc.), 130 N. Y. Supp. 1005 3964, 4108, 4119
v. Steinbrenner, 47 N. J. L. 161 108
v. Story, 6 Barb. 419, 6 N. Y. 85 2696
v. United States, 212 U. S. 481 1331
v. Untermyer, 133 App. Div. (N. Y.) 146 3987
v. Winter, 143 U. S. 60 3465, 3482
v. Young, 33 Pa. 175 3975
v. Zumbaugh, 12 Ind. App. 272 1140
New York, etc., Tel. Co. v. Dryburg, 35 Pa. 298 3546, 3550, 3553, 3579, 3610, 3611
New Zealand Ins. Co. v. Earnmoor S. S. Co., 79 Fed. 368 1092
Newark v. Chestnut Hill. L. Co., 77 N. J. Eq. 23 3937
v. Stout, 52 N. J. L. 35 2815
Newark C. Co. v. Upson, 40 Ohio St. 17 4626
Newark City I. Co. v. Fisher, 76 Fed. 427 2239
Newark R. Co. v. McCann, 58 N. J. L. 642 4682
Newark Savings Inst. v. Panhorst, 7 Biss. 99 500, 1626
Newaygo, The, 205 Fed. 178 2733
Newberry v. Bennett, 38 Fed. 308 2393, 2436
v. Connecticut, etc., R. Co., 25 Vt. 377 3518
v. Furnival, 46 How. Pr. 139 2271
v. Getchel & M. L. Mfg. Co., 100 Iowa 441 4737
v. Gibson, 125 Iowa 575 4314, 4329, 4348
v. Lee, 3 Hill, 523 436
v. Ruffin, 102 Va. 73 2013
v. Trowbridge, 13 Mich. 263 791
Newbold v. Wright, 4 Rawle 195 4294
Newbrough v. Walker, 8 Gratt. 16 242, 244, 1995, 3189, 3224
Newburgh v. Galatian, 4 Cow. 340 295, 2876, 2885
Newburn v. Durham, 10 Tex. Civ. App. 655 4836, 4842

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Newbury v. Getchell & M. L. & Mfg. Co., 100 Iowa 441 334, 1503, 4652, 4772
Newburyport v. Fidelity Mut. L. Ins. Co., 197 Mass. 596 1117
Newburyport W. Co. v. Newburyport, 168 Mass. 541 4070, 4079
Newby v. Platte County, 25 Mo. 258 4119
Newcomb, In re, 32 Fed. 826 1121
Newcomb v. Boston P. Department, 146 Mass. 596 151
v. Clark, 1 Denio, 226 416
v. Gibson, 127 Mass. 396 2855
v. Hale, 90 N. Y. 326 2820, 2841
v. Kloeblen, 77 N. J. L. 791 2761
v. La Roe, 162 App. Div. (N. Y.) 906 639
v. New York Cent., etc., R. Co., 182 Mo. 687 4800
v. Raynor, 21 Wend. 108 782
v. Wallace, 112 Mass. 25 35, 39
Newcombe v. Hyman, 16 N. Y. Misc. 25 2482
Newcomer v. State, 77 Tex. 286 1588, 1589
Newell v. Downs, 8 Blackf. 523 1529
v. Fowler, 23 Barb. 628 2792
v. Griswold, 6 Johns. 45 1008
v. Holton, 22 Minn. 19 976
v. Jones, 4 C. & P. 124 1013
v. Keith, 11 Vt. 214 1005, 1108
v. Lawton, 20 R. I. 307 2472
v. Loeb, 77 Wash. 182 3999, 4107, 4143
v. Nixon, 4 Wall. 572 664
v. Roake, 7 B. & C. 404 3696
v. St. Louis T. Co., 108 Mo. App. 530 4700
v. Smith, 28 N. Y. Misc. 182 4187
v. Smith, 49 Vt. 255 3349
v. Whitcher, 53 Vt. 389 3735
Newfield v. Copperman, 15 Abb. Pr. (N. S.) 360 4608
Newfoundland v. Newfoundland R. Co., 12 App. Cas. 199 526
Newgass v. Railway Co., 54 Ark. 140 3969, 4003, 4026, 4053, 4103
Newhall v. Gilson, 8 Cush. 595 38
v. Journal P. Co., 105 Minn. 44 2551, 2555
v. Turney, 14 Ill. 338 525
v. Wyatt, 139 N. Y. 452 638
Newlan v. Dunham, 60 Ill. 23 2222
v. Shafer, 38 Ill. 379 1014, 1032
Newman, In re, 4 Ch. Div. 724 883, 914, 919
Newman v. Alvord, 51 N. Y. 195 4486
v. Auling, 3 Atk. 579 1086
v. Blake & Knowles Steam Pump Works, 41 App. Cas. (D. C.) 449 4113
v. Covenant Mut. Ins. Co., 76 Iowa 56 3046, 3076
v. Crocker, 1 Bay, 246 382
v. Davis, 58 Iowa 447 4614, 4648
v. Fowler, 37 N. J. L. 89 433
v. Gleason, 132 La. 561 1969
v. Goza, 2 La. Ann. 642 1897
v. Kane, 9 Nev. 234 4214
v. Kershaw, 10 Wis. 333 1164, 1878
v. Levi, 74 W. Va. 223 825
v. McGregor, 5 Ohio 349 356, 2329, 2667
v. Metcalf, 4 Bush 67 1583
v. Metropolitan E. R. Co., 118 N. Y. 618 3946, 3962, 4081, 4108, 4124
v. Mountain Park L. Co., 85 Ark. 208 2931, 3734
Newman v. Munk, 36 N. Y. Misc. 639 4274
v. New York, etc., R. Co., 54 Hun 335 4617
v. Newman, 4 M. & S. 70 1558
v. Newman, 29 Mo. App. 649 1019, 1020
v. Otto, 4 Sandf. 668 1356
v. Perrill, 73 Ind. 153 834
v. St. Louis, etc., R. Co., 2 Mo. App. 402 1269
v. Scarbrough, 115 La. 860 2772
v. Smith, 2 Salk. 642 1390
v. Smith, 77 Cal. 22 4424
v. Stein, 75 Mich. 402 4512, 4543, 4592
v. Sylvester, 42 Ind. 106 2981
v. Third Ave. R. Co., 50 N. Y. Sup. Ct. 412 1465
v. Washington, Mart. & Yerg. 79 2489
v. Williams, 29 Miss. 212 985
v. Wolfson, 69 Ga. 764 887
Newmarket I. Foundry v. Harvey, 23 N. H. 395 2225, 2272
Newmyer v. Roush, 21 Idaho 106 2146, 2149
Newport v. Cook, 2 Ash 332 3724
Newport News Pub. Co. v. Beaumeister, 104 Va. 744 4832
Newport News, etc., Co. v. Mercer, 96 Ky. 475 3329, 3346, 3353
Newport News, etc., R. Co. v. Bickford, 105 Va. 182 558
v. Dentzel's Adm'r, 12 Ky. L. Rep. 626 4795
v. Lake, 105 Va. 311 4054
Newport W. & L. Co. v. Drew, 141 Cal. 103 821, 1221
v. Western U. Tel. Co., 137 N. C. 513 3570
v. Western U. Tel. Co., 153 N. C. 153 3570, 3571, 3594
Newson v. Douglass, 7 Harris & J. 417 1107
Newsum v. Newsum, 1 Leigh 86 51
Newton v. Bennet, 1 Bro. Ch. 359 1117, 1125
v. Brown, 152 N. C. 200 1717, 1741
v. Devlin, 134 Mass. 490 2755, 2763
v. Hawks, 113 Me. 44 4784
v. Horland, 1 Man. & G. 644 3824
v. Kennerly, 31 Ark. 626 958
v. Locklin, 77 Ill. 103 1499, 4842
v. New York, etc., R. Co., 106 App. Div. (N. Y.) 415 3480
v. Newbegin, 43 Me. 293 1402
v. Round, 109 Iowa 286 1662
v. Russell, 24 Hun 40 1729
v. Russell, 87 N. Y. 527 1728
v. Sly, 15 Mich. 391 3728
v. Wilson, 3 Hen. & Munf. 470 3149
Newton R. Works v. Home R. Co., 100 Ill. App. 421 2456
Newton's Appeal, 84 Conn. 234 4020, 4106, 4107
Nexsen v. Lyell, 5 Hill 466 677, 4289
Neys v. Taylor, 12 S. D. 488 4615, 4619, 4624
Niagara, The, 89 Fed. 1000 2728
Niagara Bank v. Rosevelt, 9 Cow. 409 717, 737
Niagara Falls B. Co. v. Wall, 98 Mich. 158 18
Niagara Falls P. Co. v. Lee, 20 App. Div. (N. Y.) 217 2876, 2886, 2887
Niagara Fire Ins. Co. v. Halfin, 22 Ky. L. Rep. 1212 3044
v. Hart, 13 Wash. 651 2491
v. Scammon, 144 Ill. 490 3049
Niblo v. North Amer. Ins. Co., 1 Sandf. 551 3041, 3047, 3051, 3064
Nicewanger v. Bevard, 17 Ind. 621 1847

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Nichol v. Alexander, 28 Wis. 118 2088, 2159
v. Goeher, 12 Manitoba 177 1005
v. Thompson, 1 Camp. 52n 1034
Nicholas v. Burlington, etc., R. Co., 78 Minn. 43 4952
v. Haines, 98 Fed. 692 921
v. Knowles, 17 Fed. 494 741
v. New York Cent., etc., R. Co., 89 N. Y. 370 21
Nicholds v. Crystal P. G. Co., 126 Mo. 55 1512
Nicholl v. Williams, 2 M. & W. 758 507, 509
Nicholls v. American S. & W. Co., 117 App. Div. (N. Y.) 21 2347, 2351
v. Creditors, 9 Rob. 476 636
v. Mapes, 1 Cal. App. 349 4270
v. Skeel, 12 Iowa 300 977
v. Wilson, 11 M. & W. 106 2541
Nichols v. Brabazon, 94 Wis. 549 4742, 4748, 4774
v. Bridgeport, 23 Conn. 189 3958
v. Briton Ferry Urban Dist. Council, [1915] W. C. & Ins. Rep. 14 5202
v. Bronson, 2 Day 211 4164
v. Brunswick, 3 Cliff. 81 4725
v. Camden R. I. Co., 62 W. Va. 409 1495, 3527
v. Coleman, 96 App. Div. (N. Y.) 353 1135
v. Coolahan, 10 Metc. (Mass.) 449 2533
v. Dusenbury, 2 N. Y. 283 548, 2828, 3257, 3263, 4361
v. Fearson, 7 Pet. 104 987
v. Freeman, 11 Ired. 99 1981, 1990
v. French, 83 Ohio 162 3728
v. Guy, 2 Ind. 82 4503
v. Hunton, 45 N. H. 470 1827, 1861
v. Knowles, 17 Fed. 494 705
v. MacLean, 101 N. Y. 526 693, 1776
v. Michael, 23 N. Y. 264 4311, 4312
v. Morse, 100 Mass. 523 2225
v. New York & P. Tel. & T. Co., 126 App. Div. (N. Y.) 184 3774
v. Nichols, 147 Mo. 387 1315, 4979, 4981, 4982
v. Oregon S. L. R. Co., 28 Utah 319 1383, 1498, 4674
v. Pinner, 18 N. Y. 306 4377
v. Pittsfield, 209 Pa. 240 105
v. Rasch, 138 Ala. 372 172, 226, 2340
v. Richmond, 162 Mass. 170 12
v. Scranton S. Co., 137 N. Y. 471 381, 2255
v. Superior, 109 Wis. 643 2592
v. Tracy, 1 Sandf. 278 783
v. Tremlett, 1 Sprague 367 3301
v. Walter, 8 Mass. 243 2060
Nichols & S. Co. v. Beyer, 168 Mo. App. 686 883, 918
v. Marshall, 108 Iowa 518 1146
v. Paulson, 10 N. D. 440 4347
v. Soderquist, 77 Minn. 509 1835, 1838
v. Stubbs Thresher Co., 160 Ky. 694 2392
Nicholsburg v. Second Ave. R. Co., 11 N. Y. Misc. 432 148
Nicholson v. Gouthit, 2 H. Bl. 609 2937
v. Merritt, 23 Ky. L. Rep. 2281 4535, 4544
v. Munigle, 6 Allen 215 3243
v. New York, etc. R. Co., 22 Conn. 74 3958
v. O'Donald, 79 Ill. 195 1505
v. Paget, 1 Cr. & M. 48 2745, 2748
Nicholson v. Patchin, 5 Cal. 474 2522
v. Pease, 61 Vt. 534 656
v. Rogers, 129 Mo. 136 1311, 1363, 1369, 4537, 4543
v. Wadsworth, 2 Swanst. 387 2006
v. Whitlock, 57 S. C. 36 1131
Nicholson-W. S. & C. Co. v. Urquhart, 32 Tex. Civ. App. 527 4292
Nick Peay C. Co. v. Miller, 100 Ark. 284 2754
Nickels v. Maine F. & M. Ins. Co., 11 Mass. 253 3032
v. People's B. L. Ass'n, 93 Va. 380 1164
Nickerson, In re, 218 Mass. 158 5192, 5193, 5194
Nickerson v. Allen, 110 La. 194 3826
v. Babcock, 29 Ill. 497 1917
v. Bridges, 216 Mass. 416 2046
v. California S. Co., 10 Cal. 520 4353
v. Chatterton, 7 Cal. 568 1683
v. Easton, 12 Pick. 110 2540
v. Harriman, 38 Me. 277 4846
v. Soesman, 98 Mass. 364 287, 615
v. Spindell, 164 Mass. 25 1446
v. Suplee, 174 Ill. App. 136 782
Nickleson v. Stryker, 10 Johns. 115 4960, 4962
Nickley v. Thomas, 22 Barb. 654 4372
Nicklin v. Williams, 10 Ex. 259 393, 3762
Nickoll v. Ashton, [1901] 2 K. B. 126, [1900] 2 Q. B. 298 2308
Nicolet v. Insurance Co., 3 La. 366, 3040, 3056
Nicoll v. Miller, 37 Ill. 387 3727
v. Nicoll, 16 Wend. 446 590
v. Ogden, 29 Ill. 323 3727
v. Sweet, 163 Iowa 683 4946, 4947, 4950
v. Todd, 70 Ill. 295 3727
Nicrosi v. Walker, 139 Ala. 369 977
Niebling v. Laidlaw, 12 Ohio C. C. (N. S.) 463 1538
Niebuhr v. Sonn, 29 App. Div. (N. Y.) 330 1353
Nielsen v. Albert Lea, 87 Minn. 285 1715, 1721, 1729
Nielson v. Read, 15 Phila. 450, 12 Fed. 441 867, 884
Niendorff v. Manhattan R. Co., 4 App. Div. (N. Y.) 46 4718
Nier v. Missouri Pac. R. Co., 12 Mo. App. 35 4757
Nierenberg v. Wood, 59 N. J. L. 112 443
Nieto v. Clark, 1 Cliff. 145 1347, 3467
Night v. Wilcox, 14 N. Y. 413 4967
v. Wilcox, 15 Barb. 279 4966
v. Wilcox, 18 Barb. 212 4966
Nightingale, The, 6 New South Wales L. R. 18 (P. & D.) 2723
Nightingale v. Chafee, 11 R. I. 609 665
v. Scannell, 18 Cal. 315 1329, 1349, 4178, 4227
Nikkel v. Conaway, 27 Okla. 405 1981, 2031, 2032
Niland v. Murphy, 73 Wis. 326 1948
Nile v. Phinney, 90 Me. 122 1935
Niles v. Board of Com'rs, 8 Blackf. 158 1202
v. Central Vermont R. Co., 87 Vt. 356 1372
v. Iroquois Realty Co., 130 App. Div. (N. Y.) 744 3162
v. New York Cent., etc. R. Co., 176 N. Y. 119 127, 287
v. Sawtell, 7 Mass. 444 2129
Nilson v. Chicago, etc. R. Co., 84 Neb. 595 4887, 4905
v. Jonesboro, 57 Ark. 168 832, 866, 868, 869, 884, 885

[REFERENCES ARE TO PAGES]

Nilson v. Kalispell, 47 Mont. 416 4792
v. Morse, 52 Wis. 240 2697, 2706
Nimick v. Holmes, 25 Pa. 366 3037
Nimocks v. Welles, 42 Kan. 39 1721, 1760
Nimrod, The, 141 Fed. 215, aff'd 141 Fed. 834 2370, 2374, 2415, 2421, 2429
Nims v. Troy, 59 N. Y. 500 3741, 3751
Nineteenth Ward Bank v. First Nat. Bank, 184 Mass. 49 682
Niobe, The, 13 Prob. D. 556, [1891] App. Cas. 401 4987
Nipp v. Wiseheart, 7 Ind. App. 642 4668
Nirdlinger v. American Dist. Tel. Co., 245 Pa. 453 55, 117, 2636
Nisbet v. Lawson, 1 Ga. 275 1119
v. Rayne & Burn, [1910] 2 K. B. 689 5199
Nith, The, 36 Fed. 86 3346, 3400
Nitka v. Western U. Tel. Co., 149 Wis. 106 3644, 3659
Nitram Co. v. Creagh, 84 N. J. L. 243 5205
Nitz v. Bolton, 71 Mich. 388 4345, 4352
Niver v. Rossman, 18 Barb. 50 876, 881, 918
Nixa C. Co. v. Lehmann-H. G. Co., 70 Kan. 664 2379
Nixon v. Biloxi, 76 Miss. 810 1726
v. Carson, 38 Iowa 338 534
v. Cutting F. P. Co., 17 Mont. 90 1014
v. Denham, 1 Irish L. 100 3155
v. Fidelity & D. Co., 150 Fed. 574 371, 382
v. Hill, 2 Allen 215 1611
v. Jardine, 23 Up. Can. C. P. 470 1563
v. Kiddy, 66 W. Va. 355 748
v. Lindsay, 2 Jones' Eq. 230 554
v. Ludlam, 50 Ill. App. 273 4763
v. Marr, 190 Fed. 913 1955
v. Myers, 141 Pa. 477 2548
v. Nixon, 8 Dana 5 1121
v. Nixon, 21 Ohio St. 114 2238
v. Omaha, etc. St. R. Co., 79 Neb. 550 1471, 4743
v. Phelps, 29 Vt. 198 2484
v. Porter, 38 Miss. 401 3705
v. Seal, 78 Miss. 363 1738
v. Stillwell, 52 Hun 353 3774
Noakes v. New York Cent., etc., R. Co., 121 App. Div. 716 108, 4801
Noble v. Ames Mfg. Co., 112 Mass. 492 47, 292, 2569
v. Arnold, 23 Ohio St. 264 306, 1719, 1727, 1728
v. Beeman-S.-W. Co., 65 Ore. 93 2836
v. Cass, 2 Sim. 343 2124
v. Douglass, 56 Kan. 92 3694
v. Epperly, 6 Ind. 468 1680
v. Fagnant, 162 Mass. 275, 286 821, 2405, 2421
v. Hand, 163 Mass. 289 258
v. Howard, 2 Hayw. 14 580, 589
v. Kelly, 40 N. Y. 415 4176
v. Libby, 144 Wis. 632 2580, 2602
v. Murphy, 91 Mich. 653 2810
v. Nelson, 154 Mo. App. 616 2407, 2428
v. Smith, 2 Johns. 52 642
v. Walker, 32 Ala. 456 978, 1873
v. White, 103 Iowa 352 4601
v. Wilder, 25 Tex. Civ. App. 311 2322, 2325
Noble's Est., 178 Pa. 460 1121, 1130
Nobles v. Bates, 7 Cow. 307 887
Noceto v. Weill, 166 Ill. App. 162 6, 3766
Noe v. Hodges, 3 Humph. 162 790, 801, 1107
v. Rapid R. Co., 133 Mich. 152 160
Nocl v. Murray, 13 N. Y. 167 656, 669
v. Quincy, O. & K. C. R. Co., — Mo. App. —, 182 S. W. 787 5039
v. Redruth F. Co., [1896] 1 Q. B. 453 4725
v. Wheatley, 30 Miss. 181 2395
Noel C. Co. v. Atlas P. C. Co., 103 Md. 209 419, 2274
Noetling v. Wright, 72 Ill. 390 4375
Nofsinger v. Hartnett, 84 Mo. 549 1784, 1785, 1788
Noftzger v. Moffett, 63 Kan. 354 2480
Nohrden v. Northeastern R. Co., 59 S. C. 87, 105 4863
v. Wright, 98 Minn. 477 443
Noice v. Brown, 39 N. J. L. 569 4961
Nokken v. Avery Mfg. Co., 11 N. D. 399 405, 1391
Nolan v. Foley, 141 Iowa 671 819, 2031
v. Glynn, 163 Iowa 146 3663, 3665, 4968
v. Johns, 126 Mo. 159 1719
v. Labatut, 117 La. 431 1597, 1599
v. Mendere, 6 Tex. Civ. App. 203 1310, 3827
v. Traber, 49 Md. 460 4544
v. Whitney, 88 N. Y. 648 2674, 2684
Noland v. Clark, 10 B. Mon. 239 677
v. Johnson, 5 J. J. Marsh. 351 4290
Nolde v. Gray, 73 Neb. 373 1981
Nolen v. Farrow, 154 Ala. 269 717
Nolin v. Pearson, 191 Mass. 283 4979
Nolle v. Thompson, 3 Metc. (Ky.) 121 541, 553
Nolte v. Chicago, R. I. & P. R. Co., 165 Iowa 721 4946
v. Herter, 65 Ill. App. 430 4502
v. Reichelm, 96 Ill. 425 4381
Nones v. Northouse, 46 Vt. 587 334, 412, 3474, 4693
Noon v. Finnegan, 32 Minn. 81 3746
v. Finnegan, 29 Minn. 418 3746
v. Salisbury Mills, 3 Allen 340 2524
Noonan v. Ilsley, 17 Wis. 314 2318, 2330, 4239
v. Ilsley, 21 Wis. 138 1028, 2087, 2088
v. Lee, 2 Black 499 1957, 2094, 2211
v. Luther, 119 App. Div. (N. Y.) 701 1280
v. Orton, 30 Wis. 358 4606
v. Pardee, 200 Pa. 474 395, 3917
Nooning v. Miller, 178 Mo. App. 297 2501, 2504
Norcross v. Cambridge, 166 Mass. 508 4151
v. Norcross, 53 Me. 163 161
v. Otis Bros. & Co., 152 Pa. 481 4608
v. Vose, 199 Mass. 81 2596, 2668
Nordgard v. Marysville & N. Ry. Co., 211 Fed. 721 5037, 5039
Nordgren v. Lawrence, 74 Wash. 305 98, 3202
Nordhaus v. Peterson, 54 Iowa 68 1281, 1700
v. Vandalia R. Co., 147 Ill. App. 274 3408
v. Vandalia R. Co., 242 Ill. 166 425, 4920
Noreuga, The, 211 Fed. 355 2717
Norfleet v. Cromwell, 64 N. C. 1 3242
Norfolk v. American S. G. Co., 108 Mass. 404 2849
v. Johnakin, 94 Va. 285 4795
Norfolk L. Co. v. Simmons, 2 Marvel 317 425
Norfolk R. & L. Co. v. Spratley, 103 Va. 379 4745, 4747, 4793
v. Williar, 104 Va. 679 4758
Norfolk Southern R. Co. v. Crocker, — Va. —, 84 S. E. 681 4800

[REFERENCES ARE TO PAGES]

Norfolk Southern R. Co. v. Ferebee, 238 U. S. 269, aff'g 163 N. C. 351 5075, 5130, 5142, 5143
Norfolk & P. T. Co. v. Miller, 174 Fed. 607 1387, 3514
Norfolk & W. S. Co. v. Davis, 12 App. Cas. (D. C.) 306 4504, 4534, 4535
Norfolk, etc., R. Co. v. Adams, 90 Va. 393 3309
v. Ampey, 93 Va. 108 4795
v. Anderson, 90 Va. 1 1338, 3500, 3513, 3521, 3527
v. Bohannon, 85 Va. 293 3779
v. Carter, 91 Va. 587 3757, 4145
v. Cheatwood, 103 Va. 356 4860, 4863, 4874
v. Denny, 106 Va. 383 4952
v. Dixie T. Co., 228 U. S. 593 3431
v. Earnest, 229 U. S. 114 5073, 5074, 5083, 5084, 5085, 5087
v. Groseclose, 88 Va. 267 108, 109
v. Holbrook, 235 U. S. 625, rev'g 215 Fed. 687 5111, 5112
v. Lipscomb, 90 Va. 137 1281
v. Marpole, 97 Va. 594 4664
v. Mundy, 110 Va. 422 2060, 2131
v. Neely, 91 Va. 539 1281, 1338, 3450, 3482, 3502, 3503, 3513
v. Perrow, 101 Va. 345 488
v. Potter, 110 Va. 427 3343, 3347
v. Reeves, 97 Va. 284 3345
v. Spears, 110 Va. 110 1377, 4682
v. Spencer, 104 Va. 657 1477
v. Stevens, 97 Va. 631 4863, 4864, 4917
v. Stone, 111 Va. 730 3498
v. Thomas, 110 Va. 622 3748
v. Wilkinson, 106 Va. 775 3330, 3345, 3404, 3430
v. Wysor, 82 Va. 250 1258
Norma, The, Lush. 124 2731
Norman v. Beaumont, Willes 484 1482
v. Beckman, 58 Fla. 325 3692, 3695, 3702
v. Cunningham, 5 Gratt. 63 4225, 4422
v. Fife, 61 Ark. 33 1691, 1702
v. Harrington, 118 Mich. 623 4380
v. Hope, 13 Ont. 556, 14 Ont. 287 1625
v. Manciette, 1 Sawyer 484 4839
v. Rogers, 29 Ark. 365 481, 4298
v. Vandenberg, 157 Mo. App. 488 1414, 2508
v. Vickery (Tex. Civ. App.), 128 S. W. 452 860
v. Wells, 17 Wend. 136 1425, 1431
v. Winch, 65 Iowa 263 41, 2060, 2074
Normannia, The, 62 Fed. 469 130, 3443, 3483, 4408, 4414, 4424
Normile v. Wheeling T. Co., 57 W. Va. 132 4654, 4703, 4736, 4794
Norrington v. Wright, 115 U. S. 188 2232
Norris v. Beaty, 6 W. Va. 477 714, 728
v. Durham, 9 Cow. 151 1527
v. Elliott, 39 Cal. 72 4514
v. Hall, 18 Me. 332 1221
v. Harris, 15 Cal. 226, 256 376
v. Haverhill, 65 N. H. 89 1491
v. Hero, 22 La. Ann. 605 2945
v. Langley, 19 N. H. 423 988
v. Letchworth, 140 Mo. App. 19 1941, 2019
v. McCanna, 29 Fed. 757 4269, 4285
v. McFadden, 159 Mich. 424 3260
v. Massachusetts Mut. L. Ins. Co., 131 Mass. 294 1221
v. Mersereau, 74 Mich. 687 1600
v. Morrill, 40 N. H. 399 1279
Norris v. Morrison, 45 N. H. 490 3729
v. O'Connor, 166 Iowa 303 2403
v. Parker, 15 Tex. Civ. App. 117 2389
v. Philadelphia, 49 Pa. Super. Ct. 641 3773, 3806
v. Philadelphia, 70 Pa. 332 1210, 4149, 4156
v. Pitmore, 1 Yeates 408 1570
v. Pueblo, 12 Colo. App. 290 4088
v. School Dist., 12 Me. 293 356, 2667
v. Southern R., 84 S. C. 15 78
v. State, 22 Ark. 524 1607
Norristown T. Co. v. Burket, 26 Ind. 53 4094
North v. Bunn, 128 N. C. 196 2005, 2029
v. Cates, 2 Bibb 591 1493, 1495
v. Johnson, 58 Minn. 242 172, 1259, 2744
v. La Flesh, 73 Wis. 520 741
v. Mallory, 94 Md. 305 2663, 2666, 2687, 2688
v. Musgrave, 1 Roll. Abr. 574 1573
v. Phillips, 89 Pa. 250 4249
v. Turner, 9 S. & R. 244 27
v. Wakefield, 13 Q. B. 538 783
v. Walker, 66 Mo. 453 1877
v. Wingate, Cro. Car. 559 1573
North Alabama C. I. & R. Co. v. Jones, 156 Ala. 360 1413
North Alabama T. Co. v. Daniel, 3 Ala. App. 428 3508
v. Daniel, 158 Ala. 414 3472
North Alaska S. Co. v. Hobbs, 159 Cal. 380 2371, 2415
v. Larsen, 220 Fed. 93 4993
North American T. & T. Co. v. Morrison, 178 U. S. 262, 44 L. ed. 1061 3451, 3456
North Atchison Bank v. Gay, 114 Mo. 203 1920
North Baltimore B. G. Co. v. Altpeter, 133 Wis. 112 205
North British & M. Ins. Co. v. Cohn, 17 Ohio C. C. 185 372
North Carolina R. Co. v. Zachary, 232 U. S. 248, rev'g 156 N. C. 496 5024, 5037, 5041, 5051, 5055, 5061, 5066, 5123, 5127, 5132, 5136, 5140
North Cheshire & M. B. Co. v. Manchester B. Co., [1899] App. Cas. 83 4490
North Chicago St. R. Co. v. Barber, 77 Ill. App. 257 4707
v. Brodie, 156 Ill. 317 4862, 4870
v. Brown, 178 Ill. 187 1375, 4706
v. Burnham, 102 Fed. 669 2599
v. Dudgeon, 83 Ill. App. 528 4826
v. Duebner, 85 Ill. App. 602 4672
v. Fitzgibbons, 79 Ill. App. 632 4792, 4813
v. Fitzgibbons, 180 Ill. 466 4792
v. LeGrand Co., 95 Ill. App. 435 250, 798, 799
v. Lehman, 82 Ill. App. 238 4663, 4664
v. Shreve, 70 Ill. App. 666 1503
v. Wiswell, 68 Ill. App. 443 4827
v. Wrixon, 150 Ill. 532 1521
v. Zeiger, 182 Ill. 9 4704
North Coast R. Co. v. Aumiller, 61 Wash. 271 4150
v. Kraft, 63 Wash. 250 3113, 4090, 4143
North Eastern R. Co. v. Sineath, 8 Rich. 185 4026
North End Sav. Bank v. Snow, 197 Mass. 339 2793
North Erin, The, 71 Fed. 430 2726
North-German Lloyd v. Heule, 44 Fed. 100 3283

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v. Wood, 18 Pa. Super. 488, 493 183, 558, 3477
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North Missouri R. Co. v. Akers, 4 Kan. 453 3364, 3404
North Packing & P. Co. v. Western U. Tel. Co., 70 Ill. App. 275 3548, 3553, 3617
North Pennsylvania R. Co. v. Adams, 54 Pa. 94 1209, 1210
v. Davis, 26 Pa. 238 4089
v. Kirk, 90 Pa. 15 4870, 4931, 4933, 4934, 4935
North Point C. I. Co. v. Utah & Salt Lake C. Co., 23 Utah 199 206, 1364, 3798, 3825
North River Meadow Co. v. Shrewsbury Church, 22 N. J. L. 424 1190
North Shore L. Co. v. South Side L. Co., 176 Ill. App. 96 378, 2256, 2281
North Shore R. Co. v. Pion, 14 Ont. App. 612 3874
North Star, The, In re, 44 Fed. 492 4996, 5011
In re, 62 Fed. 71 5011
In re, 80 C. C. A. 536, 151 Fed. 168 5001
In re, 106 U. S. 17 4986, 4987
In re, 140 Fed. 263 5001, 5005, 5011
North Star H. F. Co. v. Rinkey, 92 Minn. 80 4352
North Star T. Co. v. Alaska-Y. P. Exp., 68 Wash. 457 3208
North State F. Ins. Co. v. Dillard, 88 Ark. 473 746
North Traction Co. v. Hays, 184 Ala. 592 4064
North Troy School Dist. v. Troy, 80 Vt. 16 1037
North Vernon v. Voegler, 103 Ind. 314 372, 399, 400, 401, 3869
North-Western Mut. L. Ins. Co. v. Freeman, 19 Tex. Civ. App. 632 1090
North & South R. S. Co. v. Nowland, 73 Ill. App. 689 1110
v. O'Hara, 73 Ill. App. 691 868
Northam v. Hurley, 1 El. & Bl. 665 35, 38
Northampton Bank v. Balliet, 8 W. & S. 311 627, 791
Northampton Nat. Bank v. Wylie, 52 Hun 146 1692, 1707, 1708
Northampton's Case, 12 Coke 134 4600
Northcutt v. Hume, — Tex. Civ. App. —, 174 S. W. 974 40
v. Springfield Crushed Stone Co., 178 Mo. App. 389 3880
Northen v. Tatum, 164 Ala. 368 2699
Northern Alabama R. Co. v. Key, 150 Ala. 641 1476
Northern Assur. Co. v. Borgelt, 67 Neb. 282 2907
Northern Bank v. Riley, 12 Ky. L. Rep. 92 (Ky. Super. Ct.) 1545
Northern C. Co. v. Lindblom, 162 Fed. 250 3388, 3401, 3403, 3433
v. Nestor, 138 Fed. 383 3467, 3472
Northern Cent. R. Co. v. Mills, 61 Md. 355 417
v. Newman, 98 Md. 507 3502
v. O'Conner, 76 Md. 207, 217 3443, 3471, 3485
v. Oldenburg, 122 Md. 236 3973
Northern Colorado I. Co. v. Poupipirt, 22 Colo. App. 563 311, 477
v. Richards, 22 Colo. 450 261
Northern Ins. Co. v. Potter, 63 Cal. 157 783
v. Wright, 70 N. Y. 445 2788
Northern Light Lodge v. Kennedy, 7 N. D. 146 2745
Northern Nat. Bank v. Lewis, 78 Wis. 475 722
Northern Ohio R. v. Akron C. & H. Co., 30 Ohio C. C. 51 303
Northern Pac. R. Co. v. Adams, 64 C. C. A. 196, 116 Fed. 324 4852
v. Babcock, 154 U. S. 190 4952, 4953
v. Chervenak, 203 Fed. 884 1478
v. Freeman, 27 C. C. A. 457, 83 Fed. 82 4901
v. Goss, 203 Fed. 904 809
v. Lewis, 51 Fed. 658 143, 3736, 4174
v. Lewis, 162 U. S. 366, 40 L. ed. 1002 4174
v. Meese, 239 U. S. 614 5147, 5158, 5212
v. Montgomery, 86 Fed. 251 2106, 2134
v. Murray, 87 Fed. 648 4095
v. Owens, 86 Minn. 188 1578, 1581
v. Pauson, 70 Fed. 585 3450
v. Union Lumber Co., 76 Wash. 563 4020, 4072, 4074, 4143
v. Urlin, 158 U. S. 271 1428, 1472, 1473
v. Washington ex rel. Atkinson, 222 U. S. 370, rev'g 53 Wash. 673 5053
v. Wendel, 156 Fed. 336 4715
Northern Pac., etc., R. Co. v. Coleman, 3 Wash. 228 3962, 4120, 4129
v. Forbis, 15 Mont. 452 4038
Northern Queen, The, 117 Fed. 906 4848
Northern S. Co. v. Wangard, 123 Wis. 1 317, 2370, 2432
Northern T. Co. v. McClary, 66 Ill. 233 3389, 3394
v. Palmer, 171 Ill. 383 435
v. Sellick, 52 Ill. 249 1135, 4217, 4232
v. Snyder, 76 Fed. 34 3176
Northern Texas T. Co. v. Jamison, 38 Tex. Civ. App. 55 1377
v. Mullins, 44 Tex. Civ. App. 566 4747
v. Yates, 39 Tex. Civ. App. 114 4655
Northern Trust Co. v. Buck & Rayner, 263 Ill. 222 3120
Northern, etc., R. Co. v. Oldenburg, 122 Md. 236 3961
v. Union, etc., Co., 76 Wash. 563 3962, 3963
Northey Mfg. Co. v. Sanders, 31 Ont. 475 2386
Northridge v. Moore, 118 N. Y. 419 1986, 1997
Northrop v. Cross, 2 N. D. 433 4316
v. Graves, 19 Conn. 548 1116
Northrup v. Cook, 39 Mo. 208 2275
v. Cross, 2 N. D. 433 4317
v. Garrett, 17 Hun 497 1704, 1705
v. Hayward, 102 Minn. 307 683
v. McGill, 27 Mich. 234 47, 4302, 4303
Northwest F. Co. v. Kilbourne, 128 Fed. 261 834
Northwestern C. Co. v. Rice, 5 N. D. 432 2371, 2380
Northwestern Grain Co. v. Kerr Gifford Warehouse Co., 76 Wash. 689 4209
Northwestern I. Co. v. Meade, 21 Wis. 480 621
v. Industrial Comm. of Wisconsin, 154 Wis. 97 5201
Northwestern I. & M. Co. v. Hirsch, 94 Ill. App. 579 2294

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v. Callendar, 36 Wash. 492 2387
Northwestern L. Ins. Co. v. Irish, 38 Wis. 361 1807, 1808
v. Starkweather, 38 Wis. 361 1805
Northwestern Lumber & Wrecking Co. v. Parker, 125 Minn. 107 3256
Northwestern Mut. L. Ins. Co. v. Rochester German Ins. Co., 85 Minn. 48 3012
Northwestern Nat. Bank v. Keen, 14 Phila. 7 2756
Northwestern Port Huron Co. v. Iverson, 22 S. D. 314 538, 559
Northwestern S. B. & Mfg. Co. v. Great Lakes E. Works, 181 Fed. 38 207, 323, 863, 2634, 2635, 2643
Northwestern S. S. Co. v. Dexter Horton & Co., 29 Wash. 565 4386
Northwestern T. Co. v. Boston M. Ins. Co., 41 Fed. 793 3000
Northwestern Tel. Ex. Co. v. Chicago, etc., R. Co., 76 Minn. 334 3644
Northy v. Northy, 45 N. H. 141 2212
Norton v. Adams Exp. Co., 123 Mo. App. 233 3414
v. Ailen, 134 Ga. 21 702
v. Babcock, 2 Metc. (Mass.) 510 556, 2110, 2115, 2147, 2156, 2159
v. Baxter, 41 Minn. 146 827
v. Clayton H. Ass'n, 149 Ala. 248 756
v. Coons, 3 Denio 130, 6 N. Y. 33 2853, 2859, 2861
v. Davis, 13 Tex. Civ. App. 90 1795
v. Erie R. Co., 163 N. Y. App. Div. 466 5067
v. Hall, 41 Vt. 471 2834
v. Hinecker, 137 Iowa 750 1453, 3145
v. Jackson, 5 Cal. 262 2094, 2211
v. Kull, 132 N. Y. Supp. 387 332
v. Kumpe, 121 Ala. 446 1596, 1600, 1609
v. Lexington F., L. & M. Ins. Co., 16 Ill. 235 3014, 3015
v. Lincoln Traction Co., 92 Neb. 649 1492
v. Livingston, 64 Vt. 473 4594
v. Moore, 3 Head 480 1421
v. Mulligan, 4 Strobh. 355 1598
v. Parker, 17 Ohio C. C. 715 1142
v. Reid, 11 S. C. 593 2841
v. Rensselaer Ins. Co., 7 Cow. 654 3019
v. Scholefield, 9 M. & W. 665 3839
v. Sewall, 106 Mass. 143 99
v. Shields, 132 Fed. 873 2695
v. Wales, 1 Robert. 561 2293
v. Warner, 9 Conn. 172 4976, 4977
v. Willis, 75 Me. 80 4136
v. Witte, 147 App. Div. (N. Y.) 94 1997
Nortonville C. Co. v. Sisk, 145 Ky. 55 2555
Norvell v. Hudgins, 4 Munf. 496 1825
Norwalk, City of, 55 Fed. 98 4989
Norwalk v. Ireland, 68 Conn. 1 1600
v. Pormore, 86 Conn. 658 3995
Norway Plains Sav. Bank v. Moors, 134 Mass. 129 2597
Norwich, City of, 4 Bene. 271 3412
Norwich Yarn Co., In re, 22 Beav. 143, 168 1073
Norwich, etc., T. Co. v. Western Massachusetts Ins. Co., 34 Conn. 561 3000
Norwood, The, 215 Fed. 655 4999, 5014
Norwood v. Interstate Nat. Bank, 92 Tex. 268 4212, 4325, 4329
Norwood v. Lathrop, 178 Mass. 208 2656, 2676, 2677
v. Maremont, Wolfson & Cohen Co., 182 Ill. App. 78 1502
Nosler v. Hunt, 18 Iowa 212 2072
Nossaman v. Rickert, 18 Ind. 350 4662
Nostrum v. Halliday, 39 Neb. 828 4375
Notara v. Henderson, L. R. 7 Q. B. 225 3405
Notaseme Hosiery Co. v. Straus, 215 Fed. 361 4487, 4490
Notkins v. Pashalinski, 83 Conn. 458 2501
Nott v. Owen, 86 Me. 98 3105
Notting Hil., The, 9 Prob. Div. 105 3360
Nottingham C. & I. Co. v. Preas, 102 Va. 820 2283, 2289, 2295
Nounnan v. Sutter County L. Co., 81 Cal. 1 4378
Nourse v. Snow, 6 Me. 208 3389
v. Weitz, 120 Iowa 708 1794, [illegible]
Novakovich v. Union T. Co., 89 Ark. 412 2508
Novelty I. Works v. Capital City O. Co., 88 Iowa 524 2599, 2625, 2626, 2630
Nowell v. Wright, 3 Allen 166 1594
Nowlan v. Cain, 3 Allen 261 4381, 4382
Nowland v. Martin, 1 Ired. 307 2844, 2869
Nowlen v. Colt, 6 Hill 461 360
Nowlin v. Pyne, 40 Iowa 166 905
v. Snow, 40 Mich. 699 4378
Noxon v. Gregory, 5 How. 339 586
v. Remington, 78 Conn. 296 1502, 1518, 4979, 4983
Noyes v. Anderson, 1 Duer 342 3145, 3186
v. Blodgett, 58 N. H. 502 4392
v. Caldwell, 216 Mass. 525 2510
v. French L. Co., 80 Minn. 397 3700
v. Newmarch, 1 Allen 51 1541
v. Noullet, 118 La. 888 2642
v. Phillips, 15 Abb. Pr. (N. S.) 400, 60 N. Y. 408 862, 901, 1561
v. Pugin, 2 Wash. 653 2477, 2689
v. Rutland, etc., R. Co., 27 Vt. 110 1331
v. Stillman, 24 Conn. 15 395
v. Stone, 163 Mass. 490 4212
v. Ward, 19 Conn. 250 306
v. White, 9 Kan. 640 1814, 1910
v. Wyckoff, 114 N. Y. 204, 30 Hun 466 786, 793, 807, 809
v. Young, 32 Mont. 226 759
Noyles v. Phillips, 60 N. Y. 408 1552
Nuckit v. Lawrence, 5 Rand. 571 1116
Nuckolls v. Anderson, 120 Ga. 677 1494
v. Powell (Tex. Civ. App.), 90 S. W. 933 3174
Nudd v. Burrows, 91 U. S. 426 5135
v. Wells, 11 Wis. 415 1515
Nuestra Senora de Regla, The, 108 U. S. 92 1039
Nugent v. Armour P. Co., 208 Mo. 480 2306
v. Brooklyn Heights R. Co., 154 App. Div. (N. Y.) 667 30
v. Teachout, 67 Mich. 571 1958
Nunan v. San Francisco, 38 Cal. 689 1363, 1367
Nunn v. Lynch, 89 Ark. 41 1004, 3706, 3708
Nunnamaker v. Columbia W. P. Co., 47 S. C. 485 3955
Nunnelee v. Morton, Cooke 21 1051, 1241
Nunnemaker v. Lanier, 48 Barb. 234 2927
Nurre v. Chittenden, 56 Ind. 462 2855
Nurse v. Barnes, T. Raym. 77 291, 357, 3216

[REFERENCES ARE TO PAGES]

Nussbaum v. Trinity & B. Valley R. Co. (Tex. Civ. App.), 149 S. W. 1083 489
Nutall v. Brannin, 5 Bush 11 703
Nutt v. Merrill, 40 Me. 237 2894
v. Sewall, 40 Barb. 449 2885
Nutter v. Junction R. Co., 13 Ind. 479 1492
Nutting v. Dickinson, 8 Allen 540 2221
v. Herbert, 35 N. H. 120, 37 N. H. 346 2060, 2066, 2068, 2088
v. McCutcheon, 5 Minn. 382 965
v. Thomasson, 57 Ga. 418 4275
Nuzum v. Morris, 25 W. Va. 559 583
Nye v. Iowa City A. Works, 51 Iowa 129 535, 2393, 2405, 2436
v. Merriam, 35 Vt. 438 4432
v. Snyder, 56 Neb. 754 2437
v. Thompson, 16 Q. B. 175 4579
Nyers v. York, etc., R. Co., 2 Curt. C. C. 28 2687
Nysewander v. Lowman, 124 Ind. 584 4392

O

O. C. Hanchett, 76 Fed. 1003 2729
O. L. Hallenbeck, The, 119 Fed. 468 4946
O. & A. R. Co. v. Fulvey, 17 Gratt. 366 1507
Oak v. Dustin, 79 Me. 23 2825
Oak Lawn S. Co. v. Sparks M. Co., 159 Mo. App. 496 2403
Oak Leaf M. Co. v. Littleton, 105 Ark. 392 147
Oak Ridge C. Co. v. Rogers, 108 Pa. 147 3788
Oakes, Matter of, 19 App. Div. (N. Y.) 192 1082, 1085
Oakes v. Buckley, 49 Wis. 592 2046
v. Buckman, 87 Vt. 187 796
v. Maine Cent. R. Co., 95 Me. 103 4858, 4862, 4872, 4906
v. Miller, 11 Colo. App. 374 4413
v. Moore, 24 Me. 214 2221
v. Smith, 121 Ga. 317 1704
Oakford v. Nixon, 177 Pa. 76 3125, 3182
Oakland Bank v. Applegarth, 67 Cal. 86 797
Oakley v. Boorman, 21 Wend. 588 2768, 2781, 2783, 2786
v. Crenshaw, 4 Cow. 250 2959
Oakley Mills, etc., Co. v. Neese, 54 Ga. 459 3849
Oaks v. Scheifferly, 74 Cal. 478 2873
Oates v. Bullock, 136 Ala. 537 4607, 4628, 4634
v. Union Pac. R. Co., 104 Mo. 514 4954
Oatman v. Walker, 33 Me. 67 692
O'Banion v. De Garmo, 121 Iowa 139 2754
O'Bannon v. St. Louis & S. R. Co., 106 Mo. App. 316 1393
O'Barr v. Alexander, 37 Ga. 195 1482
Obbard v. Betham, Moo. & M. 483 557
O'Beirne v. Lloyd, 43 N. Y. 248 377, 384
Obenauer v. Solomon, 151 Mich. 570 2501, 2510
Obenchain v. Roff, 29 Okla. 211 2373, 2455
Ober v. Indianapolis, etc., R. Co., 13 Mo. App. 81 3344
v. Katzenstein, 160 N. C. 439 2342, 2346, 2349, 2356
Oberdorfer v. White, 118 Ky. 291 1791
Oberg v. Northern Pac. R. Co., 136 Fed. 981 4674
Oberinger v. Nichols, 6 Bin. 159 1108
Oberlies v. Bullinger, 132 N. Y. 598 2665
Oberlin v. Oregon-Washington R. & Nav. Co., 71 Ore. 177 5066
v. Upson, 84 Ohio 111 4959
Obermeyer v. Logeman C. Mfg. Co., 229 Mo. 97 152
v. Nichols, 6 Bin. 159 1067
Oberne v. Gaylord, 13 Ill. App. 30 1693, 1694
Oberreich v. Foster, 152 Ill. App. 302 1765, 1766
O'Blenis v. Karing, 57 N. Y. 649 2871
O'Boyle v. Shively, 65 Ill. App. 278 4624
O'Brien v. Anniston P. Works, 93 Ala. 582 888, 2599, 2648
v. Ball, 119 Mass. 28 3145
v. Commercial F. Ins. Co., 63 N. Y. 111 3020
v. Gilliland, 4 Tex. Civ. App. 40 2511
v. Home Ben. Soc., 117 N. Y. 310 3076
v. Illinois S. Co., 203 Fed. 436 212, 918, 3167
v. Jones, 91 N. Y. 93 2396
v. Loomis, 43 Mo. App. 29 1281
v. Merchants' F. Ins. Co., 38 N. Y. Super. Ct. 482 1484
v. North River Ins. Co., 128 C. C. A. 618, 12 Fed. 102 3058
v. O'Brien B. W. Co., 154 Mo. App. 183 2482
v. Omaha W. Co., 83 Neb. 71 1539
v. Park & H. R. Co., 194 Pa. 336 4044
v. Pennsylvania S. V. R. Co., 119 Pa. 184 3759
v. Philadelphia, 150 Pa. 589 3951
v. Philadelphia, 215 Pa. 407 4768
v. Phoenix F. Ins. Co., 76 N. Y. 459 3021
v. Quinn, 35 Mont. 441 1368
v. Schenley Park & H. R. Co., 194 Pa. 336 4044
v. Semple, Montreal L. R. 6 Super. Ct. 344 1322
v. White, 105 Me. 308 152, 1511, 4751, 4802
v. Worcester, 172 Mass. 348 3909
v. Young, 95 N. Y. 428 947, 951, 1047, 1185
O'Brien County v. Mahon, 126 Iowa 539 1559, 1574, 2743, 2814
O'Bryan v. Jones, 38 Mo. App. 90 659, 670
Ocala F. & M. Works v. Lester, 49 Fla. 199 2888, 4314, 4321
O'Callaghan v. Dellwood Park Co., 149 Ill. App. 34 4652
Occidental C. M. Co. v. Comstock T. Co., 125 Fed. 244 175, 226, 271, 286, 407, 1004
Ocean Bank v. Carll, 55 N. Y. 441 1825
Ocean Nat. Bank v. Fant, 50 N. Y. 474 813
Ocean Queen, The, 5 Blatch. 493 3393
Ocean Steamship Co. v. Williams, 69 Ga. 251 4836, 4837, 4841
Oceanic, The, 61 Fed. 338 4888, 4938
Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola, 134 N. Y. 461 2430
Oceanica, The, 156 Fed. 306 1449, 5015
Ochlhof v. Solomon, 73 App. Div. (N. Y.) 329 4433
Ochs v. Woods, 160 App. Div. (N. Y.) 740 31
Ockenden v. Henly, Ellis, Bl. & E. 485 921, 2015, 2016
Ockford v. Barrelli, 20 Week. Rep. 116 757
O'Connell v. Casey, 206 Mass. 520 2508

[REFERENCES ARE TO PAGES]

O'Connell v. City of Davenport, 164 Iowa 95 4697
v. Fay, 186 Ill. App. 113 3256
v. Main, etc., H. Co., 90 Cal. 515 2701
v. Rosso, 56 Ark. 603 293, 1258, 1267, 2701
v. Rugely, 48 Tex. Civ. App. 456 1918, 1920, 1924
v. Strong, Dudley 265 1330
O'Conner v. Chicago, etc., R. Co., 144 Iowa 289 4790
v. Hartford F. Ins. Co., 31 Wis. 161 3021
v. Kleiman, 143 Iowa 435 1849
O'Connor v. Bank, 13 Vict. L. R. 820 4320
v. Brucker, 117 Ga. 451 1403, 1407
v. Enos, 56 Wash. 448 2146, 2150, 2164, 2186
v. Fond du Lac, etc., R. Co., 52 Wis. 526 8
v. Forster, 10 Watts 418 3318
v. Henderson B. Co., 95 Ky. 633 929, 2688
v. New York & Y. L. I. Co., 8 N. Y. Misc. 243 1732, 1735
v. Nolan, 64 Ill. App. 357 2355
v. O'Connor, 27 Ind. 69 4585
v. Parrott, 22 Ill. App. 429 3828
v. St. Louis, etc., R. Co., 56 Iowa 735 3868
v. Smith, 84 Tex. 232 252, 2641, 2694, 2695, 2697, 2703
v. Such, 9 Bosw. 318 1556, 1636
v. Varney, 10 Gray 231 566
Ode v. Manhattan R. Co., 56 Hun 199 4084
O'Dea v. Michigan Cent. R. Co., 142 Mich. 265 1471, 1473
Odell v. Boston & M. R., 109 Mass. 50 2227
v. Dozier, 104 Ga. 203 2501
v. Hole, 25 Ill. 204 4314, 4317, 4332
O'Dell v. James Stewart & Co., 96 Neb. 147 1476, 4752
Odell v. New York E. R. Co., 130 N. Y. 690 3962, 3964, 4082
v. Stephens, 12 Ind. 384 4967
v. Story, 81 Neb. 437 1430, 4395
Ogden v. Raymond, 22 Conn. 379 2983
O'Doherty v. Postal Tel.-C. Co., 134 App. Div. (N. Y.) 298 1511, 4860, 4905
Odom v. Carter, 36 Tex. 281 800
v. New England M. S. Co., 91 Ga. 505 1161, 1183
v. Odom, 2 Baxt. 446 2859
O'Donnell v. American S. R. Co., 41 App. Div. (N. Y.) 307 4811
v. Colby, 153 Ill. 324, rev'g 55 Ill. App. 112 1656, 1667, 1674
v. McElroy, 157 Mo. App. 547 2482
v. O'Donnell, 3 Bush 216 3725
v. Omaha, etc., R. Co., 31 Neb. 846 1056
v. Rhode Island Co., 28 R. I. 245 326, 327
v. Rosenberg, 14 Abb. Pr. (N. S.) 59 888, 893
v. St. Louis T. Co., 107 Mo. App. 34 4668
O'Driscoll v. Doyle, 31 Colo. 193 286
Oehlhof v. Solomon, 73 App. Div. (N. Y.) 329 4392
Oehman v. Portmann, 153 Mo. App. 240 4175
Oellien v. Galt, 150 Mo. App. 537 4311
Oelrichs v. Spain, 15 Wall. 211 223, 306, 1723
Oeltjen v. People, 160 Ill. 409, aff'g 56 Ill. App. 138 1585
Oettinger v. Levy, 4 E. D. Smith 288 3244
O'Fallon C. Co. v. Laquet, 89 Ill. App. 13 4862, 4893
O'Ferrall v. Simplot, 4 Iowa 381 3719
Offord v. Davies, 12 C. B. (N. S.) 748 2743, 2769
Offterdinger v. Ford, 92 Va. 636 1689, 1696
O'Flaherty v. Nassau El. R. Co., 34 App. Div. (N. Y.) 74, aff'g 165 N. Y. 624 4678
v. Sutton, 49 Mo. 583 3722
Ogan v. Missouri Pac. R. Co., 142 Mo. App. 248 4882
O'Gara v. Ellsworth, 85 App. Div. (N. Y.) 216 2295, 2297
Ogborn v. Hoffman, 52 Ind. 439 749, 758
Ogburn v. Ogburn, 3 Port. 126 2396
v. Whitlow, 80 Tex. 239 2204
Ogburn-D. L. Co. v. Taylor (Tex. Civ. App.), 126 S. W. 48 2250
Ogden v. Ball, 38 Minn. 237 2087, 2122
v. Davis, 116 Cal. 32 1788, 1792
v. East River Ins. Co., 50 N. Y. 388 3049
v. Folliott, 3 T. R. 733 1174
v. General Mut. Ins. Co., 2 Duer 204 3022, 3289
v. Gibbons, 5 N. J. L. 518 1389, 1390
v. Glidden, 9 Wis. 46 573, 574
v. Larrabee, 57 Ill. 389 1123
v. Lucas, 48 Ill. 492 208, 4160
v. Marshall, 8 N. Y. 340 328, 3314
v. Pennsylvania R. Co., 229 Pa. 378 4042
v. Raymond, 22 Conn. 384 2981
v. Sanderson, 3 E. D. Smith 166 3129
v. Saunders, 12 Wheat. 213 1151
v. Stevens, 241 Ill. 556 1006
v. United States, 60 Fed. 725 2685
Ogden L. Co. v. Busse, 92 App. Div. (N. Y.) 143 3837
Ogdens v. Nelson, [1903] 2 K. B. 287 258
Ogdon v. Pattee, 149 Mass. 82 1085
Ogg v. Murdock, 25 W. Va. 139 4836
Ogilby v. Munro, 52 N. Y. Misc. 170 2876
Ogilvie v. Hull, 5 Hill 52 548, 3259
v. Lee, 158 Mo. App. 493 759
Ogle v. Atkinson, 5 Taunt. 759 4284
v. Earl Vane, L. R. 2 Q. B. 275 2283, 2293
v. Earl Vane, L. R. 3 Q. B. 272 2239, 2293
Oglebay v. Todd, 166 Ind. 250 2797
Oglesby v. Missouri Pac. R. Co., 150 Mo. 137 4795
O'Gorman v. Harby, 18 N. Y. Misc. 228 3258
v. O'Gorman, [1903] 2 Irish 573 62
O'Grady v. Keyes, 1 Allen 284 1625
v. Stotts City Bank, 106 Mo. App. 366 275
v. Union Stock Yards Co., 90 Neb. 138 4900
O'Hanlan v. Great Western R. Co., 6 B. & S. 484, 118 Eng. C. L. 491 3348, 3399, 3433
O'Hanlon v. Grubb, 38 App. D. C. 251 3249
O'Hara, Matter of, 19 N. Y. Misc. 254 1085
O'Hara v. Laclede G. L. Co., 131 Mo. App. 428 152, 4930
O'Heron v. American B. Co., 177 Ill. App. 405 1014

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v. Frank, 103 U. S. 697 959
v. Myers, 14 Ohio. 538 1616
Ohio L. Ins. Co. v. Ledyard, 8 Ala. 866 2867
Ohio L. Ins. & T. Co. v. Reeder, 18 Ohio 35, 46 673
Ohio River C. Co. v. United States, 45 Ct. of Cls. 542 2655
Ohio Southern R. Co. v. Snyder, 5 Ohio Dec. 480 3963, 4021, 4043
Ohio Valley R. & T. Co. v. Kerth, 130 Ind. 314 2620, 4038, 4044
Ohio Valley Tel. Co. v. Meyer, 22 Ky. L. Rep. 36 3827
Ohio Valley Trust Co. v. Allison, 243 Pa. 201 1986, 1988, 1999
v. Wernke, 42 Ind. App. 326 4861, 4926, 4930
v. Wernke, 179 Ind. 49 4925, 4943
Ohio & M. R. Co. v. Collarn, 73 Ind. 261 4803
v. Combs, 43 Ill. App. 119 3939
v. Cosby, 107 Ind. 32 4763
v. Hecht, 115 Ind. 443 4682, 4683, 4692
v. Irvin, 27 Ill. 178 1419, 1444, 2305
v. Judy, 120 Ind. 397 1484, 3523
v. McGehee, 47 Ill. App. 348 312
v. Nuetzel, 43 Ill. App. 108 3894
v. Taylor, 27 Ill. 207 1419, 1443, 2305
v. Thillman, 143 Ill. 127 4145
v. Trapp, 4 Ind. App. 69 3743, 3768
v. Wachter, 123 Ill. 440 400, 401, 4002
v. Wangelin, 152 Ill. 138 4911, 4941
Ohio & Western Pennsylvania Dock Co. v. Trapnell, 88 Ohio St. 516 4808
Ohio, etc., R. Co. v. Dickerson, 59 Ind. 317 222, 488, 3472, 3498
v. Voight, 122 Ind. 288 4875
Ohliger v. Toledo, 20 Ohio C. C. 142 4733
Ohling v. Luitjens, 32 Ill. 23 2212
Ohman v. New York, 168 Fed. 953 4479
Ohnmacht v. Mt. Morris E. L. Co., 66 App. Div. (N. Y.) 482 4773
O'Horo v. Kelsey, 60 App. Div. (N. Y.) 604 3823, 3824
Ohrstrom v. Tacoma, 57 Wash. 121 1504, 1511
Oil Co. v. Messick Grocery Co., 136 N. C. 354 4324
Oil Creek, etc., R. Co. v. Keighron, 74 Pa. 316 161
Oil-Well S. Co. v. Priddy, 41 Ind. App. 200 2374
v. Watson, 168 Ind. 603 2376
O'Keefe v. Dyer, 20 Mont. 477 840, 861, 865, 868, 910
v. Eighth Ave. R. Co., 33 App. Div. (N. Y.) 324 4811
v. Liverpool, etc., Ins. Co., 140 Mo. 558 3012, 3013
v. New York, 186 N. Y. 297 1046
v. United R. Co., 124 Mo. App. 613 413, 4744
v. Walsh, [1903] 2 Irish 681 432, 435
O'Kelly v. Faulkner, 92 Ga. 521 2472
Okenden v. Henly, El., Bl. & El. 485 1948
Oklahoma City v. Hill, 6 Okla. 114 3736, 3749, 3815, 3823
Oklahoma City & T. R. Co. v. Dunham, 39 Tex. Civ. App. 575 3925
Oklahoma Farmers' Mut. Ind. Ass'n v. McCorkle, 21 Okla. 606 3009
Oklahoma Fire Ins. Co. v. Ross, — Tex. Civ. App. —, 170 S. W. 1062 264
Olcott v. Bolton, 50 Neb. 779 4380
Old Colony R. Co. v. Evans, 6 Gray 25 1940
v. Miller, 125 Mass. 1 4118, 4149
v. Plymouth, 14 Gray 155 4057, 4072
v. Slavens, 148 Mass. 363 2430
Old Dominion C. M. & S. Co. v. Bigelow, 203 Mass. 159 434, 4397
Old River Rice Irr. Co. v. Stubbs, — Tex. Civ. App. —, 168 S. W. 28 388
Old Saucelito L. & D. D. Co. v. Commercial Union Assur. Co., 66 Cal. 253 3017
Old South Ass'n v. Boston, 212 Mass. 299 3974
Oldershaw v. Holt, Ad. & E. 590 2594
Oldfather v. Zent, 14 Ind. App. 89 1375, 1505, 4624
Oldfield v. Angeles B. & M. Co., 62 Wash. 260 3102, 3108, 3110
v. Angeles Brewing & Malting Co., 77 Wash. 158 3112
v. New York & H. R. R., 14 N. Y. 310 1394, 4942
v. Vassar College, 68 App. Div. (N. Y.) 372 2382
v. Wabash, etc., R. Co., 22 Mo. App. 607 401
Oldfield's Est., In re, 158 Iowa 98 1357, 1505, 2464
Oldham v. Bentley, 6 B. Mon. 430 4377
v. Kerchner, 79 N. C. 106 252
Olds v. Cary, 13 Ore. 362 1728, 1729
v. Chicago Open Board of Trade, 33 Ill. App. 445 4283
Olds W. Works v. Bank, 10 Ky. L. Rep. 253 732
Olean, In re, 135 N. Y. 341 4096
Olean v. King, 116 N. Y. 355 1595, 1598, 1616
O'Leary v. Rowan, 31 Mo. 117 1364, 4731
v. Stymest, 6 Allen (N. B.) 289 3014
Oleson v. Brown, 41 Wis. 413 4185, 4187
v. Merrill, 20 Wis. 462 4312
Oleszefski v. Taylor, 19 Pa. Dist. 145 4959
Olin v. Bradford, 24 Pa. Super. Ct. 7 4693, 4697, 4704
Oliphan v. Bearley, 54 N. J. L. 521 4187
Oliphint v. Mansfield, 35 Ark. 191 1723
Olivant v. Perineau, 2 Str. 1191 4301
Olive Branch, The, 1 Low. 286 2723
Oliver v. Bank of England, [1902] 1 Ch. 610 2982
v. Bredl, 25 Pa. Super. Ct. 653 3190
v. Bush, 125 Ala. 534 2094
v. Chapman, 15 Tex. 400 4432
v. Holt, 11 Ala. 574 385
v. Houghton County St. R. Co., 134 Mich. 367 4656, 4849, 5108
v. Klamath Lake N. Co., 54 Ore. 95 3933
v. Lansing, 48 Neb. 338 2902, 2903
v. La Valle, 36 Wis. 592 138, 148, 4679, 4684
v. Love, 104 Mo. App. 73 1249
v. Loydon, 163 Cal. 124 3108
v. Moore, 53 Hun 472 3148, 3259
v. Mutual Com. Ins. Co., 2 Curt. C. C. 290 3004
v. North Pac. T. Co., 3 Ore. 84 4657
v. Northern Pac. Ry. Co., 196 Fed. 432 5045
v. Oliver, 11 C. B. (N. S.) 139 4478
v. Pate, 43 Ind. 132 4649

[REFERENCES ARE TO PAGES]

Oliver v. Perkins, 92 Mich. 304 245, 254, 265, 284, 4531, 4535
v. Pettaconsett Const. Co., 36 R. I. 477 1476, 4752
v. Phelps, 20 N. J. L. 180 728
v. Sattler, 233 Ill. 536 2512
v. Shoemaker, 35 Mich. 464 606
Olivera's Est., 70 Cal. 184 1049
Ollivant v. Bayley, 5 Q. B. 288 2373
Olmstead v. Bach, 78 Md. 132 379, 2525, 2552
v. Beale, 19 Pick. 528 2524, 2541, 2544
v. Burke, 25 Ill. 86 1364, 3216
v. Hoy, 112 Iowa 349 3669, 3670
v. Olmstead, 38 Conn. 309 1569
v. Partridge, 16 Gray 381 1321, 4648
v. Rawson, 188 N. Y. 517 296, 2123, 2141
v. Rawson, 110 App. Div. (N. Y.) 809 2112, 2131
v. Red Cloud, 86 Neb. 528 4793
v. Scutt, 55 Conn. 125 523
Olmsted v. Brown, 12 Barb. 657 112, 4555, 4560, 4562
v. Miller, 1 Wend. 506 4554
O'Louglin v. Billy, 95 App. Div. (N. Y.) 99 690
v. Carr, 9 Kan. App. 818 1673
Olsen v. Henderson, 113 App. Div. (N. Y.) 676 2598
v. Montana O. P. Co., 35 Mont. 400 4865
Olson v. Burton (Tex. Civ. App.), 141 S. W. 549 760
v. Chicago, etc., R. Co., 94 Minn. 241 4742, 4743
v. Chippewa Falls, 71 Wis. 558 104
v. Flavel, 34 Fed. 477 4989
v. Gill Home I. Co., 58 Wash. 151 151, 4816
v. Goerig, 45 Wash. 541 2596
v. Huntimer, 8 S. D. 220 42
v. Neal, 63 Iowa 216 4640
v. Nebraska Tel. Co., 87 Neb. 593 1485, 4652, 4795
v. Nonenmacher, 63 Minn. 425 2708
v. Northern Pac. R. Co., 49 Wash. 626 3528
v. Rice, 140 Iowa 630 4972
v. Rydl, 25 S. D. 268 2249, 2301
v. Solverson, 71 Wis. 663 3676, 3677
v. State Bank, 72 Minn. 320 2479, 2499
v. Veazie, 9 Wash. 481 1055
v. Viroqua, 121 Wis. 571 2693
Oluf, The, 19 Fed. 459 3307
Olwell v. Skobis, 126 Wis. 308 432, 1512, 4660, 4812
Olympe De La Grange v. Southwestern Tel. Co., 25 La. Ann. 383 3555
Olympia, The, 156 Fed. 252 5015
Olympia L. & P. Co. v. Harris, 58 Wash. 410 3986, 4119, 4128
Olyphant v. St. Louis O. & S. Co., 28 Fed. 729 667, 2260
Omaha v. Armour, 196 Fed. 885 117
v. Flood, 57 Neb. 124 3951, 3976
v. Hansen, 36 Neb. 135 3989
v. Kramer, 25 Neb. 489 4138
v. Schaller, 26 Neb. 522 4108
Omaha Belt R. Co. v. McDermott, 25 Neb. 714 3955
Omaha Bridge & Terminal R. Co. v. Whitney, 68 Neb. 389 4052, 4053
Omaha C., C. & L. Co. v. Fay, 37 Neb. 68 2370, 2415
Omaha F. Ins. Co. v. Thompson, 50 Neb. 580 746, 1496
Omaha Horse R. Co. v. Cable Tram-Way Co., 32 Fed. 727 4078
Omaha Hotel Co. v. Kountze, 107 U. S. 378 1771
Omaha Nat. Bank v. Kiper, 60 Neb. 33 2929, 2939
Omaha Southern R. Co. v. Beeson, 36 Neb. 361 3984, 4042
v. Todd, 39 Neb. 818 3957, 3970, 3977, 3979, 3981, 4125
Omaha St. R. Co. v. Emminger, 57 Neb. 240 1469, 1472, 4663, 4732, 4748
Omaha W. Co. v. Schamel, 147 Fed. 502 149, 4900, 4911
Omaha & C. B. St. R. Co. v. Interstate Commerce Commission, 230 U. S. 324 5038
Omaha & G. S. & R. Co. v. Tabor, 13 Colo. 41 3791, 4232, 4260
Omaha, etc., R. Co. v. Brady, 39 Neb. 27 4744
v. Chollette, 41 Neb. 578 4758, 4759, 4761
v. Crow, 54 Neb. 747 1394
v. Doney, 3 Kan. App. 515 3984
v. Ryburn, 40 Neb. 87 4715
O'Malley v. Commonwealth, 182 Mass. 196 1449
v. Great Northern R. Co., 86 Minn. 380 3333, 3418
O'Mara v. Hudson River R. Co., 38 N. Y. 445 4942
O'Meallie v. Moreau, 116 La. 1020 331, 354
O'Meara v. Cardiff C. Co., 154 Ill. App. 321 797, 1014, 1539
v. McDaniel, 49 Kan. 685 2082
v. North American M. Co., 2 Nev. 112 4211, 4214, 4328
Omerod v. Tate, 1 East 464 591
Ominger v. New York Cent. R. Co., 6 Thomp. & C. 498 23
Ommen v. Talcott, 175 Fed. 261 1128, 1448
Omnisky v. Weinhagen, 113 Minn. 422 4681
Omohundro v. Crump, 18 Gratt. 703 608
Onderdonk v. Emmons, 9 Abb. Pr. 187 1798
O'Neal v. Bacon, 1 Houst. 215 1826, 1828, 2388
v. Bainbridge, 94 Kan. 518 227
v. Brown, 21 Ala. 482 383
v. McKinna, 116 Ala. 606 4644, 4647
v. Seim, 158 N. C. 588 2339
Oneal v. Weisman, 39 Tex. Civ. App. 592 4375, 4383
O'Neall v. Bookman, 9 Rich. 80 953, 1206, 1212
v. Sims, 1 Strobh. 115 1206, 1212
Oneida, The, 84 Fed. 716 4997
Oneida, The, 128 Fed. 687 3408, 3429
Oneida Mfg. Co. v. Lawrence, 4 Cow. 440 2379
O'Neil v. Adams, 144 Iowa 385 4540, 4575
v. Brown, 158 Ky. 118 3232
v. Buffalo F. Ins. Co., 3 N. Y. 122 3019
v. Dry Dock, etc., R. Co., 59 N. Y. Super. 123 4663
v. Flanagan, 64 Mo. App. 87 3143
O'Neill v. Crane, 65 App. Div. (N. Y.) 358 2494
v. Johnson, 53 Minn. 439 4606, 4610, 4627
v. Lindsay Light Co., 181 Ill. App. 700 4209
v. New York, etc., R. Co., 45 Hun 458 314
v. Patterson, 26 N. Y. Misc. 3 4229

[REFERENCES ARE TO PAGES]

O'Neill v. San Pedro, etc., R. Co., 38 Utah 475 3978, 3984
v. Sinclair, 54 Ill. App. 298, 302, aff'd 153 Ill. 525 2509, 2513
v. Supreme Council, 70 N. J. L. 410 377
v. Traynor, 24 N. Y. Misc. 686 2556
O'Neill Mfg. Co. v. Pruitt, 110 Ga. 577 1468
v. Woodley, 118 Ga. 114 1051, 1523, 4234, 4241, 4248
Oneonta, etc., Co. v. Schwarzenbach, 164 App. Div. (N. Y.) 548 3960, 3961
Ongaro v. Twoby, 49 Wash. 93 4745
Ontario, The, 37 Fed. 220 3000
Ontario Bank v. Lightbody, 13 Wend. 101 595, 654
Ontario F. Ass'n v. Cutting P. Co., 134 Cal. 21 2308
Ontario L. Co. v. Hamilton B. Mfg. Co., 27 Ont. App. 346 2265
Opdike v. Bartels, 11 N. J. Eq. 133 3727
Opelousas, etc., R. Co. v. Bradford, 118 La. 506 3962, 4033
v. St. Landry C. O. Co., 121 La. 796 3983, 4006
Opening of Second Ave., 7 Pa. Super. Ct., 55 4145, 4146
Opening of Tremont Ave., In re, 71 N. Y. Misc. 480 4055
Opinion of Justices, In re, 209 Mass. 607 5150, 5155, 5157, 5161, 5162, 5170
Opp v. Ten Eyck, 99 Ind. 345 1793
Oppenheimer v. Bank, 97 Tenn. 19 1818, 1924
v. Halff, 68 Tex. 409 4422
v. Knepper Realty Co., 50 N. Y. Misc. 186 2146, 2165
v. United States Exp. Co., 69 Ill. 62 3415
Opsahl v. Judd, 30 Minn. 126 4875, 4939, 4943, 4944
v. Northern Pac. Ry. Co., 78 Wash. 197 5084, 5092
Optenberg v. Skelton, 109 Wis. 241 2432
Oram v. Franklin, 5 Blackf. 42 4503
Orange County Bank v. Brown, 9 Wend. 85 3283, 3412, 3529, 3531
Orange H. Co. v. Townsend, — Tex. Civ. App. —, 130 S. W. 701 3208, 3214
Orange L. Co. v. Thompson, (Tex. Civ. App.) 126 S. W. 604 3889
Orange Rice M. Co. v. McIlhenny, 33 Tex. Civ. App. 592 2556
Orange & A. R. Co. v. Fulvey, 17 Gratt. 366 2330
Orange, etc., R. Co. v. Placide, 35 Md. 315 2687
Orchard v. Globe P. Co., 240 Mo. 575 4506
v. Hughes, 1 Wall. 73 644
Ordelheide v. Traube, 183 Mo. App. 363 2613
Ordinary v. Bracey, 2 Bay 542 1636
v. Connolly, 75 N. J. Eq. 521 1631, 1640
v. Cooley, 30 N. J. L. 271 1631
v. McCollum, 3 Strobh. 494 732
v. Spann, 1 Rich. 429 633
Ordway v. Canisteo, 66 Hun 569 3878
v. Farrow, 79 Vt. 192 1235
Oregon, The, 55 Fed. 666 3313, 3315
Oregon, The, 73 Fed. 846 4852
Oregon, The, 89 Fed. 520 5011, 5013, 5014
Oregon, New England M. Co. v. Vader, 28 Fed. 265 1201
Oregon Pac. R. Co. v. Forrest, 128 N. Y. 83 746
Oregon R. & N. Co. v. Mosier, 14 Ore. 519 4052, 4053
Oregon S. L. R. Co. v. Fox, 28 Utah 311 4108
v. Jones, 29 Utah 147 4151
Oregon S. L., etc., R. Co. v. Mitchell, 7 Utah 505 4102
Oregon & C. R. Co. v. Jackson, 21 Ore. 360 3766, 3775, 3788, 3793, 3831
O'Reilly v. Hoover, 70 Neb. 357 1492
v. Long, 25 Ind. App. 525 3692
v. Mahoney, 123 App. Div. (N. Y.) 275 1102, 2694
v. New York, etc., R. Co., 16 R. I. 388 4954
Orenbaum v. Sowell (Tex. Civ. App.), 153 S. W. 905 842, 887
Orendorf v. New York Cent., etc. R. Co., 119 App. Div. (N. Y.) 638 4876
Orgall v. Chicago, etc., R. Co., 46 Neb. 4 4859
Organ v. Memphis, etc., R. Co., 51 Ark. 235 3993, 4020
Orhanovich v. The America, 4 Fed. 337 5006
Orient Ins. Co. v. Adams, 123 U. S. 67 2999, 3015
v. Parlin-O. Co., 14 Tex. Civ. App. 512 3008
Orient M. Co. v. Freckleton, 27 Utah 125 1417
Oriental, The, v. Barclay, 16 Tex. Civ. App. 193 1392
Oriental Bank v. Fremont Ins. Co., 4 Met. 1 1221
Oriental L. Co. v. Blades L. Co., 103 Va. 730 2236, 2274, 2873, 2874, 2875, 2893, 2896
Oriflamme, The, 3 Sawyer 397 3488, 3496, 4653, 4669, 4670, 4790
Original Hartlepool C. Co. v. Gibb, 5 Ch. Div. 713 528
O'Riley v. McChesney, 3 Lans. 278, aff'd 49 N. Y. 672 3860, 3864, 3878, 3923
Orlando v. Syracuse R. T. Co., 109 App. Div. (N. Y.) 356 1465, 1471
Orlean, In re, 135 N. Y. 341 3960
Orleans County Nat. Bank v. Moore, 112 N. Y. 543 715, 732
Orleans & J. R. Co. v. International C. Co., 113 La. 409 1111, 2793
v. Jefferson, etc., R. Co., 51 La. Ann. 1605 4048, 4069
Orman v. Mannix, 17 Colo. 564 1363
Ormsbee v. Davis, 18 Conn. 555 1664, 1672, 1675, 4352
Ormsby v. Graham, 123 Iowa 202 565, 2511
v. Louisville, 79 Ky. 202 1064
v. Vermont C. M. Co., 56 N. Y. 623 2311, 2954, 4211, 4243
Ornstein v. Yahr & L. D. Co., 119 Wis. 429 379, 2543, 2547
O'Rourke v. Hadcock, 114 N. Y. 541 786
v. New York, 130 App. Div. (N. Y.) 673 1199
Orr v. Bigelow, 20 Barb. (N. Y.) 21 2246, 2885
v. Bigelow, 14 N. Y. 556 2276
v. Carnegie N. G. Co., 2 Pa. Super. Ct. 401 4133, 4140
v. Churchill, 1 H. Bl. 227 853, 869, 871, 971, 1002
v. Dayton & M. T. Co., 178 Ind. 40 38, 343, 2873, 3762

[REFERENCES ARE TO PAGES]

Orr v. Farmers' Alliance W. & C. Co., 97 Ga. 241 2340
v. Nagle, 87 Hun 12 705, 717
v. Seiler, 1 Penny. 445 4628
v. Skofield, 56 Me. 483 4504
v. Wahlfeld Mfg. Co., 179 Ill. App. 235 4700, 4701, 4815, 4834
Orr T. & F. Co. v. Metropolitan S. Co., 77 N. J. L. 749 1455
Orr & L. H. Co. v. Murray, 163 Fed. 54 4458
Orrick v. Dawson, 67 W. Va. 403 531
Orrok v. Commonwealth Ins. Co., 21 Pick. 456 3010, 3032
Orscheln v. Scott, 90 Mo. App. 352 1468
Ort v. Bowden (Tex. Civ. App.), 148 S. W. 1145 3933
Orth v. Anderson, 163 App. Div. (N. Y.) 519 2793
v. Featherly, 87 Mich. 315 4543
v. Milwaukee, 92 Wis. 230 4125
Ortiz v. Navarro, 10 Tex. Civ. App. 195 3676
Ortman v. Green, 26 Mich. 209 2224
Ortmann v. First Nat. Bank, 49 Mich. 56 930
Ortmeier v. Ivory, 208 Ill. 577 690
Orton v. Noonan, 29 Wis. 541 529
v. Phelan, 2 Head 445 2376
v. Scofield, 61 Wis. 382 2513
Osake v. Larkin, 40 Kan. 206 71
Osborn v. Bank of United States, 9 Wheat. 738 1221
v. Guy's Hospital, 2 Str. 728 2469
v. Leach, 133 N. C. 427 1399
v. Leach, 135 N. C. 628 26, 330, 4503, 4512, 4535, 4558
v. Lovell, 36 Mich. 246 1536
v. Martha's Vineyard R. Co., 140 Mass. 549 770
v. Robbins, 36 N. Y. 365 2825
v. Schenck, 83 N. Y. 201 4209
v. Texas & P. R. Co., 134 La. 863 4809
v. United States, 33 Ct. of Cls. 304 3753
Osborn's Sons & Co., In re, 177 Fed. 184 1056, 1199
Osborne v. Bell, 62 Mich. 214 2229
v. Cargill E. Co., 62 Minn. 400 361
v. Chicago & N. R. Co., 48 Fed. 49 3281
v. Cunningham, 4 Dev. & Batt. 423 2857
v. Detroit, 32 Fed. 36 1468, 1470
v. Ehrhard, 37 Kan. 413 2417
v. Franklin M. Co., 45 App. Div. (N. Y.) 325 2463
v. Fridrich, 134 Mo. App. 449 980
v. Gullikson, 64 Minn. 218 2743, 2814
v. Morgan, 130 Mass. 102 2995
v. Nelson L. Co., 33 Minn. 285 2462
v. Poket, 33 Minn. 10 174, 217
v. Smith, 18 Fed. 126 2820
v. Synnot, 3 Vict. L. R. (law) 148 4295
v. Thompson, 36 Minn. 528 2788
v. Van Dyke, 113 Iowa 557 126
Osbourn v. Osbourn, 11 S. & R. 58 3692
Oscala F. & M. Works v. Lester, 49 Fla. 199 4315
Oscanyan v. Winchester A. Co., 103 U. S. 261 18
Osceola, The, 189 U. S. 158 4990
Osgood v. Bauder, 75 Iowa 550 2275
v. Bauder, 82 Iowa 171 520
v. Carver, 43 Conn. 24 4204
v. Chicago, 154 Ill. 194 3957, 3965
v. Dewey, 13 Johns. 240 3097, 3099
v. Lewis, 2 Harr. & G. 495 2377, 2380, 2388
Osgood v. Nichols, 5 Gray 420 2905
v. Osgood, 39 N. H. 209 2153, 2874
v. Poole, 165 Ill. App. 63 1014
v. Skinner, 211 Ill. 229, aff'g 111 Ill. App. 606 419, 2214, 2226
O'Shea v. Kirker, 8 Abb. Pr. 69 1532, 1534
v. New York, etc., R. Co., 105 Fed. 559 768, 772
Oshkosh G. L. Co. v. Germania F. Ins. Co., 71 Wis. 454 3008
Oshkosh P. & P. Co. v. Mercantile Ins. Co., 31 Fed. 200 3012
Osler v. Walton, 67 N. J. L. 63 4783, 4784
Osmers v. Furey, 32 Mont. 581 1442, 1454, 3121, 4329
Osmun v. Winters, 25 Ore. 260 3663, 3664
v. Winters, 30 Ore. 177 3668, 3671
Ossowski v. Wiesner, 101 Wis. 238 1805, 3100
Osteen v. Southern R., 76 S. C. 368 4852, 4865, 4867
Osterheld v. Star Co., 146 App. Div. (N. Y.) 388 4537, 4550, 4575, 4586, 4598
Osterholm v. Boston, etc., M. Co., 40 Mont. 508 4712, 4723
Osterhout v. Delaware, etc., R. Co., 138 App. Div. (N. Y.) 625 4744
v. Roberts, 8 Cow. 43 4209
Osterling v. Cape May H. Co., 82 N. J. L. 650 2514
Ostrander v. Lansing, 115 Mich. 224 4699
v. Scott, 161 Ill. 399 626, 758, 814
Ostrom v. San Antonio, 33 Tex. Civ. App. 683 1350, 3739, 3821
Ostroot v. Northern Pac. R. Co., 111 Minn. 504 3414
Oswald v. Nehls, 233 Ill. 438 2469
Oswego City Sav. Bank v. Board of Education, 70 App. Div. (N. Y.) 538 951, 952
Oswego Falls P. & P. Co. v. Stecher L. Co., 146 App. Div. (N. Y.) 241 2259
Otis v. Alderson, 10 Sm. & M. 476 2456
v. Cullom, 92 U. S. 447 1871
v. Hall, 117 N. Y. 131 1646
v. Janesville, 47 Wis. 422 108
v. Jones, 31 Wend. 394 486, 4202
v. Pennsylvania Co., 71 Fed. 136 25
v. Von Storch, 15 R. I. 41 2814
Otis Elevator Co. v. City of Chicago, 263 Ill. 419 3981, 4002
v. Flanders Realty Co., 244 Pa. 186 2596, 2598, 2669
Otisfield v. Mayberry, 63 Me. 197 2898
O'Toole v. Post P. & P. Co., 179 Pa. 271 4540
Otos v. Great Northern Ry. Co., 128 Minn. 283, aff'd 239 U. S. 349 5067
Otrich v. St. Louis, etc., R. Co., 154 Mo. App. 420 436
Ott v. Murphy, 160 Iowa 730 437, 4507, 4513, 4537, 4539, 4575, 4580
v. Philadelphia, 235 Pa. 534 4768
v. Press P. Co., 40 Wash. 308 4508, 4535, 4583
v. Specht, 8 Houst. 61 4325
v. Tri-State Telephone & Telegraph Co., 127 Minn. 373 1498, 1500
Ottawa, The, 1 Low. 274 2723, 2734
Ottawa v. Gilliland, 63 Kan. 165 1462, 1481
Ottawa Northern & W. R. Co. v. Dominion B. Co., 36 Can. Sup. Ct. 347 931

[REFERENCES ARE TO PAGES]

Ottawa University v. Parkinson, 14 Kan. 159 1419, 1447, 2478
v. Welsh, 14 Kan. 164 1447
Ottawa, etc., R. Co. v. Adolph, 41 Kan. 600 1433
Otten v. Manhattan R. Co., 2 App. Div. (N. Y.) 396 4082
v. Spreckels, 24 Cal. App. 251 1451, 1459, 2687
Ottenot v. New York, etc., R. Co., 119 N. Y. 603 3853
Otter Tail Power Co. v. Brastad, 128 Minn. 415 4023, 4142
Otto v. Braman, 142 Mich. 185 2455
v. Burch, 50 Neb. 894 1675
v. Jackson, 35 Ill. 349 3098
Ottos v. Kopje Diamond Mines, In re, [1893] 1 Ch. 618 2320
Ottoway v. Milroy, 144 Iowa 631 503, 2474, 2596
Otts v. Alderson, 10 Sm. & M. 476 2388
Ottumwa v. Nicholson, 161 Iowa 473 391
v. Parks, 43 Iowa 119 298, 299, 307, 3196
Ouimette, In re, 1 Sawyer 47 674
Ould v. Spartanburg R. Co., 94 S. C. 184 863, 918
Oursler v. Baltimore & O. R. Co., 60 Md. 358 3912
Ousley v. Central T. Co., 196 Fed. 412 683
v. Hampe, 128 Iowa 675 1379, 4684
Outcalt v. Durling, 25 N. J. L. 443 4173
Outen v. Graves, 7 J. J. Marsh. 629 1195
Outhouse v. Outhouse, 13 Hun 132 4277
Outland v. Seaboard A. L. R. Co., 134 N. C. 350 3311
Outram v. Morewood, 3 East 346 2071
Outtrim, etc., C. Co. v. Gregory, 9 The Argus L. R. 52 (Austria) 2579
Outwater v. Dodge, 7 Cow. 85 2225
Ouverson v. Grafton, 5 N. D. 281 103, 104, 108, 110
Ovens v. Chicago City R. Co., 171 Ill. App. 647 4745
Over v. Dehne, 38 Ind. App. 427 3846, 3881, 3887
Overacre v. Garrett, 5 Lans. 150 1586
Overall v. Babson, 2 Yerg. 71 1501
v. Chicago Motor Car Co., 183 Ill. App. 276 2403, 3186
Overby v. Johnston, 42 Tex. Civ. App. 348 2094
Overhiser v. McCollister, 10 Ind. 41 2060, 2173
Overhold v. Vieths, 93 Mo. 422 4779
Overseers of Poor v. Bank, 2 Gratt. 547 2904
Overstreet v. Dobson, 28 Ind. 256 2147
v. Nunn, 36 Ala. 666 674
Overton v. Bolton, 9 Heisk. 762 962
v. Phelan, 2 Head 445 537, 564
v. Tracey, 14 S. & R. 311 671
v. Woodson, 17 Mo. 453 2840
Oviatt v. Pond, 29 Conn. 479 1136, 4179, 4194, 4312
Ovington v. Smith, 78 Ill. 250 1762
Owen v. Brockschmidt, 54 Mo. 285 348, 425, 774, 4831, 4858, 4914, 4942
v. Cook, 9 N. D. 134 144, 153
v. Dewey, 107 Mich. 67 4508
v. Homan, 15 Jur. 339 2823
v. McGehee, 61 Ala. 440 2865
v. McKean, 14 Ill. 459 4589
v. Routh, 14 C. B. 327 291, 368, 2316, 2317, 4241, 4251, 4252, 4255
v. Springfield, 83 Mo. App. 557 4148
v. Thomas, 33 Ill. 320 2094
v. Union M. Co., 48 Mich. 348 491
v. United States, 44 Ct. of Cls. 440 170, 293, 2654, 2655, 2656
Owen v. Warburton, 1 B. & P. N. R. 326 1482
v. Western Saving Fund, 97 Pa. 47 385
v. Williams, 38 Colo. 79 4295
Owens v. Atlantic C. L. R. Co., 147 N. C. 357 3451
v. Atlantic C. L. R. Co., 152 N. C. 439 3505
v. Baltimore & O. R. Co., 35 Fed. 715 489
v. Commonwealth Trust Co., 183 Ill. App. 605 791
v. Durham, 5 Dana 536 2514
v. Hodges, 1 McMull. 106 918
v. Kansas City, etc., R. Co., 95 Mo. 169 1462
v. Owens, 81 Md. 518 4641
v. Owens, 84 Miss. 673 1121
v. Rector, 44 Mo. 389 533, 541, 555
v. Sturges, 67 Ill. 366 534
v. Swanton, 25 Wash. 112 3263
Owensboro-H. Tel. Co. v. Wisdom, 23 Ky. L. Rep. 97 233, 248, 251
Owensboro S. & T. Co. v. Moore, 154 Ky. 431 2696, 2707
Owensboro W. Co. v. Riggan, 151 N. C. 303 2347
v. Wilson, 79 Kan. 633 536
Owensboro & H. G. R. Co. v. Coons, 20 Ky. L. Rep. 1678 405
Owensboro & N. R. Co. v. Barclay, 102 Ky. 16 4889
Owenson v. Morse, 7 T. R. 64 648, 656, 664
Owings v. Gibson, 2 A. K. Marsh. 515 3734
v. McBride, 32 Mo. 221 1805, 1806
v. Thompson, 4 Ill. 502 1828, 1845
v. Ulroy, 3 A. K. Marsh. 454 3827
Owners of No. 7 Steam Sand Pump Dredger v. Owners of S. S. Greta Holme, [1897] App. Cas. 596 5002
Owners of The Gracie v. Owners of The Argentino, 14 App. Cas. 519, aff'g The Argentino, 13 Prob. Div. 191 214, 241
Owners of the Steamship Mediana v. Owners, Master & Crew of the Lightship Comet, [1900] App. Cas. 113 5002
Owners of Wool Cargo, etc. v. New Zealand S. Co., 4 Com. Cas. 10 (1898) 3384
Owsley v. Central T. Co., 196 Fed. 412 1055
v. M. & W. P. R. Co., 37 Ala. 360 1332
Oxendale v. Witherell, 9 B. & C. 386 2230
Oxford, The, 66 Fed. 590 2729
Oxford v. Ellis, 117 Ga. 817 4223
Oxford Junction Sav. Bank v. Cook, 134 Iowa 185 1489
Oxford K. Mills v. American W. Co., 6 Ga. App. 642 2340
v. Wooldridge, 6 Ga. App. 301 2404
Oyster v. Burlington Relief Department, 65 Neb. 789 21
Ozark L. Co. v. Chicago L. Co., 51 Mo. App. 555 2214
Ozark O. Co. v. Kansas City S. R. Co., 173 Mo. App. 450 1444, 3780

P

P. Ballantine & Sons v. Fenn, 88 Vt. 166 703, 704, 711, 712
v. Public Service Corp., 86 N. J. L. 331 391

[REFERENCES ARE TO PAGES]

P. C. C., etc., R. Co. v. Ensign, 3 Ohio Dec. 451 3476
v. Reynolds, 55 Ohio St. 370 3439, 3450
P. E. Sharpless Co. v. Lawrence, 213 Fed. 423 4494
Pabst B. Co. v. Rapid S. F. Co., 56 N. Y. Misc. 445 4339
Pacaud v. McEwan, 31 Up. Can. Q. B. 328 1675
Pace v. Louisville & N. R. Co., 166 Ala. 519 488
v. Neal, 92 Ill. App. 416 1654, 1668, 1669
v. Pace, 19 Fla. 438 1638
v. Robertson, 65 N. C. 550 2838
v. St. Louis S. R. Co., 174 Mo. App. 227 3801, 3892, 3911
Pacelli v. People's Ry. Co., — Del. Super. Ct. —, 93 Atl. 560 3502, 4774
Pacific, The, Deady 17 3335
Pacific B. Co. v. Oregon Hassam P. Co., 67 Ore. 576 1354, 2696
v. United States F. & G. Co., 33 Wash. 47 391, 2757
Pacific Coast v. Yukon I. F. Co., 155 Fed. 29 3340
Pacific Coast R. Co. v. Porter, 74 Cal. 261 4119
Pacific Coast S. Co. v. United States, 53 Ct. of Cts. 56 1039
Pacific Coast S. S. Co. v. Bancroft-W. Co., 94 Fed. 180 3435
Pacific Creosoting Co. v. Thames & Mersey Marine Ins. Co., Ltd., 210 Fed. 958 3005
Pacific Exp. Co. v. Black, 8 Tex. Civ. App. 363 137, 3383
v. Darnell, 62 Tex. 639 172, 3370
v. Jones, 52 Tex. Civ. App. 367 1367, 3323
v. Lasker R. E. Ass'n, 81 Tex. 81 3750
v. Lothrop, 20 Tex. Civ. App. 339 1437, 1439, 1450, 1458, 2302, 2305
v. Needham, 37 Tex. Civ. App. 129 3375, 3378
v. Walters, 42 Tex. Civ. App. 355 1259, 2551, 2561
v. Watson, 57 Tex. Civ. App. 111 23, 4767
Pacific Ins. Co. v. Conard (C. C. A.), Baldwin 138 163, 4159, 4164, 4169, 4198
Pacific Iron Works v. Newhall, 34 Conn. 67 1832, 2385
Pacific L. Co. v. Rudebeck, 15 Wash. 336 2227
Pacific Livestock Co. v. Murray, 45 Ore. 103 443, 1430, 1445, 2799, 3803
Pacific M. Co. v. Enterprise M. Co., 16 Hawaii 282 4298
Pacific Mail S. S. Co. v. Commercial P. C. Co., 173 Fed. 28 2721
v. New York H. & R. M. Co., 74 Fed. 564 2734
v. Toel, 9 Daly 301, 85 N. Y. 646 1716, 1737
Pacific Mut. L. Ins. Co. v. Branham, 34 Ind. App. 243 3079
v. McCabe, 157 Ky. 270 3079
Pacific P. L. Co. v. Western U. Tel. Co., 123 Cal. 428 127, 209
Pacific Postal Tel. C. Co. v. Bank, 109 Fed. 369 3584, 3592
v. Fleischner, 66 Fed. 899 1093, 1142, 3552, 3585
Pacific R. v. Chrystal, 25 Mo. 544 4110
v. United States, 158 U. S. 118 1199
v. United States F. & G. Co., 33 Wash. 47 1559
Pacific R. & N. Co. v. Elmore P. Co., 60 Ore. 534 3986, 4134, 4138
Pacific S. M. Works v. California C. Co., 164 Fed. 980 228, 2343
Pacific S. W. Co. v. Alaska P.'s Ass'n, 128 Cal. 632 239, 266, 268
Pacific Tel. Co. v. Underwoods, 37 Neb. 315 3553
Pacific Tel. & T. Co. v. Huetter, 68 Wash. 442 1454
Pacific Union Club v. Commercial Union Assur. Co., 10 Cal. App. 203 142
Pacific, etc., Co. v. Chubb, 24 Cal. App. 265 3960, 3961
Packard v. Lienow, 12 Mass. 11 2970
v. Mobile, 151 Ala. 159 819
v. Slack, 32 Vt. 9 172, 1364, 2448
Packet Co. v. Hobbs, 105 Tenn. 29 476, 477, 4168
v. Sickles, 19 Wall. 611 4439, 4443, 4445, 4453, 4455
Pacquette v. Pickness, 19 Wis. 219 3702, 3705
Paddock v. Atchison, etc., R. Co., 37 Fed. 841 3450, 3452
v. Commercial Ins. Co., 104 Mass. 521 3032
v. Salisbury, 2 Cow. 811 4574
v. Simmons, 186 Mass. 152 662
v. Somes, 51 Mo. App. 320 3889, 3912
v. Somes, 102 Mo. 226 3922, 3923
v. Strobridge, 29 Vt. 470 4372
v. Watts, 116 Ind. 146 4634, 4637, 4644, 4646
Paddock-H. I. Co. v. Rice, 179 Mo. 480 436
Padget v. O'Connor, 71 Neb. 314 1849
Padgett v. Atlantic C. L. R. Co., 63 Fla. 248 40, 3441
v. Bank, 141 Mo. App. 374 714, 716
v. Decker, 145 Ky. 227 2004
Padley v. Catterlin, 64 Mo. App. 629 940, 1030, 1237
Padrick v. Great Northern R. Co., 128 Minn. 228 4814
Paducah v. Allen, 23 Ky. 701 3953
v. Allen, 111 Ky. 361 4136
v. Cully, 9 Bush 323 1588, 1592
v. Jones, 126 Ky. 809 865, 2872
Paducah L. Co. v. Paducah W. S. Co., 89 Ky. 340 171, 174
Paducah T. Co. v. Streit, 152 Ky. 63 4831
Padwick v. Stanley, 9 Hare 627 2841
Page v. Bent, 2 Metc. (Mass.) 371 4383, 4384, 4385
v. Bucksport, 64 Me. 51 105, 161
v. Burnstien, 102 U. S. 664, 26 L. ed. 268 3077
v. Carpenter, 10 N. H. 77 2226
v. Chicago, etc., R. Co., 70 Ill. 324 3964, 4125
v. Citizens' B. Co., 111 Ga. 73 4603, 4605
v. Cushing, 38 Me. 527 4603
v. Danforth, 53 Me. 174 422
v. Delaware & H. C. Co., 34 App. Div. (N. Y.) 618 4730
v. Ford, 12 Ind. 46 2429
v. Fowler, 39 Cal. 412 4211, 4245, 4350
v. Franklin, 214 Mass. 552 275
v. Freeman, 19 Mo. 421 435
v. Harper, 73 Kan. 229 2853
v. Johnston, 205 Mass. 274 4395
v. Krekey, 137 N. Y. 307, 314 3752
v. Lashley, 15 Ind. 152 2149
v. McDonnell, 55 N. Y. 299 921, 2013

[REFERENCES ARE TO PAGES]

Page v. Marsh, 36 N. H. 305 2539
v. Mille Lacs L. Co., 53 Minn. 492 3933, 3935
v. Newman, 9 B. & C. 378 962, 1033
v. Page, 24 Mo. 596 1905
v. Page, 73 N. H. 305 2474
v. Parker, 40 N. H. 47, 43 N. H. 363 437, 4392, 4410
v. Pavey, 8 C. & P. 769 238, 2443
v. Sumpter, 53 Wis. 652 47, 4172
v. Sun Ins. Office, 74 Fed. 203 3049
v. Wallace, 87 Ill. 84 979
v. Warner, 4 Cal. 395 1903, 1909
v. Webster, 51 Me. 269 2820
v. Wells, 37 Mich. 415 4392, 4420
Page Farmers' E. Co. v. Thompson, 20 N. D. 256 4391
Page Woven F. Co. v. Pool, 133 Mich. 323 686
Page's App., 71 Pa. 402 1079
Pahlman v. Taylor, 75 Ill. 629 2779
Paige v. Banks, 13 Wall. 608 4478
v. Barrett, 151 Mass. 67 407, 2545, 2552
v. Stone, 10 Metc. (Mass.) 169 682
Pain v. Metropolitan St. R. Co., 170 Mo. App. 574 1382
v. Packard, 13 Johns. 174 2819
Paine v. Ball, 3 Mass. 235 1634
v. Bonney, 6 Abb. Pr. 99 709
v. Boston, 4 Allen 168 1449
v. British-B. M. Co., 41 Mont. 28 4208
v. Caswell, 38 Me. 80 960, 968
v. Chicago, etc., R. Co., 45 Iowa 569 3503
v. Dwinel, 53 Me. 52 661, 662
v. Farr, 118 Mass. 74 460, 493
v. Kelley, 197 Mass. 22 1295, 4836
v. Miller, 6 Ves. 349 349
v. San Bernardino Valley T. Co., 143 Cal. 654 4763
v. Sherwood, 21 Minn. 225, 19 Minn. 215 327, 2275, 2284, 2353
v. Woods, 108 Mass. 160 4108, 4113
Paine L. Co. v. United States, 55 Fed. 854 21, 4004
Painter v. Gibson, 88 Iowa 120 1559
v. Ives, 4 Neb. 122 4601, 4839, 4842
v. Lebanon L. Co., 164 Mich. 260 4387, 4395
v. Munn, 117 Ala. 322 1685, 1688, 1699, 1704
v. Newby, 11 Hare 26 1978, 2052
v. Norfolk & W. R. Co., 144 N. C. 436 371
v. Stahley, 15 Wyo. 510 3803, 3812
Paisley v. Western New York & P. T. Co., 80 N. Y. Misc. 258 1382
Pakmer v. Leffler, 18 Iowa 125 954
Palatine Ins. Co. v. O'Brien, 109 Md. 100 923, 3040
v. O'Brien, 107 Md. 341 1089
Palestine H. W. Co. v. Terminal W. Co., 67 N. Y. Misc. 456 1454, 4227
Palestine I. F. & G. Co. v. Connally (Tex. Civ. App.), 148 S. W. 1109 918, 2240, 2255, 2257
Palethorpe v. Lesher, 2 Rawle 272 779
Paley v. Osborne, 10 Coke 130b 1528
Pallet v. Sargent, 36 N. H. 496 471, 475, 4569, 4577, 4580
Pallett v. Murphy, 131 Cal. 192 2617
Palliser v. Title Ins. Co., 61 Misc. (N. Y.) 490 3093
Palm v. Fancher, 93 Miss. 785 1202
v. Ohio & M. R. Co., 18 Ill. 217 2688, 2693
Palmer v. Andover, 2 Cush. 600 107
v. Andrews, 7 Wend. 142 3686
Palmer v. Augenstein, 18 App. Cas. (D. C.) 511 4172, 4178
v. Bagg, 64 Barb. 641, 56 N. Y. 523 2753, 2767
v. Baum, 123 Ill. App. 584 1320, 4663, 4703, 4740, 4962, 4964, 4966, 4968
v. Blackburn, 1 Bing. 61 3031
v. Call, 2 McCrary, 522 979
v. Cedar Rapids, etc., R. Co., 124 Iowa 424 1498, 4711
v. Chicago, etc., R. Co., 112 Ind. 250 1288
v. Courtney, 32 Neb. 773 2382
v. Crosby, 1 Blackf. 139 1532
v. Darby, 2 Ohio N. P. 416 224
v. Darby, 64 Ohio St. 520 287
v. Dewitt, 47 N. Y. 532 4478
v. Euback, 3 Hen. & Munf. 502 1354
v. Foley, 71 N. Y. 106 1713, 1716
v. Goldberg, 128 Wis. 103 1442, 4391
v. Grand Junction R., 4 M. & W. 749 3285
v. Haskins, 28 Barb. 90 4523, 4525, 4598
v. Hill, 140 Mich. 468 1904
v. Holland, 51 N. Y. 416 2940
v. Ingram, 2 Ga. App. 200 1399, 3189
v. Laberee, 23 Wash. 409 953, 1047
v. Leader P. Co., 6 Pa. Dist. 182 4543
v. Leader P. Co., 7 Pa. Super. Ct. 594 4549
v. Leffler, 18 Iowa 125 870, 967, 976
v. Lloyd Mystic Legion, 86 Neb. 596 1091
v. Lorillard, 16 Johns. 347 3290, 3291
v. Louisville & N. R. Co. (Misc.), 123 N. Y. Supp. 47 3537
v. Maine Cent. R. Co., 92 Me. 399 4839, 4840, 4843
v. Matthews, 162 N. Y. 100 4574
v. Meriden B. Co., 188 Ill. 508 3147
v. Miller, 19 Ind. App. 624 2464
v. Murray, 8 Mont. 174, 8 Mont. 312 1060, 1135
v. New York Cent., etc., R. Co., 153 App. Div. (N. Y.) 296 4922, 4924
v. New York News P. Co., 31 App. Div. (N. Y.) 210, 215 4537, 4543
v. Palmer, 106 Me. 25 1080
v. Palmer, 15 App. Div. (N. Y.) 609 1120
v. Penobscot L. Ass'n, 90 Me. 193 3345, 3346
v. Philadelphia, etc., R. Co., 218 Pa. 114 1279, 4869
v. Pirson, 4 Misc. (N. Y.) 455 2928
v. Reynolds, 3 Cal. 396 1357
v. St. Paul F. & M. Ins. Co., 44 Wis. 201 3021
v. Stephens, 1 Denio 471 2986
v. Stockwell, 9 Gray 237 1102
v. Temple, 9 A. & E. 508 2015, 2016
v. Toms, 96 Wis. 367 834, 887, 893, 919
v. United States, 41 App. Cas. (D. C.) 341 4175
v. Warren St. R. Co., 206 Pa. 574 150
v. Washington S. I. Co., 43 Wash. 451 2013
v. Waterloo, 138 Iowa 296 1363, 1377

[REFERENCES ARE TO PAGES]

Palmer v. Wick & P. S. S. Co., [1894] App. Cas. 318 2858
v. Winona R. & L. Co., 78 Minn. 138, 83 Minn. 85 4709
v. Winston-S. R. & E. Co., 131 N. C. 250 4783
v. Wylie, 19 Johns. 276 1360
v. Yarrington, 1 Ohio St. 253 1145
v. York Bank, 18 Me. 166 1392, 1535
Palmer Co. v. Ferrill, 17 Pick. 58 3926, 4108
Palmer T. Co. v. Long, 140 Ky. 111 149, 1494
Palmeri v. Manhattan R. Co., 133 N. Y. 261 3468
Palms v. Howard, 129 Ky. 668 2490
Pana v. Bowler, 107 U. S. 529 1146
Panasuk, In re, 217 Mass. 589 5146, 5211
Pancoast v. Bumell, 32 Iowa 394 4762
v. Travelers' Ins. Co., 79 Ind. 172 1159, 1163
Pangburn v. Bull, 1 Wend. 345 4610
Panhandle & G. R. Co. v. Kirby, 42 Tex. Civ. App. 340 3957, 4108
Pankey v. Atchison, T. & S. F. R. Co., 180 Mo. App. 185 5079
Pankopf v. Hinkley, 141 Wis. 146 87, 4681
Pannell v. Allen, 160 Mo. App. 714 1367, 1368, 4169
Panos v. American & F. Co., 147 Mo. App. 570 4662, 4718, 4720
Pantall v. Rochester & P. C. & I. Co., 18 Pa. Super. 341, 204 Pa. 158 395, 396
Panton v. Holland, 17 Johns. 92 6, 3916
v. Isham, 3 Lev. 359 3835
Paola v. Garman, 80 Kan. 702 8
Paola G. Co. v. Paola G. Co., 56 Kan. 614 234, 248, 253, 287, 2622
Pape v. Ferguson, 28 Ind. App. 298 2294, 2296, 2298, 2344
v. Lathrop, 18 Ind. App. 633 2548, 2549, 2550
v. Westacott, [1894] 1 Q. B. 272 2928
Papineau v. Taber, Montreal L. R. 2 Q. B. 107 4689
Papot v. Barbour, 165 Ala. 257 2683
Pappas v. Stark, 123 Minn. 81 3209
Pappenheim v. Metropolitan E. R. Co., 128 N. Y. 436 414
Paquin v. St. Louis & S. R. Co., 90 Mo. App. 118, 128 4705
v. Wisconsin Cent. R. Co., 99 Minn. 170 56, 75
Paradine v. Jane, Aleyn 26 2527, 3066, 3138, 3150
Paragon Ref. Co. v. Lee, 98 Tenn. 643 569, 2275, 2297
Paragould, City of, v. Milner, 114 Ark. 334 4107
Paragould & M. R. Co. v. Smith, 93 Ark. 224 730
Parana, The, 1 Prob. Div. 452 2367
Parchman v. McKinney, 12 Sm. & M. 631 712, 740
Pardee v. Douglas, 122 App. Div. (N. Y.) 395 275, 2584, 2589
v. Drew, 25 Wend. 459 3412, 3534
v. Markle, 111 Pa. 548 735
v. Robertson, 6 Hill 275 495, 496, 1621
Pardridge v. Bailey, 20 Ill. App. 351 684, 685
v. Brady, 7 Ill. App. 639 1329, 3829, 4167
Parfitt v. Chambre, L. R. 15. Eq. 36 875
Parham v. Langford, 43 Tex. Civ. App. 31 467
v. Pulliam, 5 Cold. 497 871
v. Randolph, 4 How. (Miss.) 435 4383
Parham S. M. Co. v. Brock, 113 Mass. 194 2754, 2767
Paris v. Allred, 17 Tex. Civ. App. 125 3860, 3878, 3905
v. Cairo, etc., R. Co., 248 Ill. 213 4058, 4060
v. Jenkins, — Tex. Civ. App. —, 122 S. W. 411 3881
v. Johnson, 155 Ala. 403 3188
Paris Flouring Co. v. Imperial Cotton Milling Co., 181 Ill. App. 215 2277
Paris, etc., R. Co. v. Flanders, — Tex. Civ. App. —, 165 S. W. 98 4712
v. Robinson, 104 Tex. Civ. App. 482 4873, 4895, 4904
Parish v. Baird, 160 N. Y. 302 3770
v. Kohler, 11 Phila. 346 599
v. McPhee, 102 Wis. 241 2220
v. Stone, 14 Pick. 198 534, 1830, 1831
v. Van Arsdale-Osborne Brokerage Co., 92 Kan. 286 1690, 2742
v. Wheeler, 22 N. Y. 494 4176, 4288
v. White, 5 Tex. Civ. App. 71, 74 2105
v. Whitney, 3 Gray 510 2147
v. Yazoo, etc., R. Co., 103 Miss. 288 3346, 3434
Park v. Bates, 12 Vt. 381 2094, 2110
v. Cheek, 4 Cold. 20 2056, 2060, 2076, 2083, 2122
v. Cheek, 2 Head 451 2068
v. Chicago & S. W. R. Co., 43 Iowa 636 257, 3209, 3918, 3933
v. Ensign, 66 Kan. 50 2872
v. Hammond, 4 Camp. 344, 6 Taunt. 495 2911, 2914
v. Hubbard, 134 App. Div. (N. Y.) 468 414
v. Hutchinson, 80 Ark. 183 583
v. Independent School Dist., 65 Iowa 209 2557
v. McCauley, 67 W. Va. 104 691
v. McDaniels, 37 Vt. 594 1364, 2897, 4190, 4270
v. Mighell, 3 Wash. 737 2519
v. Northport S. & R. Co., 47 Wash. 597 3773, 3897
v. Richardson, 91 Wis. 189 2405
v. Southern R., 78 S. C. 302 416
v. White, 23 Ont. 611 3843
v. Wiley, 67 Ala. 310 804, 816, 820
Park Bank v. Watson, 42 N. Y. 490 1821
Park City Yacht Club v. Bridgeport, 85 Conn. 366 12
Parkdale v. West, 12 Ont. App. 602 3874
Parke v. Blackiston, 3 Harr. 373 4569, 4581
v. Fellman, 145 App. Div. (N. Y.) 836 4839
v. Frank, 75 Cal. 364 4
v. Franko-Am. T. Co., 120 N. Y. 51 2230
v. Seattle, 5 Wash. 1 3913, 3917
Parker v. Atlantic C. L. R. Co., 133 N. C. 335 3334, 3438
v. Barlow, 93 Ga. 700 2411
v. Beasley, 116 N. C. 1 816
v. Bethel H. Co., 96 Tenn. 252 978, 980
v. Biglow, 14 Pick. 436 994
v. Bond, 5 Mont. 1 1728
v. Boston & M. R., 84 Vt. 329 1500, 4722, 4735

[REFERENCES ARE TO PAGES]

Parker v. Broas, 20 La. Ann. 167 790, 802
v. Brown, 15 N. H. 176 2056, 2072, 2075, 2088
v. Bryant, 40 Vt. 291 422
v. Chambers, 24 Ga. 518 1421
v. Cobe, 208 Mass. 260 1078
v. Coture, 63 Vt. 155 338, 4785, 4971
v. Cunningham, 5 Vict. L. R. 202 278, 281
v. Davis, (Legal Tender Cases) 12 Wall. 457 601
v. Dekle, 46 Fla. 452 1399
v. Eagle F. Ins. Co., 9 Gray 152 3041, 3066
v. Elliott, 6 Munf. 587 502, 4972
v. Ellis, 2 Sandf. 223 2860, 2863
v. Enslow, 102 Ill. 272 1464
v. Farley, 10 Cush. 281 4640
v. Fenwick, 138 N. C. 209 2393, 2404
v. First Nat. Bank, 3 N. D. 87 4283
v. Fisher, 39 Ill. 164 1524
v. Forehand, 99 Ga. 743 3662, 3666
v. Gilliam, 1 Ired. 545 234
v. Gordon, 7 East 385 622
v. Gortatowsky, 129 Ga. 623 816, 1031, 3109, 3147
v. Great Western R. Co., 7 M. & G. 253 3285
v. Green, 8 Metc. (Mass.) 137 703, 704, 714, 726, 728
v. Griswold, 17 Conn. 288 32, 1353, 3737
v. Harden, 121 N. C. 57 4222
v. Harvey, 2 Eq. Cas. Abr. 460 2211
v. Hollis, 50 Ala. 411 3098, 3099
v. Holmes, 4 N. H. 97 780, 781
v. Hulme, 1 Fish. Pat. Cas. 44 4494
v. Jones, 4 Camp. 112 2909
v. Lake Shore, etc., R. Co., 93 Mich. 607 1458, 1485
v. Lowell, 11 Gray 353 1368, 3943
v. McKannon, 76 Vt. 96 226, 374, 2237
v. Macomber, 17 R. I. 674 2528, 2534
v. McQueen, 8 B. Mon. 16 4599
v. Marquis, 64 Mo. 38 2421
v. Mayes, 85 S. C. 419 748
v. Meadows, 86 Tenn. 181 3237, 3240, 3243, 3245
v. Medsker, 80 Ind. 155 1652
v. Meek, 3 Sneed 29, 4957 4961
v. Mellor, Carth 398, 1 Ld. Raym. 217 4348
v. Mercer, 6 How. (Miss.) 323 733
v. Mise, 27 Ala. 480 4165
v. Monteith, 7 Ore. 277 4967, 4969
v. Moulton, 114 Mass. 99 4378
v. Nations, 33 Tex. 210 2808
v. Nickerson, 137 Mass. 487 1128
v. Nickerson, 112 Mass. 195 2902
v. Norfolk & C. R. Co., 119 N. C. 677 3878
v. Otis, 130 Cal. 322 1018
v. Ottumwa, 113 Iowa 649 4684
v. Parker, 33 Ala. 459 1446
v. Parker, 102 Iowa 500 4634, 4645, 4647
v. Peabody, 56 Vt. 221 1621
v. Pringle, 2 Strobh. 242 534, 2456
v. Republican Co., 181 Mass. 392 4531, 4533, 4535, 4563
v. Rodman, 84 Ind. 256 2382
v. Russell, 133 Mass. 74 375, 376, 388, 416
v. St. Louis T. Co., 108 Mo. App. 465 143, 4747
v. St. Martin, 53 Minn. 1 4409
Parker v. Shackelford, 61 Mo. 68 1269, 1349, 3827
v. Simonds, 8 Metc. (Mass.) 205 47, 1664, 1665, 1666, 4339, 4342, 4353
v. Simpson, 180 Mass. 334, 358 1124
v. Smith Eastern R. Co., 2 C. P. Div. 416, 1 C. P. Div. 618 3416
v. South Carolina & G. R. R., 48 S. C. 364, 382 4732
v. Tiers, 29 Fed. 800 3270
v. United States, 1 Pet. C. C. 262 673
v. Walker, 12 Rich. Law 138 4392, 4397
v. Waycross & F. R. Co., 81 Ga. 387 3790
v. Wilson, 98 Ark. 553 1129
v. Wise, 6 M. & S. 239 2749
v. Young, 188 Mass. 600 4222
Parker-B. L. Co. v. Great Northern Co., 69 Wash. 123 3432
Parker-Washington Co. v. City of Chicago, 185 Ill. App. 237 841
v. St. Louis T. Co., 165 Mo. App. 302 4176
Parkes v. Prescott, L. R. 4 Ex. 169 157
v. Seasongood, 152 Fed. 583 3911
Parkham v. Harney, 6 Sm. & M. 55 1480
v. McMurray, 32 Ark. 261 4198
Parkhill v. Bekin's Van & Storage Co., 169 Iowa 455 4731, 4735
Parkhurst v. Gloucester Mut. F. Ins. Co., 100 Mass. 301 3004
v. Ketchum, 6 Allen 406 4530, 4572, 4573, 4579
v. Masteller, 57 Iowa 474 340, 1268, 4613, 4628
v. Van Courtlandt, 1 Johns. Ch. 273 2005
Parkin v. Dick, 11 East 502 1850
Parkins v. Missouri Pac. R. Co., 76 Neb. 242 1094, 2240, 2257
v. Scott, 6 L. T. Rep. (N. S.) 394 4554
Parkinson v. Jacobson, 13 Hun 317 2194
v. Kortum, 148 Iowa, 217 113
v. Lee, 2 East 314 2372, 2386
v. Sherman, 74 N. Y. 88 2194
v. Woulds, 125 Mich. 325 2056
Parkist v. Alexander, 1 Johns. Ch. 394 2902
Parks v. Allen, 42 Mich. 82 827
v. Alta California Tel. Co., 13 Cal. 422 3379, 3585, 4428
v. Booth, 102 U. S. 96 4450, 4475
v. Boston, 15 Pick. 198 3146, 4086
v. Byrne, 120 Minn. 519 3820
v. Elmore, 59 Wash. 584 325, 1094
v. General Interest Assur. Co., 5 Pick. 34 3059
v. Ingram, 22 N. H. 283 703, 704, 717, 736, 737
v. Lubbock, 92 Tex. 635 999
v. Marshall, 10 Ind. 20 2330, 2331
v. Morris A. & T. Co., 54 N. Y. 586 2301, 2305, 2370, 2371, 2375, 2429
v. O'Connor, 70 Tex. 377 962, 2341, 2369, 2447
v. Ross, 11 How. 362, 13 L. ed. 730 2981
v. Sullivan, 46 Colo. 340 476, 4161, 4168, 4189
v. Wisconsin Cent. R. Co., 33 Wis. 413 3964, 4133
Parkway, In re, 150 App. Div. (N. Y.) 482 4088, 4130
Parli v. Reed, 30 Kan. 534 4614

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Parlin I. Co. v. Clements (Tex. Civ. App.), 156 S. W. 368 4186
Parmalee v. Wilks, 22 Barb. 539 141, 173, 2636
Parmalee Co. v. Wheelock, 224 Ill. 194 432
Parmelee v. Lawrence, 44 Ill. 405 772, 991, 993, 1174, 2823
v. Lawrence, 48 Ill. 331 941, 1194
v. Raymond, 43 Ill. App. 609 1444, 3398, 3536
Parmenter v. Fitzpatrick, 135 N. Y. 190 1439, 1448, 4228, 4230
v. Marion, 113 Iowa, 297 144
Parmer v. Anderson, 33 Ala. 78 4513, 4514
Parna, The, 2 Prob. Div. 118 3358
Parnell v. Hampton, 10 Ired. 463 4347
Paro v. St. Martin, 180 Mass. 29 283, 390
Parr v. Baer, 24 Cal. App. 149 2547
v. Greenbush, 42 Hun 232 832, 848, 929
v. Loder, 97 App. Div. (N. Y.) 218 4646
Parriconi v. Greco, 115 La. 558 339, 4792
Parrin v. Montana Cent. R. Co., 22 Mont. 290 4183
Parris v. Hulett, 26 Vt. 308 2867
Parroski v. Goldberg, 80 Wis. 339 4267, 4307, 4321
Parrot v. Den, 34 Cal. 79 1355
Parrott v. Atlantic, etc., R. Co., 140 N. C. 546 3506
v. Barney, 1 Sawyer 423 3150
v. Chicago, etc., R. Co., 127 Iowa 419 1511, 3762, 3764
v. Housatonic R. Co., 47 Conn. 575 4168, 4169
v. Knickerbocker, etc., I. Co., 46 N. Y. 361 1136, 1138
v. Scott, 6 Mont. 340 1654
Parry v. Cambria, etc., R. Co., 247 Pa. 169 3961, 4016
v. Frame, 2 B. & P. 451 4282
Parry Mfg. Co. v. Tobin, 106 Wis. 286 2392, 2405, 2456
Parsell v. Circuit Judge, 39 Mich. 542 4349
Parshall v. Minneapolis, etc., R. Co., 35 Fed. 649 1480, 4694
Parson v. Sexton, 4 C. B. 899 494
Parsons v. Connon's Ex'r, 27 Del. 298 701
v. Delaware & H. Co., 167 N. Y. App. Div. 536 5043
v. District, 35 App. D. C. 326 308
v. Hardy, 14 Wend. 215 3294, 3328, 3329
v. Harper, 16 Gratt. 64 223, 4836, 4841
v. Hughes, 9 Paige 591 773
v. Jameson, 70 N. H. 625 1244
v. Johnson, 28 App. Div. (N. Y.) 1 4387, 4392, 4399
v. Lindsay, 26 Kan. 426 4779
v. Lloyd, 3 Wils. 341, 2 W. Bl. 845 4841
v. Martin, 11 Gray 111 368, 2923, 2964
v. Miller, 46 W. Va. 334 1585
v. Missouri Pac. R. Co., 94 Mo. 286 4941
v. Pettingell, 11 Allen 507 474, 3752
v. Sexton, 4 C. B. 899 2390
v. Sutton, 66 N. Y. 92 316, 325, 476, 2276, 2309
v. Treadwell, 50 N. H. 356 1117
Parsons v. United States Exp. Co., 144 Iowa 745 3405
v. Utica C. Mfg. Co., 80 Conn. 58 1031, 1209
v. Winchell, 5 Cush. 592 1334
Parsons B. C. & S. F. Co. v. Mallinger, 122 Iowa 703 2374, 2390
Parsons & P. R. Co. v. Montgomery, 46 Kan. 120 1513
Partello v. Missouri Pac. R. Co., 217 Mo. 645 1424, 1497, 1499
v. Missouri Pac. R. Co., 240 Mo. 122 4797
Partenheimer v. Van Order, 20 Barb. 479 443, 3938
Partong v. Prang, 3 Cliff. 537 4478
Partridge v. Boston & M. R. Co., 107 C. C. A. 49, 184 Fed. 211 4654, 4667
v. Dykins, 28 Okla. 54 3235, 3237, 4684
v. Gilbert, 15 N. Y. 601 1022
v. Hatch, 18 N. H. 494 2091
v. Menck, 2 Barb. Ch. 101 4484
v. Moynihan, 59 N. Y. Misc. 234 753
v. Scott, 2 M. & W. 220 3916
Parvin v. Hoopes, Morris 294 1876
Pasadena v. Stimson, 91 Cal. 238 4001
Pascal v. Chicago, etc., R. Co., 160 Iowa 484 3752, 3806
Paskusz v. Bodner, 75 N. J. L. 447 2749
Pasley v. Freeman, 3 T. R. 51 4374
Pasman v. Fletcher, Clayton 73 4554
Pass v. Shine, 113 N. C. 284 975
Passaic, The, 190 Fed. 644, aff'd 204 Fed. 266 5039
Passenger R. Co. v. Philadelphia, 51 Pa. 465 1116
v. Young, 21 Ohio St. 518 1331, 1332, 1336
Passinger v. Thorburn, 34 N. Y. 634 238, 239, 284, 408, 2423, 2440
Passmore v. Western U. Tel. Co., 78 Pa. 238, 9 Phila. 90 3546, 3549, 3553, 3554
Passumpsic Bank v. Goss, 31 Vt. 315 2818
Pastene v. Adams, 49 Cal. 87 153
Pastor v. Regan, 9 N. Y. Misc. 547, 551 4840
v. Solomon, 26 N. Y. Misc. 125, aff'g 25 N. Y. Misc. 322 862, 899
Pastorius v. Fisher, 1 Rawle 27 32, 38
Patapsco G. Co. v. Magee, 86 N. C. 350 4313
Patapsco Ins. Co. v. Biscoe, 7 Gill & J. 293 3005
Patchen v. Keeley, 19 Nev. 404 3814
Patching v. Smith, 28 Ont. 201 3172
Pate v. Gray, Hemp. 155 962, 1108, 1874
v. Mitchell, 23 Ark. 590 2164
v. Spotts, 6 Munf. 394 1557
v. Vandeman, — Tex. Civ. App. —, 141 S. W. 317 546, 4292, 4293
Patek v. American S. & R. Co., (Colo.) 83 C. C. A. 284, 154 Fed. 190 4855, 4856
Patent B. Co. v. Moore, 75 Cal. 205 882, 894
Paterson v. Chicago, etc., R. Co., 95 Minn. 57 1442
v. Lockhart, 7 F. 954, 42 Sc. L. R. 755 5174
v. Wallace, 1 Macq. 748 350
v. Westervelt, 17 Wend. 543 1617
v. Wilcox, 20 Up. Can. C. P. 385 4958, 4963, 4964
Paterson & N. R. Co. v. Newark, 61 N. J. L. 80 3968, 4060

[REFERENCES ARE TO PAGES]

Patnote v. Sanders, 41 Vt. 66 356, 796, 2524, 2538
Patochi v. Central Pac. R. Co., 52 Cal. 90 1526
Paton v. Great Northern R. Co., 129 Minn. 101 4805
v. Sanborn, 133 Iowa 650 1477
Patrick v. Clay, 4 Bibb 246 1108, 1880
v. Colorado S. Co., 20 Colo. 268 35, 2584
v. Farmers' Ins. Co., 43 N. H. 621 3019, 3021
v. Greenway, 1 Saund. 346b 37
v. Hazen, 10 Vt. 183 457
v. Kirkland, 53 Fla. 768 947
v. Marshall, 2 Bibb 40 2029, 2047
v. Nelson, 2 Head 507 1799
v. Putnam, 27 Vt. 645 2528
v. Roach, 21 Tex. 256 2025, 2043
v. Swinney, 5 Bush 421 2396
Patridge v. Emson, Noy 62 1574
Patry v. Chicago, etc., R. Co., 77 Ill. 218 4831
Pattangall v. Mooers, 113 Me. 412 471
Pattee v. McCabe-B. W. Co., 97 Mo. App. 356 1368
Patten v. American Nat. Bank, 15 Colo. App. 479 1113
v. Bartlett, 111 Me. 409 3234
v. Belo, 79 Tex. 41 4576
v. Chicago & N. R. Co., 32 Wis. 524, 36 Wis. 413 136, 1499, 1512, 3529, 4678
v. Douglass, 44 Conn. 541 745
v. Fullerton, 27 Me. 58 639
v. Glover, 1 D. C. App. Cas. 466 640, 641, 643
v. Gurney, 17 Mass. 182 1528, 4374, 4433, 4606
v. Hamilton, 12 Ind. 256 1521
v. Libbey, 32 Me. 378 1363, 1368
v. Lynett, 133 App. Div. (N. Y.) 746 253, 2696, 2701
v. Northern Cent. R. Co., 33 Pa. 426 3975, 3978
v. Union Pac. R. Co., 29 Fed. 590 3282
Patten's App., 45 Pa. 152 578
Patterson v. Ackerson, 1 Edw. 96 3138
v. Arthurs, 9 Watts 152 2150
v. Baltimore, 124 Md. 153 3961, 3965, 4142
v. Bank, 26 Ore. 509 742
v. Bark Eudora, 190 U. S. 169 5024
v. Blakeney, 33 Ala. 338 1403
v. Boom Co., 3 Dill. 465 3696, 3976, 4097
v. Boston, 23 Pick. 425, 20 Pick. 159 4008, 4020, 4023
v. Bradley, 4 Ind. Terr. 124 2581
v. Campbell, 44 Nova Scotia 214 2843
v. Cappon, 125 Wis. 198 2097, 2123, 2127
v. Corn Exchange, 197 Fed. 686 4434
v. Cox, 25 Ind. 261 799
v. Detroit, etc., R. Co., 56 Mich. 172 3449
v. Ely, 19 Cal. 28 1356
v. Emerick, 21 Ind. App. 614 3111
v. Evans, 153 Mo. App. 684 4508
v. First Nat. Bank, 73 Neb. 384 627, 699
v. Frazer (Tex. Civ. App.), 93 S. W. 146 59, 1328
v. Freehold, 38 N. J. L. 255 1582, 1596
v. Gage, 11 Colo. 50 2755
v. Graham, 140 Ill. 531 3127
v. Gresham, 25 Ark. 380 4221
v. Hayden, 17 Ore. 238 4972
v. Houston, 92 Ill. App. 624 2482
Patterson v. Hulings, 10 Pa. 506 541, 555
v. Iaeger & S. R. Co., 178 Fed. 649 3981
v. Illinois Cent. R. Co., 123 Ky. 783 3323, 3370
v. Kingsland, 8 Blatchf. 278 1745
v. Lippincott, 47 N. J. L. 457 2982
v. McMinn (Tex. Civ. App.) 152 S. W. 223 1430, 4391
v. McNeely, 16 Ohio St. 348 947
v. Marine Nat. Bank, 130 Pa. 419 277
v. Meyerhofer, 204 N. Y. 96 232
v. Mississippi B. Co., 98 U. S. 403 487
v. Missouri G. Co., 72 Mo. App. 492 1102
v. Murphy, 41 Neb. 818 2013, 2017
v. New Orleans, etc., L. & P. Co., 110 La. 797 1305
v. Parker, 2 Hill 598 1556
v. Patterson, 59 N. Y. 574 525
v. Patterson, 13 Johns. 379 2471
v. Rinard, 81 Ill. App. 80 1727, 1761
v. Sharp, 41 Cal. 133 1229, 1235
v. South & N. A. R. Co., 89 Ala. 318 1281
v. Springfield Traction Co., 178 Mo. App. 250 3488, 4702, 4735, 4786
v. Steamship Co., 140 N. C. 412 3484
v. Stewart, 6 W. & S. 527 1028, 2122, 2153, 2159
v. Thompson, 24 Ark. 55 4958, 4962
v. United States, 2 Wheat. 222 1527
v. Waldman, 20 Ky. L. Rep. 514 3765, 3827
v. Ward, 8 N. D. 87 587
v. Wenatchee C. Co., 53 Wash. 155 2580
v. Westervelt, 17 Wend. 543 495, 1618
Patterson's App., 128 Pa. 269 1087, 1088
Patterson's Est., 5 N. Y. Misc. 178 1082
Patteson v. Graham, 16 N. Y. St. Rep. 703 952
Pattillo v. Alexander, 96 Ga. 60 1918
Pattison v. Adams, 7 Hill 126 4283
v. Gulf B. Co., 116 La. 963 4503, 4509, 4510
v. Hull, 9 Cow. 747 704, 728, 729, 741, 743
v. Jenkins, 33 Ind. 87 1194
v. Seattle, etc., R. Co., 64 Wash. 370 503
v. Skillman, 43 N. J. Eq. 392 770
Patton v. Caldwell, 1 Dall. 419 296
v. Cruce, 72 Ark. 421 4593
v. England, 15 Ala. 69 1950, 2196
v. Garrett, 37 Ark. 605 3118
v. Kennedy, 1 A. K. Marsh. 389 2130
v. McFarlane, 3 P. & W. 419 2094
v. Madison Nat. Bank, 126 Ky. 469 4180
v. Philadelphia, 175 Pa. 88 3990
v. Pittsburgh, etc., R. Co., 96 Pa. 169 4954
v. Sanborn, 133 Iowa 650 1471, 4718
v. Schneider, 139 Ky. 643 2114
v. Smith, 130 Ky. 819 2835
v. Taylor, 7 How. 132 2211
Patton P. Co. v. Erie R. Co., 148 Ill. App. 410 3401
Patty v. Pease, 8 Paige 277 571, 574
Patureau v. Wilbert, 44 La. Ann. 355 3773
Patzack v. Von Gerichten, 10 Mo. App. 424 4842
Paul v. Carver, 24 Pa. 207 12
v. Christie, 4 Har. & McH. 161 1228
v. Cragnaz, 25 Nev. 293, 320 266

[REFERENCES ARE TO PAGES]

Paul v. Dodd, 2 C. B. 800 668
v. Frazier, 3 Mass. 71 4959
v. Goodluck, 2 Bing. N. C. 220 1656
v. Grimm, 165 Pa. 139 2944
v. Hadley, 23 Barb. 521 4372
v. Harden, 9 S. & R. 23 1527
v. Jones, 1 T. R. 599 2835
v. Leyenberger, 17 Ill. App. 107 1495
v. Nurse, 8 B. & C. 486 3133
v. Omaha & St. L. R. Co., 82 Mo. App. 500 4720
v. Paul, 36 Pa. 270 3725
v. Slason, 22 Vt. 231 43, 4203
v. Witman, 3 W. & S. 407 297, 2124
Paul Gerli & Co. v. Doorly, (Misc.) 151 N. Y. Supp. 574 1824
Paulin, In re, 4 New Zeal. L. R. (Super. Ct.) 1338 3110
Paulin v. Kaighn, 29 N. J. L. 480 2853, 2865
Pauling v. Sartain, 4 J. J. Marsh. 238 1182, 1398
Paull v. Halferty, 63 Pa. 46 4566
Paulmier v. Erie R. Co., 34 N. J. L. 151 4858, 4935, 4939
Paulsen v. Dallett, 2 Daly 40 2500
Pauly v. Wilson, 57 Fed. 548 673
Pause v. Atlanta, 98 Ga. 92 3951, 3996, 4006, 4086
Pauza v. Lehigh Valley C. Co., 231 Pa. 577 1478, 4751
Pavenstedt v. New York L. Ins. Co., 203 N. Y. 91 1892
v. New York L. Ins. Co., 113 App. Div. (N. Y.) 866 1902
Pavesich v. New England L. Ins. Co., 122 Ga. 190 4505
Pavey v. American Ins. Co., 56 Wis. 221 1505
Pavitt v. Lehigh Valley R. Co., 153 Pa. 302 3340
Pawlak v. Hayes, 162 Wis. 503 5212
Pawlet v. Sandgate, 19 Vt. 62 1043
Pawley v. Turnbull, 3 Giff. 70 2687
Pawnee, The, 205 Fed. 333 5038
Pawnee D. & I. Co. v. Adams, 1 Colo. App. 250 1481
Paw Paw v. Eggleston, 25 Mich. 36 1582, 1588
Pawson v. Miller, 66 App. Div. (N. Y.) 12 4273
Pawtucket Mut. F. Ins. Co. v. Landers, 5 Kan. App. 623 998
Paxroski v. Goldberg, 80 Wis. 339 4220
Paxson v. Dean, 31 Ind. App. 46 1494
v. Potter, 30 Pa. Super. Ct. 615 3142
Paxson Co. v. Board of Chosen Freeholders, 201 Fed. 656 3941, 4173, 4198
Paxton v. Brinton, 126 Fed. 541 4447
v. State, 59 Neb. 460, 476 1586
v. Vadbonker, 1 Neb. (Unof.) 776 48, 289
v. Woodward, 31 Mont. 195 4505, 4508, 4512, 4513, 4544, 4596
Paxton T. Co. v. Detroit S. R. Co., 10 Interstate Com. 422 3312
Payne v. Baehr, 153 Cal. 441 1599
v. Barnet, 2 A. K. Marsh. 312 764
v. Clark, 23 Mo. 259 1220
v. Commercial Bank, 6 Sm. & M. 24 2811
v. Cutler, 13 Wend. 605 556, 1826, 1839
v. Elliott, 54 Cal. 341 26, 4207
v. Ellzey, 2 Wash. (Va.) 143 1358, 1561
v. Georgetown L. Co., 117 La. 983 56, 4774
v. Graves, 5 Leigh 561 2047, 3150
v. Hackney, 84 Minn. 195 685, 2003
Payne v. Haine, 16 M. & W. 541 2587, 3151, 3152
v. Irvin, 144 Ill. 482 3234
v. Joyner, 7 Ark. 462 1709
v. Kansas & A. V. R. Co., 46 Fed. 546 4034
v. King, 141 Mo. App. 246 4325, 4327
v. Ladue, 1 Hill 116 1830
v. Lindsley (Tex. Civ. App.), 126 S. W. 329 4292
v. McInteer, 1 Mass. 69 1112
v. McPhaul, 128 Ga. 510 978
v. Moore, 31 Ind. App. 360 319
v. Morgan's Louisiana & Texas R., etc., Co., 38 La. Ann. 164 239
v. New South Wales C. Co., 10 Ex. 291 764
v. Rodden, 4 Bibb 304 2381
v. Rogers, 2 H. Bl. 349 453
v. Rouss, 46 App. Div. (N. Y.) 315 4544
v. Seagars, 13 Ga. App. 101 716, 722
v. Terre Haute & I. R. Co., 157 Ind. 616 21
v. Watters, 9 Ga. App. 265 3193
v. Webb, 29 W. Va. 627 583
Payton v. Gulf Line R. Co., 4 Ga. App. 762 1258
Peabody v. Boston E. R. Co., 191 Mass. 513 4116
v. Citizens' State Bank, 98 Minn. 302 276
v. City of Boston, 220 Mass. 376 4096
v. Haverhill, etc., R. Co., 200 Mass. 277 109
v. Lynch, 184 Ill. App. 78 1430, 4177, 4189
v. Munson, 211 Ill. 324 1853
v. New York, etc., R. Co., 187 Mass. 489 4140, 4155
v. Oregon R. & N. Co., 21 Ore. 121 3464
v. Peters, 5 Pick. 1 629
v. Rees, 18 Iowa 571 1818
v. Richard Realty Co., 69 N. Y. Misc. 582 886, 2757
v. Tarbell, 2 Cush. 226 2028, 2047
v. Whitcomb, 195 Mass. 330 4380
Peace v. Stennet, 4 J. J. Marsh. 449 758
Peach v. Jewish Cong. of Johannesburg, 1 So. African Rep. 345 (1894) 869
Peach River L. Co. v. Montgomery, 51 Tex. Civ. App. 487 2501
Peacock v. Banks, Minor 387 1182, 1184, 1398, 1878
v. Coltrane, 44 Tex. Civ. App. 530 2524, 2525, 2561, 2562
v. Dickerson, 2 C. & P. 51n 807
v. Monk, 1 Ves. Sr. 128 2067
v. Pursell, 14 C. B. (N. S.) 728 679
v. Young, 21 L. T. (N. S.) 527 161
Peak v. Frost, 162 Mass. 298 4389
v. Lemon, 1 Lans. 295 486
Peake v. Milaca State Bank, 120 Minn. 455 4602
Peaks v. Oldham, 1 Cowp. 277 4556
v. Piscataquis Co. Com'rs, 112 Me. 318 3961, 3963, 4018
Pearce v. Albright, 12 N. M. 202 2479
v. Bryant C. Co., 121 Ill. 590 637, 681
v. Chicago, 169 Ill. 631 4147
v. Hennessy, 10 R. I. 223 958, 1206
v. Maguire, 17 R. I. 61 1691, 1709, 1710
v. Martin, 130 Ill. App. 24 977
v. Stace, 207 N. Y. 506 3671

[REFERENCES ARE TO PAGES]

Pearce v. Wallace, 1 Har. & J. 48 1148, 1878
v. Wilkins, 2 N. Y. 469, aff'g 5 Denio 541 782
Pearl v. Clark, 2 Pa. 350 703, 706
v. Deacon, 24 Beav. 186 710
v. Deacon, 1 De G. & J. 461 742
v. Garlock, 61 Mich. 419 1674, 1676
v. Macauley, 6 App. Div. (N. Y.) 70 154
v. Omaha, etc., R. Co., 115 Iowa 535 4877
v. Wells, 6 Wend. 291 782
Pearl St. Congregational Soc. v. Imlay, 23 Conn. 10 2812
Pearll v. Bay City, 174 Mich. 643 1503, 4737
Pearre v. Smith, 110 Md. 531 2474
Pears v. Gibbons, [1913] W. C. & Ins. Rep. 469, 6 B. W. C. C. 722 5176
Pearsall v. Dwight, 2 Mass. 88 1145, 1905
v. Summersett, 4 Taunt. 593 2753
v. Western U. Tel. Co., 124 N. Y. 256 3546, 3547, 3566
v. Western U. Tel. Co., 44 Hun 532 3551
Pearsall St., In re (Misc.), 135 N. Y. Supp. 763 4088
Pearse v. Coaker, L. R. 4 Ex. 92 3696
v. Goddard, 1 Tyler 373 1807
v. Quebec S. Co., 24 Fed. 285 3394, 3421
Pearson v. Bailey, 23 Ala. 537 978
v. Carr, 97 N. C. 194 3695
v. Crallan, 2 Smith 404 (1805) 1814
v. Dailey, 7 Lea 674 1642
v. Darrington, 32 Ala. 227 1121
v. Davis, 1 McMull. 37 2098
v. Duane, 4 Wall. 605 222, 3453
v. Ford, 1 Kan. App. 580 2163
v. Gayle, 11 Ala. 278 2814
v. Germond, 83 Hun 88 3258
v. Haydel, 87 Mo. App. 495 1644
v. Hendrick, 13 Cal. App. 732 2482
v. Howe, 1 Allen 207 4385
v. Inlow, 20 Mo. 322 3781
v. Mason, 120 Mass. 53 2214
v. Parker, 3 N. H. 366 659, 2843
v. Sanderson, 128 Ill. 88 1067
v. Spartanburg County, 51 S. C. 480 4691
v. Thomason, 15 Ala. 700 626, 753
v. Treadwell, 179 Mass. 462, 467 947
v. Williams, 24 Wend. 244, 26 Wend. 630 624, 890, 892, 899
Pease v. Barber, 3 Cai. 266 1115
v. Hirst, 10 B. & C. 122 2754
v. Sabin, 38 Vt. 432 2370, 2428
v. Shippen, 80 Pa. 513 469, 4573
v. Smith, 5 Lans. 519 1135
v. Syler, 78 Wash. 24 1924
v. Warner, 153 Mich. 140 2150
Peaslee v. Breed, 10 N. H. 489 2835
v. Railway T. Co., 120 Minn. 347 4799, 4831
Peaslee-G. Co. v. McMath, 148 Ky. 265 99, 100
Peason v. Lemaitre, 5 Mann & G. 700 4517
Peavy v. Hovey, 16 Neb. 416 699
Peay v. Western U. Tel. Co., 64 Ark. 538 3642
Pecare v. Chouteau, 13 Mo. 527 2066
Peck v. Bonebright, 75 Iowa 98 4358
v. Brewer, 48 Ill. 55 4361
v. Bristol, 74 Conn. 483 4105, 4125, 4145
v. Cohen, 40 N. Y. Sup. Ct. 142 2789
v. Farrington, 9 Wend. 44 2456
Peck v. Granite State P. Ass'n, 21 N. Y. Misc. 84 1201
v. Hensley, 20 Tex. 673 2094, 2204
v. Hibbard, 26 Vt. 698 1147
v. Hiler, 24 Barb. 178 3124
v. Kansas City M. R. & C. Co., 96 Mo. App. 212 312, 2689, 2699, 2705
v. McCormick H. Mach. Co., 94 Ill. App. 586, 196 Ill. 295 520
v. McLean, 36 Minn. 228 428, 1545
v. Mayo, 14 Vt. 33 1147, 1152, 1163, 1180, 1878
v. New York, etc., R. Co., 8 Hun 286 3529
v. Small, 35 Minn. 465 4621, 4624, 4629
v. Steinberg, 163 Cal. 127 1458
v. Superior, etc., R. Co., 36 Minn. 343 4128
v. United States, 152 Fed. 524 3304
Peck-H. Co. v. Heifner, 136 Ala. 473 2688, 2699
Pecker v. Sawyer, 24 Vt. 459 1866, 1867
Peckham v. Ashburst, 18 R. I. 376 2502
v. Barcalow, Lalor's Supp. 112 591
v. Burlington, Brayton 134 433
v. Hadwen, 8 R. I. 160 3728
Peckham I. Co. v. Harper, 41 Ohio St. 100 223, 4270, 4272, 4431, 4432
Pecos, etc., R. Co. v. Balsengame, 42 Tex. Civ. App. 66 4769
v. Bishop, — Tex. Civ. App. —, 154 S. W. 305 3330
v. Bivins, — Tex. Civ. App. —, 130 S. W. 210 3347, 3390
v. Cox, 105 Tex. 40 3430
v. Crews, — Tex. Civ. App. —, 139 S. W. 1049 3346, 3431
v. Grundy, — Tex. Civ. App. —, 171 S. W. 318 3342
v. Huskey, — Tex. Civ. App. —, 166 S. W. 493 1379, 4683
v. Maxwell, — Tex. Civ. App. —, 156 S. W. 548 3367
v. Morrison, — Tex. Civ. App. —, 169 S. W. 1098 3337
v. Porter (Tex. Civ. App.), 156 S. W. 267 1442, 3398, 3432, 3437
v. Rosenbloom, — Tex. —, 177 S. W. 952 5042
v. Rosenbloom, 240 U. S. 439, rev'g — Tex. —, 173 S. W. 215 5069, 5071
v. Stinson, — Tex. Civ. App. —, 181 S. W. 526 5053
v. Stoker (Tex. Civ. App.), 142 S. W. 971 2706
v. Williams, 34 Tex. Civ. App. 100 327, 1477, 3450, 3452
Pedelty v. Wisconsin Z. Co., 148 Wis. 245 3766
Peden v. Chicago, etc., R. Co., 78 Iowa 131 1963
v. Mail, 118 Ind. 560 4628
v. Moore, 1 Stew. & Port. 71 515, 537, 1957, 2196
v. Platte Valley F. & C. Co., 93 Neb. 141 284, 357
Pedersen v. Delaware, L. & W. R. Co., 229 U. S. 146, rev'g 197 Fed. 537 5042, 5043, 5047, 5049, 5059, 5060, 5063
v. Sorensen, 162 Ill. App. 522 1403
Pedley v. Freeman, 132 Iowa 356 2026
Pee Dee River L. Co. v. Fountain, 90 S. C. 122 1737
Peebles v. Boston, etc., R. Co., 112 Mass. 498 4285, 4293
v. Gee, 1 Dev. 341 739, 1215

[REFERENCES ARE TO PAGES]

Peek v. Derry, 37 Ch. Div. 541 4230, 4384, 4408
v. Gurney, L. R. 13 Eq. 79, L. R. 6 H. of L. 377 4388
v. Hampton, 115 Va. 855 3962, 3963, 4033, 4035
v. Steinberg, 163 Cal. 127 1417, 2318
v. Traylor, 17 Ky. L. Rep. 1312 4976
Peekskill, etc., R. Co. v. Peekskill, 21 App. Div. (N. Y.) 94, aff'd 165 N. Y. 628 909
Peel v. Tatlock, 1 B. & P. 419 2770
Peele v. Northcote, 7 Taunt. 478 2957
Peelle v. State, 118 Ind. 512 1124, 1563, 1643
Peerce v. Athey, 4 W. Va. 22 1762
Peerless M. Co. v. Gates, 51 Minn. 124 4351
Peerless Mfg. Co. v. New York, etc., R. Co., 73 N. H. 328 3334
Peers v. Nevada P. L. & W. Co., 119 Fed. 400, 404 1385, 1394, 1396, 4868
Peery v. Illinois Cent. R. Co., 123 Minn. 264, 128 Minn. 119 5053
Peet v. Chicago, etc., R. Co., 20 Wis. 594 217, 2367, 3349, 3360
v. East Grand Forks, 101 Minn. 518 2688
v. Mills, 76 Wash. 437 5147, 5212
v. Sherwood, 43 Minn. 447 2501
v. Whimore, 14 La. Ann. 408 1539
Peffley v. Kenrick, 4 Ind. App. 510 1655, 1656
Pegler v. Hyde Park, 176 Mass. 101 4006, 4089, 4093, 4152
Pegram v. Riley, 88 Ala. 399 2868
v. Stortz, 31 W. Va. 220 1264, 1268, 1302
v. Western U. Tel. Co., 100 N. C. 28 3615
Pegues M. Co. v. Brown, (Tex. Civ. App.) 145 S. W. 280 11
Peine v. Weber, 47 Ill. 41 895
Peirce v. Bent, 69 Me. 381 586, 590
v. Cornell, 117 App. Div. (N. Y.) 66 2589, 2593
v. Garrett, 65 Ill. App. 628 2799
v. Jung, 10 Wis. 30 889
v. Van Dusen, 78 Fed. 693 5024
v. Whittemore, 8 Mass. 282 1636
Peirpoint v. Peirpoint, 71 W. Va. 431 966, 1874
Peirse v. Bowles, 1 Stark. 323, 523 817, 818
Peirson v. Boston E. R. Co., 191 Mass. 223 4082, 4138
Peisch v. Dickson, 1 Mason 9 2972
v. Ware, 4 Cranch 347 2726
Pekin v. Brereton, 67 Ill. 477 16
v. Reynolds, 31 Ill. 529 622, 940, 1041
v. Winkel, 77 Ill. 56 1480
Peking, City of, The, 15 App. Cas. 438 5006
Pelatowski v. Black, 213 Mass. 428 2601, 2670
Pelham v. Way, 15 Wall. 196 1625
Pelican, The, 158 Fed. 183 2731
Pell v. Shearman, 10 Ex. 766 285
Pellage v. Pellage, 32 Wis. 136 2472
Pellardis v. Journal P. Co., 99 Wis. 156 4511, 4595
Pellett v. Manufacturers' & M.'s Ins. Co., 104 Fed. 502 264, 410, 2573, 2574
Pelley v. Walker, 79 Iowa 142 4273
Pelmothe v. Phillips, 20 New South W. (law) 61 78, 3905
Peltier v. Miet, 50 Ill. 511 4522, 4528
Pelton v. Illinois Cent. R. Co., — Iowa —, 150 N. W. 236 5136
v. Powell, 96 Wis. 473 559
Pelton v. Smith, 50 Wash. 459 1016, 2470, 2473
Peltz v. Eichele, 62 Mo. 171 47, 410, 2324, 4485, 4493
Pelzer v. Steadman, 22 S. C. 279 662
Pemberton v. Vaughan, 10 Q. B. 87 420
Pemlo v. Beakley, 15 S. D. 344 3710
Penas v. Chicago, etc., R. Co., 112 Minn. 203 1332
Pence v. California M. Co., 27 Utah 378 1480
v. Carney, 58 W. Va. 296 7
v. Christman, 15 Ind. 287 980
v. Duvall, 9 B. Mon. 48 2095, 2098, 2104
v. Gabbert, 63 Mo. App. 302 2094
v. Gabbert, 70 Mo. App. 201 2133
v. Huston, 6 Gratt. 304 2198
Pendegrass v. St. Louis & S. F. R. Co., 179 Mo. App. 517 1373
Pender v. Fobes, 1 Dev. & Batt. 250 2386
Pender L. Co. v. Wilmington I. Works, 130 N. C. 584 2364
Pendergast v. Greenfield, 40 Hun 494 525
v. McCaslin, 2 Ind. 87 3695
v. Reed, 29 Md. 398 2275, 4406
v. Young, 21 N. H. 234 3183
Pendleton v. Atlantic L. Co., 3 Ga. App. 714 39
v. Cline, 85 Cal. 142 207, 2577
v. Richmond, etc., R. Co., 104 Va. 813 4853
Pendleton St. R. Co. v. Rahmann, 22 Ohio St. 446 1503
Penfield v. Potts, 126 Fed. 475 4471
v. Sage, 71 Hun 573 4257
Pengra v. Wheeler, 24 Ore. 532 905, 3148
Penley v. Watts, 7 M. & W. 601 302, 2863, 3159, 3162
Penley's Case, 89 Me. 313 3957
Penn v. Schmisseur, 77 Ill. App. 526 2146, 2198
v. Smith, 93 Ala. 476 2242, 2244
v. Smith, 98 Ala. 560 2242
v. Smith, 104 Ala. 445 2242, 2340
v. Taylor, 24 Ill. App. 292 3763
v. Western U. Tel. Co., 159 N. C. 306 3555, 3607, 3608, 3621, 3623, 3639
Penn L. Co. v. McPherson, 133 N. C. 287 514, 536
Penn Mut. L. Ins. Co. v. Heiss, 141 Ill. 35 4002, 4008, 4102
v. Norcross, 163 Ind. 379 673, 3083
Penn P. G. Co. v. Rice, 216 Ill. 567 2241
Pennebaker v. Bell City Mfg. Co., 130 Ky. 592 294
Pennell v. Deffell, 4 De G., McN. & G. 372 736
v. United States, 162 Fed. 75 1039, 4997, 5013
v. Woodburn, 7 C. & P. 117 302, 3159, 3196
Penney v. Commonwealth, 173 Mass. 507 3963, 4023, 4093, 4095
v. Holberg, 53 Miss. 567 1714
v. Johnston, 142 Ill. App. 634 4643
v. Woody, (Tex. Civ. App.) 147 S. W. 872 2127, 2131
Penniman v. Hartshorn, 13 Mass. 87 2225
Pennington v. Underwood, 56 Ark. 53 2497
v. Western U. Tel. Co., 67 Iowa 631 3566
v. Yell, 11 Ark. 212 2942
Penniston v. Chicago, etc., R. Co., 34 La. Ann. 777 4827
Pennock v. Freeman, 1 Watts 401 1942

[REFERENCES ARE TO PAGES]

Pennoyer v. Allen, 56 Wis. 511 3847
Pennsylvania Co. v. Bray, 125 Ind. 229 3450, 3476
v. Chapman, 220 Ill. 428 25, 503, 763
v. Cole, 214 Fed. 948 5074, 5087
v. Dolan, 6 Ind. App. 109 2547, 2559, 2561
v. Donat, 239 U. S. 50, aff'g 224 Fed. 1021 5067
v. Dovey, 64 Pa. 260 825
v. Files, 65 Ohio St. 403 4743
v. Good, 56 Ind. App. 562 2535, 2545
v. Greso, 79 Ill. 127 1505
v. Lenhart, 120 Fed. 61 3500
v. Lilly, 73 Ind. 252 1396, 4859, 4931, 4935
v. McClain, 9 Pa. Dist. Ct. 747 1065
v. Marion, 104 Ind. 239 488
v. Newmeyer, 129 Ind. 401 1466
v. Pennsylvania, etc., R. Co., 151 Pa. 334 3947, 3949, 4126
v. Philadelphia, etc., R. Co., 1 Pa. Dist. 301 4249
v. Philadelphia, etc., R., 153 Pa. 160 4250
v. Reidy, 99 Ill. App. 477 4802
v. Roy, 102 U. S. 451 4779
v. Scofield, 121 Fed. 814 1416, 3491
v. Scofield, (Pa.) 88 C. C. A. 602, 161 Fed. 911 4934
v. Sheeley, 221 Fed. 901 5078, 5084, 5086
v. Stantley, 10 Ind. App. 421, 38 Ind. App. 421 3952
v. Swain, 189 Pa. 626 1110
v. Swain, 7 Pa. Dist. 406 1574
v. Whitlock, 99 Ind. 16 52
Pennsylvania C. Co. v. Blake, 85 N. Y. 226 722
v. Sanderson, 113 Pa. 126 9
Pennsylvania F. Ins. Co. v. Drackett, 63 Ohio St. 41 3008, 3012
Pennsylvania, I. W. Co. v. Vogt Mach. Co., 139 Ky. 497 1340, 1345, 4503, 4508, 4509, 4544
Pennsylvania Min. Co. v. Smith, 210 Pa. 49 1970
Pennsylvania N. G. Co. v. Cook, 123 Pa. 170 2851
Pennsylvania R. Co. v. Adams, 55 Pa. 499 4846, 4895, 4935
v. Allen, 53 Pa. 276 3472, 4657
v. Anda, 131 Ill. App. 426 1436
v. Bantom, 54 Pa. 495 4859, 4914
v. Books, 57 Pa. 339 222, 334, 3443, 3472, 3488, 3495, 3501
v. Bowers, 124 Pa. 183 21
v. Butler, 57 Pa. 335 4758
v. Connell, 112 Ill. 295 3449, 3474, 3476, 3499
v. Cooper, 58 Pa. 408 3855
v. Dale, 76 Pa. 47 412, 4725
v. Eby, 107 Pa. 166 3822
v. Goodman, 62 Pa. 332 4890
v. Goughnour, 208 Fed. 961 5078, 5087
v. Hope, 80 Pa. 373 68
v. Keller, 67 Pa. 300 4859, 4870
v. Kelly, 31 Pa. 372 348, 3472, 4772
v. Knox, 218 Fed. 748 5051
v. Lippincott, 116 Pa. 472 3841
v. McCloskey, 23 Pa. 526 4858
v. Marchant, 119 Pa. 541 3841, 3955
v. Midvale S. Co., 201 Pa. 624 3309
v. Miller, 87 Pa. 395 3417
v. Orem F. & P. Co., 111 Md. 356 3384, 3436
v. Palmer, 127 Fed. 956 3473
v. Patterson, 73 Pa. 491 3162, 3170
v. Reichert, 58 Md. 261, 277 869
v. Spicker, 105 Pa. 142 3449
Pennsylvania R. Co. v. Titusville, etc., Co., 71 Pa. 350 2357, 3313
v. Vandiver, 42 Pa. 365 1347
v. Washburn, 50 Fed. 335 312
Pennsylvania S. Co. v. New York City R. Co., 198 Fed. 721 227, 229, 377, 1454
Pennsylvania S. D. & T. Co. v. Thomas, 4 Pa. Dist. 421 1880
Pennsylvania & O. C. Co. v. Graham, 63 Pa. 290 334, 3474, 3489, 4732
Pennsylvania, etc., R. Co. v. Bunnell, 81 Pa. 414, 426 1444, 3098, 3964, 4026, 4132, 4133, 4134
v. Walsh, 124 Pa. 544 3951, 3982
v. Ziemer, 124 Pa. 560 1139, 3951, 4098, 4149
Pennwell, In re, 119 Fed. 139 3170
Penny v. Andrus, 41 Vt. 631 2421
v. Atlantic C. L. R. Co., 153 N. C. 296 158
v. Atlantic C. L. R. Co., 161 N. C. 523 1141
v. Avison, 3 Jurist (N. S.) 62 1127
v. Fellner, 6 Okla. 386 3123
v. Foy, 8 B. & C. 11 2875
v. Ludwick, 152 N. C. 375 1093, 4339
v. New Orleans G. N. R. Co., 135 La. 962 5125, 5131
Pennybecker v. McDougal, 48 Cal. 160 4318
Pennypacker v. Jones, 106 Pa. 237 234, 285, 910, 2625
v. Umberger, 22 Pa. 492 722, 831
Penobscot, The, 106 Fed. 419 2727
Penoyer v. Hallett, 15 Johns. 332 3294
v. Watson, 16 Johns. 100 2753, 2767
Penoza v. Northern Pac. Ry. Co., 215 Fed. 200 4861, 4918
Penrose v. Hart, 1 Dall. 378 1214
Penruddock's Case, 5 Coke 100b 3842
Pensacola G. Co. v. Pebley, 25 Fla. 381 1512
Pensacola S. v. Wilkins, 64 Fla. 407 1478
Pensacola & A. R. Co. v. Hilton, 147 Ky. 553 1110
Penson v. Gooday, Cro. Car. 327 1529
v. Inland Empire P. Co., 73 Wash. 338 4822
Pentoney v. St. Louis T. Co., 108 Mo. App. 681 4744
Penwell v. Flickinger, 46 Mont. 526 681
People v. Adirondack R. Co., 160 N. Y. 236 3946
v. Albany, 11 Wend. 539 3921
v. Alkenhead, 5 Cal. 106 1582
v. Backus, 117 N. Y. 196 2756
v. Banker, 8 How. Pr. 258 798
v. Barrett, 141 Ill. App. 168 306, 1628
v. Bartels, 138 Ill. 322 1594, 1605
v. Bartlett, 3 Hill 570 1560
v. Beach, 49 Colo. 516 1604
v. Beach, 77 Ill. 52 1597, 1614
v. Birdsall, 20 Johns. 297 1598
v. Brenan, 30 How. Pr. 417 694
v. Brewer, 27 Mich. 137 4971
v. Calder, 89 App. Div. (N. Y.) 503 3947
v. California Safe Deposit & Trust Co., 168 Cal. 241 521, 526
v. Canal Com'rs, 5 Denio 401 1042, 1064, 4150, 4156
v. Carbannes, 20 Cal. 525 1558
v. Central Pac. R. Co., 76 Cal. 29, 34 838, 864, 917, 918
v. Central Pac. R. Co., 105 Cal. 576 1064
v. Chalmers, 60 N. Y. 158 2752, 2760, 2792

[REFERENCES ARE TO PAGES]

People v. Chicago & A. R. Co., 228 Ill. 162 1066
v. Coler, 60 App. Div. (N. Y.) 77 4150
v. Common Council, etc., 78 N. Y. 56 4147
v. Common Pleas, 1 Wend. 297 1482
v. Compher, 14 Ill. 447 1557
v. Cook, 44 Cal. 638 606
v. Crowe, 145 Ill. App. 450 1367
v. Crowe, 130 Ill. 349 4168, 4200
v. Deckey, 206 N. Y. 581 3990
v. Dennison, 84 N. Y. 272 521, 550
v. Deutscher Krieger Bund, 129 App. Div. (N. Y.) 80 1626
v. Dunlap, 13 Johns. 437 1636
v. Eastwood, 14 N. Y. 562 1420, 1422
v. Faulkner, 107 N. Y. 477 1581
v. Flynn, 189 N. Y. 180 294, 342
v. Foote, 19 Johns. 58 1592
v. Foster, 133 Ill. 496 1592, 1604, 1613
v. Freeman, 110 App. Div. (N. Y.) 605 1031
v. Gaine, 1 Johns. 343 1243, 1246
v. Gardner, 55 Cal. 304 1604
v. Gas Light Co., 78 N. Y. 56 4147
v. Gasherie, 9 Johns. 71 1132
v. Gerken, 152 Ill. App. 486 1594
v. Getzendaner, 137 Ill. 234 966
v. Globe Mut. L. Ins. Co., 91 N. Y. 174 13
v. Gold & S. Tel. Co., 98 N. Y. 67 1037
v. Goodwin, 18 Johns. 187 1307
v. Grant, 139 Mich. 26 714, 727
v. Grant, 138 Mich. 60 2793
v. Hallett, 4 Cow. 67 34
v. Hathaway, 206 Ill. 42, 102 Ill. App. 628 1560
v. Holmes, 2 Wend. 281, 615 1558, 1598
v. Hopson, 1 Denio 577 633
v. Howell, 4 Johns. 296 664
v. Huffman, 182 Ill. 390, 398 1653
v. Jansen, 7 Johns. 332 1592, 2795
v. Jenkins, 17 Cal. 500 1591
v. Johr, 22 Mich. 461 1559
v. Judges, etc., 6 Cow. 598 587
v. Kelsey, 14 Abb. Pr. 372 3128
v. Kendall, 14 Colo. App. 175 1615
v. Lambert, 5 Mich. 349 1183
v. Laning, 73 Mich. 284 1613
v. Lee, 104 N. Y. 441 2747
v. Life Ins. & A. Co., 78 N. Y. 114 3086
v. Lucas, 93 N. Y. 585 1595
v. Lyons, 168 Ill. App. 396 1574
v. McGoorty, 270 Ill. 610 5152
v. McHatton, 7 Ill. 638 1597
v. McHenry, 19 Wend. 482 1614
v. Maddox, 176 Ill. App. 480 1132
v. Manning, 8 Cow. 297 2534
v. Mathewson, 20 Johns. 300 1598
v. Mayor, 5 Lans. 524 129
v. Mayor, 4 N. Y. 419 3957
v. Mercantile Co-op. Bank, 104 App. Div. (N. Y.) 219 18
v. Merchants' T. Co., 187 N. Y. 293 952
v. Miller, 24 Mich. 458 693
v. Moon, 4 Ill. 123 1590
v. Morton, 24 App. Div. (N. Y.) 563 2563
v. Mullender, 132 Cal. 217 3692
v. Musical P. Union, 118 N. Y. 181 2563
v. Myers, 138 N. Y. 590 1065
People v. Nelson, 162 App. Div. (N. Y.) 34 3961, 3965, 4013
v. New York C. A. Gas. Co., 196 N. Y. 421 7
v. New York C. P. C., 13 Wend. 649 590
v. New York Cent., etc., R. Co., 155 App. Div. (N. Y.) 699 3773, 3812
v. New York County, 5 Cow. 331 739, 1031, 1199
v. New York, etc., R. Co., 116 App. Div. (N. Y.) 849 1626
v. Nolan, 101 N. Y. 539 1776
v. Pacific S. Co., 155 Ill. App. 586 1574
v. Pacific S. Co., 50 Colo. 273 1604
v. Parker, 231 Ill. 478 757
v. Pennock, 60 N. Y. 426 1595, 2756
v. Petrie, 94 Ill. App. 652, aff'd 191 Ill. 497 41, 1638
v. Phillips, 88 App. Div. (N. Y.) 560 4095
v. Randolph, 24 Ill. 324 1636
v. Ring, 15 Wend. 623 1614
v. Russell, 4 Wend. 570 1592
v. Schuyler, 4 N. Y. 173, rev'g 5 Barb. 156 1601
v. Schwartz, 151 Ill. App. 190 47, 267, 344, 1600, 1608, 4162
v. Security L. Ins. & A. Co., 78 N. Y. 114 3085
v. Sohmer, 152 App. Div. (N. Y.) 585 4058
v. Stillings, 136 App. Div. (N. Y.) 439 4151
v. Summers, 16 Ill. 173 1636
v. Supervisors, 28 N. Y. 112 2563
v. Supervisors, 4 Barb. 64 4146
v. Tazewell County, 22 Ill. 147 622
v. Ten Eyck, 13 Wend. 448 1614
v. Tieman, 30 Barb. 193 693
v. Title G. & S. Co., 227 U. S. 382 1560
v. Toomey, 122 Ill. 308 1613
v. Vilas, 36 N. Y. 459 1595
v. Western Life Indemnity Co., 181 Ill. App. 116 1092
v. White, 11 Ill. 341 2814
v. Wilcox (App. Div.), 138 N. Y. Supp. 1055 1099
v. Williams, 51 Ill. 63 4097
v. Wilson, 169 Ill. App. 452 1783, 1788
v. Zucca, 160 App. Div. (N. Y.) 578 3982
People's Bank v. Aetna Ins. Co., 76 Fed. 548 1056
v. Legrand, 103 Pa. 309 2809
v. Stewart, 152 Mo. App. 314 664
People's Bldg., L. & S. Ass'n v. Pickerell, 21 Ky. L. Rep. 1386 294
People's Bldg. & L. Ass'n v. McElroy, 79 Ill. App. 266 3828
People's Co-op. Ass'n v. Lloyd, 77 Ala. 387 2564
People's Elec. R. Co. v. McKeen Motor Car Co., 214 Fed. 73 4362
People's F. & C. Co. v. Crosby, 57 Neb. 282 785
People's G. L. & C. Co. v. Amphlett, 93 Ill. App. 194 1474
People's I. Co. v. Davenport, 149 Mass. 122 3797
v. Steamer Excelsior, 44 Mich. 229 408, 409, 3796, 3799
People's L. & D. Co. v. Grant, 18 Can. Sup. Ct. 362 961
People's Nat. Bank v. Brogden, 98 Tex. 360 2938

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People's P. R. Co. v. Lauderbach, 4 Penny. (Pa.) 406 4695
People's Sav. Bank v. Campau, 124 Mich. 106 1569
v. Hill, 81 Me. 71 2055, 2092
v. Waterloo & C. F. R. T. Co., 118 Iowa 740 2416, 2427
People's U. S. Bank v. Goodwin, 148 Mo. App. 364 4505
Peoria v. Fruin-B. C. Co., 169 Ill. 36 1044
v. Simpson, 110 Ill. 294 4835
Peoria B. Ass'n v. Loomis, 20 Ill. 235 4730
Peoria G. S. Co. v. Turney, 175 Ill. 631 2371
Peoria Ins. Co. v. Whitchill, 25 Ill. 466 3021
Peoria M. & F. Ins. Co. v. Lewis, 18 Ill. 553 1032, 1089, 3021
Peoria R. Mfg. Co. v. During, 85 Mo. App. 131 2747
Peoria, etc., Ins. Co. v. Whitehill, 25 Ill. 466 1529
Peoria, etc., R. Co. v. Bryant, 57 Ill. 473 3993, 4056, 4094
v. Johns, 43 Ill. App. 83 4738
v. Laurie, 63 Ill. 264 4094
v. Peoria & F. R. Co., 105 Ill. 110 3973, 4073, 4074
v. Rice, 144 Ill. 227 1464
v. Sawyer, 71 Ill. 361 3964, 3980, 4028
Peoria, etc., T. Co. v. Vance, 225 Ill. 270 3963, 4109, 4114
v. Vance, 234 Ill. 36 3962, 4033, 4138
Peper v. St. Louis B. Mfg. Co., 146 Mo. App. 187 3163, 3165
Pepper v. Deakyne, 212 Pa. 181 1943, 1945
v. Philadelphia, 114 Pa. 96, 110 1485
v. Rowley, 73 Ill. 262 3129
v. Southern Pac. Co., 105 Cal. 389 4930, 4933
v. Telegraph Co., 87 Tenn. 554 3549, 3578, 3604, 3615, 3617
Peppercorn v. Black River Falls, 89 Wis. 38 1484, 4725, 4734, 4737
Peppin v. Cooper, 2 B. & A. 431 1582, 1596
Percell C. S. Oil Mills v. Bell, 7 Ind. Ty. 717 4222
Perciful v. Hurd, 5 J. J. Marsh. 670 2211, 2212
Percy v. Metropolitan St. R. Co., 58 Mo. App. 75 3464
Pere Marquette R. Co. v. Weilnau, 157 Mich. 699 4057
Pereire, The, 8 Bene. 301 3385
Perham v. Coney, 117 Mass. 102 481, 4200, 4201, 4300
v. Portland Elec. Co., 33 Ore. 451 4852
Perianes v. Valdes, 4 Porto Rico Fed. 126 4862
Perine v. Grand Lodge A. O. U. W., 51 Minn. 224 1090
v. Standfield, 107 Mich. 553 2641
Perit v. Pittfield, 5 Rawle 166 631
Perkins v. Beck, 4 Cranch C. C. 68 809, 810
v. Blauth, 163 Cal. 782 1095, 3877
v. Brown, — Tenn. —, 177 S. W. 1158 218
v. Cady, 111 Mass. 318 631
v. Catlin, 11 Conn. 213 2779, 2781
v. Coleman, 51 Miss. 298 1202
v. Concord R., 44 N. H. 223 1428
v. Cummings, 2 Gray 258 1850
Perkins v. Dunlap, 5 Me. 268 791
v. Ewan, 66 Ark. 175 4212, 4213, 4227, 4228
v. Fourniquet 14 How. 313 1050, 1051, 1255, 1803
v. Freeman, 26 Ill. 477 480, 4201
v. Giles, 9 Leigh 397 1607
v. Gilman, 8 Pick. 229 782
v. Hart, 11 Wheat. 237 2458, 2542, 2543
v. Hersey, 1 R. I. 493 3663, 3664
v. Jacobs, 99 Wis. 409 1805
v. Lyman, 9 Mass. 522 923
v. Lyman, 11 Mass. 76 881, 923
v. Marrs, 15 Colo. 262 4211
v. Missouri, etc., R. Co., 55 Mo. 201 1344
v. North End Bank, 17 Wash. 100 2802
v. Ogilvie, 148 Ky. 309 1369, 4164
v. Oxford P. Co., 104 Me. 109 4852
v. Pitman, 34 N. H. 187 1621
v. Portland, etc., R. Co., 47 Me. 573 3428
v. Railroad, 55 Mo. 201 3513
v. Stewart, 75 Minn. 21 1036
v. Towle, 43 N. H. 220 3827, 3832
v. Vaughan, 5 Scott N. R. 881 460, 4783
v. Washington Ins. Co., 4 Cow. 645 2914, 3039
v. Watson, 92 Miss. 452 1794
v. Wright, 37 Ind. 27 3529
Perkyns v. Baynton, 1 Bro. Ch. 574 1246
Perlberger v. Grell, 77 App. Div. (N. Y.) 128 1454
Perley v. Balch, 23 Pick. 283 515, 532, 1828, 2391, 2456
v. B. C. & M. R. Co., 57 N. H. 212 399
v. City of Cambridge, 220 Mass. 507 4054
v. Eastern R. Co., 98 Mass. 414 51, 68, 4678
v. Muskegon County, 32 Mich. 132 1579
Perlman v. Bernstein, 83 App. Div. (N. Y.) 203 1716
v. Bernstein, 93 App. Div. (N. Y.) 335 1729
Perniciaro v. Veniero (Misc.), 90 N. Y. Supp. 369 3123
Perolin Co. v. Young, 65 Wash. 300 228, 1841
Perovich v. Domansky, 231 Pa. 66 1267
Perpetual Trustee Co. v. Orr, 6 New South Wales St. Rep. 679 3133
Perreau v. Bevan, 5 B. & C. 284 1654, 1655, 1764
Perret v. Dupre, 2 Rob. 54 3232
Perrett v. Wallis, 2 Dall. 252 1570
Perriam v. Pacific C. Co., 133 Fed. 140 2731, 2734
Perrie v. Roberts, 2 Ch. Cas. 84 733
Perrigo v. St. Louis, 185 Mo. 274 4703, 4727
v. Spaulding, 13 Blatch. 389 4446
Perrin v. Chidester, 159 Iowa 31 1943, 1947
v. Lyman, 32 Ind. 16 1189, 1192, 1193
v. Parker, 126 Ill. 201 1016
v. Reynolds, 12 Vict. L. R. 440 1997
Perrine v. Chicago & H. C. Co., 173 Ill. App. 287 3790
v. Hankinson, 11 N. J. L. 181 3097, 3106, 3112
v. Hotchkiss, 58 Barb. 77 1425
v. Perrine, 35 Ala. 644 3727
v. Serrell, 30 N. J. L. 454 2392, 2405, 2415

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v. Winter, 73 Iowa 645 4523, 4524, 4525
Perrins v. Ragland, 5 Leigh 552 2859
Perrott v. Shearer, 17 Mich. 48 489, 3424
Perry v. Aldrich, 13 N. H. 343 3131
v. Ayers, 159 Cal. 414 4391
v. Bailey, 94 Me. 50 3733
v. Boileau, 10 S. & R. 208 1528
v. Booth, 67 App. Div. (N. Y.) 235 736
v. Boyd, 126 Ala. 162 2028
v. Bozeman, 67 Ga. 643 717
v. Breed, 117 Mass. 155 4513
v. Chandler, 2 Cush. 237 482, 486, 4204
v. Chester, 53 N. Y. 240 585
v. Chicago, etc., R. Co., 89 Mo. App. 49 3346
v. Council Bluffs City W. W. Co., 67 Hun 456, 467, aff'd 143 N. Y. 637 1818
v. Denson, 1 Greene 467 1562
v. Dickerson, 85 N. Y. 345 372, 379, 381, 382
v. Friend, 57 Ark. 437 2781
v. Horn, 22 W. Va. 381 1737
v. Hyde, 10 Conn. 329 2981
v. Jeffries, 61 S. C. 292 1427
v. Lovejoy, 49 Mich. 529 4979
v. Metropolitan St. R. Co., 68 App. Div. (N. Y.) 351 1468
v. Oregon, 139 Ill. App. 606 11
v. Payne, 217 Pa. 252 2880
v. Perry, 98 Ky. 242 693
v. Pittsburgh Union P. R., 153 Pa. 236 3482
v. Simpson W. Co., 37 Conn. 520 2563
v. Smith, 22 Vt. 301 2336
v. Sulier, 92 Mich. 72 4640, 4645
v. Sumrall L. Co., 95 Miss. 691 685
v. Tacoma M. Co., 152 Fed. 115 1765
v. Taylor, 1 Utah 63 959
v. Tozer, 90 Minn. 431 125
v. Washburn, 20 Cal. 318 1064
v. White, 33 N. B. 41 4190
Perry County v. Selma, etc., R. Co., 65 Ala. 391 1064
Perry Tie & L. Co. v. Reynolds, 100 Va. 624 2340, 2344, 2348, 2356
Perry, etc., S. Co. v. Smith, 42 Ind. App. 413 3877
Perryman v. McCall, 66 Ala. 402 2749
Pershing v. Canfield, 70 Mo. 140 2211
Person v. Lipps, 219 Pa. 99 2242, 2246
Persse v. Cole, 1 Cal. 369 3400, 3425
v. Watrous, 30 Conn. 139 1655
Peru H. Co. v. Lenhart, 48 Ind. App. 319 143, 435, 442
Peru P. & I. Co. v. Harker, 144 Fed. 673 4222
Peru & I. R. Co. v. Hasket, 10 Ind. 409 76
Peruvian G. Co., In re, [1894] 3 Ch. 690 1016
Peshtigo, The, 25 Fed. 488 4987
Petel v. Flint, etc., R. Co., 119 Mich. 492 3710
Peter v. Beverly, 10 Pet. 532 664
v. Thickstun, 51 Mich. 589 1445, 1452
Peter White, The, 149 Fed. 594 2726, 2728
Peterborough v. Jeffrey, 6 N. H. 462 1442, 2306
Peterborough Real Estate I. Co. v. Ireton, 5 Ont. 47 2825
Peterborough Sav. Bank v. Hodgdon, 62 N. H. 300 712, 977
Peterman v. United States Rubber Co., 221 Ill. 581 1120, 1121
Peters v. Anderson, 5 Taunt. 596 703, 714, 717, 722
v. Anderson, 88 Va. 1051 2509
v. Ballistier, 3 Pick. 495 2922
v. Barnhill, 1 Hill (S. C.) 234 625, 2843
v. Bessemer, etc., R. Co., 225 Pa. 307 4769
v. Birkett, 153 Mich. 61 4391
v. Bowman, 98 U. S. 56 1957
v. Cooper, 95 Mich. 191 2238
v. Craig, 6 Dana 307 2576
v. Grubb, 21 Pa. 455 3124
v. Holmes, 45 Pa. Super. Ct. 278 2507
v. Kamiczaitis, 161 Ill. App. 575 4904
v. Lake, 66 Ill. 206 4969, 4975
v. McKean, 4 Denio 546 1985, 1986, 1992, 2000, 2027
v. McPherson, 62 Wash. 496 822
v. Mayor, 8 Hun 405 4234
v. Myers, 22 Wis. 602 2147, 2158
v. Railroad Co., 42 Ohio St. 275 3281
v. Snavely-Ashton, 144 Iowa 147 1705, 1706
v. Southern Pac. Co., 160 Cal. 48 4873, 4874, 4900, 4909, 4934
v. Streep (Misc.), 138 N. Y. Supp. 146 4186, 4196
v. Tilghman, 111 Md. 227 3791
v. Warren Ins. Co., 14 Pet. 99 3000
v. Whitney, 23 Barb. 24 2569, 2576, 2580
Peters B. & L. Co. v. Lesh, 119 Ind. 98 4329, 4344, 4346
Petersen, In re, 21 Fed. 885 3387, 3425, 3428
Petersen v. St. Louis T. Co., 199 Mo. 331 108
Peterson v. Ayre, 13 C. B. 353 2276, 2299
v. Brackey, 143 Iowa 75 1310, 1476
v. Chicago, etc., El. R. Co., 176 Ill. App. 218 1482
v. Drew, 2 Alaska 560 2525, 2558
v. Edmonson, 5 Harr. 378 3138
v. Gresham, 25 Ark. 380 4230, 4239
v. Haight, 3 Whart. 150 4361
v. Hall, 61 Minn. 268 4313
v. Lone Lake L. Co., 58 Wash. 72 2241
v. Mannix (Neb.), 90 N. W. 210 1238
v. Middlesex & S. T. Co., 71 N. J. L. 296 1338
v. Morgan, 116 Mass. 350 4577, 4587
v. Peterson, 42 Utah 270 2798
v. Poignard, 8 B. Mon. 309 2905
v. Polk, 67 Miss. 163 4345
v. Pusey, 237 Ill. 204 2676
v. Reisdorph, 49 Neb. 529 4637, 4645
v. Roessler & H. C. Co., 131 Fed. 156 4728, 4813
v. Russell, 62 Minn. 220 2781, 2791
v. Seattle E. Co., 71 Wash. 349 1504, 1507
v. Seattle T. Co., 23 Wash. 615 4722
v. Steinhoff, 44 Wash. 189 2131
v. Toner, 80 Mich. 350 4616, 4645
v. Wadley, etc., R. Co., 117 Ga. 390 4710
v. Western U. Tel. Co., 65 Minn. 18 4506, 4549
v. Western U. Tel. Co., 72 Minn. 41 4543
v. Western U. Tel. Co., 75 Minn. 368 4549
v. Wheeler, 45 Mo. 369 749

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Petit v. Colmery, 4 Pennew. (Del.) 266 4836, 4837, 4842
Petre v. Duncombe, 20 L. J. (Q. B.) 242, 2 Lown., M. & P. 107 1033
Petres v. Harmon, 8 Blackf. 112 2846
Petri v. First Nat. Bank, 83 Tex. 424 1823
v. Fond du Lac Nat. Bank, 84 Tex. 212 1823
v. Lane, 58 Mich. 527 2707
Petrie v. Columbia, etc., R. Co., 29 S. C. 303 418, 4914, 4916
v. Folz, 54 N. Y. Super. Ct. 223 2127
v. Hannay, 3 T. R. 659 1488, 1528
v. Lane, 67 Mich. 454 245, 2584
v. Ludwig, 41 Ind. App. 310 4391
v. Metropolitan St. R. Co., 177 Mo. App. 359 1385
v. Pennsylvania R. Co., 42 N. J. L. 449 3464
v. Smith, 1 Bay 115 791, 801
v. Williams, 88 Hun 292, aff'd 153 N. Y. 671 4298
Petrified B. M. Co. v. Rogers, 150 Fed. 445 2301, 2422
Petschelt v. Preis, [1915] W. C. & Ins. Rep. 11 5202
Pettee v. Tennessee Mfg. Co., 1 Sneed 381 234
Petterson v. Butler Bros., 123 Minn. 516 766
Pettes v. Tilden, 2 Mass. 118 1570
Pettie v. Boston T.-B. Co., 49 Fed. 464 5014
Pettigrew v. Summers, 32 Ark. 571 958
Pettigrew Mach. Co. v. Harmon, 45 Ark. 290 753, 783
Pettingill v. Goulet, 137 Wis. 285 4332
Pettis v. Bloomer, 21 How. Pr. 317 888, 893, 928
v. Ray, 12 R. I. 344 977
Pettit v. Allen, 64 App. Div. (N. Y.) 579 1668
v. Frothingham, 48 Tex. Civ. App. 105 3789
v. Grand Junction, 119 Iowa 352 3885
v. Mercer, 8 B. Mon. 51 305, 1685, 1687, 1690, 1694, 1704
Petty v. Brunswick & W. R. Co., 109 Ga. 666 25, 763, 780
v. Dill, 53 Ala. 645 704
Pettygrove v. Hoyt, 11 Me. 66 1660, 1663
Petz v. Voight B. Co., 116 Mich. 418 3109
Peuchen v. Imperial Bank, 20 Ont. 325 2397
Pevey v. Jones, 71 Miss. 647 2096
v. Schulenberg & B. L. Co., 33 Minn. 45 2697
Pew v. First Nat. Bank, 130 Mass. 391 2468
Pewaukee M. Co. v. Howitt, 86 Wis. 270 3231, 3236, 3244, 3247, 3253
Pewtriss v. Austen, 6 Taunt. 522 4372
Peyser v. Cole, 11 Ore. 38 871, 1921
v. Lund, 89 App. Div. (N. Y.) 195 172, 314
v. Myers, 135 N. Y. 599 1214
Peytoe's Case, 9 Coke 77 762
Peyton v. Butler, 3 Haywood 141 102
v. Harmon, 22 Gratt. 643 1557
v. Smith, 2 Dev. & B. Eq. 325, 352 3725
v. Texas & P. R. Co., 41 La. Ann. 861 4829
Pezant v. National Ins. Co., 15 Wend. 453 3014
Pfeiffer v. Brown, 165 Pa. 267 8
v. Lansberg B. Co., 44 Mo. App. 59 2467
v. Oregon-Washington R. & Nav. Co., 74 Ore. 307, writ of error dismissed 239 U. S. 658 5072, 5079, 5082
Pfeil v. Kemper, 3 Wis. 315 1435, 1446, 2478
Pfirshing v. Heitner, 91 Ill. App. 407 2781
Pfister v. Milwaukee Free Press Co., 139 Wis. 627 1340, 4509, 4543, 4548, 4549, 4567, 4573, 4585
Pflegar v. Hastings & D. R. Co., 28 Minn. 510 3993
Pflueger v. Lewis F. & M. Co., 134 Fed. 28 664
Pfohl v. Rupp, 166 App. Div. (N. Y.) 630 3831
Phalen v. Clark, 19 Conn. 421 18
v. Rochester R. Co., 31 App. Div. (N. Y.) 448 4860, 4893, 4895
Phansteihl v. Vanderhoof, 22 Mich. 296 1712
Phantom, L. R., The, 1 Adm. & Ecc. 58 2720
Phares v. Barbour, 49 Ill. 370 2805
Pharis v. Gere, 31 Hun 443 1360
Pharr v. Gall, 104 La. 700 2117
v. Morgan's, etc., Co., 115 La. 138 58, 3839, 3888
Phbachek v. Hazzard, 83 Minn. 437 2502
Phelan v. Albany, etc., R. Co., 1 Lans. 258 906
v. Granite B. P. Co., 227 Mo. 666 4652, 4812
v. Tomlin, 164 Ala. 383 1986, 1989
Pheland v. Andrews, 52 Ill. 486 2422
Phelin v. Kenderdine, 20 Pa. 354 4967
Phelps v. Beebe, 71 Mich. 554 2682
v. Bergers, 92 Neb. 851 1505, 4976, 4982
v. Berkshire St. R., 210 Mass. 49 3821
v. Brown, 95 Cal. 572 2018
v. Cape Girardeau W. W. & E. Co., 165 Mo. App. 454 290, 389
v. Cogswell, 70 Cal. 201 4624, 4629
v. Daniel, 86 Ga. 363 1789
v. Elyria M. Co., 12 Ohio Dec. 692 238, 2444
v. Foster, 18 Ill. 309 1719
v. Hale, 43 Colo. 255 2503
v. Johnson, 8 Johns. 54 452, 456, 780
v. London, etc., R. Co., 19 C. B. (N. S.) 321 3532
v. McGee, 18 Ill. 155 2294
v. New Haven, etc., Co., 43 Conn. 453 414, 3155, 3162
v. Owen, 11 Cal. 11 1282
v. Paris, 39 Vt. 511 537
v. Riley, 3 Conn. 266 2330
v. Sage, 2 Day 151 827
v. Taylor, 4 T. B. Mon. 170 697
v. Town, 14 Mich. 374 1411
v. Vischer, 50 N. Y. 69 2778
v. Williamson, 5 Sandf. 578 3301
v. Winona, etc., R. Co., 37 Minn. 485 4943, 4944
Phenix v. Clark, 2 Mich. 327 4325
Pheters v. Page, 83 Me. 234 2994
Phetteplace v. Steere, 2 Johns. 442 1830
Phettiplace v. Northern Pac. R. Co., 84 Wis. 412 3520, 3522, 3527
Phifer v. Commissioners, 157 N. C. 150 4114
v. Steenburg, 66 Fla. 555 1935
Philadelphia v. Dyer, 41 Pa. 463 4152, 4156

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Philadelphia v. Linnard, 97 Pa. 242 3964, 3988, 4094, 4098
v. Miskey, 68 Pa. 49 4152
v. Rink (Pa.), 2 Atl. 505 694
Philadelphia, B. & W. R. Co. v. McConnell, 228 Fed. 263 5066
v. Schubert, 224 U. S. 603, aff'g 36 App. Cas. (D. C.) 565 5116
Philadelphia Ball Club v. Philadelphia, 192 Pa. 632 3975, 4022, 4098
Philadelphia Cas. Co. v. Cannon & B. M. Co., 133 Ky. 745 722
Philadelphia Drying Mach. Co., Inc. v. Kummerer, 56 Pa. Super. Ct. 24 2455
Philadelphia L. Co. v. Towner, 13 Conn. 249 985
Philadelphia Life Ins. Co. v. Fidelity & Deposit Co. of Maryland, 224 Pa. 236 2797
Philadelphia M. & T. Co. v. New Whatcom, 19 Wash. 225 1045
Philadelphia R. & R. Co. v. Smith, 64 Fed. 679 3842
Philadelphia S. T. Co. v. Philadelphia R., Fed. Cas. No. 11,085, aff'd 23 How. 209 5008
Philadelphia T. Co. v. Orbann, 119 Pa. 37 1278, 1344, 3503
Philadelphia Veneer & Lumber Co. v. Garrison, 160 Ky. 329 543
Philadelphia Whiting Co. v. Detroit W. L. Works, 58 Mich. 29 2273, 2370, 2421
Philadelphia & R. R. Co. v. Anderson, 94 Pa. 360 140
v. Getz, 113 Pa. 214 4012, 4086
v. Knight, 124 Pa. 58 1210
v. Little, 41 N. J. Eq. 519 2802
v. Reading & P. R. Co., 2 Pa. Dist. 857 3994
v. Smith, 105 Pa. 195 1210
Philadelphia, etc., R. Co. v. Crawford, 112 Md. 508 3468, 3473, 4835, 4840
v. Derby, 14 How. 468 1330, 1331, 1347, 3412
v. Diffendal, 109 Md. 494 3346, 3375, 3425, 3430
v. Green, 110 Md. 32 1282, 1329, 3468, 3502
v. Hoeflich, 62 Md. 300 1276, 1278
v. Hogeland, 66 Md. 149 108
v. Howard, 13 How. 307 252, 1938, 2451, 2696
v. Karr, 38 App. D. C. 193 389, 400, 3853, 3879
v. Larkin, 47 Md. 155 1269, 1282, 1343
v. Lewis, 33 Pa. 33 986
v. Mitchell, 107 Md. 600 87, 93, 4689
v. Quigley, 21 How. 202 1288. 1331, 1332, 3512
v. Rice, 64 Md. 63 3476
v. Schubert, 36 App. D. C. 565 25
v. Tucker, 35 App. D. C. 123 478, 4876
v. Walker, 45 Pa. Super. Ct. 524 759
Philbrick v. Shaw, 62 N. H. 356 2797
Philbrook v. Berlin S. P. Co., 75 N. H. 599 3766, 4034
v. Eaton, 134 Mass. 398 4284
v. Moxey, 191 Mass. 33 2496
Philbrooks v. McEwen, 29 Ind. 347 2816
Philby v. Northern Pac. R. Co., 46 Wash. 173 4847
Philip v. Durkee, 108 Cal. 300 1353
Philippi v. Wolff, 14 Abb. Pr. (N. S.) 196 4757
Philips v. Philadelphia & R. T. R. Co., 184 Pa. 537 3985
Philips, etc., C. Co. v. Seymour, 91 U. S. 646 2666
Phillipi v. Capell, 38 Ala. 575 1560, 1709
Phillips v. Behn, 19 Ga. 298 1523
v. Berick, 16 Johns. 136 376
v. Blake, 1 Metc. (Mass.) 156 648
v. Bradshaw, 167 Ala. 199 4502, 4508
v. Brittingham, 2 Boyce (Del.) 173 3737
v. Columbus City B. Ass'n, 53 Iowa 719 984
v. Covell, 79 Hun 210 41
v. Davis, 2 Sneed 520 1643
v. Denver City T. Co., 53 Colo. 458 110
v. Dickerson, 85 Ill. 11 97
v. Dugan, 21 Ohio St. 466 606
v. Durham & C. R. Co., 138 N. C. 12 72, 319
v. Earle, 8 Pick. 182 3283, 3412
v. Epp, 6 Kulp 405 3143
v. Fowler, Barnes 441 1482
v. Foxall, L. R. 7 Q. B. 666 1592, 2771, 2795
v. Gallant, 62 N. Y. 264 2657, 2674
v. Gaston, 37 Ga. 16 802
v. Hebden, 28 R. I. 1 4391
v. Herndon, 78 Tex. 378 1989, 2011
v. Hollenberg M. Co., 82 Ark. 9 2214
v. Homfray, L. R. 6 Ch. 770 3747, 3786
v. Hoyle, 4 Gray 568 1296, 1379, 4958, 4964
v. Im Thurn, L. R. 1 C. P. 463 1152
v. Jones, 12 Neb. 213 4383
v. Kelly, 29 Ala. 628 1305, 4776
v. Kent, 23 N. J. L. 155 1491
v. Langlow, 55 Wash. 385 2501, 2512
v. Le June, 1 Ohio C. C. (N. S.) 616 4535, 4592
v. Le June, 25 Ohio C. C. 107 4546
v. London, etc., R. Co., 4 Q. B. Div. 406 4696
v. London, etc., R. Co., 5 Q. B. Div. 78 4696, 4796, 5088
v. London, etc., R. Co., 42 L. T. Rep. 6 4656, 4679, 4710, 4730
v. Malone, Minor 110 1537
v. Merritt, 2 Up. Can. C. P. 513 2225
v. Moir, 69 Ill. 155 2926, 2956
v. Monges, 4 Whart. 225 548, 3099, 4361
v. Moses, 65 Me. 70 721
v. Ocmulgee Mills, 55 Ga. 633 624
v. Pease, 39 Cal. 582 4149
v. Pennywit, 1 Ark. 59 418
v. Phillips, 34 N. J. L. 208 3846
v. Port Townsend Lodge, 8 Wash. 529 3263
v. Postal Tel. Co., 130 N. C. 513 4096, 4146
v. Price, 3 M. & S. 183 1655
v. Rehm, 64 Ill. App. 477 1108
v. Reichart, 17 Ind. 120 2061, 2098, 2187
v. Reynolds, 236 Ill. 119 1075
v. St. Clair I. P. Co., 166 Pa. 21 4043
v. St. Louis, etc., R. Co., 211 Mo. 419 58
v. Scales Mound, 195 Ill. 353 1482, 3956, 3962, 4037
v. Scott, 43 Mo. 86 2947, 2950
v. Silvester, L. R. 8 Ch. 173 1026, 2038, 2041
v. South Park Com'rs, 119 Ill. 626 1026. 1062. 4145
v. Southwestern R. Co., 4 Q. B. Div. 406 1497, 4796
v. Speyers, 49 N. Y. 653 4211
v. Stevens, 16 Mass. 238 3150

[REFERENCES ARE TO PAGES]

Phillips v. Stewart, 87 Mo. App. 486 3696, 3699
v. Storm, 16 Mass. 238 3066
v. Terry, 3 Keyes 313 389, 414
v. Terry, 5 Abb. Pr. (N. S.) 327 1419, 1426
v. Thomas, 70 Wash. 533 1302, 1505, 4971, 4974
v. Thompson, 1 Johns. Ch. 131 2047
v. Thompson, 2 Johns. Ch. 418 678
v. Vermillion, 91 Ill. App. 133 2444
Phillips L. Co. v. Smith, 7 Ga. App. 222 2561
Phillips, etc., Co. v. Seymour, 91 U. S. 646 2576, 2668
Phillipsburg v. Degenhart, 30 Mont. 299 1578, 1583
Philp v. Nock, 17 Wall. 460 4439, 4441, 4442, 4447, 4449, 4451, 4465
Philpot v. Taylor, 75 Ill. 309 102, 223, 303, 2968, 2985
Philpots v. Evans, 5 M. & W. 475 2256
Philpott v. Jones, 2 Ad. & El. 41 714, 720
v. Jones, 4 Nev. & Man. 14 720
Phinazee v. Bunn, 123 Ga. 230 2473
Phinizy v. Bush, 129 Ga. 479 748
v. Guernsey, 111 Ga. 346 2044, 2045
Phinney v. Baldwin, 16 Ill. 108 870, 963, 975
v. Hubbard, 2 Wash. Terr. 369 4392
v. Illinois Cent. R. Co., 122 Iowa 488 152
Phipps v. Addison, 7 Blackf. 375 1398
v. Tarpley, 31 Miss. 433 2061, 3196
Phoenix v. Ryland, 69 Md. 437 3039
Phoenix Assur. Co. v. Fristoe, 53 W. Va. 361 416
Phoenix B. Co. v. Keystone B. Co., 10 App. Div. (N. Y.) 176, aff'd 153 N. Y. 644 1728, 1732, 1741
Phoenix I. Co. v. United States, 39 Ct. of Cls. 526 884, 887
Phoenix I. Works Co. v. Rhea, 98 Tenn. 461 524
Phoenix Ins. Co. v. A. B. Banks & Co., 114 Ark. 18 2917
v. Allen, 11 Mich. 501 596, 669, 670, 677, 2940
v. Carey, 80 Conn. 426 1253
v. Church, 81 N. Y. 218 669
v. Cochran, 51 Pa. 143 3000, 3041
v. Continental Ins. Co., 14 Abb. Pr. (N. S.) 266 839
v. Frissell, 142 Mass. 513 2916
v. Hedrick, 73 Ill. App. 601, aff'd 178 Ill. 212 1396, 1403
v. McAtee, 33 Ind. App. 106 1442
v. Meier, 28 Neb. 124 628
v. Overman, 21 Ind. App. 516 822
v. Port Clinton F. Co., 14 Ohio C. C. 160 3009
v. Pratt, 36 Minn. 409 2916
v. Spiers, 87 Ky. 285 3039
v. Taylor, 5 Minn. 492 3018
Phoenix Mut. L. Ins. Co. v. Baker, 85 Ill. 410 3090
v. Holloway, 51 Conn. 310 2753, 2770
Phoenix P. Co. v. American C. & P. Co., 111 Md. 549 226, 1734, 1751
Phoenix R. Co. v. Landis, 13 Ariz. 80 4947
Phy v. Clark, 35 Ill. 377 2947
Piaget N. Co. v. Headley, 123 Fed. 897 4445, 4454, 4459
Picard v. McCormick, 11 Mich. 68 4377
Pichon v. Martin, 35 Ind. App. 167 4120, 4127, 4138
Pick v. Rubicon H. Co., 27 Wis. 433 4195
Pickard v. Bankes, 13 East 20 595
v. Bridges, 7 Ga. App. 463 4602
v. Collins, 3 Barb. 444 3842
v. McCormick, 11 Mich. 68 2387
Pickell v. St. Paul City R. Co., 120 Minn. 340 4823
Pickens v. Boom Co., 58 W. Va. 11 1418, 1433, 1482, 3845, 3902
v. Coal River B. & T. Co., 51 W. Va. 445 3850, 3858
v. Finney, 12 Sm. & M. 468 2814
v. Hayden, 2 Stew. 10 1538
v. Major (Tex. Civ. App.), 139 S. W. 1040 4391, 4407
v. Miller, 83 N. C. 543 2859
v. South Carolina & G. R. Co., 54 S. C. 498 1268, 1280, 1343, 3448, 3461
Pickerill v. Louisville, 125 Ky. 213 3881, 3882, 3887, 3936
Pickering v. Bardwell, 21 Wis. 526 2238
v. Day, 3 Houst. 474 1597, 1614
v. Pickering, 11 N. H. 141 428
v. Pulsifer, 9 Ill. 79 1360
v. Staples, 5 S. & R. 107 2056
v. Truste, 7 T. R. 53 4301
Pickering Mfg. Co. v. Gordon, — Tex. Civ. App. —, 168 S. W. 14 2347
Pickert v. Rugg, 1 N. D. 230 4241
Pickett v. Bates, 3 La. Ann. 627 2837
v. Bridges, 10 Humph. 172 4353
v. Ford, 4 How. (Miss.) 246 311, 2399
v. Handy, 9 Colo. App. 357 1243
v. McDonald, 6 How. (Miss.) 269 2211
v. School Dist., 25 Wis. 558 2462
v. Wilmington & W. R. Co., 117 N. C. 616 116, 413
v. Wren, 187 Mo. App. 83 4394
Pickford v. Grand Junction R. Co., 8 M. & W. 372 3311
Pickle v. Anderson, 62 Wash. 552 697
Pickles v. Ansonia, 76 Conn. 278 2482, 4028, 4108
Pickwick v. McCauluff, 193 Mass. 70 774
Pickwood v. Wright, 1 H. Bl. 643 1360
Pico v. Cohn, 91 Cal. 129 17
Pidcock v. Crouch, 7 Ga. App. 299 1835
Pidgeon v. Williams, 21 Gratt. 251 612
Pidkens v. Wood, 57 W. Va. 480 2797
Piedmont H. Co. v. Henderson, 9 Ga. App. 672 1530, 4837, 4838, 4841
Piedmont W. Co. v. Hudgens, 4 Ga. App. 393 2340
Piedmont & A. L. Ins. Co. v. Fitzgerald, 1 Tex. Civ. Cas. 784 3084, 3089
Piedmont, etc., C. Co. v. Kearney, 114 Md. 496 3917, 3918
Pierce v. Aiken (Tex. Civ. App.), 146 S. W. 950 2464
v. Banton, 98 Me. 553 1136, 2380, 2395, 2398, 2403, 4345
v. Beers, 190 Mass. 199 2923
v. Benjamin, 14 Pick. 356 480, 484, 4201, 4291, 4304
v. Bent, 69 Me. 381 588
v. Bidwell T. Co., 153 Mich. 323 2430, 4718
v. Brew, 43 Vt. 292 2147
v. Carpenter, 65 Mo. App. 191 1277, 1385, 4774
v. Charter Oak L. Ins. Co., 138 Mass. 151 1091
v. Chicago & M. E. R. Co., 137 Wis. 550 3970, 3987, 4107, 4130
v. Conant, 25 Me. 33 995
v. Conners, 20 Colo. 178 4925, 4928, 4930, 4939
v. Dart, 7 Cow. 609 16, 3921

[REFERENCES ARE TO PAGES]

Pierce v. Doolittle, 130 Iowa 333 4634
v. East Tennessee, etc., Co., 173 U. S. 1 2551, 2554
v. Fuller, 8 Mass. 223 887, 891
v. Garrett, 65 Ill. App. 682 2798
v. Getchell, 76 Me. 216 1349
v. Gilson, 9 Vt. 216 26, 2897
v. Hoffman, 4 Wis. 277 538
v. Hosmer, 66 Barb. 345 37
v. Johnson, 4 Vt. 247 2054, 2058
v. Joldersma, 91 Mich. 463 3128
v. Jung, 10 Wis. 30 848, 862
v. Knight, 31 Vt. 701 722, 730
v. Lehigh Valley C. Co., 232 Pa. 170 1139
v. Maetzold, 126 Minn. 445 1635, 1638
v. Millay, 44 Ill. 189 4657
v. Norton, 82 Conn. 441 2479
v. O'Brien, 189 Mass. 58 4210, 4227
v. Parker, 4 Metc. (Mass.) 80 783
v. Pierce, 25 Barb. 243 3097
v. Pierce, 3 Pick. 299 4976
v. Robie, 39 Me. 205 418, 419
v. Rowe, 1 N. H. 179 1135, 1207, 1221
v. St. Louis, etc., R. Co., 94 Ark. 489 78, 163, 3481
v. Seattle Elec. Co., 78 Wash. 167 1519
v. Seattle Elec. Co., 83 Wash. 141 4712
v. Southern Pac. Co., 120 Cal. 156 3341, 3410, 3414, 3426, 3429
v. Spader, 13 Ind. 458 2329
v. Sweet, 33 Pa. 151 728, 737, 783
v. Tennessee C., I. & R. Co., 173 U. S. 1 371, 380, 385
v. Thompson, 6 Pick. 193 4605
v. Tiersch, 40 Ohio St. 168 4392
v. Tuttle, 51 How. Pr. 193 581
v. Van Dyke, 6 Hill 613 4313, 4347, 4351
v. Wagner, 29 Minn. 355 3891, 3905, 3906
v. Wells, Fargo & Co., 189 Fed. 561 3418
v. Williams, 23 L. J. (Ex.) 322 297
v. Wood, 23 N. H. 519 1503
v. Woodward, 6 Pick. 206 388, 413
v. Worcester, etc., R. Co., 105 Mass. 199 3977
Pierce Co. v. Wells Fargo & Co., 236 U. S. 278 3338
Pierce & Son v. Davis, 155 Ky. 270 699
Piercy v. Johnson City, 130 Tenn. 231 3993
Pierrepont v. Barnard, 5 Barb. 364 363
Pierro v. St. Paul, etc., R. Co., 39 Minn. 451 396
Piers, In re, 117 App. Div. (N. Y.) 553 4013, 4021
Piersall v. Huber Mfg Co., 159 Ky. 338 2393
Pierson v. Crooks, 115 N. Y. 539 2271
v. Dunlop, 2 Cowp. 571 1817
v. Ells, 46 Hun 336 1760
v. Finney, 37 Ill. 29 1360
v. Glenn, 14 N. J. L. 37 3842
v. Holdridge, 92 Kan. 365 4406
v. Hooker, 3 Johns. 68 770, 771
v. Illinois Cent. R. Co., 149 Mich. 167 3449
v. Illinois Cent. R. Co., 159 Mich. 110 3449
v. Kingman Milling Co., 91 Kan. 775 766
v. Lyon, 150 Ill. App. 116 4802
v. McCahill, 21 Cal. 122 748, 756
Pierson v. Northern Pac. R. Co., 61 Wash. 450 3417
v. Spaulding, 61 Mich. 90 2337
v. Steortz, Morris 136 4592
v. Wallace, 7 Ark. 282 1891
Pieser v. Minkota M. Co., 94 Ill. App. 595 1014
Piester v. Piester, 22 S. C. 139 960
Pietro, G., The, 39 Fed. 366 3308
Pigeon v. United States, 27 Ct. of Cls. 167 864, 2693
Pigott v. Graham, 48 Wash. 348 4381
Pigou v. French, 1 Wash. C. C. 278 2835
Pike v. Chicago, 155 Ill. 656 2620
v. Daly, 54 N. J. L. 4 3698
v. Dilling, 48 Me. 539 1306
v. Nicholas, L. R. 5 Ch. 260 4480
v. Pike, 24 N. H. 384 418
v. Street, M. & M. 226 1856, 1867
Pike County v. Horsford, 11 Ill. 170 1041
Pike St., In re, 42 Wash. 551 4120
Pilcher v. Central R. Co., 155 Ala. 316 3330, 3342, 3345, 3370
Pilger v. Marder, 55 Neb. 113 1673
Pilkington v. Commissioner for Claims, 2 Knapp 18 598
Pilkins v. Hans, 87 Neb. 7 4873
Pill v. Brooklyn Heights R. Co., 6 N. Y. Misc. 267 4694, 4695
v. Brooklyn Heights R. Co., 148 N. Y. 747 4695
Pilling v. Benson, 34 R. I. 519 1500, 1507
Pillow v. Brown, 26 Ark. 240 1228
Pillsbury v. Mitchell, 5 Wis. 17 2151, 2153, 2173
v. Moore, 44 Me. 154 3842, 3859
v. Streeter, 15 N. D. 174 2046
Pilmore v. Hood, 5 Bing. N. C. 97 157, 159
Piltz v. Yonkers R. Co., 83 App. Div. (N. Y.) 29 1382
Pim v. Greer, 64 Mo. App. 175 2464
Pimm v. Clement Talbot, Ltd., [1914] W. C. & Ins. Rep. 350, 7 B. W. C. C. 565 5203
Pinch v. McCulloch, 72 Minn. 71 2814
Pinches v. Swedish Lutheran Church, 55 Conn. 183 2597, 2681
Pinckard v. American F. L. M. Co., 143 Ala. 568 2056
v. Bramlett, 165 Ala. 327 695
Pinckney v. Dambmann, 72 Md. 173 2275, 2293
v. Dunn, 2 S. C. 314 2945
v. Singleton, 2 Hill (S. C.) 52 1051
Pinckneyville v. Hutchings, 63 Ill. App. 137 3853
Pindall v. Bank of Marietta, 10 Leigh 481 711, 1205
v. Northwestern Bank, 7 Leigh 617 645, 647
Pindar v. Upton, 45 N. H. 258 1561
Pine v. Reid, 6 Man. & Gr. 1 3021
v. St. Paul City R. Co., 50 Minn. 144 3451, 3503
v. Smith, 11 Gray 38 1160, 1171, 1879
v. Western Nat. Bank, 63 Kan. 462 1077
Pine Bluff I. Works v. Boling, 75 Ark. 469 2631
Pine Bluff W. & L. Co. v. McCain, 62 Ark. 118 433
Pine Bluff & A. R. Ry. Co. v. Washington, — Ark. —, 172 S. W. 872 3502, 3525, 4774
v. Washington, 116 Ark. 179 4812
Pine Bluff & W. R. Co. v. Kelly, 78 Ark. 83 3753, 3755, 3774, 4145

[REFERENCES ARE TO PAGES]

Pine County v. Willard, 39 Minn. 125 1586
Pine Forest, The, 129 Fed. 700 2717
Pine St., In re, 57 Wash. 178 4150
Pineland Mfg. Co. v. Guardian T. Co., 139 Mo. App. 209 2144
Pineo v. New York, etc., R. Co., 34 Hun 80 4939
Pinero v. Judson, 6 Bing. 206 3102
Pinet v. Montague, 103 Mich. 516 2561
Pingery v. Cherokee & D. R. Co., 78 Iowa 438 3977, 3978
Pinhorn v. Tuckington, 3 Camp. 468 1033
Pink v. Catanich, 51 Cal. 420 4572
v. Fleming, 25 Q. B. Div. 396 3000
Pinkerton v. Boston, etc., R. Co., 109 Mass. 527 4097
v. Manchester & L. R. Co., 42 N. H. 424 291, 368, 2310, 2315, 2902, 2954, 4239
v. Randolph, 200 Mass. 24 42, 3812
v. Sydnor, 87 Ill. App. 76 4840, 4841
Pinkerton's Est., In re, 49 N. Y. Misc. 363 2471
Pinkham v. Chelmsford, 109 Mass. 225 4134
v. Crocker, 77 Me. 563 2955
v. Wemple, 12 Cal. 449 1806
Pinkney v. Weaver, 216 Ill. 185 862
Pinkstaff v. Allison D. Dist., 213 Ill. 186 3983, 4025
v. People, 59 Ill. 148 1648, 1649
Pinkston v. Huie, 9 Ala. 252 1995
v. Talliaferro, 9 Ala. 547 2869
Pinmore, The, 121 Fed. 423 2735
Pinnel's Case, 5 Co. Rep. 117 749, 750, 754
Pinney v. Andrus, 41 Vt. 631 312, 2388, 2446, 4413
v. Barnes, 17 Conn. 420 376, 384, 388
v. Berry, 61 Mo. 359 3852, 3881
v. French, 67 Kan. 473 727
v. Gleason, 5 Wend. 393 624, 2336
v. Jorgenson, 27 Minn. 26 802, 803, 1918
v. McGregory, 102 Mass. 186 2838
v. Winsted, 83 Conn. 411 400, 3755, 3812, 3875
Pinnix v. Canal & W. Co., 132 N. C. 124 3840
Pinson v. Campbell, 124 Mo. App. 260 4636, 4644
v. Kirsh, 46 Tex. 29 1705
v. Puckett, 35 S. C. 178 623
Pintard v. Davis, 21 N. J. L. 632 2820
Pioneer M. Co. v. Mitchell, 190 Fed. 937 434
Pioneer Press Co. v. Hutchinson, 63 Minn. 481 1364, 3258
Pioneer S. & L. Co. v. Freeburg, 59 Minn. 230 2795
Piper v. Boston & M. R. Co., 75 N. H. 435 22
v. Brown, 1 Holmes 196 4471
v. Connelly, 108 Ill. 647 3796
v. Gunn, 74 Kan. 884 2025
v. Hoard, 107 N. Y. 73 4373
v. Kingsbury, 48 Vt. 480 271, 493, 3687
v. Menifee, 12 B. Mon. 465 540
Piper's Est., 15 Pa. 533 1640
Pipolo v. Fred T. Ley & Co., 216 Mass. 246 171, 2687, 2694
Pipperly v. Stewart, 50 Barb. 52 1097
Pippet v. Hearn, 5 B. & Ald. 634 4614
Pirie v. Steele, 8 C. & P. 200 3032
Pister v. Keystone Mut. Ben. Ass'n, 3 Pa. Super. Ct. 50 635
Pitcher v. Christ Church, 83 Conn. 308 2527
Pitcher v. Livingston, 4 Johns. 1 303, 1028, 2063, 2136, 2143, 2153, 4418
v. Lowe, 95 Ga. 423 2275
v. Tovey, 1 Salk. 81 3133
Pitkin v. Frink, 2 Metc. (Mass.) 12 1938
v. Leavitt, 13 Vt. 379 297, 298, 2137, 2143
v. New York Cent., etc., R. Co., 94 App. Div. (N. Y.) 31 4938
Pitman v. Ball, 140 Mo. App. 389 1450
v. Conner, 27 Ind. 337 2061, 2115
v. Hooper, 3 Sumn. 66 3302
v. Kintner, 5 Blackf. 250 2986
v. Self, — Tex. Civ. App. —, 147 S. W. 907 4390
Pitt v. Daniel, 82 Mo. App. 168 1392
v. Donovan, 1 M. & S. 639 4566
Pittman v. Barret, 34 Mo. 84 949, 1874
v. Bloch Q. Co., 48 Tex. Civ. App. 320 2343
v. Colbert, 120 Ga. 341 1404
v. Pacific Exp. Co., 24 Tex. Civ. App. 595 3333, 3419
Pitts v. Congdon, 2 N. Y. 352 2804
v. Hall, 2 Blatch. 229 4448, 4450
v. Tilden, 2 Mass. 118 1568, 1570
v. Van Orden (Tex. Civ. App.), 158 S. W. 1043 640
Pittsburg, In re, 243 Pa. 392 4022
Pittsburg C. Co. v. Foster, 59 Pa. 365 2598, 2638
v. West Side B. R. Co., 227 Pa. 90 2743
Pittsburg, C., C. & St. L. R. Co. v. Crockett, 182 Ind. 490 4044
Pittsburg G. Co. v. Ashton V. Co., 184 Pa. 36 1442, 2572
Pittsburg I. & S. Engineering Co. v. National T. W. Co., 184 Pa. 251 2281, 2298, 2623
Pittsburg L. & T. Co. v. Northern Cent. L. Ins. Co., 140 Fed. 888 4375, 4381, 4385, 4408, 4410
Pittsburg M. Co. v. Spooner, 74 Wis. 307 4368
Pittsburg P. G. Co. v. Leary, 25 S. D. 256 809, 826, 827, 1115, 1229
v. Monroe, 79 S. C. 564 569
Pittsburg Reduction Co. v. Horton, 87 Ark. 576 128
Pittsburg Sheet Mfg. Co. v. West Penn S. S. Co., 201 Pa. 150 2287
Pittsburg Steel Foundry v. Pittsburg S. Co., 223 Pa. 430 243, 294, 2696, 2701
Pittsburg T.-C. L. Co. v. Sharp, 190 Pa. 256, 7 Pa. Dist. 544 2684
Pittsburg Vitrified P. & B. Co. v. Fisher, 79 Kan. 576 4936
Pittsburg, etc., R. Co. v. Andrews, 39 Md. 329 222, 334, 3495
v. Caldwell, 74 Pa. 421 151
v. Chicago, 53 Ill. 80 1541
v. Chicago, 242 Ill. 178 1454, 4174
v. Dodd, 115 Ky. 176 295
v. Gates, 137 Ill. App. 309 4858
v. Hazen, 84 Ill. 36 3329
v. Powers, 74 Ill. 341 4779
Pittsburgh v. Grier, 22 Pa. 54 72
v. Scott, 1 Pa. 309 16
Pittsburgh C. Co. v. Northy, 158 Mich. 530 2236
Pittsburgh, C., C. & St. L. Ry. Co. v. Bir, — Ind. —, 105 N. E. 921 488
v. Bir, 56 Ind. App. 598 4791
Pittsburgh C. M. Co. v. Greenwood, 39 Cal. 71 1355
Pittsburgh H. & H. Co. v. Bown, 174 Fed. 981 2214

[REFERENCES ARE TO PAGES]

Pittsburgh Nat. Bank v. Hall, 107 Pa. 583 1654, 1663
Pittsburgh P. G. Co. v. Kerlin, 122 Fed. 414 2230
Pittsburgh R. Co. v. Chapman, 145 Fed. 886 436, 774
Pittsburgh & W. R. Co. v. Patterson, 107 Pa. 461 4033
Pittsburgh, etc., R. Co. v. Bentley, 88 Pa. 178 3980, 4089
v. Berryman, 11 Ind. App. 640 3473, 3482
v. Blair, 11 Ohio C. C. 579 4683
v. Brown, 178 Ind. 11 4858, 4862, 4923, 4951
v. Burton, 139 Ind. 356 4875, 4878, 4893, 4900, 4908
v. Carlson, 24 Ind. App. 559 405
v. Coll, 37 Ind. App. 232 3438, 3519, 3527
v. Collins, 168 Ind. 467 4652, 4662
v. Cozatt, 39 Ind. App. 682 4673
v. Donahue, 70 Pa. 119 1329
v. Dooley, 13 Ohio C. C. (N. S.) 225 4900
v. Fagin, 3 Ohio N. P. (N. S.) 30 488, 4728
v. Farmers' Trust & Savings Co., — Ind —, 108 N. E. 108 5069
v. Glinn, 219 Fed. 148 5066
v. Hannigh, 39 Ind. 509 3450
v. Heck, 50 Ind. 303 2238, 2276
v. Higgs, 165 Ind. 694 3334
v. Hinds, 53 Pa 512 1347, 3467, 3469
v. Hixon, 110 Ind. 225 3804
v. Hosea, 152 Ind. 412 5118
v. Iddings, 28 Ind. App. 504 162
v. Indiana H. Co., 154 Ind. 322 3751
v. Jones, 111 Pa. 204 4077
v. Kinnare, 203 Ill. 388 4882, 4883
v. Lightheiser, 168 Ind. 438 1467, 1476, 4795
v. Lynch, 43 Ind. App. 177 1374, 1378
v. Lyon, 123 Pa. 140 1268, 3505
v. McCloskey, 110 Pa. 436 3977, 3978, 3980, 4017, 4026, 4108
v. Mahoney, 148 Ind. 196 21, 25
v. Montgomery, 152 Ind. 1 24
v. Moore, 110 Ill. App. 304 411
v. Moore, 152 Ind. 345 25
v. Morton, 61 Ind. 539 3326
v. Naylor, 73 Ohio 115 4856
v. Noftsger, 148 Ind. 101 3889
v. Nuzum, 50 Ind. 141 3452
v. O'Conner, 171 Ind. 686 4674
v. Parish, 28 Ind. App. 189 4906
v. Reed, 44 Ind. App. 635 4858, 4870, 4945, 5097
v. Richardson, 40 Ind. App. 503 3467, 3469
v. Robinson, 95 Pa. 426 4111, 4116, 4130
v. Rose, 74 Pa. 362 3988, 4133
v. Ross, 169 Ind. 3 1476
v. Russ, 57 Fed. 822 3465, 3500, 3514
v. Russ, 67 Fed. 662 3482
v. Shaeffer, 59 Pa. 350 2770
v. Sheppard, 56 Ohio St. 68 3335, 3436
v. Slusser, 19 Ohio St. 157 3503, 3506
v. Sponier, 85 Ind. 165 4794
v. Sudhoff, 173 Ind. 314 56, 1478, 4882, 4905
v. Swinney, 59 Ind. 100 4036
v. Swinney, 97 Ind. 586 1139, 3745, 3809
v. Taylor, 104 Pa. 306 1139, 1141
v. Thompson, 56 Ill. 138 488, 3498
v. Vance, 115 Pa. 325 4006, 4039
Pittsburgh, etc., R. Co. v. Vining, 27 Ind. 513 4853
v. Welch, 54 Ind. App. 335 3766
v. Wilson, 34 Ind. App. 324 286, 327
v. Wilson, 46 Ind. App. 444 2592, 2621
v. Wood, 45 Ind. App. 1 3329, 3345
Pitzer v. Harmon, 8 Blackf. 112 659
Pixler v. Nichols, 8 Iowa 106 2539, 2576
Pizzi v. Reid, 72 App. Div. (N. Y.) 162 4870
Pla v. San Juan L. & T. Co., 3 Porto Rico Fed. 216 4663, 4742
Place v. Dodge, 54 Ill. App. 167 4373, 4394
v. Dudley, 41 App. Div. (N. Y.) 540 1986
Placer v. Dickerson, 45 Cal. 12 1582
Placer County v. Austin, 8 Cal. 303 2905
Plaff v. Pacific Exp. Co., 251 Ill. 243, aff'g 159 Ill. App. 493 1399, 3389, 3414, 3437
Plain v. Roth, 107 Ill. 588 704, 741
Planche v. Colburn, 8 Bing. 14 2506
Planck v. Anderson, 5 T. R. 37 1629
Plano Mfg. Co. v. Downey, 100 Ill. App. 36 1668
v. Richards, 86 Minn. 94 2406
Plant v. Condit, 22 Ark. 454 534, 2456
Plant's Mfg. Co. v. Falvey, 20 Wis. 200 670, 675
Planters' Bank v. Stockman, 1 Freeman's Ch. 502 742
v. Union Bank, 16 Wall. 483 20, 1520
Planters' F. Mfg. Co. v. Elder, 101 Fed. 1001 3288
Planters' Mut. Ins. Co. v. Engle, 54 Md. 468 3020
v. Rowland, 66 Md. 236 3063
Planters' State Bank v. Schlamp, 124 Ky. 295 709
Planters' & Merchants' Ins. Co. v. Thurston, 93 Ala. 255 3023
Planters' & Miners' Bank v. Hudgins, 84 Ga. 108 1787
Plate v. Durst, 42 W. Va. 63 2471
Plath v. Braunsdorff, 40 Wis. 107 1495, 3527, 4617
Platt v. Brand, 26 Mich. 173 527, 553
v. Bright, 29 N. J. Eq. 128 4086
v. Brown, 30 Conn. 336 1310, 4392, 4432
v. Continental Ins. Co., 62 Vt. 166 1135, 3032
v. Depree, 9 T. L. Rep. 194 2502
v. Farney, 16 Ill. App. 216 3250
v. Gilchrist, 3 Sandf. 118 2209, 2211
v. Grand Trunk R. Co., 12 Ont. 119 2109
v. Milford, 66 Conn. 320 3976
v. Ottumwa, 136 Iowa 221 1417
v. Robinson, 10 Wis. 128 978
v. Waterbury, 80 Conn. 179 3849
Platter v. Green, 26 Kan. 252 2749
v. Seymour, 86 Ind. 323 40
Plattner I. Co. v. Bradley, 40 Colo. 95 590
Platts v. Walrath, Lalor's Supp. 59 753
v. Walrath, Hill & Denio, 59 761
Plattsmouth v. Boeck, 32 Neb. 297 3878
Platz v. McKean, 178 Pa. 601 4759, 4761
Player v. Warn, Cro. Car. 54 1534
Playford v. United Kingdom Tel. Co., L. R. 4 Q. B. 706 3607
Pleasanton's Appeal, 75 Pa. 344 2770
Pleasants v. North Beach, etc., R. Co., 34 Cal. 586 32

[REFERENCES ARE TO PAGES]

Pledger v. Wade, 1 Bay 35 2331
Plevin v. Henshall, 10 Bing. 24 509, 4296
Plimpton v. Gardiner, 64 Me. 360 1363, 1368, 3942
Plomer v. Long, 1 Stark. 153 707
Plonty v. Murphy, 82 Minn. 268 4685
Ploof v. Burlington T. Co., 70 Vt. 509 108, 109
Plourd v. Jarvis, 99 Me. 161 1279, 4984
Plowman Const. Co. v. Garrison's Adm'r, 157 Ky. 462 1378
Pluard v. Gerrity, 162 Ill. App. 527 3208, 3254
Plum v. Mitchell, 16 Ky. L. Rep. 162 1981, 1994
Plumb v. Campbell, 129 Ill. 101 1099, 2967
v. Ives, 39 Conn. 120 1388, 3825
v. Woodmansee, 34 Iowa 116 1703, 1705
Plumbing Co. v. Carr, 54 W. Va. 272 2683
Plumer v. Harper, 3 N. H. 88 3842, 3858
Plumleigh v. Dawson, 6 Ill. 544 37. 1522
Plumley v. Ewart & Son, Ltd., [1915] W. C. & Ins. Rep. 317 5202
Plummer v. Buckman, 55 Me. 105 2007
v. Erskine, 58 Me. 59 711
v. Green, 49 Neb. 316 4286
v. Harbut, 5 Iowa 308 37, 4200
v. Hardison, 6 Ala. App. 525 4271, 4295
v. Johnsen, 70 Wis. 131 4520
v. McKean, 2 Stew. 423 874
v. Milan, 70 Mo. App. 598 4701, 4702
v. Penobscot L. Ass'n, 67 Me. 363 319, 3349, 3890, 3919, 3923
v. Rigdon, 78 Ill. 222 354, 1959, 1989, 1996, 2008
v. Smonton, 10 Up. Can. Q. B. 220 1989
Plump v. Ives, 39 Conn. 120 1390
Plumstead's Appeal, 4 S. & R. 545 642
Plunkett v. Davis S. M. Co., 84 Md. 529 2792
v. Lewis, 3 Hare 316 641
v. Meredith, 72 Ark. 3 2592
Plymell v. Meadows, 170 Mo. App. 37 1392
Plymouth v. Graver, 125 Pa. 24 1139
v. Old Colony, etc., R. Co., 14 Gray 155 4058
v. Pere Marquette R. Co., 139 Mich. 347 4057
Plymouth County v. Kerseborn, 108 Iowa 304 1583
Plymouth G. M. Co. v. United States F. & G. Co., 35 Mont. 23 1327, 1694, 1699, 1705, 1727, 2480
Plymouth Rock, The, 9 Fed. 413 2716, 2717, 2728
Plymouth & S. T. Co. v. Dempsey, 9 Ohio N. P. (N. S.) 65 4014, 4107
Pneumatic T. Co. v. Puncture Proof P. T. Co., 16 Rep. of Pat. Cas. 209
Poag v. Charlotte O. & F. Co., 61 S. C. 190 2377
Pocahontas C. Co. v. Rukas, 104 Va. 278 4860, 4863, 4874
Poccardi, Royal Consul of Italy v. Public Service Comm., 75 W. Va. 542 5192
Pochila v. Calvert, etc., R. Co., 31 Tex. Civ. App. 398 4115, 4117, 4118
Pocomoke, The, 173 Fed. 94 2721
Podhaisky v. Cedar Rapids, 106 Iowa 543 3882
Podlaski v. Bender, 150 Ill. App. 312 1430
Poe v. Raleigh, etc., R. Co., 141 N. C. 525 413, 4905
Poehlmann v. Kertz, 105 Ill. App. 249 3661, 3663, 3670
v. Kertz, 204 Ill. 418 3662, 3673
Poel v. Brunswick-Balke-Collender Co. of New York, 159 App. Div. (N. Y.) 365 2236
Poett v. Stearnes, 31 Cal. 78 602
Pogel v. Meilke, 60 Wis. 248 425, 762, 774
Pogue v. Kaweah P. & W. Co., 138 Cal. 664 832, 837, 888
Pohlman v. Chicago, etc., R. Co., 131 Iowa 89 8
Poillon v. Martin, 1 Sandf. Ch. 569 579
Poindexter v. King, 22 La. Ann. 697 2927
v. La Roche, 7 Sm. & M. 699 728, 729, 743
Poingdestre v. Royal Exch., R. & M. 378 3032
Point Street I. Works v. Turner, 14 R. I. 122 1028, 2133, 2141
Pointer v. Smith, 7 Heisk. 137 731. 744
Pokrok Zapadu P. Co. v. Zizovsky, 42 Neb. 64 4502, 4539
Polack v. Pioche, 35 Cal. 416 3150, 3153
Poland v. Earhart, 70 Iowa 285 70
v. Miller, 95 Ind. 387 2375, 2432
v. Thomaston F. & O. B. Co., 100 Me. 133 2693
Polar Wave I. & F. Co. v. Alton Branch H. Soc., 155 Ill. App. 310 2
Polglass v. Oliver, 2 Cr. & J. 15 790, 791, 1884
Polhemus v. Annin, 1 N. J. L. 176 1107
v. Heiman, 45 Cal. 573 535, 542, 2230, 2370, 2371, 2456
Polhemus P. Co. v. Hallenback, 46 App. Div. (N. Y.) 563 1039, 1575
Polhill v. Walter, 3 B. & Ad. 114 101, 2986
Poliakoff v. Petry, 50 N. Y. Misc. 602 2214
Polin v. Weisbrot, 52 Pa. Super. Ct. 312 760
Poling v. Flanagan, 41 W. Va. 191 741
Polk v. Allen, 19 Mo. 467 4233
v. Daly, 14 Abb. (N. S.) 156 2558
Polk County v. Syphen, 17 Iowa 358 1544
Polk P. Co. v. Smedley, 155 Mich. 249 737
Polkinghorne v. Hendricks, 61 Miss. 366 2780
Pollack v. Pennsylvania R. Co., 210 Pa. 634 110
Pollak v. Davidson, 87 Ala. 551 4299
Pollard, Ex parte, 2 Low. 411 848
Pollard v. American F. M. Co., 139 Ala. 183 1019, 1021, 2480, 3701
v. Dwight, 4 Cranch 421 2056
v. Herries, 3 B. & P. 335 1902
v. Lyon, 91 U. S. 225 15, 1366, 4502, 4503, 4553
v. Pittman, 37 Ind. App. 475 2852
v. Pleasant Hill, 3 Dill. 195 1210
v. Porter, 3 Gray 312 35. 39
v. Underwood, 4 Hen. & M. 459 3718
v. Yoder, 2 A. K. Marsh. 264 936, 1109
Pollen v. James. 45 Miss. 129 1853
v. Le Roy, 10 Bosw. 38, 30 N. Y. 549 1944, 2238, 2242, 2244
Polley v. Polley, 82 Ky. 64 2154
Pollitt v. Long, 58 Barb. 20 3902, 3918
Pollman C. & S. Co. v. St. Louis, 145 Mo. 651 814

[REFERENCES ARE TO PAGES]

Pollock v. Colglazure, Sneed 2 594, 615
v. Ehle, 2 E. D. Smith 541 1101
v. Gantt, 69 Ala. 373 215, 1685, 1697, 1701
v. Glazier, 20 Ind. 262 1174, 1194
v. Learned, 102 Mass. 49 1081
v. Maysville, etc., R. Co., 103 Ky. 84 3755
v. Pollard, 1 Allen 490 1081
v. Queens L. & T. Co., 147 App. Div. (N. Y.) 571 1963
v. Whipple, 57 Neb. 82 1721
Polo v. Palisade C. Co., 75 N. J. L. 873 4934
Polsley v. Anderson, 7 W. Va. 202 291, 2477
Polson v. Stewart, 167 Mass. 211 1984
Polykranas v. Krausz, 73 App. Div. (N. Y.) 583 4271
Pomerene v. White, 70 Neb. 171 4661, 4737
Pomeroy v. Ainsworth, 22 Barb. 119 1147, 1878
v. Burnett, 8 Blackf. 142 1845, 2153
v. Chicago, etc., R. Co., 25 Wis. 641 4095
v. Drury, 14 Barb. 418 1953
v. Noud, 145 Mich. 37 1105
v. Rice, 16 Pick. 22 661
v. Smith, 17 Pick. 85 4284
v. Wimer, 167 Ind. 440 2513
Ponca v. Crawford, 23 Neb. 662 1480
v. Smith, 84 Me. 266 2405
Pond v. Baker, 58 Vt. 293 4221
v. Clark, 47 Vt. 565 457
v. Dougherty, 6 Cal. App. 686 2798
v. Harris, 113 Mass. 114 210, 306, 2700
v. Harwood, 139 N. Y. 111 735, 741
v. Horne, 65 N. C. 84 1195
v. Merrifield, 12 Cush. 181 39
v. Metropolitan E. R. Co., 42 Hun 567 3881
v. Metropolitan E. R. Co., 112 N. Y. 186 401, 4085
v. Warner, 2 Vt. 532 2875
Pond-D. L. Co. v. Spencer, 86 Fed. 846 3281, 3326
Pond & Hasey Co. v. O'Connor, 70 Minn. 266 723, 737
Ponder v. Scott, 44 Ala. 241 611
Pong v. De Lindsey, 1 Dyer 82a 800
Ponsenby v. Adams, 2 Brown P. C. 431 892
Pontiac v. Carter, 32 Mich. 164 13
Pontifex v. Bignold, 3 Scott N. R. 390 38
Pontius v. Kimble, 56 Ind. App. 144 1266, 4628
Pool v. Boston, 5 Cush. 219 2541
v. Coal Belt E. R. Co., 157 Ill. App. 24 4102
v. Devers, 30 Ala. 672 469, 4512, 4524, 4568
v. Doster, 57 Miss. 258 2867
v. Southern Pac. Co., 7 Utah 303 4882, 4893, 4901
v. Walker, 156 N. C. 40 2254
v. White, 175 Pa. 459 948
v. Williaks, 8 Ired. 286 2864
Poole v. Adkisson, 1 Dana 115 2976
v. Cox, 9 Ired. 69 1589, 1614
v. McLeod, 1 Sm. & M. 391 423
v. Tumbridge, 2 M. & W. 223 785, 1230, 1234
Pooley v. Dutton, 165 Iowa 745 4980, 4981
v. Harradine, 7 El. & B. 431 2806
Poor v. Woodburn, 25 Vt. 239 4362
Pope v. Allis, 115 U. S. 363 2393
v. Baltimore W. Co., 103 Md. 9 2276
v. Barrett, 1 Mason 117 2960
v. Caddell, 125 Ky. 837 2501
v. Dodson, 58 Ill. 360 674
v. Ferguson, 82 N. J. L. 566 2276, 2341
v. Graniteville Mfg. Co., 1 Ga. App. 176 286, 318, 502
v. Hahnke, 155 Ill. 617 1829
v. Jenkins, 30 Mo. 528 1136, 4327, 4342
v. King, 108 Md. 37 2684
v. Marshall, 78 Ga. 635 980
v. Pollock, 46 Ohio St. 367 4608, 4610
v. Porter, 102 N. Y. 366 2232
v. Transparent I. Co., 91 Va. 79 741
v. Tunstall, 2 Ark. 209 761, 762
v. United States, 26 Ct. of Cls. 11 3105
v. Welsh, 18 Ala. 631 4572
v. Western U. Tel. Co., 14 Ill. App. 531 3607
Pope Metals Co. v. Sadek, 149 Wis. 394 325, 2275
v. Sandoval Z. Co., 148 Ill. App. 444 2274, 2280
Popham v. Barnard, 77 Mo. App. 619 3429
Popiel v. Manhasset Mortgage Co. (Misc.), 146 N. Y. Supp. 1073 3186
Poposkey v. Munkwitz, 68 Wis. 322 3189, 3190, 3191, 3196, 3218, 3231
Popp v. L. & N. R. Co., 101 Ky. 157 1805
Poppenburg v. R. M. Owen & Co., 84 N. Y. Misc. 126 861, 929, 2258
Poppenhusen v. Seeley, 3 Keyes 150 1790
Popper v. Spelz, 184 Ill. App. 35 2755
Poppers v. Meagher, 148 Ill. 192 843, 863
Popple v. Sylvester, 22 Ch. Div. 98 961, 969
Poppleton v. Jones, 42 Ore. 24 1097
Porges v. Jacobs, 75 Ore. 488 3882
Porier Mfg. Co. v. Griffin, 104 Minn. 239 1447
Port v. Huntingdon, etc., R. Co., 168 Pa. 19 4145
v. Jackson, 17 Johns 239 2874
v. Robbins, 35 Iowa 208 2804
Port Blakely M. Co. v. Sharkey, 102 Fed. 259 3381
Port Carbon I. Co. v. Groves, 68 Pa. 149 2376
Port Glasgow & N. S. Co. v. Caledonia R. Co., 19 Rettie 608 489
Port Hunter, The, [1910] Prob. Div. 343 2725, 2729
Port Huron, etc., R. Co. v. Voorheis, 50 Mich. 506 3964
Port Jervis v. First Nat. Bank, 96 N. Y. 550 299, 307
Port Royal v. Graham, 84 Pa. 426 1016
Port Townsend S. R. Co. v. Barbare, 46 Wash. 275 4134
Portable E. Mfg. Co. v. Bradley, 158 Iowa 19 231, 260
Porter v. Aberdeen & R. R., 148 N. C. 563 3734, 3759
v. Boone, 1 W. & S. 252 633
v. Botkins, 59 Pa. 484 469, 4580
v. Bradley, 7 R. I. 538 2156, 2186, 3189
v. Brown, 11 Ariz. 153 624
v. Burkett, 65 Tex. 383 2697, 2705
v. Chicago, etc., R. Co., 99 Iowa 351 680, 681
v. Davis, 2 How. Pr. 30 588

[REFERENCES ARE TO PAGES]

Porter v. Delaware, etc., R. Co., 73 N. J. L. 405 345, 4667
v. Delaware, etc., R. Co., 134 Fed. 155 4661, 4700, 4737
v. Dunn, 61 Hun 310 2469
v. Duval, 60 Misc. (N. Y.) 122 2580
v. Elizalde, 125 Cal. 204 2464
v. Fletcher, 25 Minn. 493 4380, 4433
v. Forment, 47 Cal. 165 3943
v. Gjertsen, 37 Minn. 386 4614
v. Grimsley, 98 N. C. 550 1118
v. Hanley, 10 Ark. 187 3710
v. Hannibal, etc., R. Co., 71 Mo. 66 339, 3643, 4662, 4858
v. Hellingsworth, 30 N. Y. Misc. 628 2510
v. Henderson, 11 Mich. 20 4594
v. Hildebrand, 14 Pa. 129 3521, 3532
v. Hill, 9 Mass. 34 2072, 2088
v. Hopkins, 63 Cal. 53 1730
v. Hopkins, 91 Ohio St. 74 5159
v. Horton, 80 Ill. App. 333 2851
v. Ingraham, 10 Mass. 88 632, 1903
v. International B. Co. (N. Y. Misc.), 137 N. Y. Supp. 214 1440, 3754
v. Johnson, 96 Ga. 145 10, 268
v. Knight, 63 Iowa 365 1690, 1691, 1701, 1706
v. Long, 136 Mich. 150 1074
v. Mack, 50 W. Va. 581 372
v. Metropolitan E. R. Co., 120 N. Y. 284 5
v. Munger, 22 Vt. 191 1179
v. Nash, 1 Ala. 452 1115
v. New England, The, 17 Mo. 290 3449, 3452
v. North Missouri R. Co., 33 Mo. 128 3926
v. Noyes, 2 Me. 26 2147
v. Price, 80 Fed. 655 1202
v. Roseman, 165 Ind. 255 684
v. Rummery, 10 Mass. 64 1491
v. Scranton City, 36 Pa. Super. 218 371, 4034
v. Seiler, 23 Pa. 424 1309
v. Stanley, 47 Me. 515 1588
v. Steamboat New England, 17 Mo. 290 222
v. Sweeney, 61 Tex. 216 3131
v. Travis, 40 Ind. 556 1941, 1942, 1947
v. Tull, 6 Wash. 408 3144
v. Whitlock, 142 Iowa 66 1483, 2545, 2575
v. Woodruff, 36 N. J. Eq. 174 2902
v. Woods, 3 Humph. 56 233, 356, 537, 2667, 2682
v. Wormser, 94 N. Y. 431 2946
Porter N. Co. v. National N. Co., 22 Fed. 829 4441
Porter S. Mfg. Co. v. United Contractors, 80 N. J. L. 115 2670
Porter's App., 94 Pa. 332 1089
Porter's Est., 21 Pa. Dist. 330 1087
Porterfield v. Humphreys, 8 Humph. 497 3353
Porteus v. Doe, 115 Minn. 281 3415
Portis v. Merri'l, 33 Ark. 416 976
Portland v. Investment Co., 64 Ore. 410 4134
v. Tigard, 64 Ore. 404 4105, 4130, 4138, 4139, 4140
Portland Bank v. Stubbs, 6 Mass. 422 3293
Portland Co. v. Searle, 169 Fed. 968 2259, 2262, 2263
Portland & R. R. Co. v. Deering, 78 Me. 61 236, 1434, 4038, 4059, 4063
Portland & S. R. Co. v. Clarke County, 48 Wash. 509 4004
v. Ladd, 47 Wash. 88 4040
Portman v. Middleton, 4 C. B. (N. S.) 322 196, 2603
Portneuf I. Co. v. Budge, 16 Idaho 116 4102
Portneuf M. Valley I. Co. v. Portneuf I. Co., 19 Idaho 483 4048
Portsmouth Ins. Co. v. Brazee, 16 Ohio 82 3006, 3022
v. Brinckly, 2 Ins. L. J. 842 3039
Portsmouth Sav. Bank v. Yeiser, 81 Neb. 343 820, 1048, 2152
Posener v. Long (Tex. Civ. App.) 156 S. W. 591 4764
Posey v. Garth, 7 Mo. 94 2524
v. West C. Co., 92 Miss. 736 525
Posner v. Rosenberg, 149 App. Div. (N. Y.) 272 697, 862
v. Seder, 184 Mass. 331 2547
Post v. Aetna Ins. Co., 43 Barb. 351 3019, 3021
v. Arnot, 2 Denio 344 826
v. Burger & Gohlke, 216 N. Y. 544 5172
v. Campau, 42 Mich. 90 2094, 2173, 2174, 2175
v. Davis, 7 Kan. 217 284
v. Doremus, 60 N. Y. 371 1786, 1793
v. Doremus, 1 Hun 521 1793
v. Hampshire Mut F. Ins. Co., 12 Metc. (Mass.) 555 3040, 3055
v. Hartford St. R. Co., 72 Conn. 362 4791
v. Jackson, 17 Johns. 239 2192, 2894
v. Jones, 19 How. 150 2718, 2735
v. Losey, 111 Ind. 74 2755
v. Merritt, 85 App. Div. (N. Y.) 239 3768
v. Munn, 4 N. J. L. 61 164, 4184, 4199, 4299
v. Olmsted, 47 Neb. 893 4941
v. Robertson, 1 Johns. 24 3294
v. Tradesmen's Bank, 28 Conn. 420 673
v. Union Nat. Bank, 159 Ill. 421 674, 675
v. Vetter, 2 E. D. Smith 248 3233
Post B. S. Co. v. Williams, 57 Ill. App. 434 1741
Post-Intelligencer Pub. Co. v. Harris, 11 Wash. 500 703
Post Office Site, In re, 210 Fed. 832 3996, 4024, 4151
Post P. Co. v. Butler, 137 Fed. 723 4591
v. Hallam, 59 Fed. 530 4517, 4530
v. Peck, 199 Fed. 6 4534, 4538
Postal Tel. C. Co. v. Akron C. Co., 3 Ohio C. Co., 3 Ohio C. C. (N. S.) 259 3569
v. Alabama & V. R. Co., 68 Miss. 314 4067, 4068
v. Barwise, 11 Colo. App. 328 3546, 3569, 3570
v. Beal, 159 Ala. 249 3588, 3609, 3622, 3654
v. Bruen, 39 N. Y. 220 3960
v. Christian, 102 Miss. 845 3618
v. Douglass, 96 Ga. 816 1414
v. Ford, 117 Ala. 612 3609
v. Hulsey, 132 Ala. 444 149, 4679
v. Lathrop, 131 Ill. 575 3601
v. Likes, 225 Ill. 249 4654
v. Louisville, C. O. Co., 136 Ky. 843 3559, 3564

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Postal Tel. C. Co. v. Morgan's L. & T. R. & S. Co., 49 La. Ann. 58 4069
49 La. Ann. 58 4069
v. Nichols, 159 Fed. 643 3552, 3564
v. Northern Pac. R. Co., 211 Fed. 824 4066
v. Pace G. Co. (Tex. Civ. App.), 126 S. W. 1172 3546
v. Peyton, 124 Ga. 746 4131
v. Railroad Co., 49 La. Ann. 1270 4069
v. Schaeffer, 23 Ky. L. Rep. 344 3551, 3613, 3616
v. Smith (Tex. Civ. App.), 124 S. W. 733 3654
v. Sunset C. Co., 102 Tex. 148 182, 3564, 3570, 3591
v. Talerico (Tex. Civ. App.), 136 S. W. 575 3564, 3567, 3595
v. Terrell, 124 Ky. 822 3622
v. Wells, 82 Miss. 733 3546, 3551
v. Zopfi, 93 Tenn. 369 153
Postal Tel. C. Co. of Idaho v. Oregon S. L. R. Co., 104 Fed. 623 4067
Postal Tel. C. Co. of Montana v. Oregon S. L. R. Co., 114 Fed. 787 4067
Postal Tel. C. Co. of Utah v. Oregon S. L. R. Co., 23 Utah 474 4067, 4068
v. Oregon S. L. R. Co., 114 Fed. 787, 104 Fed. 623 4067, 4069
Posthoff v. Bauendahl, 43 Hun 570 2889
v. Schreiber, 47 Hun 593 2890
Postlethwait v. Garrett, 3 T. B. Mon. 345 992
Postlewaite v. Postlewaite, 1 Ind. App. 473 4978
Postmaster-General v. Furber, 4 Mason 333 736
v. Munger, 2 Paine C. C. 189 1589, 1614
v. Norvell, Gilpin 106 707, 1582
v. Rice, Gilpin 554 1559
Poston v. Jones, 2 Ired. Eq. 350 3122
v. Jones, 2 Dev. & B. 294 3693
v. Rose, 87 N. C. 279 553
Poteet v. Western U. Tel. Co., 74 S. C. 491 3613, 3654
Pothinger v. Owensboro W. Co., 6 Ky. L. Rep. 453 209
Potomac, The, 105 U. S. 630 5003
Potomac B. Works v. Barber, 103 Md. 509 2274
Potomac Co. v. Union Bank, 3 Cranch C. C. 101 1199
Potomac P. Co. v. Burchell, 109 Va. 676 869, 876
Potter v. Ahrens, 110 Cal. 674 892
v. Batt, 72 N. J. L. 470 4560
v. Brown, 5 East 124 1151
v. Chicago, etc., R. Co., 21 Wis. 372, 22 Wis. 615 1501, 1515, 3529, 4871, 4937
v. Douglass, 44 Conn. 546 813
v. Everitt, 7 Ired. Eq. 152 3716
v. Froment, 47 Cal. 165 1363, 1368, 3882
v. Gronbeck, 117 Ill. 404 2821
v. Hammondsport, 112 App. Div. (N. Y.) 91 1465
v. Indiana, etc., R. Co., 95 Mich. 389 3885, 3933
v. John Welch & Sons, Ltd., [1914] 3 K. B. 1020, W. C. & Ins. Rep. 607, 7 B. W. C. C. 738 5202
v. Lansing, 1 Johns. 215 2934
v. Leviton, 199 Ill. 93 1806
v. McPherson, 61 Mo. 240 905
Potter v. Mardre, 74 N. C. 36 4260, 4262, 4263
v. Mellen, 36 Minn. 122 40
v. Merchants' Bank, 28 N. Y. 641 2331, 4273, 4278
v. Metropolitan R. Co., 28 L. T. (N. S.) 735 4693
v. Necedah L. Co., 105 Wis. 25 4363, 4364, 4393, 4400
v. New York Evening Journal Pub. Co., 68 App. Div. (N. Y.) 95 4505, 4532, 4544, 4571
v. North, 1 Saund. 347 4348
v. Ocean Ins. Co., 3 Sumn. 27 3000
v. Providence W. Ins. Co., 4 Mason 298 3028
v. Putnam, 74 Conn. 189 3990
v. Stamfli, 2 Kan. App. 788 1386
v. Swindle, 77 Ga. 419 4840
v. Taggart, 59 Wis. 1 4372, 4417
v. Taylor, 6 Vt. 676 2058
v. Titcomb, 7 Me. 319 1599
v. Truitt, 3 Harr. 331 3104
v. United States, 122 Fed. 49 4257
v. Washburn, 13 Vt. 558 4174
v. Webb, 6 Me. 14 1570
v. Western U. Tel. Co., 138 Iowa 406 3634, 3656, 3657
v. Whatcom, 25 Wash. 207 1045
Pottlitzer v. Wesson, 8 Ind. App. 472 748
Pottoff v. Hanson, 174 Fed. 983 2225
Potts v. Chapin, 133 Mass. 276 3685
v. Coleman, 67 Ala. 221 698
v. Minneapolis, St. P. & S. S. M. R., 124 Minn. 413 3995, 4100
v. Nathans, 1 W. & S. 155 2800
v. Polk County, 80 Iowa 401 746
v. Railroad Co., 119 Pa. 278 4127
Pottstown G. Co. v. Murphy, 39 Pa. 257 3839, 3840, 3841
Pottsville, etc., Ins. Co. v. Minnequa Springs, etc., Co., 100 Pa. 137 2914
Potulni v. Saunders, 37 Minn. 517 3830, 4159
Poucher v. Norman, 3 B. & C. 744 2469
v. Scott, 98 N. Y. 422 699
Poulin v. Canadian Pac. R. Co., 52 Fed. 197 3463
Poulson v. Collier, 18 Mo. App. 583 715, 741
v. Markus, 34 S. D. 428 1952
Poulton v. Lattimore, 9 B. & C. 259 494, 516, 2390
Pounder v. Northeastern R., [1892] 1 Q. B. 385 185
Pounds v. Coburn, 210 Mo. 115 2214
Pounsett v. Fuller, 17 C. B. 660 1975, 1997, 2002
Poupard v. Dumas, 105 Mich. 326 4645
Poutra v. Martin, — Tex. Civ. App. —, 135 S. W. 725 3243
Pow v. Davis, 1 B. & S. 221 2986
Powe v. Powe, 42 Ala. 113 1235, 2329
Powell v. Aiken, 4 K. & J. 343 3786
v. Augusta & S. R. Co., 77 Ga. 200 4669
v. Beckley, 28 Neb. 157 3232
v. Blow, 34 Mo. 485 701
v. Brodhurst, [1901] 2 Ch. 160 695
v. Brookfield P. B. & T. Mfg. Co., 104 Mo. App. 713 3839, 3846
v. Burroughs, 54 Pa. 329 857, 884, 909, 3116
v. Dayton R. Co., 16 Ore. 33 3127
v. Deveney, 3 Cush. 300 71
v. Freeman, 105 Tex. 317 5054
v. Glenn, 21 Ala. 458 4290

[REFERENCES ARE TO PAGES]

Powell v. Guy, 3 Dev. & Batt. 70 1109, 1875
v. Hankey, 2 P. Wms. 82 1070
v. Henry, 27 Ala. 612 677
v. Hill (Tex. Civ. App.), 152 S. W. 1125 4185, 4186
v. Hinsdale, 5 Mass. 342 4362
v. Horrell, 92 Mo. App. 406 1075, 1076
v. Horton, 2 Bing. N. C. 668 2388
v. Howard, 109 Mass. 192 2676
v. Knighton, 43 Ala. 626 611
v. Martyr, 8 Ves. 146 1026, 1965
v. Monson Co., 6 Mason 355 2147
v. Monson & B. Mfg. Co., 3 Mason 347 3717
v. Myers, 26 Wend. 591 3529
v. Nevada, etc., R. Co., 28 Nev. 40 56, 4793
v. New England C. Y. Co., 154 App. Div. (N. Y.) 875 2306, 2371, 2379, 2404
v. Newburgh, 19 Johns. 284 2970, 2976, 2977
v. Newell, 59 Minn. 406 2534
v. Ong, 92 Ill. App. 95 4273
v. Pennsylvania R. Co., 32 Pa. 414 3335
v. Russell, 88 Miss. 549 2527
v. Salisbury, 2 Y. & J. 391 66, 111
v. Smith, 8 Johns. 249 2835, 2851
v. Strickland, 163 N. C. 393 341
v. Thompson, 80 Ala. 51 433
v. Union Pac. R. Co., 255 Mo. 420 4871, 4883, 4884
v. Waters, 17 Johns. 176 2783
v. White, 11 Leigh 309 644
v. Wiley, 125 Ga. 823 467
v. Woodbury, 85 Vt. 504 1716, 4611, 4633, 4647
Power v. Augusta, 191 Fed. 647 1484, 4652, 4656, 4669
v. Barham, 4 A. & E. 473 2388
v. Brown, 2 Ohio C. C. (N. S.) 320 264, 384
v. Butcher, 10 B. & C. 329 2848
v. Harlow, 57 Mich. 107 4670, 4671
v. North, 15 S. & R. 12 2013
v. Turner, 37 Mont. 521 1431
v. Whitmore, 4 M. & S. 141 3034, 3035
Powers v. Benson, 120 Iowa 428 4316, 4348
v. Chicago, etc., R. Co., 130 Iowa 615 3334, 3430
v. Clarke, 127 N. Y. 417 2744, 2750
v. Council Bluffs, 45 Iowa 652 400, 3849, 3866, 3878
v. Dennison, 30 Vt. 752 2059
v. Harris, 42 Tex. Civ. App. 250 760
v. Lynch, 3 Mass. 77 1150
v. Manhattan R. Co., 120 N. Y. 178 1276, 1281, 4085
v. Presgroves, 38 Miss. 227 468, 471, 4530, 4572, 4573, 4595
v. St. Louis, etc., R. Co., 158 Mo. 87 3860
v. Tilley, 87 Me. 34 4256
v. Ware, 4 Pick. 106 413
v. Wheatley, 45 Cal. 113 3671
v. Wilson, 47 Iowa 666 2539
v. Woolfolk, 132 Mo. App. 354 531, 686
v. Yonkers, 114 N. Y. 145 2599
Powers M. Co. v. Wells-F. & Co., 93 Minn. 143 3414, 3419
Powles v. Page, 3 C. B. 16 754
Powley v. Vivian & Co., 169 N. Y. App. Div. 170 5175
Poyntell v. Spencer, 6 Pa. 254 2206, 2208
Poynter v. Mallory, 20 Ky. L. Rep. 284 2803
v. United States, 41 Ct. of Cls. 443 2666
Prader v. Grim, 13 Cal. 585 305, 1705
v. Grimm, 28 Cal. 11 1719, 1727
v. National Masonic A. Ass'n, 95 Iowa 149 3000
Praed v. Graham, 24 Q. B. Div. 53 1497, 4521, 4522, 4549, 4552
Prairie v. Worth, 78 N. C. 169 1597
Prairie Creek C. M. Co. v. Kittrell, 106 Ark. 138 4704
Prairie F. Co. v. Taylor, 69 Ill. 440 545
Prairie State L. & B. Ass'n v. Nubling, 64 Ill. App. 329 1186
Pranke v. Herman, 76 Wis. 428 4312
Pratalongo v. Larco, 47 Cal. 379 1909
Prather v. Chicago S. R. Co., 221 Ill. 190 3980, 3986
v. First Presbyterian Soc., 13 Ohio N. P. (N. S.) 169 1509, 2480
Pratt v. Adams, 7 Paige 615 1161, 1163, 1166
v. Auto Springs R. Co., 196 Fed. 495 2260, 2261
v. Bates, 40 Mich. 37 2191
v. Coman, 37 N. Y. 440 669
v. Davis, 118 Ill. App. 161, aff'd 224 Ill. 300 32, 1288, 1324, 1372, 1375, 4659, 4774, 4794
v. Dunlap, 85 Conn. 180 475, 2643, 2681
v. Foote, 9 N. Y. 463 630
v. Freeman & Sons Mfg. Co., 115 Wis. 648 2241, 2243, 2247, 2248, 2249
v. Hampe, 114 Iowa 237 4622
v. Johnson, 100 Me. 443 2455
v. Law, 9 Cranch. 494 2047
v. McJunkin, 4 Rich. 5 1645
v. Manhattan L. Ins. Co., 47 La. Ann. 855 1089
v. New York Cent. Ins. Co., 55 N. Y. 505 3019
v. Northam, 5 Mason 95 643
v. Paine, 119 Mass. 439 3196
v. Patterson, 112 Pa. 475 2512
v. Philbrook, 41 Me. 132 2381
v. Pioneer Press Co., 35 Minn. 251 1518, 4503, 4506, 4518, 4521, 4531, 4587
v. Thomas, 2 Hill. (S. C.) 654 1529
v. Wallbridge, 16 Ind. 147 990
Pratt Engineering & Machine Co. v. Trotti, 142 Ga. 401 1276
Pray v. Life Ind. & S. Co., 104 Iowa, 114 1090
v. Maine, 7 Cush. 253 637
v. Wasdell, 146 Mass. 324 1782
Preas v. Vollentine, 53 Wash. 137 1824
Preble v. Boghurst, 1 Swanst. 580 839
v. Bottom, 27 Vt. 249 2696
v. Wabash R. Co., 243 Ill. 340 4883
v. Wabash R. Co., 149 Ill. App. 584 4883
Predmore v. Consumers' L. & P. Co., 99 App. Div. (N. Y.) 551 4934, 4942
Pregenzer v. Burleigh, 6 N. Y. Misc. 140 3308
Prehn v. Royal Bank, L. R. 5 Ex. 92 277, 278, 1899
Preiser v. Wielandt, 48 App. Div. 569 96, 166
Prendergast v. Chicago City R. Co., 114 Ill. App. 156 4920, 4935
v. Turner, 1 Y. & C. 98 874
Prentice v. Dike, 6 Duer 220 2405, 2415
v. Elliott, 72 Ga. 154 1072, 1073

[REFERENCES ARE TO PAGES]

Prentice v. Pickersgill, 6 Wall. 511 1804
v. Townsend, 143 App. Div. (N. Y.) 151 2006
v. Zane, 2 Gratt. 262 1818
Prentiss v. Barnes, 6 Allen 410 1364
v. Ledyard, 28 Wis. 131 2545, 2556
v. Russ, 16 Me. 30 3685
v. Shaw, 56 Me. 427 339, 465, 467, 4662, 4783
v. Wood, 132 Mass. 486 3844
Presbyterian Board of Publication, etc., v. Gilliford, 139 Ind. 524 2749
Presbyterian Church v. United States, 33 Ct. of Cls. 339 3748
Prescott v. Grimes, 143 Ky. 191 27, 3837
v. Maxwell, 48 Ill. 82 1241
v. Otterstatter, 85 Pa. 534 3235, 3238
v. Parker, 4 Mass. 170 1052, 1221
v. Robinson, 74 N. H. 460 30, 165, 4667, 4671, 4675, 4681
v. Tousey, 50 N. Y. Super. 12 4511, 4523, 4528
v. Trueman, 4 Mass. 627 2054, 2136, 2146, 2151, 2152, 2175, 2181
v. White, 21 Pick. 341 2148
Prescott Bank v. Caverly, 7 Gray 216 1869
President, The, 92 Fed. 673 3450, 3452
President, etc., v. Wadleigh, 7 Blackf. 102 532
President, etc., Delaware & H. C. Co. v. Pennsylvania C. Co., 50 N. Y. 250 2221, 2683
Preslar v. Stallworth, 37 Ala. 402 2831, 2833, 2835, 2848, 2871
Presley v. Davis, 7 Rish. Eq. 195 1645
Press P. Co. v. McDonald, 63 Fed. 238 4528, 4529, 4543
Press Pub. Co. v. Monroe, 73 Fed. 196 1326, 4477, 4482
v. Reading News Agency, 44 Pa. Super. 428 264
Presse v. Watrous, 30 Conn. 139 1658, 1663
Pressed Steel Car Co. v. Eastern R. Co., 121 Fed. 609 837, 863, 888
Presser v. Hildebrand, 23 Iowa 483 2046
Pressman v. Mooney, 5 App. Div. (N. Y.) 121 4920
Prest v. Cole, 183 Mass. 283 763, 806
Preston v. American L. Co., 119 Mass. 400 2525, 2536
v. American S. Co., 104 Md. 40 2767
v. Campbell, 3 Hayw. 20 2863
v. Cedar Rapids, 95 Iowa 71 4004
v. Cooper, 1 Dill. 589 4606
v. Finney, 2 W. & S. 53 543
v. Frey, 91 Cal. 107 4513, 4577
v. Garrard, 120 Ga. 689 2792
v. Grant, 34 Vt. 201 745
v. Leighton, 6 Md. 88 1415
v. Newton, 213 Mass. 483 4025
v. Prather, 137 U. S. 604 4221
v. Preston, 4 Gratt. 88 2857
v. Syracuse, 158 N. Y. 356 2655
v. Walker, 26 Iowa 205 1208
v. Walker, 109 Ga. 290 2200
Prestons v. McCall, 7 Gratt. 121 3116
Prestwood v. Carlton, 162 Ala. 327 47, 284, 3188, 3196
v. McGowin, 128 Ala. 267 2058, 2093, 2095, 2098
v. Watson, 111 Ala. 604 3692, 3702
Pretty v. Bickmore, L. R. 8 C. P. 401 3843
Prettyman v. Barnard, 37 Ill. 105 674
v. Oregon R. & N. Co., 13 Ore. 341 3389, 3397
v. Short, 5 Harr. 360 **1871**
Prettyman v. Williamson, 1 Pennew. (Del.) 224 4971, 4974, 4975, 4976
Previsich v. Butte E. R. Co., 47 Mont. 170 1507
Prevo v. Lathrop, 2 Ill. 305 947
Prevost v. Gratz, 3 Wash. C. C. 434 2211
Prewitt v. Southwestern Tel. & T. Co., 46 Tex. Civ. App. 123 1500
v. Trimble, 92 Ky. 176 4388
v. Wilson, 128 Iowa 198 4505, 4512
Pribbeno v. Same, 81 Neb. 657 3893
Pribble v. Kent, 10 Ind. 325 4271
Price v. Central R. Co., 110 Ga. 280 3458
v. Clapp, 119 Tenn. 425 1328, 1531, 4537, 4546
v. Deal, 90 N. C. 290 2056, 2060, 2092
v. Dearborn, 34 N. H. 481 1397
v. Denison, 95 Minn. 106 4634
v. Denver, etc., R. Co., 12 Colo. 402 3282
v. Drainage Com'rs, 253 Ill. 114 3964
v. Eisen, 31 N. Y. Misc. 457 3199
v. Grautz, 118 Pa. 402 3848
v. Great Western R. Co., 16 M. & W. 244 1033
v. Green, 16 M. & W. 346 835, 869
v. Greer, 76 Ark. 426 3734
v. Hamilton, 12 S. C. 32 714
v. Hartshorn, 44 Barb. 655 3287
v. Hay, 132 Ill. 543 2464
v. High Shoals Mfg. Co., 132 Ga. 246 32, 320
v. Hobbs, 47 Md. 359 3719
v. Justrobe, Harp. 111 2337
v. Lewis, 17 Pa. St. 51 533, 549
v. Merritt, 55 Mo. App. 640 741
v. Metropolitan St. R. Co., 220 Mo. 435 1382
v. Milwaukee, etc., R. Co., 27 Wis. 98 3996
v. Northern Elec. R. Co., 168 Cal. 173 4747
v. Oswego, etc., R. Co., 50 N. Y. 213 3425
v. Page, 24 Mo. 67 1905
v. Peterson, 38 Ark. 494 1122
v. Pickett, 21 Ala. 741 3131
v. Price, 101 Ky. 28 2473
v. Reynolds, 39 N. J. L. 171 519, 557
v. St. Louis, etc., R. Co., 133 Mo. App. 653 126, 312
v. Severn, 7 Bing. 316 1495, 3528
v. United States, 33 Ct. of Cls. 106 57
v. Warren, 1 Hen. & M. 385 1483
v. Weehawken F. Co., 31 N. J. Eq. 31 4053
v. Whitely, 50 Mo. 439 4506, 4540
v. Wright, 35 New Bruns. 26 335, 4653, 4780
Price C. & V. Co. v. Haley, 137 Ky. 305 4809
Price's Est., 18 Pa. Dist. 442 1130
Prichard v. Evans, 31 W. Va. 137 2211
v. Martin, 27 Miss. 305 2545, 2548, 2551
v. Miller, 86 Ala. 500 946
v. Mulhall, 127 Iowa 545 1937, 1941
v. Mulhall, 140 Iowa 1 1970, 2031, 2931
Prickett v. Badger, 1 C. B. (N. S.) 296 2506, 2508
v. Crook, 20 Wis. 358 1276
v. Ritter, 16 Ill. 96 3099
Pride v. Boyce, Rice Eq. 386 2841
Prideaux v. Mineral Point, 43 Wis. 513 108
Pridgen v. Andrews, 7 Tex. 461 962
v. Hill, 12 Tex. 374 1010

[REFERENCES ARE TO PAGES]

Pridgen v. McLean, 12 Tex. 420 1879
Pridgeon v. Excelsior B. Club, 66 Mich. 326 3124, 3125
Pridgin v. Strickland, 8 Tex. 427 4233
Pries v. Ashland L., P. & St. R. Co., 143 Wis. 606 4856
Priest v. Eide, 19 Mont. 53 1247
v. Nichols, 116 Mass. 401 316, 1419, 1423, 3249
v. Watkins, 2 Hill. 225 693
Priestley v. Maclean, 2 F. & F. 288 161
v. Northern I. & C. R. Co., 26 Ill. 207 234, 3343, 3393
Prigdon v. McLean, 12 Tex. 420 1184
Prignitz v. McTiernan, 18 N. Y. Misc. 651 1536
Prime v. Eastwood, 45 Iowa 640 4535, 4555, 4562
Primeau v. Granfield, 184 Fed. 480 1122
v. National L. Ass'n, 77 Hun 418 622
Primley v. Shirk, 163 Ill. 389, aff'g 60 Ill. App. 312 944
Primrose v. Western U. Tel. Co., 154 U. S. 1 3414, 3546, 3553, 3554, 3560
Prince v. Brooklyn Eagle, 16 N. Y. Misc. 186 1324, 4542
v. Hake, 75 Wis. 638 337
v. Lamb, 1 Ill. 378 1055, 1184
v. Lamb, 138 Cal. 120 1355, 1879
v. Lynch, 38 Cal. 528 424, 773, 776
v. Moulton, 1 Ld. Raym. 248 388
v. Ocean Ins. Co., 40 Me. 481 3010
v. St. Louis C. C. Co., 112 Mo. App. 49 4221, 4269, 4295
v. State Mut. L. Ins. Co., 77 S. C. 187 1259, 3089
Prince Albert v. Strange, 1 MacN. & G. 25 4478
Prindle v. Haight, 83 Wis. 50 460, 466
Pringle v. Philadelphia Cas. Co., 153 App. Div. (N. Y.) 180 1091
v. Spaulding, 53 Barb. 17 1989
v. Witten, 1 Bay 256 2056
Printing Ass'n v. Smith, 55 Fed. 240 4599
Prinz Heinrich, The, 13 Prob. Div. 31 2719
Prior v. Eggert, 39 Wash. 481 4652, 4717
v. Morton B. Stables, 43 App. Div. (N. Y.) 140 4228
v. Powers, 1 Keb. 811 1482
Priscilla, The, 153 Fed. 476 2726
Pritchard v. Comer, 71 Ga. 18 704, 709, 742
v. Edison E. I. Co., 179 N. Y. 364 3881, 3889
v. Fox, 4 Jones 140 2405
v. Hennessy, 1 Gray 294 1486, 1490
v. Hewitt, 91 Mo. 547 1498
v. Long, 9 M. & W. 666 1390
v. Norton, 106 U. S. 124 1145, 1147
v. Smith, 77 Ga. 463 663, 666
Pritchet v. Boevey, 1 Cr. & M. 775 306
Pritzlaff H. Co. v. Berghoefer, 103 Wis. 359 2665, 2683
Probate Court v. Bates, 10 Vt. 285 482
v. Merriam, 8 Vt. 234 1639
v. Slason, 23 Vt. 306 1642, 1643
Probst v. Hinesley, 133 Ky. 64 432, 1459, 3881
Procter v. Houghtaling, 37 Mich. 41 4580
v. Southern California R. Co., 130 Cal. 20 3443, 3457
Proctor v. Atlantic Fish Co., 208 Mass. 351 2414
v. Cable Co., 145 Mich. 503 748
v. Cooper, Prec. in Ch. 116 1188
Proctor v. Crozier, 6 B. Mon. 268 1354
v. Eastern R. Co., 105 Mass. 512 3326
v. Irvin, 22 Mont. 547 4269
v. Maine Cent. R. Co., 101 Me. 459 3712
v. Marshall, 18 Tex. 63 728
Proctor C. Co. v. Beaver, 151 Ky. 839 1478
v. Moses, 19 Ky. L. Rep. 419 4620
Produce Reporter Co. v. Adams Exp. Co., 176 Ill. App. 74 3323, 3414
Proebstel v. State Ins. Co., 14 Wash. 669 635
Proffitt v. Henderson, 29 Mo. 325 3835, 3836
Pronk v. Brooklyn Heights R. Co., 68 App. Div. 390 43
Pronskevitch v. Chicago & A. R. Co., 232 Ill. 136 1464, 1467, 4713
Propeller Monticello v. Mollison, 17 How. 152 489
Propeller Tow-boat Co. v. Western U. Tel. Co., 125 Ga. 478 3591
Proprietors of Eastern New Jersey v. Force, 72 N. J. Eq. 56 368
Proprietors of L. & C. v. Lowell Horse R. Co., 109 Mass. 221 295, 299, 307
v. Nashua & L. R. Co., 10 Cush. 385 4017, 4072
v. Newcomb, 7 Met. 276 16
Propsom v. Leatham, 80 Wis. 608 4754
Prospect St., In re, 77 Misc. (N. Y.) 254 4088
Prosser v. Jones, 41 Iowa 674 176, 217, 2581, 2640
v. Whitney, 46 Mich. 407 1799
Protection, The, 102 Fed. 516 3410
Proud v. Bayes, 34 L. J. (Ch.) 406 4036
Proudlove v. Twemlow, 1 Cr. & M. 326 4204
Prout v. Chisolm, 21 App. Div. (N. Y.) 54 2965
Provenzano v. Thayer Mfg. Co., 9 Daly 90 521
Providence, The, 38 C. C. A. 670, 98 Fed. 133 5000, 5005
Providence v. McEachron, 33 N. J. L. 339 1576
Providence W. Ins. Co. v. Bradley F. Co., 33 Fed. 685 3035
v. Western U. Tel. Co., 153 Ill. App. 118 140, 1020, 3574
v. Western U. Tel. Co., 247 Ill. 84 3546, 3601
Providence & W. R. v. Worcester, 155 Mass. 35 3765
Providence, etc., S. Co. v. Fall River, 187 Mass. 45 4155
v. Phoenix Ins. Co., 89 N. Y. 559 3038
Provident L. Ins. Co. v. Baum, 29 Ind. 236 3071
Provident, etc., Co. v. Ellinger, — Tex. Civ. App. —, 164 S. W. 1024 3085, 3087
v. Philadelphia, 202 Pa. 78 4151
Provost v. Cook, 184 Mass. 315 2433
Prude v. Sebastian, 107 La. 64 227, 254
Prudence, The, 212 Fed. 541 4989
Pruett v. Western U. Tel. Co., 6 Tex. Civ. App. 533 3584
v. Williams, 156 Ala. 346 306, 1628, 4190
Pruitt v. Cox, 21 Ind. 15 4964, 4973
v. English, — Tex. Civ. App. —, 173 S. W. 1172 4621, 4622, 4642
v. Gunn, 151 Ala. 651 4314
v. Jones, 14 Tex. Civ. App. 84 4392

[REFERENCES ARE TO PAGES]

Prussing v. Jackson, 208 Ill. 85 1510
v. Jackson, 85 Ill. App. 324 4506
Prussner v. Brady, 136 Ill. App. 395 1288, 3734, 3828
Pruyn v. Milwaukee, 18 Wis. 367 962, 966, 1209
Pryor v. Buffalo, 197 N. Y. 123 951, 952, 2031, 2149
v. Buffalo, 61 N. Y. Misc. 162 1222
v. Foster, 130 N. Y. 171 3258, 3260, 4382, 4389, 4407, 4413, 4416
v. Metropolitan St. R. Co., 85 Mo. App. 367 4694, 4696, 4705
Pryse v. McGuire, 81 Ky. 608 2095, 2205
Publishers' Syndicate, In re, 7 Ont. L. R. 223 38, 209
Pucket v. St. Louis, etc., R. Co., 25 Mo. App. 650 383
Puckett v. McDonald, 6 How. (Miss.) 269 2197
v. National A. Ass'n, 134 Mo. App. 501 378
v. Scott, 45 Tex. Civ. App. 392 3099
Puckford v. Maxwell, 6 T. R. 52 667
Puebla, City of, 153 Fed. 925 2726
Pueblo v. Griffin, 10 Colo. 366 1374
v. Strait, 20 Colo. 13 12, 16, 3951
Puett v. Beard, 86 Ind. 172 583, 589, 591
Puffer v. Welch, 144 Wis. 506 4387
Puget Sound I. Co. v. Frankfort, etc., Ins. Co., 52 Wash. 124 1229, 2874, 2877
Puget Sound I. & S. Works v. Clemmons, 32 Wash. 36 2418, 2421
Puget Sound N. Co. v. Lavander, 160 Fed. 851 4909
Puget Sound, etc., R. Co. v. Foster, — Wash. —, 146 Pac. 154 3962, 3965
Pugh v. Cameron, 11 W. Va. 523 2826
v. Chesapeake & O. R. Co., 101 Ky. 77 433
v. Jackson, 154 Ky. 649 282, 284
v. London, etc., R. Co., [1896] 2 Q. B. 248 93
v. McCarty, 40 Ga. 444 4595
v. Porter Bros. Co., 118 Cal. 628 2947, 2948
v. White, 78 Ky. 210 1715, 1759
Pugmire v. Oregon S. L. R. Co., 33 Utah 27 22, 1376, 1381
Pujol v. McKinley, 42 Cal. 559 965, 967, 1204
Pujolas v. Holland, 3 Irish C. L. 533 505
Pulaski A. C. Co. v. Gibboney S. B. Co., 110 Va. 444 3938
Pulaski G. L. Co. v. McClintock, 97 Ark. 576 56, 146, 4905
Pulaski S. Co. v. Miller's Creek L. Co., 138 Ky. 372 193, 2768, 2773
Pullan v. Stallman, 70 N. J. L. 10 6
Pullen v. Boston E. R. Co., 208 Mass. 356 4742
v. Chase, 4 Ark. 120 1110
v. Glidden, 68 Me. 562 4634, 4643, 4644, 4649
Puller v. Stainforth, 11 East 232 3276, 3277
Pulliam v. Booth, 21 Ark. 420 759
v. Taylor, 50 Miss. 251 752
Pulling v. Great Eastern R. Co., 9 Q. B. Div. 110 4740, 4951
v. Supervisors, 3 Wis. 337 758
Pullis v. Somerville, 218 Mo. 624 1121, 4234
Pullman Co. v. Chicago, 224 Ill. 248 4042, 4047
v. Custer, — Tex. Civ. App. —, 140 S. W. 847 3484, 3533
v. Green, 128 Ga. 142 3541
Pullman Co. v. Hoyle, 52 Tex. Civ. App. 534 1425, 2891, 4742
v. Kelly, 86 Miss. 87 345
v. Lutz, 154 Ala. 517 95, 3483, 3506, 3507
v. Schaffner, 126 Ga. 609 1497, 3539, 3541
v. Stern, 88 Miss. 390 3543
v. Vanderhoeven, 48 Tex. Civ. App. 414 3533
v. Willett, 27 Ohio C. C. 649, 7 Ohio C. C. (N. S.) 173, aff'd 72 Ohio 690 329, 3542, 3543
Pullman P. C. Co. v. Barker, 4 Colo. 344 135, 3452, 4679, 4680
v. Bluhm, 109 Ill. 20 4787
v. Booth (Tex. Civ. App.), 28 S. W. 719 3542
v. Central T. Co., 171 U. S. 138 18, 3109
v. Fowler, 6 Tex. Civ. App. 755 3543
v. Gardner, 3 Penny. 78 3540
v. Gavin, 93 Tenn. 53 3539, 3540
v. Green, 128 Ga. 142 3540
v. Hall, 106 Ga. 765 3539
v. Hocker, 41 Tex. Civ. App. 607 3542
v. King, 99 Fed. 380 3443, 3450, 3483, 3542
v. Krauss, 145 Ala. 395 3542
v. Lawrence, 74 Miss. 782 1273, 1317, 1340, 1343, 1345, 3507, 3523, 4775
v. Lowe, 28 Neb. 239 3539
v. McDonald, 2 Tex. Civ. App. 322 3450, 3457, 3475, 3485
v. Matthews, 74 Tex. 654 3541
v. Metropolitan St. R. Co., 157 U. S. 94 2373
v. Nelson, 22 Tex. Civ. App. 223 3542
v. Pollock, 69 Tex. 120 3539
v. Reed, 75 Ill. 125 1499, 3503
v. Trimble, 8 Tex. Civ. App. 335 3485
v. Woods, 76 Neb. 694 3539
Puls v. Powelson, 142 Iowa 604 1508
Pulsifer v. Hotchkiss, 12 Conn. 234 515, 1839
v. Shepard, 36 Ill. 513 807, 809, 816
Pulteney v. Warren, 6 Ves. 92 1563, 1564, 1573
Pumpelly v. Green Bay Co., 13 Wall. 166 3948, 3949
v. Phelps, 40 N. Y. 60 284, 354, 1985, 1989, 1991, 2008, 3189
Pumphrey v. Eyre, Tappan, 283 647
Punta Gorda Bank v. State Bank, 52 Fla. 399 2744, 2754
Punteney-M. Mfg. Co. v. Northwall Co., 66 Neb. 5 2416
v. Northwall Co. (Neb.) 91 N. W. 863 2372
v. Northwall, 70 Neb. 688 231, 233, 2415, 2455
Purcell v. Daly, 19 Abb. N. C. 301 342
v. Duncan, 107 App. Div. (N. Y.) 501 4779
v. Hannibal, etc., R. Co., 50 Mo. 504 2148
v. McNamara, 9 East 361 4640
v. Lauer, 14 App. Div. (N. Y.) 33 139, 4853, 4941
v. St. Paul City R. Co., 48 Minn. 134 84, 90, 95, 3484, 4667, 4676, 4688
v. Warburton, 70 Wash. 129 3236, 3247
Purdin v. Hancock, 67 Ore. 164 809

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Purdon N. S. Co. v. Western U. Tel. Co., 153 Fed. 327 3566, 3568
Purdy v. Forstall, 45 La. Ann. 814 2814, 2830
v. Nova Scotia Midland R. & I. Co., 11 N. Y. Misc. 406 2547, 2548
v. Peters, 35 Barb. 239 2783
v. Philips, 11 N. Y. 406 943, 1030, 1032, 1881
v. Phillips, 1 Duer 169 1108
Pure O. Co. v. Terry, 209 Pa. 403 1654, 1671
Puritan C. Co. v. Clark, 204 Pa. 556 2250, 2262, 2267, 2284
Puritan C. M. Co. v. Pennsylvania R. Co., 237 Pa. 420 1139, 3284
Puritan Mfg. Co. v. Westimire, 47 Ore. 557 2379
Purkett v. Gregory, 3 Ill. 44 556
Puroto v. Chieppa, 78 Conn. 401 3737
Purple v. Horton, 13 Wend. 9 470, 4581, 4584
Pursiful v. Pineville B. Co., 97 Ky. 154 2809
Purtel v. Morehead, 2 Dev. & Bat. 239 759
Purves' Est., 9 Pa. Dist. 5 2470
Purviance v. Sutherland, 2 Ohio St. 478 2832
Purvis v. Rayer, 9 Price, 488 1953
v. Woodward, 78 Miss. 922 992
Pusey v. Allegheny, 98 Pa. 522 4145
v. Wathen, 90 Ky. 473 2397
Puterbaugh v. Puterbaugh, 7 Ind. App. 280 1953, 1988, 1994, 2473
Puth v. Zimbleman, 99 Iowa 641 4974
Putman v. Home Ins. Co., 123 Mass. 324 2999
v. New York, etc., R. Co., 47 Hun 439 105
v. Ritchie, 6 Paige 390 2027, 2029
v. Southern Pac. Co., 21 Ore. 230 5118
v. Tillotson, 13 Metc. (Mass.) 517 2227
Putnam v. Boston & P. R. Corp., 182 Mass. 351 3951
v. Broadway, etc., R. Co., 55 N. Y. 108 4679
v. French, 53 Vt. 404 684
v. Lewis, 8 Johns. 389 658, 667, 669, 1032
v. New York, etc., R. Co., 47 Hun 439 135
v. Putnam, 13 Pick. 129 824
v. Russell, 17 Vt. 54 703, 708
v. St. Louis S. R. Co., 43 Tex. Civ. App. 448 3799, 3742
v. Southern Pac. R. Co., 21 Ore. 230 4851, 4946
v. Stalker, 50 Ore. 210 4639, 4644
Putney v. Milwaukee L., H. & T. Co., 34 Wis. 379 3960
Putz v. St. Paul G. L. Co., 108 Minn. 243 312, 1511
Pye v. British Auto Com. Syndicate, [1906] 1 K. B. 425 842, 913
v. Faxon, 156 Mass. 471 3741
v. Gillis, 9 Ga. App. 725 340, 1327, 4690
Pyke v. Clark, 3 B. Mon. 262 1000
v. Jamestown, 15 N. D. 157 327, 4681
Pym v. Great Northern R. Co., 2 B. & S. 759, 4 B. & S. 396 4852, 4899, 4912, 4935, 4951
Pyott L. & M. Co. v. Tarwater, 126 Tenn. 601 1737

Q

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Quain v. Russell, 8 Hun 319 60
Qualy v. Johnson, 80 Minn. 408 4314, 4315
Quanah, A. & P. Ry. Co. v. Campbell, — Tex. Civ. App. —, 170 S. W. 859 3390
v. Galloway (Tex. Civ. App.), 154 S. W. 653 4
Quarles v. George, 23 Pick. 400 2276
v. Quarles, 2 Munf. 321 1121
Quarnberg v. Chamberlain, 29 S. D. 377 231, 1721, 1728, 1750
Quartz Hill Con. G. M. Co. v. Eyre, 11 Q. B. Div. 674 4606, 4610
Quay v. Duluth, etc., R. Co., 153 Mich. 567 235, 245, 4195
Quebec v. Gulf, etc., R. Co., 98 Tex. 6 768
Queen, The, 2 Adm. & Ecc. 53 2721
Queen, The, 40 Fed. 694 345, 349, 4989
Queen v. Fall, 10 L. J. (Q. B.) 145 1488
v. Waterhouse, L. R. 7 Q. B. 545 3850
Queen Anne Boulevard, In re, 77 Wash. 91 4107, 4108
Queen City Bank v. Brown, 75 Hun 259 524, 2830
Queen City F. Ins. Co. v. First Nat. Bank, 18 N. D. 603 2917
Queen City G. Co. v. Pittsburg C. P. Co., 97 Md. 429 535, 2374
Queen Ins. Co. v. Jefferson Ice Co., 64 Tex. 578 1089, 3008
v. McCoin, 105 Ky. 806 3051
Queen Mab, The, 3 Hagg. 242 2727
Queen of Arkansas Ins. Co. v. Taylor, 100 Ark. 9 3046
Queen of the Pacific, The, 25 Fed. 610 2726
Queensland Nat. Bank v. Peninsular & O. S. N. Co., [1898] 1 Q. B. 567 3384
Querini Stamphalia, The, 19 Fed. 123 3282
Quesnel v. Woodlief, 6 Call 218 2047
Quick v. Swing, 53 Ore. 149 2545, 2561
v. Taylor, 113 Ind. 540 2150
v. Walker, 125 Mo. App. 257 2093, 2112, 2143
Quidnuck Co. v. Chafee, 13 R. I. 438 668
Quigley v. Birdseye, 11 Mont. 439 32, 33
v. C. S. Brackett Co., 124 Minn. 366 840, 891
v. Central Pac. R. Co., 11 Nev. 350 341, 1297, 1344, 1495, 3474, 3478, 3501, 3507, 4662
v. De Haas, 82 Pa. 267 376, 2659
Quigley F. Co. v. Rhea, 114 Va. 271 3788, 4308
Quill v. Southern Pac. Co., 140 Cal. 268 4933
Quillen v. Betts, 1 Pennew. 53 2
Quimby v. Boston & M. R. Co., 150 Mass. 365 21, 3415
v. Carter, 20 Me. 218 1536, 4392
Quimby's Estate, In re, — N. J. L. —, 92 Atl. 56 1638, 2745
Quin v. Brittain, Hoff. Ch. 353 786
v. Keefe, 2 H. Bl. 553 1147, 1878
v. King, 1 M. & W. 42 1553
v. Moore, 15 N. Y. 432 37, 4858, 4870
Quince v. Callender, 1 Desaus. 160 1158
Quincy v. Jones, 76 Ill. 231 3916
Quincy C. Co. v. Hood, 77 Ill. 68 1395
Quincy H. R. & C. Co. v. Schulte, 71 Fed. 487

[REFERENCES ARE TO PAGES]

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Quinette v. Bisso, 136 Fed. 825 161, 4848
v. Carpenter, 35 Mo. 502 3099
Quinlan v. Philadelphia, 205 Pa. 309, 106
Quinlan's Est. v. Smye, 21 Tex. Civ. App. 156 987
Quinlan v. Welch, 69 Hun 584 30
Quinn v. Baldwin Star C. Co., 19 Colo. App. 497 1713, 1716, 1728, 1745
v. Burton, 195 Mass. 277 2512
v. Chicago, etc., R. Co., 23 S. D. 126 3882
v. Dresbach, 75 Cal. 159 689, 691
v. Leathem, [1901] App. Cas. 495 427
v. Lloyd, 1 Sweeney 253 606
v. Lloyd, 41 N. Y. 349 696
v. Long Island R. Co., 34 Hun 331 4824
v. Moore, 15 N. Y. 432 1394
v. O'Keefe, 9 App. Div. (N. Y.) 68 4693
v. Power, 29 Hun 183 4939
v. Review P. Co., 55 Wash. 69 4592
v. Sewell, 50 Ark. 380 656
v. Shamokin, etc., R. Co., 7 Pa. Super. Ct. 19 149
v. South Carolina R. Co., 29 S. C. 381 1268, 1343, 3507
v. United States, 99 U. S. 30 858
Quinnipiac B. Co. v. Hackbarth, 74 Conn. 392 1660, 1661, 1664
Quint v. Ophir S. M. Co., 4 Nev. 304 2477
Quintard v. Corcoran, 50 Conn. 34 864
Quirk v. Siegel-Cooper Co., 43 App. Div. (N. Y.) 464 1384
Quist v. Goodfellow, 99 Minn. 509 2504
Quitman Furniture & Hardware Co. v. Rountree, 14 Ga. App. 382 2123
Quitman N. S. Co. v. Conway, 63 Fla. 253 4222, 4259
Quynn v. Whetcroft, 3 Harr. & McH. 352 817

R

R. — v. M. —, 21 Wis. 50 4579
R. A. Elder & Co. v. Shoffstal, 90 Ohio St. 265 4391
R. Pierce & Son v. Davis, 155 Ky. 270 699
R. R. Rhodes, The, 82 Fed. 751 2717, 2720, 2726, 2733
Raab v. Roberts, 30 Ind. App. 6 1474
Raab's Estate, 16 Ohio St. 274 779
Rabb v. Goodrich, 46 Tex. Civ. App. 541 2489
Raas v. Sharp, 46 Mont. 474 1417
Rabboni, The, 53 Fed. 948 5011, 5012
Rabe v. Jourdan, 46 Tex. Civ. App. 456 361
v. Shoenberger C. Co., 213 Pa. 252 3762, 3768
Racine, The, [1906] Prob. Div. 273 4995
Racine S. Mfg. Co. v. Badger Mfg. Co., 123 Wis. 94 2231
Racklev v. Pearce, 1 Ga. 241 723
Radcliff v. Mayor, etc., 4 N. Y. 195 12, 14, 3949
Radcliffe v. Hollyfield, 216 Pa. 367 4647
Rader v. Galveston, etc., R. Co. (Tex. Civ. App.), 137 S. W. 718 4898
v. Yeargin, 85 Tenn. 486 1640, 1651
Radford v. Hull, 30 Miss. 712 1602
Radley v. Leray Paper Co., 214 N. Y. 32 4871, 4875
v. Leray Paper Co., 214 N. Y. 688 4875
v. Leray Paper Co., 156 App. Div. (N. Y.) 429 4885
Radley v. Seider, 99 Mich. 431 4675, 4686
Radloff v. Haase, 196 Ill. 365 2, 868
v. Haase, 96 Ill. App. 74 858, 863, 918
Radtke v. St. Louis B. & B. Co., 229 Mo. 1 1357, 1377, 4706
Radway v. Briggs, 37 N. Y. 256 66
Raeside v. Hamm, 87 Iowa 720 2421
Rafel v. McDermott, 30 N. Y. Misc. 208 1491
Raferty v. Russell, 10 New South Wales St. Rep. 200 4521
Rafferty v. Missouri R. Co., 15 Mo. App. 559 1539
Raffery v. Buckman, 46 Iowa 195 4872
Raflo, In re, 217 Fed. 313 664, 697, 698
Ragan v. Kansas City & S. R. Co., 144 Mo. 623 4103, 4152
Rager v. Louisville & N. R. Co., 137 Ky. 811 1484
v. Louisville & N. R. Co., 139 Ky. 760 1482
Ragland v. Conqueror Z. Cos., 136 Mo. App. 631 294, 3182, 3195
v. Norfolk & W. S. Co., 163 Fed. 376 4837
v. Taylor, 7 Ky. L. Rep. 163 4260
Ragnarok, The, 158 Fed. 694 2738
Ragsdale v. Ezell, 20 Ky. L. Rep. 1567 4668
v. Kinney, 119 Ala. 454 4208
v. Meridian L. & I. Co., 71 Miss. 284 2048
v. Southern R. Co., 119 Ga. 627 3333
v. Southern R. Co., 60 S. C. 381 4146
Rahm v. Deig, 121 Ind. 283 2275, 2341
Rahway v. Crowell, 40 N. J. L. 207 1583
Raiford v. Western U. Tel. Co., 160 N. C. 489 3621
Raikes v. Todd, 8 A. & E. 846 2807
Rail v. Little Falls L. Co., 47 Minn. 422 2226
Railey v. Hopkins (Tex. Civ. App.), 131 S. W. 624 58, 1349, 4232
v. Hopkins, 50 Tex. Civ. App. 600 4233
Railroad v. Acuff, 92 Tenn. 26 762
v. Davis, 104 Tenn. 442 4882
v. Delaney, 102 Tenn. 289 1366
v. Gesner, 20 Pa. 240 1026
v. Greer, 87 Tenn. 698 2912, 2913
v. Griffin, 92 Tenn. 694 3659
v. Johnson, 97 Tenn. 667 4849
v. Jones, 100 Tenn. 512 1532
v. Kelly, 91 Tenn. 699 3389
v. Odil, 91 Tenn. 61 3426
v. Ray, 101 Tenn. 1 1386
v. Spence, 93 Tenn. 173 4911
v. Telegraph Co., 101 Tenn. 62 4067
v. Wallace, 91 Tenn. 35 1141
v. Wyrick, 99 Tenn. 500 350, 4862
Railroad Commission of Louisiana v. Texas & P. R. Co., 229 U. S. 336 5053
Railroad Co. v. Baldwin, 113 Tenn. 205 3531, 3532
v. Barron, 5 Wall. 90 418, 1395, 4861, 4872, 4945
v. Cabinet Co., 104 Tenn. 568 862, 893, 3336, 3346, 3366, 3401, 3429
v. Cobb, 35 Ohio St. 94 1142
v. Finney, 10 Wis. 388 1307, 1338
v. Foreman, 24 W. Va. 662 1434
v. Fraloff, 100 U. S. 24 3412
v. Gesner, 20 Pa. 240 1139, 3855
v. Hambleton, 40 Ohio St. 496 3843
v. Hardware Co., 138 N. C. 174 4631
v. Hardware Co., 143 N. C. 54 323, 4604, 4626, 4643, 4646

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Railroad Co. v. Howard, 13 How. 307 2709
v. Hutchins, 32 Ohio St. 571 365, 3788
v. Hutchins, 37 Ohio St. 282 365, 366, 4211, 4216, 4260, 4263
v. Jones, 95 U. S. 439 3922
v. Ketchum, 27 Conn. 170 2500
v. Levy, 59 Tex. 563 3643, 3646
v. Levy, 59 Tex. 542, 59 Tex. 563 3646
v. Lockwood, 17 Wall. 357 3333, 3335
v. O'Donnell, 49 Ohio St. 489 3329, 3346, 3384, 4208, 4300, 4302
v. Perkins, 49 Ohio St. 326 4103
v. Pratt, 22 Wall. 123 3335
v. Reeves, 10 Wall. 176 139, 3332
v. Smith, 21 Wall. 255 547, 564, 2578, 2672
v. Soutter, 13 Wall. 517 4417
v. Tiernan, 37 Kan. 606 2500
v. Tyree, 7 W. Va. 693 4110, 4119
Railroad Cos. v. Schutte, 103 U. S. 118 1822
Railway v. Branch, 45 Ark. 524 3520, 3522
v. Combs, 51 Ark. 324 1434, 3979, 4095
v. Cravens, 57 Ark. 112 3333
v. Hall, 53 Ark. 7 1508
Railway Act, In re, 36 Can. Sup. Ct. 136 24
Railway Adv. Co. v. Standard Rock C. Co., 83 App. Div. (N. Y.) 191, aff'd 178 N. Y. 570 2696, 2705
Railway Co. v. Beard, 55 Ark. 300 2715
v. Beard, 56 Ark. 309, 60 Ark. 151 165, 2701, 2697
v. Berry, 60 Ark. 433 3531, 3534
v. Cook, 57 Ark. 387 3852, 3873, 3882
v. Cox, 55 Ohio St. 497 24, 25
v. Davis, 55 Ark. 462 4937
v. Davis, 56 Ark. 51 3449, 3502
v. Dean, 43 Ark. 529 3449, 3474
v. Dobbins, 60 Ark. 481 1463, 4652, 4657
v. Donahoe, 56 Tex. 162 3513
v. Doughtry, 88 Tenn. 751 1271
v. Eadie, 43 Ohio St. 91 108
v. Higdon, 111 Tenn. 121 3853, 3854, 3855
v. Howard, 90 Tenn. 144 478, 4910
v. Jones, 59 Ark. 105 1430, 3804
v. Lee, 90 Tenn. 570 1276, 1277
v. Lyman, 57 Ark. 512 408, 1445, 3798, 3892, 3895
v. Maddry, 57 Ark. 306 4886
v. Morris, 35 Ark. 622 3898
v. Neel, 56 Ark. 279 180, 3403
v. Nevill, 60 Ark. 375 3363
v. Sharpe, 38 Ohio St. 150 4059
v. Snyder, 24 Ohio St. 670 4853
v. Spangler, 44 Ohio St. 471 22
v. Staley, 41 Ohio St. 118 101
v. Stevens, 95 U. S. 655 20
v. Sweet, 57 Ark. 287 4860, 4876
v. Sweet, 60 Ark. 550 4875, 4901, 4905, 4913
v. Trimble, 54 Ark. 354 3450, 3487
v. Wallace, 90 Tenn. 52 4[illegible]8
v. Yarborough, 56 Ark. 612 408
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Railways Ice Co. v. Howell, — Ark. —, 174 S. W. 241 4877, 4880, 4884, 4905, 4908
Raines v. Calloway, 27 Tex. 678 2112
Raines v. Jones, 4 Humph. 490 803
v. New York Press Co., 92 Hun 515 4536, 4541
v. Southern Ry. Co., 169 N. C. 189 5080, 5081
Rainey v. Kemp, 54 Tex. Civ. App. 486 4644
Rains v. Herring, 68 Tex. 468 4183
v. St. Louis, etc., R. Co., 71 Mo. 165 4889
Rainwater v. Hummell, 79 Iowa 571 816, 817
Raisin F. Co. v. Barrow, 97 Ala. 694 2307
Raisor v. Chicago & A. R. Co., 215 Ill. 47 4955
Rajnowski v. Detroit, etc., R. Co., 74 Mich. 20 1478
Rakes v. Atlantic G. & P. Co., 7 P. I. 359 478
Raleigh v. Clark, (Ky.) 71 S. W. 857 316
v. Clark, 114 Ky. 732 314
Raleigh, C. & S. R. Co. v. Mecklenburg Mfg. Co., 166 N. C. 168 3961, 3965, 3972, 3979, 4018
Raleigh L. Co. v. Wilson, 69 W. Va. 598 553, 558, 2343, 2455
Raleigh R. Co. v. Wicker, 74 N. C. 220 4119
Ralli v. Rockmore, 111 Fed. 874 2280
Rallman v. Baker, 5 Humph. 406 1109
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v. Eldredge, 58 Hun 203 2787
v. Eldridge, 137 N. Y. 525 2766
v. Gies-G. Co., 164 Mich. 44 4786
Ralston v. Bank, 112 Cal. 208 1353, 4217, 4222, 4240
v. Sharon Hill, 43 Pa. Super. Ct. 280 3983, 4003
v. Wood, 15 Ill. 159 659, 1636
Ralton v. Sherwood L. Co., 54 Wash. 254 1482
Rambaut v. Irving Nat. Bank, 42 App. Div. (N. Y.) 143 4269, 4270
Ramey v. Baltimore, etc., R. Co., 235 Ill. 502 3849, 3924
v. Holcombe, 21 Ala. 567 2556, 2567
Ramish v. Kirschbraun, 98 Cal. 676, 107 Cal. 659 2357
Ramjak v. Austro-S. S. Co., 186 Fed. 417 4661
Ramlose v. Dollman, 100 Mo. App. 347 888
Ramney v. Meisenheimer, 61 Mo. App. 434 2382
Ramsay v. Davis, 20 Wis. 31 1805
v. Gardner, 11 Johns. 439 2970
v. Meade, 37 Colo. 465 226, 255, 257, 509
v. Warner, 97 Mass. 13 720
Ramsay's Estate v. People, 197 Ill. 572 1578, 1591, 1595, 1613
v. Whitbeck, 183 Ill. 550 2832
Ramsdell v. Grady, 97 Me. 319 4655, 4656, 4662, 4730
v. Hulett, 50 Kan. 440 936
v. Soule, 12 Pick. 126 662
Ramsden v. Boston, etc., R. Co., 104 Mass. 117 331, 1331
Ramsey v. Blalock, 32 Ga. 376 2382
v. Browder, 136 N. C. 251 759
v. Capshaw, 71 Ark. 408 193, 2592
v. Glenn, 33 Kan. 271 4952
v. Holmes E. P. Co., 85 Wis. 174 252, 265, 2697
v. Hurley, 72 Tex. 194 4273, 4279
v. Lewis, 30 Barb. 403 2865
v. Maberry, 135 Mo. App. 569 286, 293
v. McCauley, 2 Tex. 189 1182, 1878

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v. New York, etc., R. Co., 136 N. Y. 543 3764
v. Perth Amboy S. & E. Co., 72 N. J. Eq. 165 318
v. Sargent, 21 N. H. 397 1828
v. Thomas, 45 Mo. 111 43 9
v. Tully, 12 Ill. App. 463 535, 2343
v. Westmoreland Bank, 2 P. & W. 203 2816
Ramsey's Appeal, 2 Watts 228 585, 586
Ramsey's Appeal, 4 Watts 71 1131, 1248
Ramskill v. Edwards, 31 Ch. Div. 100 2854
Ranch v. Lynch, 4 Boyce (Del.) 446 4400
Ranck v. Albright, 36 Pa. 367 2522
v. Cedar Rapids, 134 Iowa 563 4048, 4050, 4100, 4137
Rand v. Butte E. R. Co., 40 Mont. 398 432, 1332, 3439
v. Harris, 4 N. H. 555 3294
v. Pursel, 58 Ill. App. 228 3101
v. White Mountains R. Co., 40 N. H. 79 368, 2237
Randall v. American F. Ins. Co., 10 Mont. 340 1089
v. Burton, 23 Up. Can. C. P. 268 1553
v. Carpenter, 88 N. Y. 293 1720, 1721, 1728
v. Cleveland, 6 Conn. 328 3834
v. Duff, 107 Cal. 33 959
v. Evening News Ass'n, 97 Mich. 136 4526
v. Evening News Ass'n, 101 Mich. 561 4506
v. Fay, 158 Mich. 630 2374
v. Grant, 59 App. Div. (N. Y.) 485 1875
v. Greenhood, 3 Mont. 506 1135
v. Hazelton, 12 Allen 412 119
v. Lynch, 2 Camp 352 3305
v. Newson, 2 Q. B. Div. 102 294, 2375, 2431
v. Packard, 142 N. Y. 47 2485, 2486, 2492, 2494
v. Parramore, 1 Fla. 409 728
v. Peerless M. C. Co., 212 Mass. 352 227, 262
v. Raper, 96 Eng. C. L. 82 238, 302
v. Raper, El. B. & E. 84 294, 408, 2416, 2446
v. Rich, 11 Mass. 494 659, 2842
v. Sprague, 74 Fed. 247 3307
v. Thompson, 1 W. & W. (Tex.) sec. 1102 3111
v. Thornton, 43 Me. 226 2388
v. United States L. Co., 72 App. Div. (N. Y.) 317 3883
v. Western U. Tel. Co., 139 Ky. 373 3636, 3638
Randell v. Mallett, 14 Me. 51 2153
v. Trimen, 18 C. B. 786 223, 302, 310, 2984
v. Trimen, 37 Eng. L. & Eq. 275 2984
Randle v. Birmingham R., L. & P. Co., 169 Ala. 314 4867
Randlet v. Herren, 20 N. H. 102 655, 666
Randolf v. Bloomfield, 77 Iowa 50 3906, 3925
Randolph v. Bayles, 2 N. J. L. 52 1543
v. Bayne, 44 Cal. 366 1186
v. Hannibal, etc., R. Co., 18 Mo. App. 609 1343, 3481, 3507, 4662
v. Inman, 172 Ill. 575 1075
v. Merchants' Nat. Bank, 9 Lea 63 4289
v. Metcalf, 6 Cold. 400 1541
v. Parish, 9 Port. 76 1398
Randon v. Barton, 4 Tex. 289 2275, 2311
v. Toby, 11 How. 493 2396
Ranelaugh v. Hayes, 1 Vern. 189 2841
Raney v. Baron, 1 Fla. 327 1799
v. Drainage Dist., 84 Kan. 688 4155
Rangenier v. Seattle E. Co., 52 Wash. 401 4801
Ranger v. Goodrich, 17 Wis. 78 468, 4502
v. Great Western R. Co., 3 Ry. Cas. 298 2687
v. Great Western R. Co., 5 H. of L. Cas. 72 2685
v. Harwood, 39 Tex. 139 2975
v. Hearne, 37 Tex. 30 2371
Rank v. Rank, 5 Pa. 211 4266, 4299
Rankin v. Badgett, 5 Ark. 346 1824
v. Barnes, 5 Bush 20 565
v. Cincinnati, N. O. & T. P. R. Co., 163 Ky. 183 3352
v. Collins, 50 Ind. 158 2854
v. Darnell, 11 B. Mon. 30 1938
v. Matthiesen, 10 S. D. 628 2780
v. Oliphant, 9 Mo. 239 3719
v. Pacific R. Co., 55 Mo. 167 3364
v. Pittsburgh, 7 Pa. Dist. 489 4098
v. Potter, 5 Moak's Eng. Rep. 40 L. R. 6 H. of L. 83 3004
v. Rankin, 216 Ill. 132 817, 1965
v. Scott, 12 Wheat. 177 579
v. Wilson, 47 Iowa 463 2867
Ranking v. Mortimere, 7 Watts 372 4378
Ranklin v. Demott, 61 Pa. 263 605
Ranlet v. Concord R. Co., 62 N. H. 561 3997, 3998, 4011, 4021
Rannels v. Washington University, 96 Mo. 226 3717, 3718
Ranney v. Bader, 48 Mo. 539 1527
v. Donovan, 78 Mich. 318 2513
Ransberry v. North American T. & T. Co., 22 Wash. 476 3443, 3445
Ransom v. Boston, 192 Mass. 299 2555
v. Boston, 196 Mass. 248 2558
v. Brinkerhoff, 56 N. J. Eq. 149 1636
v. City of Boston, 193 Mass. 537 2563
v. Halcott, 18 Barb. 56 1622, 1623
v. McCurley, 140 Ill. 626 4502, 4519
v. Mayor, 1 Fish. Pat. Cas. 252 4493, 4494
v. New York & E. R. Co., 15 N. Y. 415 222, 3081, 3472, 3474, 3495, 3515, 4657, 4669, 4693, 4748
Ranson v. Ranson, 233 Ill. 369 294
v. Sherwood, 26 Conn. 437 2779
Ransone v. Christian, 49 Ga. 491 4569
v. Christian, 56 Ga. 351 33, 4595
Ransour v. Thomas, 10 Ired. 164 741
Ranta v. Newport Min. Co., 180 Mich. 459 1476, 4752
Rantoul Co. v. Claremont P. Co., 196 Fed. 305 502, 2261
Rantz v. Barnes, 40 Ohio St. 43 448
Rany v. Governor, 4 Blackf. 2 1555, 1582
Rapelie v. Emory, 1 Dall. 349 1016, 1134
Rapelye v. Anderson, 4 Hill 472 2784
v. Bailey, 5 Conn. 149 2748
v. Prince, 4 Hill 119 296
Raphael v. Boehm, 11 Ves. 91 1123, 1125
v. Burt, Cab. & Ell. 325 2397
Rapid Transit R. Co. v. Allen, 54 Tex. Civ. App. 245 1376
v. Smith, 98 Tex. 553 4682
v. Williams (Tex. Civ. App.), 136 S. W. 267 1376, 1417

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Raplee v. Morgan, 3 Ill. 561 1873
Rapson v. Cubitt, 1 Car. & M. 64 4697
Rarden v. Maddox, 141 Ala. 506 460
Rardin v. Walpole, 38 Ind. 146 2156, 2781
Rarey v. Lee, 7 Ind. App. 518 3852
Raridan v. Central Iowa R. Co., 69 Iowa 527 1438
Rasch v. Nassau E. R. Co., 198 N. Y. 385 3984, 4002
Rash v. Jenne, 26 Ore. 169 2097
Rashleigh v. Salmon, 1 H. Bl. 252 1397, 1398
Rasmussen v. Carbon County, 8 Wyo. 277 694
Ratcliff v. Baird, 14 Tex. 43 2497
Ratcliffe v. Evans, [1892] 2 Q. B. 524 1370, 2323, 4567
Rathbone v. Ayer, 121 App. Div. (N. Y.) 355 1449
v. Wheelihan, 82 Minn. 30 1356
Rathbun v. Wheeler, 29 Ind. 601 1194
Rathkowski v. Masolowski, 57 Ill. App. 525 3247
Ratteree v. Chapman, 79 Ga. 574 1140, 1141, 1273
Rau v. Trumbull, 68 Ill. App. 490 2275, 2289, 2301
v. Weyand, 89 App. Div. (N. Y.) 200 2632, 2634
Rauch v. Brunswig, 155 Mo. App. 367 2994
Rauh v. Wolf, 59 N. Y. Misc. 419 760
Rauhala v. Maki, 172 Mich. 112 4689, 4778, 4794
Rauma v. Bailey, 80 Minn. 336 1369, 3203
v. Lamont, 82 Minn. 477 4774
Raun v. Reynolds, 11 Cal. 14 1355
v. Reynolds, 15 Cal. 459 1546
Raupman v. Evansville, 44 Ind. 392 306, 1722
Rauth v. Davenport, 60 Hun 70 3245, 3248
Rautman v. Chicago Con. T. Co., 156 Ill. App. 457 4892, 4894
Raven Red Ash C. Co. v. Herron, 114 Va. 103 227, 2696, 2707
Ravenal v. Ingram, 131 N. C. 549 2095, 2123
Ravenga v. Mackintosh, 2 B. & C. 693 4644
Ravenswood P. M. Co. v. Dix, 61 N. Y. Misc. 235 759
Raver v. Webster, 3 Iowa 502 1685
Rawdon v. Blatchford, 1 Sandf. Ch. 344 4377
Rawley v. Rawley, 1 Q. B. Div. 460 521
v. Woodruff, 2 Lans. 419 533
Rawlings v. Anheuser-B. B. Co., 69 Neb. 34 1250
v. Clyde P. & M. Road Co., 158 Mich. 143 4677
v. Lowndes, 34 Md. 639 3727
v. Morgan, 18 C. B. (N. S.) 776 3162
v. Nash, 117 Md. 393 227, 262
Rawlins v. Murphy, 19 Wyo. 238 1094, 4151
Rawlinson v. Clarke, 14 M. & W. 187 887, 922
Rawls v. American Cent. Ins. Co., 97 S. C. 189 1238
v. American Mut. L. Ins. Co., 27 N. Y. 282 3071
Rawson v. Clark, 70 Ill. 656 2608
Rawson v. Copland, 2 Sandf. Ch. 251 2875, 2896
v. Corbett, 150 Ill. 466 3719
v. Holland, 59 N. Y. 611 142, 3340
v. Johnson, 1 East 203 2231
v. Leggett, 97 App. Div. (N. Y.) 416 4615, 4620, 4637
v. Pratt, 91 Ind. 9 564, 569, 2328
v. Samuel, Cr. & Ph. 161 457
Rawson-Works Lumber Co. v. Richardson, 26 Idaho 37 4066
Rawson, etc., Co. v. Richardson, 26 Idaho 37 3961
Ray v. Brenner, 12 Kan. 105 2814
v. Chicago & N. W. R. Co., 163 Iowa 430 3469
v. Clemens, 6 Leigh 600 295
v. Cortland & H. T. Co., 19 App. Div. (N. Y.) 530 3476
v. Haines, 52 Ill. 485 2465, 2540
v. Jeffries, 9 Ky. L. Rep. 602 1522
v. Justices, 6 Ga. 303 1556
v. Lewis, 67 Minn. 365 258, 1221
v. Light, 34 Ark. 421 4273, 4278, 4279
v. Missouri, etc., R. Co., 90 Kan. 244 1452
v. Pease, 97 Ga. 618 1918, 1926
v. Pecos, etc., R. Co., 40 Tex. Civ. App. 99 112
v. Southern R., 77 S. C. 103 1357
Raybourn v. Ramsdell, 78 Ill. 622 3158
Rayburn v. Casualty Co., 141 N. C. 425 388
v. Central Iowa R. Co., 74 Iowa 637 4697
v. Comstock, 80 Mich. 448 2693, 2697
v. Day, 27 Ill. 46 1009
v. Pennsylvania Cas. Co., 141 N. C. 425 3079
Raycroft v. Tayntor, 68 Vt. 219 13
Rayfield v. Lincher, 180 Ill. App. 454 666
v. Van Meter, 120 Cal. 416 2214
Rayman v. Klare, 242 Pa. 448 2185
Raymond v. Baar, 13 S. & R. 318 647
v. Bearnard, 12 Johns. 274 825, 1229, 2666
v. Commonwealth, 192 Mass. 486 4155
v. Cooper, 8 Up. Can. C. P. 388 2168, 2894
v. Danbury & N. R. Co., 14 Blatch. 133 1398, 1400
v. Edelbrock, 15 N. D. 231 918, 1430
v. Green, 12 Neb. 215 1704
v. Haverhill, 168 Mass. 382 103, 135, 476, 4677
v. Holmes, 11 Tex. 54 1151, 1905
v. Isham, 8 Vt. 258 1008, 1101
v. Keseberg, 91 Wis. 191 4744
v. Raymond, 10 Cush. 134 2054
v. Traffarn, 12 Abb. Pr. 52 1356
v. Varnum, 185 Ill. App. 289 530
v. Yarrington, 96 Tex. 443 42, 1418, 2322
Raymond Co. v. Pennsylvania B. F. & P. Co., 42 Pa. Super. 601 2404
Raymore R. Co. v. Pfotenhauer N. Co., 145 App. Div. (N. Y.) 163 1418, 2346, 2358, 2369
Rayner v. Bryson, 29 Md. 473 1117, 1124
v. Jones, 90 Cal. 78 1964
v. Kinney, 14 Ohio St. 283 473, 4569
v. Rees, 58 Ill. App. 292 2369
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v. Rederiaktiebolaget Condor, [1895] 2 Q. B. 289 858
v. Tacoma R. & P. Co., 70 Wash. 133 3472, 4684, 4685
Raywood R., C. & M. Co. v. Wells, 33 Tex. Civ. App. 545 2617
Razey v. Colt, 106 App. Div. (N. Y.) 103 2427
Razzo v. Varni, 81 Cal. 289 1432, 1461, 3823
Rea v. Algren, 104 Minn. 316 3235
v. Balmain New F. Co., 17 New South Wales (law) 92 78, 86, 96, 111
v. Eagle T. Co., 201 Pa. 273 621
v. Ganter, 152 Pa. 512 3117
v. Harrington, 58 Vt. 181 4502, 4514, 4524, 4538, 4555
v. Minkler, 5 Lans. 196 2092
v. Pittsburg & C. R. Co., 229 Pa. 106 4134, 4151
v. St. Louis S. R. Co. (Tex. Civ. App.) 73 S. W. 555 4682
v. Schow, 42 Tex. Civ. App. 600 1318
Reab v. McAlister, 8 Wend. 109 514, 519, 534, 543, 1008, 2455
v. Moor, 19 Johns. 337 2544
Read v. Brooklyn Heights R. Co., 32 App. Div. (N. Y.) 503 4910
v. Buffalo, 74 N. Y. 463 1220
v. Cummings, 2 Me. 82 1842, 1846
v. Dunsmore, 9 C. & P. 588 2526
v. Dupper, 6 T. R. 361 591
v. Goldring, 2 M. & S. 86 792, 803
v. Great Eastern R. Co., L. R. 3 Q. B. 555 760, 4852, 4854, 5118
v. Kelly, 4 Bibb 400 4776
v. Loftus, 82 Kan. 485 2029, 2065
v. Mutual Safety Ins. Co., 3 Sandf. 54 3016
v. Nichols, 118 N. Y. 224 52, 68
v. Plattsmouth, 107 U. S. 568 1194
v. Rann, 10 B. & C. 438 2230, 2500, 2506
v. St. Louis, etc., R. Co., 60 Mo. 199 140, 3385
v. Spaulding, 30 N. Y. 630 140, 141
v. Valley L. & C. Co., 66 Neb. 423 1431
Read Printing Co. v. J. J. Little & Ives Co. (Misc. [N. Y.]), 146 N. Y. Supp. 194 760
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v. Kepplemann, 61 Pa. 233 12
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Reagan R. B. Co. v. Dickson C. W. Co., 55 Tex. Civ. App. 509 226, 2351
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Reames v. Wilson, 147 N. C. 304 2501
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Reams v. Taylor, 31 Utah 288 3243
Reardon v. Cushing, 90 Minn. 360 931
v. Philadelphia R. T. Co., 43 Pa. Super. 344 78, 88, 3480
v. St. Louis, etc., R. Co., 215 Mo. 105 1376, 1424
v. San Francisco, 66 Cal. 492 3952, 3953
Reason v. Detroit, etc., R. Co., 150 Mich. 50 3347
v. Paducah & I. F. Co., 152 Ky. 220 3442
Reath v. State, 16 Ind. App. 146 4767
Reaves v. Anniston K. Mills, 154 Ala. 565 4767, 4772
v. Coffman, 87 Ark. 60 2797
Reay v. Whyte, 3 Tyrwh. 596 756
Rebecca, The, 1 Blatch. & H. 356 4995
Rebecca, The, v. The America, Fed. Cas. No. 11, 619 5006
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Reckert v. Snyder, 9 Wend. 416 1369
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Rector v. Hartford D. Co., 190 Ill. 380, 92 Ill. App. 175 3109
v. McCarthy, 61 Ark. 420 2771
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Rector, etc., v. New York E. R. Co., 21 App. Div. (N. Y.) 47 4082
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Red Cypress L. Co. v. Beall, 5 Ga. App. 202 758, 1366
Red Diamond C. Co. v. Steidemann, 169 Mo. App. 306 3255, 3256, 4210
Red River, etc., R. Co. v. Eastin, 39 Tex. Civ. App. 579 1432, 3326
v. Sture, 32 Minn. 95 4087
Redd v. Missouri Pac. R. Co., 161 Mo. App. 522 1340, 4669
Redderburger v. McDaniel, 38 Mo. 138 1754
Reddick v. Northern Acc. Co., 180 Mo. App. 277 3082
Reddin v Gates, 52 Iowa 210 467, 1474
Redding v. Godwin, 44 Minn. 355 1458, 2318, 4403, 4407, 4408
v. Lamb, 81 Mich. 318 2198
v. Security Mut. L. Ins. Co. (Mo. App.) 144 S. W. 185 4862
v. South Carolina R. Co., 3 S. C. 1 1330
Reddon v. Union Pac. R. Co., 5 Utah 344 1512, 4807
Redemptionists v. Wenig, 79 Md. 348 3760, 3765
Reder v. Anderson, 4 Dana 193 2468
Redfearn v. Thompson, 10 Ga. App. 550 1482, 4573
Redfield v. Bartels, 139 U. S. 694 1005
v. Davis, 6 Conn. 438 2901
v. Haight, 27 Conn. 31 2789, 2848
v. Holland P. Ins. Co., 56 N. Y. 354 749
v. Marvin, 78 Conn. 704 1079
v. Michigan Workmen's Compensation Mut. Ins. Co., 183 Mich. 633 5194
v. Oakland Con. St. R. Co., 110 Cal. 277 4888, 4893, 4900
v. Oakland Con. St. R. Co., 112 Cal. 220 4890, 4895
v. Redfield, 75 Iowa 435 4794
v. St. R. Co., 112 Cal. 220 4900

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Reding v. Reding, 143 Mo. App. 659 4535, 4541
Redinger v. Jones, 68 Kan. 627 1539, 4311
Redington v. Chase, 34 Cal. 666 828
v. Numan, 60 Cal. 632 4321
v. Pacific P. Tel. Co., 107 Cal. 317 3548, 3550, 3551, 3585
Redlich Mfg. Co. v. Rice, 203 Fed. 722 1714, 1718
Redlon v. Heath, 59 Kan. 255 2792
Redman v. Murrell, 117 La. 516 806
v. Wilson, 14 M. & W. 476 2999
Redmond v. American Mfg. Co., 121 N. Y. 415, 56 N. Y. Super. Ct. 372 4312, 4317, 4327
v. Atlanta & B. R. Co., 129 Ga. 133 760
v. Perrigo, 84 Wash. 407 3962, 3993
v. Weismann, 77 Cal. 423 1488
Redmone & Co. v. Atlanta & B. Air-Line Ry. Co., 129 Ga. 133 745
Redtor v. Pomfreich, Cro. Eliz. 639 4556
Redway v. Gray, 31 Vt. 292 4532
Redwine v. Brown, 10 Ga. 311 2130
Redwood v. Metropolitan R. Co., 6 D. C. 302 1338
Reeb v. Bosch, 17 Ill. App. 426 1407
Reebie v. Brackett, 109 Ill. App. 631 4210
Reece v. Knott, 3 Utah 451 1051
v. Northway, 58 Iowa 187 1729, 1730, 1749
v. Rodgers, 40 Pa. 171 4170
Reed, Ex parte, 4 Hill 572 1601
Reed v. Armstrong, 18 Ind. 446 634, 1411
v. Bank, 1 T. B. Mon. 92 1397
v. Bartlett, 19 Pick. 273 655
v. Beardsley, 6 Neb. 493 1981, 1983
v. Bias, 8 W. & S. 189 464, 474, 3813
v. Boardman, 20 Pick. 441 703, 706, 711
v. Brandenburg, 72 Ore. 435 2741
v. Brice, 30 Mo. 442 3734
v. Carusi, Taney 72, 20 Fed. Cas. 431 4480
v. Cassatt, 153 Pa. 156 937
v. Chicago, B. & G. Co., — Neb. —, 151 N. W. 936 3968
v. Chicago, etc., R. Co., 25 Fed. 886 4149
v. Chicago, etc., R. Co., 74 Iowa 188 4824
v. Chubb, 9 Iowa 178 532
v. Clark, 47 Cal. 194 3667, 3671, 3676
v. Coughran, 21 S. D. 257 1386
v. Crane, 89 Mo. App. 670 1360
v. Davis, 4 Ala. 83 1954
v. Detroit, 108 Mich. 224 4187
v. First Nat. Bank 23 Colo. 380 1817
v. Fish, 59 Me. 358 2745, 2767
v. Ford, 129 Ky. 471 78
v. Goettie, 7 Rich. 126 1607
v. Hanover Branch R. Co., 105 Mass. 303 1062, 4104, 4145, 4155
v. Hastings, 61 Ill. 266 536
v. Holloway (Tex. Civ. App.), 127 S. W. 1189 1449, 4391
v. Home Sav. Bank, 130 Mass. 443 1331
v. Horn, 73 Ill. 596 1322
v. Humphrey, 69 Kan. 155 2843, 2872
v. Hurd, 7 Wend. 408 720
v. Keith, 99 Wis. 672 4545, 4549
v. King, 11 Ky. L. Rep. 615 361
Reed v. Lander, 5 Bush. 598 1793, 1808
v. Lansdale, Hardin 6 985
v. Lawrence, 29 Fed. 915 4466
v. Light, 170 Ind. 550 2501
v. McConnel, 101 N. Y. 270 1431
v. Maley, 115 Ky. 816 78, 80, 340
v. Mayor, 97 N. Y. 620 1362
v. Miller, 1 Wash. 426 872
v. New York Nat. Exch. Bank, 230 Ill. 50 1727, 1734
v. New York & R. G. Co., 93 App. Div. (N. Y.) 453 1330, 1338, 3820
v. Norris, 2 Mylne & Cr. 361 2837
v. Parsons, 11 Cush. 255 692
v. Patterson, 7 W. Va. 263 2048
v. Paul, 131 Mass. 129 2189
v. Pierce, 36 Me. 455 2153, 2157
v. Price, 30 Mo. 442 3736, 3745
v. Randall, 29 N. Y. 358 535, 2371, 2391
v. Reed, 1 W. & S. 235 1086
v. Reed, 49 Ohio St. 654 3682
v. Rome, etc., R. Co., 48 Hun 231, aff'd 125 N. Y. 708 3433
v. Rudman, 5 Ind. 409 786
v. Shaw, 1 Blackf. 245 452, 456, 780, 782
v. State, 108 N. Y. 407 3853
v. Tarbell, 4 Metc. (Mass.) 93 783
v. Thompson, 88 Ill. 245 1482
v. Upton, 10 Pick. 525 660
v. Wall, 34 N. J. L. 275 4146
v. Ward, 22 Pa. 144 3132
v. Washington Ins. Co., 138 Mass. 575 3017
v. Western U. Tel., 135 Mo. 661 3547, 3551, 3556, 3557, 3568
v. White, 5 Esp. 122 753
v. Williams, 5 Sneed 580 4970, 4971
v. Wood, 9 Vt. 285 2387
v. Woodman, 17 Me. 43 784, 822, 830
Reed L. Co. v. Lewis, 94 Ala. 626 2341
Reed's Est., 8 Montgomery Co. L. Rep. 98 2473
Reed's Est., 22 Pa. Super. 635 1130
Reed's Petition, 13 N. H. 381 4063
Reeder v. Nay, 95 Ind. 164 665
v. Purdy, 41 Ill. 279 474, 3736, 3742, 3831, 3832, 4761, 4775
v. Purdy, 48 Ill. 261 1269
v. Trullinger, 151 Pa. 287 2047
Reeds v. Lee, 64 Mo. App. 683 2423
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Reeks v. Seattle E. Co., 54 Wash. 609 4806
Reele v. Western U. Tel. Co., 55 Tex. 310 352
Reems v. New Orleans G. M. R. Co., 126 La. 511 1511, 4797
Rees, In re, 17 Ch. Div. 701 1088
Rees v. Berrington, 2 Lead. Cas. in Eq. 1867 2815
v. Sheridan, 135 La. 7 1744, 1750
Reese v. Bates, 96 Va. 321 2387
v. Emrick, 6 S. & R. 286 1535
v. Garlington, 101 Ark. 487 3654
v. Hershey, 163 Pa. 253 4753, 4770
v. Jared, 15 Ind. 142 4318
v. Miles, 99 Tenn. 398 2417, 2423, 2427
v. Pennsylvania R. Co., 229 Pa. 340 25
v. Philadelphia & R. Ry. Co., 239 U. S. 463, aff'g 225 Fed. 518 5078
v. Rutherfurd, 90 N. Y. 644 1185
v. Smith, 12 Mo. 344 2088
v. Spruance, 45 Ill. 308 3506

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v. Western U. Tel. Co., 123 Ind. 294 352, 354, 3621, 3623, 3641, 3654
Reeve v. Gallivan, 89 Hun 59 2275
Reeves v. Andrews, 7 Ind. 207 1799
v. Anniston K. Mills, 166 Ala. 645 4781
v. Chambers, 67 Iowa 81 524
v. Cress, 89 Minn. 466 2280
v. Hearne, 1 M. & W. 323 763
v. Kelly, 30 Mich. 132 1847
v. Lane, 8 New Zeal. 44 948, 956
v. Lutz, 179 Mo. App. 61 4760
v. McComeskey, 168 Pa. 571 3166
v. Penrose, 26 L. R. Ir. 141 3828
v. Pulliam, 7 Baxter 119 2835, 2871
v. Roth, 179 Ill. App. 95 4548
v. Southern R., 68 S. C. 89 1348
v. Stipp, 91 Ill. 609 976, 1003
v. Sullivan, 117 App. Div. (N. Y.) 814 1722
v. Winn, 97 N. C. 246 1316, 4524, 4525, 4543
v. Younglove, 148 Iowa 699 2407
Refeld v. Woodfolk, 22 How. 318 2211
Reformed, etc., Church v. Brown, 54 Barb. 191 384
Regan v. Chicago, etc., R. Co., 51 Wis. 599 1394, 1395, 4858, 4862, 4870
v. Fosdick, 18 N. Y. Misc. 556 3109
v. New York, etc., R. Co., 60 Conn. 124 1138
Regensperger v. Kiefer, (Pa.) 20 W. N. C. 97 1290
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Reger v. Manhattan B. Co., 6 Pa. Super. 375 1710
v. Rochester R. Co., 2 App. Div. (N. Y.) 5 4941
Regester v. Reed, 185 Mass. 226 1826
v. Regester, 104 Md. 1 2241, 2244
Reggio v. Braggiotti, 7 Cush. 166 294, 297, 301, 309, 2405, 2410, 2415, 2416, 2917, 3196, 4409
Regier v. Shreck, 47 Neb. 667 1503
Regina v. Brown, 30 L. J. (Q. B.) 322 4033
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Regis v. Jaynes, 191 Mass. 245 4487, 4488, 4490, 4491
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Regnier v. Cabot, 7 Ill. 34 469
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Reich v. Workman, 110 Ark. 140 2504
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Reichenbach v. Sage, 13 Wash. 364 886, 893
Reichert v. Backenstross, 71 Hun 516 3889
v. Carfloat, etc., Co., 213 Fed. 127 2716, 2717
Reid v. Dickons, 5 B. & Ad. 499 822
v. Dunklin, 5 Ala. 205 1538, 1620
v. Fairbanks, 13 C. B. 692 4259, 4262
v. Fairbanks, 14 C. B. 729 364
v. Fargo, 130 C. C. A. 285, 213 Fed. 771 3338
v. Friendly Societies' H. Co., New Zeal. L. R. 3 C. A. 238 153
v. Furnival, 1 Cr. & M. 533 1816
Reid v. Haskins, 6 El. & B. 953 2256
v. Hibbard, 6 Wis. 175 758, 764
v. Houston, 20 Ill. App. 48 1497
v. Johnson (N. Y. Misc.), 121 Supp. 750 1997, 2000
v. Kellogg, 8 S. D. 596 687
v. Leitch Collieries, Ltd., 4 Alberta L. R. 338, 7 B. W. C. C. 1017, 21 W. L. R. 689, 2 W. W. R. 663 5173
v. McNerney, 128 Iowa 350 2501
v. Reid, 141 Ky. 402 2004, 2005
v. Sun Pub. Co., 158 Ky. 727 1290, 4545
v. Terwilliger, 116 N. Y. 530 1289
v. Windsor, 111 Va. 825 1824
Reid, Murdock & Co. v. Somerset Canning Co., 182 Ill. App. 112 2278
Reidhar v. Berger, 8 B. Mon. 160 1690, 1703
Reiff v. Bakken, 36 Minn. 333 1145
Reiger v. Worth, 127 N. C. 230 238, 2444
Reiley v. Timme, 53 Wis. 63 469
Reilley v. McMinn, 2 Pugsley (New Bruns.) 370 4265
Reilly v. Connors, 65 App. Div. (N. Y.) 470 2629
v. Curtiss, 83 N. J. L. 77 4503, 4512
v. Franklin Ins. Co., 43 Wis. 449 3008
v. Jones, 1 Bing. 302 835, 887, 917
v. Lee, 85 Hun 315, aff'd 155 N. Y. 691 520
v. Manhattan R. Co., 43 App. Div. (N. Y.) 80 4081
v. Sicilian A. P. Co., 170 N. Y. 40 405
Reily v. Lamar, 2 Cranch 343 2960
v. London, 14 Prac. Rep. 171 1466
Reimard v. Bloomsburg & S. R. Co., 228 Pa. 384 135, 3450
Reina v. Cross, 6 Cal. 29 3301
Reinback v. Crabtree, 77 Ill. 182 605, 991, 992, 993
Reindel v. Schell, 4 C. B. (N. S.) 97 889
Reineman v. Blair, 96 Pa. 155 3241
Reiner v. Jones, 38 App. Div. (N. Y.) 440 3236, 3249
Reinhalter v. Hutchins, 26 R. I. 586 2058
Reinhart v. Johnson, 62 Iowa 155 2866
Reinke v. Bentley, 90 Wis. 457 4663
Reinking v. Goodell, 161 Iowa 404 1926, 3243
Reis v. Long Island R. Co., 88 App. Div. (N. Y.) 611 4172
v. Rosenfield, 204 Fed. 282 4442
Reisan v. Mott, 42 Minn. 49 1379, 4165
Reischer v. Borwick, [1894] 2 Q. B. 548 3000
Reischmann v. Hartog C. Co., 132 N. Y. Supp. 435 3247
Reiser v. Parker, 1 Lowell 262 615
Reisert v. City of New York, 69 App. Div. (N. Y.) 302 3767, 3882
v. New York, 42 N. Y. Misc. 275 3887, 3897
v. New York, 174 N. Y. 196 3105, 3798
v. New York, 35 N. Y. Misc. 413 3761
Reisner v. Atchison Union Depot Co., 27 Kan. 382 1063
v. Union Depot & R. Co., 27 Kan. 382 3964, 4120, 4125, 4145, 4153
Reiss v. New York S. Co., 12 N. Y. Supp. 557 4171
v. Scherner, 87 Ill. App. 84 705

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Reithel, In re, 222 Mass. 163 5199
Reithmaier v. Beckwith, 35 Mich. 100 758
Reitler v. Pennsylvania R. Co., 238 Pa. 1 4725, 4728
Reitz v. Hayward, 100 Mo. App. 216 1229
Reizenstein v. Clark, 104 Iowa 287 437, 1311, 1327, 1329
Released Rates, In re, 13 Interstate Com. Rep. 550 3337
Relf v. Rapp, 3 W. & S. 21 3283, 3412
Reliance T. & D. Works v. Mitchell, 24 Ky. L. Rep. 1286 4652
Relief F. Ins. Co. v. Shaw, 94 U. S. 574 2999, 3039
Relle v. Telegraph Co., 55 Tex. 308 3643
v. Western U. Tel. Co., 55 Tex. 308 3621
Relyea v. New Haven R. M. Co., 42 Conn. 579 3301
Re Madison Ave. Baptist Church, 26 How. Pr. 72 4566
Rembt v. Roehr Co., 71 App. Div. (N. Y.) 459 4540
Remele v. Donohue, 54 Vt. 555 443
Remelee v. Hall, 35 Vt. 582 2551
Remer v. Shaw, 8 N. J. Eq. 355 977, 978
Remero v. Leky, 70 Mo. App. 364 2467
Remey v. Detroit United R., 141 Mich. 116 4655
Remington v. Eastern R. Co., 109 Wis. 154 1102
v. Foster, 42 Wis. 608 3845
v. Kirby, 120 N. C. 320 3827
Remington Sewing Machine Co. v. Kezertee, 49 Wis. 409 4428
Remke v. Clinton, 2 Utah 230 1143
Remm v. Landon, 44 Ind. App. 430 703, 813
Remmerde, In re, 206 Fed. 826 1070
Remmler v. Shenuit, 15 Mo. App. 192 4775
Remsen v. Beckman, 25 N. Y. 552 2819
v. Graves, 41 N. Y. 471 1869, 2768
Remy v. Healy, 161 Mich. 266 2372, 2377
Rend v. Boord, 75 Ind. 307 1102
Renders v. Grand Trunk R. Co., 144 Mich. 387 1363
Renfro v. Hughes, 69 Ala. 581 4270, 4299, 4307
Renihan v. Wright, 125 Ind. 536 2888, 3651
Renkert v. Elliott, 11 Lea 235 1687, 1688
Renlund v. Commodore M. Co., 89 Minn. 41 4856
Renne v. United States L. Co., 107 Wis. 305 4811
Rennell v. Kimball, 5 Allen 356 1221
Renner v. Canfield, 36 Minn. 90 53, 4686
v. Marshall, 1 Wheat. 215 1397
Reno, The, 134 Fed. 555 4997, 5011
Reno v. Cullinane, 4 Okla. 457 861
v. Hogan, 21 B. Mon. 63 3335
v. Kingsbury, 39 Mo. App. 240 4314, 4316
v. Woodyatt, 81 Ill. App. 553 1669
Rensselaer G. Factory v. Reid, 5 Cow. 587 936, 1017, 1022, 1032, 4211
Renther v. State, 3 Ind. 86 1244
Renwick v. Galt, etc., St. R. Co., 12 Ont. L. R. 35 1511, 4930
v. Goldstone, 48 Cal. 554 624
Renwick v. Morris, 3 Hill 621 3921
Replogle v. Frothingham, 16 Pa. Super. Ct. 374 4647
v. Toledo, St. L. & W. Ry. Co., 184 Ill. App. 338 559
Reporters' Ass'n v. Sun P. & P. Ass'n, 186 N. Y. 437 1366, 4539
Republic of Columbia, Ex parte, 195 U. S. 604 1040
Republic Iron & Steel Co. v. Sturges & Burn Mfg. Co., 181 Ill. App. 304 759
Republica v. Mitchell, 2 Dall. 101 1042
Republican N. Co. v. Northwestern Associated Press, 51 Fed. 377 1451, 4229
Republican P. Co. v. Conroy, 5 Colo. App. 262 4506, 4545
v. Mosman, 15 Colo. 399 4506, 4508, 4537
Respass v. Morton, Hard. 226 2968
Respini v. Porta, 89 Cal. 464 3111
Resse v. Bates, 94 Va. 321 2438
Resser v. Corwin, 72 Ill. App. 625 3110
Restad v. Engemoen, 65 Minn. 148 2227
Reszke v. Duss, 99 App. Div. (N. Y.) 353 2743
Retan v. Drew, 19 Wend. 304 784, 1236
v. Lake Shore, etc., R. Co., 94 Mich. 146 4807
Reuck v. McGregor, 32 N. J. L. 70 4840
Reusens v. Arkenburgh, 135 App. Div. (N. Y.) 75 820, 1202
v. Baltimore, etc., R. Co., 179 Ill. App. 570 3880
v. Hickman, Lauson & Diener Co. 160 Wis. 284 1492, 1500, 1505
v. Sala, 4 C. P. Div. 239 2232
Revel v. Pruitt, 42 Okla. 696 1377, 1503
v. Smith, 25 Okla. 508 1723
v. Thrash, 132 N. C. 803 2793
Revere F. Ins. Co. v. Chamberlin, 56 Iowa 508 553, 2999
Revett v. Globe Nav. Co., 68 Wash. 300 3321, 3323
Revis v. Smith, 18 C. B. 125 11, 17
Rew v. Barber, 3 Cow. 272 655, 656
v. Independent School Dist., 125 Iowa 28 962, 965
Rex v. Holt, 5 T. R. 436 4597
v. Neil, 2 C. & P. 485 3839
v. Senior, 1 Moody C. C. 346 28
v. Sheriff of Essex, 1 M. & W. 720 1628
v. Simmons, Savre 34 1482
v. Sudbrooke, 1 Smith 59 2533
v. White, 1 Burr. 333 3839
v. Woodfall, 5 Burr. 2661 1482
Rexford v. Bleckley, 131 Ga. 678 1357, 1359
Rexter v. Starin, 73 N. Y. 601 312
Rey v. Simpson, 22 How. 341 2780
Reynolds, Ex parte, 68 S. C. 436 2797
Reynolds v. Bank, etc., 18 Ind. 467 601
v. Bell, 84 Ala. 496 542
v. Braithwaite, 131 Pa. 416 3768, 3827
v. Bridge, 6 E. & B. 528 383, 887, 914, 922
v. Burlington, etc., R. Co., 106 Ill. 152 4130
v. Burr, 104 App. Div. (N. Y.) 31 1094, 1965
v. Callender, 19 Pa. Super. 610 2242
v. Chandler River Co., 43 Me. 513 319
v. Clark, — Del. —, 92 Atl. 873 334, 4659, 4690, 4730, 4743
v. Cox, 11 Ind. 262 533, 4420
v. Day, 79 Wash. 499 5148

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Reynolds v. De Geer, 13 Ill. App. 113 4603
v. Dunlap, 73 Kan. 759 4637
v. Empire L. Co., 85 Hun 470 814
v. Franklin, 44 Minn. 30 4408, 4409, 4410
v. Galveston, etc., R. Co., 101 Tex. 2 144
v. Great Northern R. Co., 119 Minn. 251 2781, 3773
v. Hanrahan, 100 Mass. 313 1330
v. Holland, 46 Wash. 537 4506, 4508
v. Hosmer, 45 Cal. 616 1543, 1544, 1545.
v. Johnson, 13 Tex. 214 2046
v. Jones, 63 Ark. 259 371, 376, 388, 1646
v. Levi, 122 Mich. 115 2702
v. Lynch, 98 Minn. 58 2025
v. McFarlane, 1 Overt. 488 704
v. McLean, 9 West Aust. L. R. 89 772
v. McManus, 139 Iowa 242 1499
v. Magness, 2 Ired. 26 2835
v. Mardis, 17 Ala. 32 1071
v. Metropolitan St. Ry. Co., 180 Mo. App. 138 432, 444, 1385
v. Ocean Ins. Co., 22 Pick. 191 3036
v. Phillips, 142 Ill. App. 482 1103
v. Phillips, 13 Ill. App. 557 493
v. Pierson, 29 Ind. App. 273 162
v. Presidio & F. R. Co., 1 Cal. App. 229 3935
v. Price, 22 Ky. L. Rep. 5 4839
v. Price, 88 S. C. 525 817
v. Ramsey, 56 Pa. Super. Ct. 97 2403
v. Reynolds, 3 Allen 605 3685
v. Reynolds, 55 Ark. 369 3705
v. Reynolds, 92 Ky. 556 2472
v. Robinson, 64 N. Y. 589 2303, 2470, 2474, 2478, 2479, 4700
v. St. Louis T. Co., 189 Mo. 408 4744
v. Schade, 131 Mo. App. 1 660, 682
v. Shuler, 5 Cow. 323 480, 4196, 4291, 4296
v. Texas & P. R. Co., 37 La. Ann. 694 58
v. Tucker, 6 Ohio St. 516 472, 4584, 4587, 4596
v. Vance, 4 Bibb 213 2051, 2052
v. Wabash R. Co., 189 Mo. 408 1511
v. Walker, 29 Miss. 250 1117
v. Ward, 5 Wend. 501 2781
v. Western U. Tel. Co., 81 Mo. App. 223 3613
v. White, 43 App. Div. (N. Y.) 595 1997
Reynolds Elevator Co. v. Merchants' Nat. Bank, 55 App. Div. (N. Y.) 1 1116
Rhea v. Swain, 122 Ind. 272 2060, 2088
Rhea Thielens I. Co. v. Racine M. & W. I. Co., 89 Ill. App. 463 2341
Rheem v. Naugatuck W. Co., 33 Pa. 356 4392, 4419
Rheinstrom v. Steiner, 69 Ohio 452 2272
Rheinwald v. Builders' Brick & Supply Co., 168 N. Y. App. Div. 425 5174
Rhind v. Freedly, 74 N. J. L. 138 2370, 2374, 2418
Rhine v. Morris, 96 Ind. 81 41
Rhinelander v. Barrow, 17 Johns. 538 26
Rhinesmith v. Erie R. Co., 76 N. J. L. 783 4699, 4724, 4750
Rhoades v. Booth, 14 Iowa 575 431
v. Chesapeake & O. R. Co., 49 W. Va. 494 2554
v. Selsey, 2 Beav. 350 1880
v. Woods, 41 Barb. 471 1680
Rhoads v. Booth, 14 Iowa 575 427, 430
Rhoads v. Chicago & A. R. Co., 130 Ill. App. 145 4944, 4945
v. Chicago & A. R. Co., 227 Ill. 328 4944
v. Gatlin, 2 Colo. App. 96 4358
v. Quemahoning C. Co., 238 Pa. 283 1281
v. Woods, 41 Barb. 471 430
Rhoda v. Alameda County, 58 Cal. 357 3766, 4231
v. Thwaites, 6 B. & C. 388 2225
Rhodes v. Auld, 5 Kan. App. 225 1734
v. Baird, 16 Ohio St. 581 171, 193, 241, 3216, 3222
v. Belchee, 36 Ore. 141 686
v. Bunch, 3 McCord 66 462, 465
v. Burkart, 28 S. C. 155 1669
v. City of Dunham, 165 N. C. 679 4000
v. Cleveland R. M. Co., 17 Fed. 426 2234
v. Clute, 17 Utah 137 2656
v. Granby C. Mills, 87 S. C. 18 1270
v. Holladay-K. L. & L. Co., 105 Mo. App. 279 47, 2217, 2351
v. Ijams, 7 Ala. 574 471, 4531
v. Louisville, etc., R. Co., 9 Bush 688 3335
v. Rapid T. Co., 16 Hawaii 319 334, 1510, 3446, 3471, 3473, 3476, 3483
v. Roberts, 1 Stew. 145 4165
v. Rodgers, 151 Pa. 634 1305, 4776
v. Sperry, 120 App. Div. (N. Y.) 467 346
v. Storr, 7 Ala. 346 1957
v. Union R. Co., 52 N. Y. Misc. 501 4835
Rhorer v. Bila, 83 Cal. 51 786
Rhymer v. Fretz, 206 Pa. 230 3935
Rhymney R. Co. v. Rhymney I. Co., 25 Q. B. Div. 146 521
Rhyne v. Rhyne, 151 N. C. 400 502
v. Rhyne, 169 N. C. 559 1552
v. Turley, 37 Okla. 159 1276, 1281, 1505
Rhyner v. Menasha, 107 Wis. 201 4731
Rhys v. Dare Valley R. Co., L. R. 19 Eq. 93 1026
Ribich v. Lake Superior S. Co., 123 Mich. 401 4813
Rice v. Ashland County, 114 Wis. 130 1044, 2026, 2042
v. Austin, 17 Mass. 197 306
v. Cassells, 48 Colo. 73 4334
v. Chicago, 57 Ill. App. 558 4095, 4096, 4147
v. Codman, 1 Allen 377 2226
v. Cook, 92 Cal. 144 1716, 1742
v. Coolidge, 121 Mass. 393 1364
v. Cottrell, 5 R. I. 340 4503
v. Council Bluffs, 124 Iowa 639 4663, 4795
v. Day, 34 Neb. 100 4608
v. Des Moines, 40 Iowa 644 4787
v. Dudley, 34 Mo. App. 383 659
v. Dudley, 65 Ala. 68 3111
v. Forsyth, 41 Md. 389 2612
v. Goddard, 14 Pick. 293 556, 1826, 1828, 2198
v. Grand Lodge, A. O. U. W., 103 Iowa 643 635
v. Grange, 131 N. Y. 149 1833
v. Hollenbeck, 19 Barb. 664 3784, 4263
v. Homer, 12 Mass. 230 3000
v. Hulbert, 67 Iowa 724 1051
v. Indianapolis & St. L. R. Co., 3 Mo. App. 27 3389, 3412
v. Lodge, etc., 92 Iowa 417 635

[REFERENCES ARE TO PAGES]

Rice v. Manley, 66 N. Y. 82 1437, 2295
v. Morton, 19 Mo. 263 2821, 2823
v. Nickerson, 9 Allen 478 313, 4773
v. Ontario S. Co., 56 Barb. 384 3363
v. Partello, 88 Ill. App. 52 2670, 2689
v. Penn P. G. Co., 88 Ill. App. 407 246
v. Penn P. Co., 117 Ill. App. 356 2240
v. Pulliam, 141 Ky. 10 2393, 4364
v. Rice, 13 Ind. 562 1788
v. Rice, 14 B. Mon. 417 2826
v. Rice, 104 Mich. 371 1379, 4983
v. Rice, 108 Ill. 199 2797
v. Shealy, 71 S. C. 161 1209
v. Southgate, 16 Gray 142 2831
v. Stone, 1 Allen 566 27
v. Turnpike Co., 7 Dana 87 4121
v. Van Why, 49 Colo. 7 449
v. Vasmer, 51 Tex. Civ. App. 167 1604
v. Webster, 18 Ill. 321 773
v. Western F. Co., 64 Ill. App. 603 2218
v. White, 4 Leigh 474 4393
v. Whitmore, 74 Cal. 619 3183, 3228
v. Wood, 113 Mass. 133 2513
v. Woods, 21 Pick. 30 767
Rice Co. v. Penn P. G. Co., 88 Ill. App. 407 284, 294, 2237, 2241, 2256 2257
Rice C. & M. Co. v. Wells, 33 Tex. Civ. App. 545 239
Rice & B. M. Co. v. International Bank, 185 Ill. 422, 86 Ill. App. 136 684
Rice's App., 79 Pa. 168 2867
Rich v. Black, 173 Pa. 92 2902
v. Doyenn, 85 Hun 510 3110
v. Hayes, 101 Me. 324 580, 585
v. Johnson, 2 Pin. 88 1028, 2134
v. Lord, 18 Pick. 322 768
v. New York E. R. Co., 16 Daly 518 4112
v. Rich, 16 Wend. 663 1357
v. St. Louis & S. F. R. Co., 166 Mo. App. 379 5067, 5125
v. Seneca Falls, 19 Blatch. 558 1210
v. Smith, 34 Hun 136 2420
v. Smith, 121 Mass. 328 3123
v. Utah Com. & S. Bank, 30 Utah 334 1445
v. Western U. Tel. Co. (Tex. Civ. App.), 110 S. W. 93 3629
Rich Grain D. Co. v. Western U. Tel. Co., 13 Ky. L. Rep. 256 (Ky. Super. Ct.) 3590, 3591
Richard S. Garrett, The, 55 Fed. 90 2724
Richard v. Bent, 59 Ill. 38 2076, 2153, 2173, 2176, 2177, 2178
v. Holman, 123 Fed. 734 3319
v. Shaw, 67 Ill. 222 2230
Richard Cocke & Co. v. New Era Gravel & Development Co., — Tex. Civ. App. —, 168 S. W. 988 2403
Richards v. Citizens' N. G. Co., 130 Pa. 37 1098, 1139
v. Commonwealth, 40 Pa. 146 2814
v. Edick, 17 Barb. 260 862, 1936, 1937
v. Fouts, 11 Ired. 466 4972
v. Gee (Tex. Civ. App.), 107 S. W. 61 1949
v. Globe Bank, 12 Wis. 692 1163, 1878, 1879
v. Iowa H. Co., 44 Iowa 304 2117, 2120
v. Jewett, 118 Iowa 629 4633
v. McPherson, 74 Ind. 158 959
v. Manitowoc & N. T. Co., 140 Wis. 85 2702
Richards v. Marsham, 2 G. Greene 217 971, 985, 990
v. Morse, 36 Me. 240 1810
v. Ontai, 20 Hawa'i 335 381, 3120
v. Page, 81 Me. 563 1485
v. Parrett, 7 B. Mon. 379 1103
v. Railroad, 56 W. Va. 592 3924
v. Richards, 2 M. & Rob. 557 4579
v. Richards, 2 B. & Ad. 447 1875
v. Salter, 6 Johns. Ch. 445 1253
v. Sanderson, 39 Colo. 270 460, 1536
v. Simms, 1 Dev. & Bat. 48 2860
v. Storer, 114 Mass. 101 2755, 2767
v. Todd, 127 Mass. 167 4390
v. Washburn, 14 App. Div. (N. Y.) 237, 28 App. Div. (N. Y.) 109, 163 N. Y. 585 2484
v. Washington Terminal Co., 233 U. S. 546 3973
Richards' Est., 185 Pa. 155 742
Richardson v. Ainsworth, 20 How. Pr. 521 690, 691
v. Allen, 74 Ga. 719 1721, 1741, 1742
v. Ashby, 32 Mo. 238 4288
v. Barker, 7 Ind. 567 4575, 4589
v. Birmingham C. Mfg. Co., 116 Ala. 381 1494, 1521
v. Board of Levee Com'rs, 68 Miss. 539 4131
v. Boston C. Laboratory, 9 Metc. (Mass.) 42 809
v. Brown, 3 Bibb 207 985
v. Brown, 9 Baxter 242 998, 1161
v. Campbell, 34 Neb. 181 971, 998
v. Centerville, 137 Iowa 253 3959, 4003
v. Chasen, 10 Q. B. 756 1369, 1998, 4732
v. Chicago & A. R. Co., 149 Mo. App. 311, 62 Mo. App. 1 3340
v. Chynoweth, 26 Wis. 656 193, 207, 2343
v. Coddington, 49 Mich. 1 717
v. Comstock, 21 Ark. 69 1824
v. Cooper, 25 Me. 450 764
v. County, 59 Neb. 400 2494
v. Detroit & M. R. Co., 176 Mich. 413 4921, 4946
v. Diss, 127 Cal. 58 959
v. Dorr, 5 Vt. 9 2058, 2152
v. Dunn, 8 C. B. (N. S.) 655 159, 302, 2969
v. Eagle Mach. Works, 78 Ind. 422 372, 2548, 2549
v. Gordon, 188 Mass. 279 3110, 3119
v. Gundy, 52 Ga. 504 2375
v. Hartmann, 68 Hun 9 2565
v. Huston, 10 S. D. 484 1281
v. Investment Co., 66 Ore. 353 941, 2666
v. Jackson, 8 M. & W. 298 807, 809
v. Kropf, 47 How. Pr. 286, 60 N. Y. 634 1785
v. Lowe, 149 Fed. 625 1826
v. McFadden, 13 Tex. 278 2396
v. McKinson, Litt. Sel. Cas. 320 (1821) 2021
v. Marshall County, 100 Tenn. 346 1871
v. Mason, 53 Barb. 601 2405
v. Mellish, 2 Bing. 229 410
v. Milburn, 11 Md. 340 3808
v. Missouri F. B. Co., 122 Mo. App. 529 1494
v. Nelson, 221 Ill. 254, aff'g 123 Ill. App. 550 1464, 4700, 4793
v. New York Cent. R. Co., 98 Mass. 85 4954
v. Northrup, 56 Barb. 105 468, 4574, 4593, 4594

[REFERENCES ARE TO PAGES]

Richardson v. Northrup, 66 Barb. 85 408, 1431, 3799
v. O'Brien, 44 Ill. App. 243 4163
v. People's Nat. Bank, 57 Ohio St. 299 1673
v. Reid, 8 New Zeal. 760 (1890) 2301
v. Rowntree, [1894] 7 App. Cas. 217 3416
v. Scott's Bluff County, 59 Neb. 400 18, 2493
v. Silvester, L. R. 9 Q. B. 34 13
v. Sioux City, 136 Iowa 436 3990, 3991, 4138
v. Skolfield, 45 Me. 386 3727
v. Smith, 2 Jones 8 1598
v. Spokane, 67 Wash. 621 1477
v. Taylor, 100 Me. 175 746
v. Thorpe, 73 N. H. 532 4508
v. Tyson, 110 Wis. 572 2480, 2491
v. Vermont Cent. R. Co., 25 Vt. 465 3913
v. Washington Bank, 3 Metc. (Mass.) 536 706
v. Webster City, 111 Iowa 427 1433, 3739, 3965
v. Williams, 2 Port. 239 1182
v. Wilmington & W. R. Co., 126 N. C. 100 1258
v. Woehler, 26 Mich. 90 897, 2539
v. Woodbury, 12 Cush. 279 711
Richardson Const. Co. v. Whiting Lumber Co., 116 Va. 490 558, 2274, 2455
Richardson F. Co. v. Peters, 82 Ill. App. 508 4884
Richardson Mach. Co. v. Swartzel, 70 Kan. 773 2547
Richbourg v. Rose, 53 Fla. 173 4311
Richelieu v. Union Pac. R. Co., 97 Neb. 360 5109
Richey v. McBean, 17 Ill. 63 4635
v. Northern Pac. R. Co., 110 Minn. 347 3314, 3351
v. Union Cent. L. Ins. Co., 140 Wis. 486 226, 264, 2573, 2575
Richi v. Chattanooga B. Co., 105 Tenn. 651 3934
Richland County v. Owens, 86 S. C. 545 1604
Richman v. Richman, 10 N. J. L. 114 1556
Richmond, The, 181 Fed. 568 2726
Richmond, The, 209 Fed. 488 2717
Richmond, The, v. Cake, 1 D. C. App. Cas. 447 3123, 3129
Richmond v. Ames, 164 Mass. 467 2132, 2156, 2163, 2181, 2182, 2183
v. Ashcraft, 137 Mo. App. 191 3711
v. Brandt, 118 Ill. App. 624 1417
v. Bronson, 5 Denio 55 1135, 1137, 3389, 3401, 3433
v. Collamer, 38 Vt. 68 1200
v. Dubuque & S. C. R. Co., 40 Iowa 264 252, 285, 375, 409, 410, 3269
v. Dubuque, etc., R. Co., 33 Iowa 422 257, 267, 1107, 2050
v. Gay, 103 Va. 320 143
v. Gentry, 136 Ky. 319 3854, 3881
v. Irons, 121 U. S. 27 1076, 1113
v. Railroad Co., 40 Iowa 264 3322
v. Roberts, 98 Ill. 472 475, 3676, 3677, 3687
v. Schickler, 57 Iowa 486 445, 1259
v. Second Ave. R. Co., 76 Hun 233 4751, 4753
v. Thompson's Heirs, 116 Va. 178 3962, 4066
v. Union S. Co., 87 N. Y. 240 3310, 3364
Richmond v. Williams, 114 Va. 698 4032
Richmond County v. Wandel, 6 Lans. 33 1578
Richmond G. Co. v. Baker, 146 Ind. 600 4655
Richmond H. Mills v. Western U. Tel. Co., 123 Ga. 216 3569
Richmond I. Works v. Woodruff, 8 Gray 447 712
Richmond Passenger, etc., R. Co. v. Robinson, 100 Va. 374 1385
Richmond R. & E. Co. v. Bowles, 92 Va. 738 4758
v. Garthright, 92 Va. 627 4795
Richmond T. Co. v. Vanderbilt, 2 N. Y. 479, 1 Hill 480 1329, 1335, 3509
Richmond & I. C. Co. v. Richmond, etc., R. Co., 68 Fed. 105 1032
Richmond, etc., R. Co. v. Allison, 86 Ga. 145 4697, 5090
v. Allison, 89 Ga. 567 4794, 4797
v. Anderson, 31 Gratt. 812 3922
v. Chamblin, 100 Va. 401 3981
v. Chandler (Miss.) 13 So. 267 1458
v. Childress, 82 Ga. 719 1462
v. Elliott, 149 U. S. 266 4753, 5090
v. Freeman, 97 Ala. 289 4867
v. Greenwood, 99 Ala. 501 433, 4775
v. Hammond, 93 Ala. 181 4906
v. Humphreys, 90 Va. 425 3965, 4039, 4054, 4123
v. Jefferson, 89 Ga. 554 3467
v. Madison County F. Court, 114 Ky. 351 4071
v. Martin, 102 Va. 201 110
v. Medley, 75 Va. 499 3922
v. Seaboard A. L. R., 103 Va. 399 4036
v. Trousdale, 99 Ala. 389 3330, 3346
v. Vance, 93 Ala. 144 1281
v. Weems, 97 Ala. 270 4659
Richmondville Union Seminary v. Hamilton Mut. Ins. Co., 14 Gray 459 3026, 3049
Richner v. Plateau L. S. Co., 44 Colo. 302 243, 1418, 2339, 2347
Richter v. Buchanan, 48 Wash. 32 4285
v. Meyers, 5 Ind. App. 33 2697
v. Stolze, 158 Mich. 594 4505, 4508
Richtmeyer v. Remsen, 38 N. Y. 206 27
Riciotto v. Clement, 94 Cal. 105 4311
Ricker v. Blanchard, 45 N. H. 39 819
v. Fairbanks, 40 Me. 43 2658
Rickert v. Snyder, 9 Wend. 416 303, 2089, 2094, 2123, 2137, 2149, 2186
Ricket v. Metropolitan R. Co., 5 B. & S. 149, L. R. 2 H. of L. 175 3971
Rickets v. Dickens, 1 Murph. 343 2094
Ricketson v. Wright, 3 Sumner 335 1143
Ricketts v. Buckstaff, 64 Neb. 851 819
v. Chesapeake & O. R. Co., 33 W. Va. 433 1338, 3474, 3513
v. Hall, 2 Bush 249 752, 754, 756
v. Lastetter, 19 Ind. 125 3185, 3205
v. Sisson, 9 Dana. 358 2462, 2475
Rickey v. Tenbroeck, 63 Mo. 563 2238, 2242, 2249
Rickmers, The, 142 Fed. 305 4991, 5000, 5012
Ricks v. Dillahunty, 8 Port. 133 2388
v. Yates, 5 Ind. 115 2539
Ricord v. Central Pac. R. Co., 15 Nev. 167 4639
Riddell v. Munro, 49 Minn. 532 4175
v. Riddell, 7 Sim. 529 2124
Riddle v. Cheadle, 25 Ohio St. 278 306, 1719
v. Driver, 12 Ala. 590 362, 363, 4256
v. Gage, 37 N. H. 519 1836

[REFERENCES ARE TO PAGES]

Riddle v. Kreimbricht, 12 La. Ann. 297 530
v. McGinnis, 22 W. Va. 253 4963, 4964, 4969
v. Moffitt, 159 Mo. App. 470 1291
v. School Dist., 15 Kan. 168 1582
Riddler v. Missouri Pac. R. Co., 184 Mo. App. 709 3420
Riddlesbarger v. McDaniel, 38 Mo. 138 602, 1749
Ridener v. Rogers, 6 B. Mon. 594 1598
Rider v. Crowe M. Co., 36 Colo. 366 1704, 2792
v. Culp, 68 Mo. App. 527 623, 696
v. Kelley, 32 Vt. 268 368, 2237, 2309
v. Kite, 61 N. J. L. 6 4602
v. Pond, 28 Barb. 447 1353
v. Rulison, 74 Hun 239 4506
v. Stryker, 63 N. Y. 136 4097
Ridge v. Erie R. Co., 54 Pa. Super. Ct. 602 3338
v. Norfolk Southern R. Co., 167 N. C. 510 4711
v. Wilson, 1 Blackf. 409 1532
Ridge Ave. P. R. Co. v. Philadelphia, 181 Pa. 592 12
Ridgely v. Aetna Life Ins. Co., 160 App. Div. (N. Y.) 719 3080
v. Mooney, 16 Ind. App. 362 2237, 2241, 2244
Ridgeway D. & E. Co. v. Pennsylvania C. Co., 221 Pa. 160 2260
Ridgway v. Osceola, 139 Iowa 590 12
v. Hungerford M. Co., 3 A. & E. 171 2525
Riding v. Smith, 1 Ex. Div. 91 157, 4557
Ridler v. Ridler, 103 Iowa 470 2471, 2472
Ridley v. Perry, 16 Me. 21 4580
v. Seaboard & R. R. Co., 118 N. C. 996 3847, 3860, 3873, 3875
Ridout v. Lewis, 1 Atk. 269 1070
Ridpath v. Merriam, 22 Wash. 311 1750
Riech v. Bolch, 68 Iowa 526 173, 2581
Rief v. Great Northern R. Co., 126 Minn. 430 1461, 1465, 1504
Rielly v. Stephenson, 222 Pa. 252 8
Riemer v. Rice, 88 Wis. 16 2502, 2512
Rieveruzzi v. Caruso, 86 N. J. L. 556 524
Rigby v. Hewitt, 5 Ex. 240 161, 3597
Rigden v. Wolcott, 6 Gill & J. 413 470
Rigdon v. Moore, 226 Ill. 382 2501
v. Temple, W. W. Co., 11 Tex. Civ. App. 542 69
Rigel, The, [1912] Prob. 99 92
Rigg v. Cook, 9 Ill. 336 1485
Riggan v. Crain, 86 Ky. 249 1759
Riggins v. Brown, 12 Ga. 271 1461
Riggs v. Bell, 5 T. R. 471 3153
v. Horde, 25 Tex. Supp. 456 2539
v. Lindsay, 7 Cranch 500 278, 1899, 2971
v. Northern Pac. R. Co., 60 Wash. 292 4854
v. Pursell, 74 N. Y. 370 1945
Righter v. Philadelphia, 161 Pa. 73 403
v. Stall, 3 Sandf. Ch. 608 733, 739, 740
Rightmire v. Hirner, 188 Pa. 325 2575
Rigney v. Chicago, 102 Ill. 64 3913, 3951
v. Monette, 47 La. Ann. 648 165, 2325, 2327
v. Tacoma L. & W. Co., 9 Wash. 245 1503
Riker v. Clopton, 83 App. Div. (N. Y.) 310 4549
Riley v. Burroughs, 41 Neb. 296 2099, 2178
v. Hale, 158 Mass. 240 3182, 3189, 3190
v. Hoffman, 216 Mass. 352 2503
v. Hopkinson, 82 N. J. Eq. 469 978
v. Horne, 5 Bing 217 3376
v. Kershan, 52 Mo. 224 749, 754, 758
v. Lidtke, 49 Neb. 139 4758, 4759
v. Littlefield, 84 Mich. 22 4322, 4334
v. McInlear's Est., 61 Vt. 254 1121
v. Martin, 35 Ga. 136 4211
v. New England Tel. & T. Co., 184 Mass. 150 59
v. Nugent, 1 A. K. Marsh. 431 4549
v. Rhea, 5 Lea 116 2863, 2864
v. Riley, 14 Ky. L. Rep. 895 (Ky. Super. Ct.) 1119, 2467
v. Streetfield, 34 Ch. Div. 388 1026
v. Western U. Tel. Co., 8 N. Y. Misc. 217 3549
Rilling v. Thompson, 12 Bush 310 958
Rime v. Rater, 108 Iowa 61 3666, 3676, 3680, 3682
Rimelin v. People, 147 Ill. App. 28 1121
Rimmer v. Wilson, 42 Colo. 180 1442
Rindge v. Judson, 24 N. Y. 64 2750
Rindskopf v. Farmers' L. & T. Co., 58 Barb. 36 2093, 2096, 2136
Rineer v. Collins, 156 Pa. 342 1986, 1988, 1990, 1996, 1997, 2003
Rinehart v. Olwine, 5 W. & S. 157 2229
Rinfret v. Morrisey, 29 R. I. 223 3714
Ring v. Cohoes, 77 N. Y. 83 105, 106
Ringe v. Judson, 24 N. Y. 64 2749
Ringen v. Ranes, 263 Ill. 11 2495
Ringer v. Virgin Timber Co., 213 Fed. 1001 1163
Ringgenberg v. Hartman, 124 Ind. 186 1676
Ringgold v. Haven, 1 Cal. 108 3389
v. Randolph, 13 Ark. 328 1546
v. Ringgold, 1 Har. & Gill 11 360
Ringhouse v. Keener, 63 Ill. 230 3708
Ringle v. Pennsylvania R., 164 Pa. 529 25
Ringlehaupt v. Young, 55 Ark. 128 41
Ringo v. Biscoe, 13 Ark. 563 1105
Ringwalt v. Wabash R. Co., 45 Neb. 760 3529
Rinker v. Lee, 29 Neb. 783 1675
Rio Grande, The, 22 Fed. 914 2729
Rio Grande R. Co. v. Cross, 5 Tex. Civ. App. 454 3403
Rio Grande S. R. Co. v. Campbell, 44 Colo. 1 4733, 4778
Rio Grande Western R. Co. v. Rubenstein, 5 Colo. App. 121 4693
Rios v. Azcuenaga, 19 Idaho 739 2618
Ripka v. Sergeant, 7 W. & S. 9 32
Ripley v. Davis, 15 Mich. 75 4211
v. Eady, 106 Ga. 422 1555
v. Gelston, 9 Johns. 201 2993
v. McClure, 4 Ex. 345 2256
v. Moseley, 57 Me. 76 2843, 2851, 2883
v. Wenzel (Tex. Civ. App.), 139 S. W. 897 1538
Riply v. Wightman, 4 McCord 477 3143
Ripon v. Bittel, 30 Wis. 614 334, 3474, 3489, 4693
Rippe v. Chicago, etc., R. Co., 23 Minn. 18 4094
Rippey v. Miller, 11 Ired. 247 1350, 3833
Ripy v. Less, 55 Tex. Civ. App. 492 3791
Riser v. Walton, 78 Cal. 490 1355

[REFERENCES ARE TO PAGES]

Risher v. Acken C. Co., 147 Iowa 459 3875, 3877, 3924
v. Risher, 194 Pa. 164 722, 725
Rising v. Dickinson, 18 N. D. 478 1594, 1609
v. Patterson, 5 Whart. 316 762
Rising Sun, The, 1 Ware 385 2737
Risley v. Squire, 53 Barb. 280 387
Riss v. Messmore, 30 N. Y. St. Rep. 250, 58 N. Y. Super. 23 2414, 2432
Ristine v. Blocker, 15 Colo. App. 224 1339
Rita, The, 62 Fed. 761 2726
Ritchie v. Atkinson, 10 East 295 2540, 2542
v. Shannon, 2 Rawle 196 1570
v. Steger, 93 Neb. 63 1482
v. Stenius, 73 Mich. 563 4592
v. Talcott, 10 N. Y. Misc. 214 4338
v. Victorian Rys. Com'r, 25 Vict. L. R. 272 4751, 4833
v. Walter, 166 Pa. 604 2788
Ritenour v. Mathews, 42 Ind. 7 2834
Ritko v. Grove, 102 Minn. 312 4399
Rittel v. Southern I. Co., 127 Mo. App. 463 4816
Rittenhouse v. Independent Line of Tel., 44 N. Y. 263 3547, 3579, 3604
v. Mayor, 25 Md. 336 2710
Ritter v. Hoy, 2 Ala. App. 358 1258
v. Phillips, 53 N. Y. 586 951
v. Sieger, 105 Pa. 400 3808
v. Singmaster, 73 Pa. 400 646
v. Smith, 70 Md. 261 3072
River S. Co. v. Atlantic Mills, 155 Fed. 466 2225, 2236, 2269
Rivera v. Cadierno, 4 Porto Rico Fed. 39 3661, 3666, 3669, 3671, 3673, 3676
Rivers v. Bay City T. & E. Co., 164 Mich. 696 413, 4878
v. Gregg, 5 Rich Eq. 274 3071
v. Griffiths, 1 D. & Ry. 215 817, 818
v. Grugett, 1 McCord 71 2385
v. Yazoo & M. R. Co., 90 Miss. 196 4509
Riverside I. Works v. Hall, 64 Mich. 165 668
Riverside Milling & Power Co. v. Bank of Cartersville, 141 Ga. 578 711, 712, 1923
Riverside Park, Matter of, 59 App. Div. (N. Y.) 603, aff'd 167 N. Y. 627 4113
Riverside R. Co. v. Husted, 109 Va. 688 2019
Riverside & Dan River C. M. Co. v. Carter, 113 Va. 346 4778
Riverton F. Co. v. McKeesport & D. B. Co., 179 Pa. 466 4006, 4076
Rives v. Columbia, 80 Mo. App. 173 4114, 4115
Rivet v. Murrell P. & Mfg. Co., 121 La. 201 1719
Rivinus v. Langford, 75 Fed. 959 4230, 4244, 4278
Rix v. Mutual Ins. Co., 20 N. H. 198 3055
v. Smith, 8 Vt. 365 1023
v. Strauts, 59 Mich. 364 1205
Rixey v. Pearre, 89 Va. 113 1922
Rizer v. Cullen, 27 Kan. 339 2843
Roach v. Bennett, 24 Miss. 98 1070
v. Caldbeck, 64 Vt. 593 1305, 4776, 4779
v. Houston, 15 Ky. L. Rep. 61 (Ky. Super. Ct.) 4314
v. Irvin, 245 Pa. 162 2047
v. Jelks, 40 Miss. 754 1117
v. Jones, 18 Tex. Civ. App. 231 3625
v. Kelly, 194 Pa. 24 61, 129, 159
Roach v. Peterson, 47 Minn. 291 3140
v. Rector, 93 Ark. 521 432, 4302
v. Thompson, 4 C. & P. 194 1927
v. Waid, 2 T. B. Mon. 142 2013
v. Wolff, 96 Neb. 43 4895, 4907
Road Co. v. Branegan, 40 Ind. 361 2500
Road Com'rs v. Hudson, 45 N. J. L. 173 1065
Roads v. Webb, 91 Me. 406 1904, 1923
v. Well, 91 Me. 406 1924
Roake v. Sullivan, 69 N. Y. Misc. 429 2061, 2065, 2133
Roakes v. Bailey, 55 Vt. 542 704, 730, 738
Roan Adm'r v. Drummond Adm'rs, 6 Rand. 182 1051, 1570
v. Holmes, 32 Fla. 295 3719, 3726
Roanoke, The, 214 Fed. 63 2716, 2717
Roanoke G. & M. Co. v. Watkins, 41 W. Va. 787 2780, 2781
Roanoke R. & E. Co. v. Sterrett, 111 Va. 293 324
Robards v. Hamrick, 39 Ind. App. 134 686
v. Netherland, 3 Bibb 529 2098
Robarts v. Tucker, 16 Q. B. 560 682
Robb v. Carnegie, 145 Pa. 324 9, 3888, 3899, 3915
v. Maysville, etc., T. Co., 3 Metc. (Mass.) 117 3966
v. Railway Co., 14 Pa. Super. Ct. 282 3460
Robbins v. Borman, 1 Pick. 122 429
v. Chicago, 4 Wall. 657 295, 299
v. Farwell, 193 Pa. 37 1536
v. Fletcher, 101 Mass. 115 4513
v. Harvey, 5 Conn. 335 2494
v. Horgan, 192 Mass. 443 685
v. Illinois W. Co., 81 Fed. 957 4465, 4466
v. Laswell, 58 Ill. 203 1075
v. Lincoln, 12 Wis. 1 717
v. Maidstone, 4 Q. B. 811 1822
v. Milwaukee, etc., R. Co., 6 Wis. 636 4093, 4094
v. Packard, 31 Vt. 570 4277
v. Robbins, 133 N. Y. 597 4601, 4602
v. St. Paul, etc., R. Co., 22 Minn. 286 4095
v. Scranton, 217 Pa. 577 3991, 4019, 4098, 4112
v. Selby, 144 Iowa 407 1134, 1242, 1443, 4400
v. Treadway, 2 J. J. Marsh. 540 4503
v. Westmoreland C. Co., 198 Pa. 301 1971
Robel v. Chicago, etc., R. Co., 35 Minn. 84 4935, 4939
Rober v. Northern Pac. R. Co., 25 N. D. 394 4876, 4934
Roberds v. Laney, — Tex. Civ. App. —, 165 S. W. 114 2795
Roberson v. Allen, 7 Ga. App. 142 3198
v. Johnson L. Co., 154 N. C. 328 4879
v. L. Co., 154 N. C. 328 4878
v. Nail, 85 Tenn. 124 1088
Robert v. Chicago & A. R. Co., 148 Mo. App. 96 3337
v. Thompson, 14 Ohio St. 1 2940
Robert Hadden, The, 68 Fed. 1017 5000
Robert S. Besnard, The, 144 Fed. 992 2721
Roberts, In re, 14 Ch. Div. 49 1033
Roberts v. Adams, 6 Porter 361 2852
v. American B. & T. Co., 83 Ill. App. 463 2841
v. Baldwin, 151 N. C. 407 318
v. Baldwin, 155 N. C. 276 3922
v. Banse, 78 N. J. L. 57 754
v. Beatty, 2 P. & W. 63 624

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v. Berdell, 61 Barb. 37 4273, 4275
v. Brandies, 44 Hun 468 753
v. Breckon, 31 App. Div. (N. Y.) 431 4540
v. Brown, 43 Tex. Civ. App. 206 32
v. Carter, 17 How. Pr. 341, 24 How. Pr. 44 590, 591
v. Carter, 28 Barb. 462 2406
v. Cocke, 28 Gratt. 207 1228
v. Coffin, 22 Tex. Civ. App. 127 978, 987
v. Comer, 41 Ind. 475 1918
v. Connelly, 14 Ala. 235 4963
v. Cooper, 19 How. 373 1767
v. Cooper, 12 Ky. L. Rep. 712 (Ky. Super. Ct.) 2865, 2868
v. Crowley, 81 Ga. 429 2545, 2561
v. Detroit, 102 Mich. 64 4700
v. Donovan, 70 Cal. 108 525
v. Druillard, 123 Mich. 286 3667, 3668, 3671
v. Dunn, 71 Ill. 46 1439, 1453
v. Durst, 4 Ohio St. 502 1718
v. Fahs, 36 Ill. 268 1758, 1760
v. Failis, 1 Cow. 238 1480
v. Fisher, 43 N. Y. 159 649
v. Fisher, 53 Barb. 69 655
v. Fleming, 31 Ala. 683 2405, 2414, 2415, 2421
v. Gallagher, 1 Wash. C. C. 156 675, 676
v. Galveston, etc., R. Co. (Tex. Civ. App.), 124 S. W. 230 4676
v. Gates, 146 Mich. 169 2928
v. Glass, 112 Ga. 456 3, 39
v. Goff, 4 B. & Ald. 92 979
v. Graham, 6 Wall. 578 1363, 1365
v. Great Northern R. Co., (Wash.) 161 Fed. 239 4855
v. Havelock, 3 B. & Ad. 404 2542, 2609
v. Holliday, 10 S. D. 576 4380, 4407
v. Jeffries, 80 Mo. 115 2865, 2868
v. Jenkins, 80 Ky. 666 1797
v. Johnson, 58 N. Y. 613 449
v. Jones, 71 S. C. 404 559
v. Krafts, 141 Cal. 20 207
v. Lambert, 2 Taunt. 283 1232
v. Landram, 20 Tex. 471 1539
v. Laramie County, 8 Wyo. 177 1581, 1584
v. Laughlin, 4 N. D. 167 2788, 2791
v. Lee, 125 Ky. 709 2274, 2352
v. Levy, 3 Abb. Pr. (N. S.) 311 2147, 2149
v. Louisiana R. & N. Co., 132 La. 446 4939
v. Lovitt, 13 Ind. App. 281 1783
v. Lynn I. Co., 187 Mass. 402 3143
v. McFadden, 32 Tex. Civ. App. 47 1953, 1982, 1987, 1989, 1997
v. McKim, 34 Nev. 191 656
v. McNeeley, 7 Jones 506 1147, 1878
v. Mason, 10 Ohio St. 278 170, 223, 1305, 1306, 1314, 4190, 4431
v. Massay, 13 Ves. 561 1027
v. Minneapolis T. M. Co., 8 S. D. 579 41, 262
v. Moss, 127 Ky. 657 383
v. Myers, 13 Law Rep. 398 4478
v. New York E. R. Co., 128 N. Y. 455 1433, 1444, 4132, 4139
v. Norris, 67 Ind. 386 373
v. Northern Pac. R. Co., 158 U. S. 1 4095
v. Ogdensburgh R. Co., 29 Hun 155 1465
v. Parrish, 17 Ore. 583 1815
v. Philadelphia, 239 Pa. 339 4032, 4134, 4135
Roberts v. Plaisted, 83 Me. 335 4380
v. Prior, 20 Ga. 561 1094
v. Railroad, 143 N. C. 176 1332
v. Richmond & D. R. Co., 88 N. C. 560 486
v. Riddle, 79 Pa. 468 2893
v. Roberts, 33 L. J. (Q. B.) 249, 5 B. & S. 384 4554, 4555, 4559
v. Rockbottom Co., 7 Metc. (Mass.) 46 1486
v. Sayre, 6 T. B. Mon. 188 2865
v. Scurvin D. Co., 22 Colo. App. 120 4046
v. Smith, 64 Tex. 94 1876
v. Snell, 1 Man. & Gr. 577 3133
v. Snow, 27 Neb. 425 1815, 1924
v. Stuyvesant S. D. Co., 123 N. Y. 57 4306
v. Tennell, 3 T. B. Mon. 247 3096, 3098
v. Thompson, 14 Ohio St. 1 670
v. Tremaine, Cr. J. 507 870, 998
v. Trunk, 179 Mo. App. 358 4868
v. Vonnegut, — Ind. App. —, 104 N. E. 321 658
v. White, 73 N. Y. 375 1730, 1735, 1737, 1742, 1748
v. White, 146 Mass. 256 820
v. Wilkins, 40 Okla. 138 4351
v. Wilkinson, 34 Mich. 129 628, 639, 2673
Roberts M. Pub. Co. v. Wise, 140 Ill. App. 443 553, 1014
Robert's App., 92 Pa. 407 1121
Robertson v. Allen, 36 Ark. 553 1501, 1520
v. Conklin, 153 N. C. 1 1317, 4614
v. County Com'rs, 10 Ill. 559 1621
v. Davidson, 14 Minn. 422 1683
v. Dumaresq, 2 Moore P. C. (N. S.) 66 2008
v. Gentry, 2 Bibb 542 40
v. Grand Rapids, 96 Minn. 69 835, 2684
v. Halton, 156 N. C. 215 4378, 4383, 4391, 4399
v. Hammond P. Co., 115 Mo. App. 520 4744
v. Jackson, 2 C. B. 412 3305
v. Jennings, 128 La. 795 4863
v. Jones, 71 Ill. 405 3790
v. Knapp, 35 N. Y. 91 1457
v. Lemon, 2 Bush 301 2098, 2104, 2137, 2143
v. Livingston, 5 Cow. 473 2959, 2960
v. Morgan, 3 B. Mon. 307 295, 297, 2893
v. Moses, 15 N. D. 351 1929, 4391
v. National S. Co., 60 N. Y. Super. Ct. 132 3345, 3426
v. New York Press Co., 2 App. Div. (N. Y.) 49 4541
v. Reed, 47 Pa. 115 416
v. Robertson, 37 Ore. 339 696
v. Shepherd, 165 Mo. 360 1560
v. Shutt, 9 Bush 659 591
v. Skelton, 12 Beav. 260 2032
v. Smith, 18 Johns. 459 775
v. Smith, 37 Ga. 604 2245
v. Smith, 129 Ind. 422 1729
v. Trammell, 98 Tex. 364, 37 Tex. Civ. App. 53 781, 2891
v. Wabash R. Co., 152 Mo. 382 4730
v. Williams, 5 Munf. 381 1853
v. Wylde, 2 M. & R. 101 4547
Robeson v. Whitesides, 16 S. & R. 320 839, 908
Robey v. Turner, 8 Gill & J. 125 1614
Robichaud v. Maheux, 104 Me. 524 463, 1280

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Robie v. Briggs, 59 Vt. 443 730
Robinett v. Lewis, Draper, 272 3720
v. Morris, Hard'n 93 1357
Robinius v. Lister, 30 Ind. 142 556
Robins v. Luce, 4 Mass. 474 624
Robinson, Re, 22 Ont. 438 1080
v. Alexander, 141 Ill. App. 192 4210
v. All'son, 36 Ala. 525 721, 736, 737
v. Ames, 20 Johns. 146 2930
v. Bakewell, 25 Pa. 424 839
v. Baltimore & O. R. Co., 237 U. S. 84 5045, 5117
v. Barrows, 48 Me. 185 1136, 4211, 4214, 4312
v. Bierce, 102 Tenn. 428 2151, 2158
v. Bland, 2 Burr. 1077 389, 936, 943, 1017, 1145, 1146, 1179, 1245, 1878, 1880
v. Bland, 2 Burr. 1085 1032
v. Boyd, 17 Mich. 128 4429
v. Boyd, 60 Ohio St. 57 2859
v. Brock, 1 Hen. & M. 211 936
v. Bullock, 66 Ala. 548 2591, 2674
v. Burton, 5 Harr. 335 1268, 4967, 4970, 4971
v. Campbell, 47 Iowa 625 2464
v. Canadian Pac. R. Co., [1892] App. Cas. 481 4851, 4857, 5118
v. Cathcart, 2 Cranch C. C. 590 860
v. Centenary Fund, 68 N. J. L. 723 842, 887
v. Chamberlain, 34 N. Y. 389 1594
v. Clark, 53 Ill. App. 368 4843
v. Cook, 6 Taunt. 336 799
v. Corn Exchange & Ins. Co., 1 Robert. 14 1117
v. Corsicana C. Factory, 124 Ky. 435 684, 1805
v. Craver, 88 Iowa 381 3666, 3687, 3689
v. Crawford, 31 App. Div. (N. Y.) 228 2970
v. Cromelien, 15 Mich. 316 1854
v. Cropsey, 2 Edw. Ch. 138 836
v. Davidson, L. R. 6 Ex. 269 2307, 2534
v. Doolittle, 12 Vt. 246 704, 714, 728
v. Drummond, 24 Ala. 174 469, 4568, 4569
v. Eau Claire B. & S. Co., 110 Wis. 369 4531
v. Exempt F. Co., 103 Cal. 1 1425
v. Ferguson, 23 New Bruns. 332 4279
v. Ferreday, 8 C. & P. 752 808
v. Fiske, 24 Me. 401 2222
v. Flint, 16 How. Pr. 286 1390
v. Gaines, 3 Call 243 820, 825
v. Garth, 6 Ala 204 1946
v. Godfrey, 2 Mich. 408 452
v. Goings, 63 Miss. 500 449, 1329, 4164
v. Gould, 11 Cush. 55 2825
v. Green, 3 Metc. (Mass.) 159 2542
v. Great Northern R. Co., 123 Minn. 495 4170, 4188
v. Hall, 28 How. Pr. 342 615
v. Harman, 1 Ex. 850 47, 1975, 1976, 2398
v. Hartridge, 13 Fla. 501 4210
v. Harvey, 5 T. B. Mon. 519 4599
v. Harvey, 82 Ill. 58 2387
v. Heard, 15 Me. 296 1847, 1938, 1984
v. Helena L. & R. Co., 38 Mont 222 1477
v. Hindman, 3 Esp. 235 2526
v. Holmes, 75 Ill. App. 203 1181, 1182
v. Holt, 39 N. H. 557 361
Robinson v. Holt, 96 Ga. 19 3365
v. Houston, etc., R. Co., 105 Tex. 185 3396
v. Huffstetler, 165 N. C. 459 2379, 2393
v. Hunt, 88 Hun 285 2458
v. Hurlburt, 34 Vt. 115 628
v. Hurley, 11 Iowa 410 4273, 4278
v. Hyer, 35 Fla. 544 2343
v. International L. Assur. Soc., etc., 42 N. Y. 54 611, 612
v. Kellum, 6 Cal. 399 4606
v. Keyser, 22 N. H. 323 4592
v. Kinney, 2 Kan. 184 870, 958
v. Kunkleman, 117 Mich. 193 589
v. Leatherbee T. & L. Co., 120 Ga. 901 757, 2216
v. L'Engle, 13 Fla. 482 3138
v. Loomis, 51 Pa. 78 871
v. Mace, 16 Ark. 97 538, 2474
v. McNeill, 51 Ill. 225 2383
v. Marine Ins. Co., 2 Johns. 323 3297
v. Marino, 3 Wash. 434 4662, 4683, 4828
v. Masterson, 136 Mass. 560 1790
v. Merchants' D. T. Co., 45 Iowa 470 3400
v. Moark-Nemo Consol. Min. Co., 178 Mo. App. 531 502, 3771, 3812
v. Morris, 30 R. I. 132 4652
v. New York Cent. & H. River R. Co., 145 App. Div. (N. Y.) 391, aff'd 203 App. Div. (N. Y.) 627 3413
v. New York E. R. Co., 175 N. Y. 219 4134
v. Noble, 8 Pet. 181 2329, 2330
v. Peru P. & W. Co., 1 Okla. 140 4212
v. Plimpton, 25 N. Y. 484 1783, 1785, 1786, 1798
v. Powers, 129 Ind. 480 4971
v. Queen, 87 Tenn. 445 1146
v. Raynor, 28 N. Y. 494 2471
v. Read, 9 B. & C. 449 667
v. Reynolds, 2 Q. B. 202 1818
v. Rice, 20 Mo. 229 2381
v. Robinson, 20 S. C. 567 623, 634
v. Rupert, 23 Pa. 523 464, 465, 1291, 4783
v. St. Louis S. R. Co., 103 Mo. App. 110 4693
v. St. Matthews, 89 S. C. 30 4662
v. Sanders, 24 Miss. 391 2539
v. Scull, 3 N. J. L. 817 422
v. Sherman, 2 Gratt. 178 2835, 2848
v. Simmons, 146 Mass. 167 1076
v. Starley, 29 Ind. 298 1805
v. Stimer, 154 Mich. 244 339
v. Superior R. T. R. Co., 94 Wis. 345 1309, 1311, 1338, 1340, 3476
v. Van Hooser, 196 Fed. 620 4433
v. Varnell, 16 Tex. 382 2236
v. Waupaca, 77 Wis. 544 4796
v. Weeks, 6 How. Pr. 161 690, 691
v. Western U. Tel. Co., 24 Ky. L. Rep. 452 3592, 3629, 3635
Robinson L. Co. v. Burton, 128 La. 120 2340, 2356, 2359
Robinson Mach. Works v. Chandler, 56 Ind. 575 2376
Robinson Min. Co. v. Riepe, 37 Nev. 27 4209
Robinson's Est., In re, 16 Pa. Dist. 31 1083
In re, 35 Pa. Super. 192 1081
Robitzek v. Daum, 220 Pa. 61 4635
Robrecht v. Marling, 29 W. Va. 765 3189, 3198

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v. Watts, 11 Tex. 764 659
Roby v. Kansas City S. R. Co., 130 La. 896 1519, 4821, 4930
v. Meyer, 84 Tex. 386 4268
v. West, 4 N. H. 285 1849, 1850, 1852
Roche v. Brooklyn City & N. R. Co., 105 N. Y. 294 1472
v. Redington, 125 Cal. 174 4795
v. Smith, 176 Mass. 595 1980, 2502, 2503
Rocheleau v. Boyle, 12 Mont. 590 4286
Rochester, Matter of, 24 App. Div. (N. Y.) 383 3994
Rochester v. Anderson, 1 Bibb. 428 460, 461, 463, 465, 1534
v. Chester, 3 N. H. 349 1442, 2306
v. Levering, 104 Ind. 562 1128, 2910, 2962, 2971
v. Montgomery, 72 N. Y. 65 299
v. Randall, 105 Mass. 295 1584, 1613
v. Seattle R. & S. R. Co., 67 Wash. 545 4895
v. Wells Fargo & Co. Exp., 87 Kan. 164 4955
Rochester L. Co. v. Stiles & P. P. Co., 135 N. Y. 209 181, 187
Rochester P. Co., 60 Hun 319 4507
Rochester & S. R. Co. v. Budlong, 6 How. Pr. 467, 10 How. Pr. 289 1420, 1434
Rochevot v. Wolf, 96 App. Div. (N. Y.) 506 2421
Rochford v. Barrett, 22 S. D. 83 1826
v. Rothschild, 16 Ohio C. C. 287 2749
Rock v. Denis, 4 Montreal L. R. (Super. Ct.) 356 345
v. Monarch B. Co., 87 Ohio St. 244 3167
v. Stinger, 36 Ind. 346 1579
Rock Creek S. Co. v. Boyd, 111 Md. 189 4, 3443, 3459
Rock Island v. Starkey, 189 Ill. 515 4676
Rock Island S. & D. Works v. Moore H. Co., 147 Ala. 581 2231
Rock Island & E. I. R. Co. v. Gordon, 184 Ill. 456 3977, 3988, 4019
Rock Island & P. R. Co. v. Johnson, 204 Ill. 488 4056
v. Leisy B. Co., 174 Ill. 547 4039
Rock Island, etc., R. Co. v. Lynch, 23 Ill. 645 4025
Rockfeller v. Donnelly, 8 Cow. 623 295, 1488, 2191, 2893
v. Lamora, 106 App. Div. (N. Y.) 345 1497
v. Merritt, 76 Fed. 909 54, 172, 4408, 4410
v. Wedge, 149 Fed. 130 779
Rockford v. Russell, 9 Ill. App. 229 104
Rockford W. Co. v. Manifold, 36 Neb. 801 2902
Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32 3846, 3853, 3877
Rockford, etc., R. Co. v. Beckemeier, 72 Ill. 267 237, 2620
v. Delaney, 82 Ill. 198 4870, 4931, 4939
v. McKinley, 64 Ill. 338 4138
v. Sage, 65 Ill. 328 2467, 2499
Rockingham Ins. Co. v. Bosher, 39 Me. 253 127
Rockland & R. L. Co. No. 1, The, 175 Fed. 524 2728
Rockwell v. Brown, 36 N. Y. 207 4515, 4604
v. Daniels, 4 Wis. 432 527
Rockwell v. Eldred, 7 Pa. Super. Ct. 95 4652
v. Lawrence, 6 N. J. Eq. 190 2047
v. Newton, 44 Conn. 333 2542
v. Portland Sav. Bank, 39 Ore. 241 2820
v. Rockwell, 4 Hill 164 2329
v. Third Ave. R. Co., 64 Barb. 438, 53 N. Y. 625 4693
v. Utz, 79 N. Y. Misc. 120 1961
v. Wells, 104 Mich. 57 2116
Rockwood v. Allen, 7 Mass. 254 47
v. Robinson, 159 Mass. 406 3834
Rocky Mount Mills v. Wilmington & W. R. Co., 119 N. C. 693 2363, 3373
Rocky Mount News v. Fridborn, 46 Colo. 440 4585, 4586
Rodemer v. Hazlehurst, 9 Gill 288 2691
Rodenbach's Appeal, 102 Pa. 572 1220
Rodes v. Commonwealth, 6 B. Mon. 359 1598
Rodgers v. Bailey, 68 W. Va. 186 1417, 1493, 1502, 1515, 4779
v. Bass, 46 Tex. 505 612
v. Cades, 103 Ark. 187 1686
v. Central Pac. R. Co., 67 Cal. 606 140
v. Clement, 162 N. Y. 422 1071, 1073
v. Ferguson, 36 Tex. 544 1349
v. Fletcher, 13 Abb. Pr. 299 1431
v. McClure, 4 Gratt. 81 2861
v. Niles, 11 Ohio St. 48 2375
v. Nowill, 6 Hare 325, 5 M. G. & S. 109 4484, 4486
v. Perrault, 41 Kan. 385 2387
v. Philadelphia, 181 Pa. 243 403
v. Phillips, 40 N. Y. 519 2227
v. Texas & P. Ry. Co., — Tex. Civ. App. —, 172 S. W. 1117
Rodman v. Hedden, 10 Wend. 498 2835, 2843
v. Moody, 14 Ky. L. Rep. 202 1783
v. Williams, 4 Blackf. 70 1847
v. Woolman, 2 Houst. 581 2516
Rodney v. St. Louis S. R. Co., 127 Mo. 676 4657, 4811
Rodocanachi v. Milburn, 18 Q. B. Div. 67 3350, 3389, 3391, 3408, 3433
Rodriquez v. Tadmire, 2 Esp. 720 4574, 4649
Roe v. Birkenhead, etc., R. Co., 7 Ex. 36 1332
v. Hayley, 12 East 464 2123
v. Snattinger, 91 Kan. 567 1247
v. State, 82 Ala. 68 819
Roebling Sons Co. v. American A. & C. Co., 231 Pa. 261 2373
v. Lock Stitch F. Co., 130 Ill. 660 2256
Roeder v. Niedermeier, 112 Mich. 608 2864
Roehm v. Horst, 178 U. S. 1 377, 2252, 2255, 2289
Roemberg v. Hughes, 18 Neb. 579 4330
Roemer v. Simon, 31 Fed. 41 4466
Roenbeck v. Brooklyn Heights R. Co., 123 App. Div. (N. Y.) 606 1382
Roesner v. Hermann, 10 Biss. 486 23
Roessing v. Pittsburg R. Co., 226 Pa. 523 4644
Roessle v. Roessle, 163 App. Div. (N. Y.) 344 3719
Roessler-H. C. Co. v. Doyle, 142 Fed. 118 3933
Roff v. Wass, 2 Sawyer 389 2722
v. Wass, 2 Sawyer 538 693
Roffey v. Greenwell, 10 A. & E. 222 1874, 1875
Rogan v. Illinois T. & S. Bank, 93 Ill. App. 39 2382

[REFERENCES ARE TO PAGES]

Rogan v. Montana Cent. R. Co., 20 Mont. 503 4727
v. Mullins, 22 App. Div. (N. Y.) 117 1485, 1490
v. Wabash R. Co., 51 Mo. App. 665 3343
Roger Williams Ins. Co. v. Carrington, 43 Mich. 252 2999
Rogers v. Abbot, 206 Mass. 270 1563, 1569
v. Ackerman, 22 Barb. 134 1419, 1457, 2387
v. Allen L. Co., 129 La. 900 4782
v. Atkinson, 1 Ga. 12 764
v. Aulick, 63 Ky. (2 Duv.) 419 1399, 1403
v. Beard, 36 Barb. 31 234
v. Bemus, 69 Pa. 432 193, 234, 2626
v. Borchard, 82 Cal. 347 2052
v. Clough, 76 N. H. 272 1737
v. Coal River B. & D. Co., 39 W. Va. 272 3850
v. Cody, 8 Cal. 324 1841
v. Coleman, 3 Cow. 62 1556
v. Colt, 21 N. J. L. 19 1108, 1881
v. Connecticut F. Ins. Co., 157 Mo. App. 671 3012
v. Crombie, 4 Me. 274 4302
v. Fitzgerald, 72 Conn. 731 4512
v. Flick, 144 Ky. 844 3891
v. Foote, 109 Me. 564 4774
v. French, 122 Iowa 18 2214, 2902
v. Hastings & D. R. Co., 22 Minn. 25 2468, 2499, 2500
v. Henry, 32 Wis. 327 1311, 4159
v. Humphrey, 39 Me. 382 537, 543
v. Interurban St. R. Co. (Misc.), 84 N. Y. Supp. 974 1454, 1486
v. Kemp Lumber Co., 18 N. M. 300 2492
v. Kennebec Co., 86 Me. 261 21
v. Lee County, 1 Dill. 529 1210
v. McGuffey, 96 Tex. 565 3194, 3228
v. Manhattan L. Ins. Co., 138 Cal. 285 1090
v. Mechanics' Ins. Co., 2 Story 173 3026
v. Missouri Pac. R. Co., 75 Kan. 222 139
v. Orion, 116 Mich. 324 4737
v. Ostram, 35 Barb. 523 537, 548, 564, 3125
v. Priest, 74 Wis. 538 1128
v. Rains, 100 Ky. 295 1923
v. Randall, 29 Mich. 41 3749, 4162
v. Rathbun, 1 Johns. Ch. 367 978
v. Rio Grande Western R. Co., 32 Utah 367 4864
v. Riverside L. & I. Co., 132 Cal. 9 295
v. Rutter, 11 Gray 410 820
v. St. Charles, 3 Mo. App. 41 4147
v. Sample, 33 Miss. 310 870, 976, 998
v. School Trustees, 46 Ill. 428 2795, 2804, 2822
v. Smith, 17 Ind. 323 4757
v. Smith, 47 N. Y. 324 1817
v. Spokane, 9 Wash. 168 746
v. State, 99 Ind. 218 1582, 1589
v. Toliver, 139 Ga. 281 4843
v. Turley, 4 Bibb 355 554
v. Union I. & F. Co., 167 Mo. App. 228 748, 2239
v. United States F. & G. Co. (Misc.), 84 N. Y. Supp. 203 1655
v. West, 9 Ind. 403 1107
v. Yarnell, 51 Ark. 198 1104
Rogers-W. F. Co. v. Wynn (Tex. Civ. App.), 156 S. W. 340 731
Roggess v. Goff, 47 W. Va. 139 1203
Rohan v. Hanson, 11 Cush. 44 713, 720, 721, 1852
Rohn v. Odenwelder, 162 Pa. 346 1079
Rohrbach v. Hammill, 162 Iowa 131 664
Rohrbough v. Barbour County Court, 39 W. Va. 472 104
Rohrman v. Bonser, 157 Ky. 397 2794
Rohrschneider v. Knickerbocker L. Ins. Co., 76 N. Y. 216 4369
Rohwer v. Chadwick, 7 Utah 385 1734, 1735, 1737
Rokes v. Amazon Ins. Co., 51 Md. 512 3021
Roland v. Martindale, 1 Bailey's Eq. 226 1118
Roles v. Rosewell, 5 T. R. 538 1553
Roley v. Crabtree, 72 Ill. App. 581 3099
Rolf v. Peterson, 2 Brown, P. C. 470 857
v. Wooster, 58 N. H. 526 637
Rolfe v. Boston & M. R. Co., 69 N. H. 476 489
Rolin v. Steward, 14 C. B. 595 277
Roller v. Effinger, 88 Va. 641 2098, 2117
Rollin v. Stewart, 14 C. B. 595 876
Rollins v. Bowman C. C. Co., 96 N. Y. App. Div. 365 42, 323, 2578
v. Central Maine Power Co., 112 Me. 175 4813
v. Clay, 33 Me. 132 3736
v. Duffy, 18 Ill. App. 398 2946, 2947, 2948
v. Quimby, 200 Mass. 162 4382, 4393
v. State, 13 Mo. 437 1602, 1605
Rollman v. Baker, 5 Humph. 406 1875
Rollstone Nat. Bank v. Carleton, 136 Mass. 226 2756
Rolph v. Crouch, L. R. 3 Ex. 44 2110, 2141, 3188, 3196
Romaine v. Van Allen, 26 N. Y. 309 4246
Roman v. Stratton, 2 Bibb 199 1660
Romano v. Capital City B & P. Co., 125 Iowa 591 4856
Romayne v. Duane, 3 Wash. C. C. 246 Fed. Cas. No. 12,028 4528
Romberg v. Hughes, 18 Neb. 579 4315, 4325, 4347
Rombough v. Balch, 27 Ont. App. 32 4935
Rome v. Omberg, 28 Ga. 46 12
v. Rhodes, 134 Ga. 650 488, 4105
Rome R. Co. v. Sloan, 39 Ga. 636 3433
Rome, etc., R. Co. v. Gleason, 42 App. Div. (N. Y.) 530 3968, 4146
Romeo v. Western C. & M. Co., 157 Ill. App. 67 4869, 4944
Romig v. Romig, 2 Rawle 241 4277
Romine v. Romine, 59 Ind. 346 2844, 2846
Romnel v. Schambacher, 120 Pa. 579 156
Ronald v. Pacific T. Co., 65 Wash. 430 775
Ronaldson & P. Co. v. Bynum, 122 La. 687 822
Ronca v. Wendell & Evans Co., 166 N. Y. App. Div. 216 4816
Roney v. McCall, 128 Ga. 249 2754
Rongo v. R. Waddington & Sons, 87 N. J. L. 395 5175
Ronker v. St. John, 21 Ohio C. C. 39 146
Ronneberg v. Falkland Islands Co., 17 C. B. (N. S.) 1 302
Ronson v. Canadian Pac. R. Co., 18 Ont. L. R. 337 4857, 4898

[REFERENCES ARE TO PAGES]

Rood v. New York, etc., R. Co., 18 Barb. 80 13
Roodhouse v. Christian, 55 Ill. App. 107 434
Rook v. Rook, 111 Ill. App. 398 2066, 2068, 2136
Rooker v. Perkins, 14 Wis. 79 3971
Rooks v. Booth, 160 Mich. 62 3175, 3209
Rooksby v. State, 92 Ind. 71 1619, 1810
Rooney v. Milwaukee C. Co., 65 Wis. 397 4779
v. New York, etc., R. Co., 173 Mass. 222 1477, 4691, 4704
v. Sacramento R. Co., 6 Cal. 638 4093
Roose v. Perkins, 9 Neb. 304 4874, 4906
Roosevelt v. Bull's Head Bank, 45 Barb. 579 807, 810, 817
v. New York & H. R. Co., 30 How. Pr. 226 821, 823
Root v. Bonnema, 22 Wis. 539 361, 4319
v. Bradley, 49 Mich. 27 789, 796
v. Butte, etc., R. Co., 20 Mont. 354 1363, 1372
v. Chandler, 10 Wend. 110 437, 2889
v. Collins, 34 Vt. 173 572, 574
v. Des Moines City R. Co., 113 Iowa 675 4653
v. King, 7 Cow. 613 469, 4568, 4572, 4580, 4586
v. King, 7 Cow. 634 4573
v. Lowndes, 6 Hill 518 4515, 4516, 4517
v. New York Cent. S. C. Co., 28 Mo. App. 199 3532, 3540, 3541
v. Railway Co., 105 U. S. 189 4453
v. Ross, 29 Vt. 488 697
v. Sherwood, 6 Johns. 68 1485, 1490
v. Sturdivant, 70 Iowa 55 1268, 4662, 4669, 4775
v. Taylor, 20 Johns. 137 525
Root's Case, 77 Pa. 276 3957
Rootes v. Stone, 2 Leigh 650 1143
Roots Co. v. Meeker, 165 Ind. 132 52
Roper v. Johnson, L. R. 8 C. P. 167 312, 375, 410, 2231, 2232, 2255
v. Lane, 9 Allen 502 2225
v. Milbourn, 93 Neb. 809 229
v. Wren, 6 Leigh 38 3150
Roper W. G. Co. v. Faver, 8 Ga. App. 178 4207, 4283, 4285
Rorebeck v. Van Eaton, 90 Iowa 82 2902
Rosa v. Butterfield, 33 N. Y. 665 2826
Rosan v. Big Muddy C. & I. Co., 128 Ill. App. 128 111, 124
Rosborough v. Canal Co., 22 Cal. 557 2500
Rose v. Adler, 147 N. Y. Supp. 307 1997
v. Beatie, 2 N. & McC. 538 169, 331, 357, 2379
v. Bozeman, 41 Ala. 678 2299, 2309
v. Bridgeport, 17 Conn. 243 1203, 1209
v. Brown, Kirby 293 785, 817
v. Buckett, [1901] 2 K. B. 449 404
v. Butler, 69 Hun 140 3236
v. Doughlass Tp., 52 Kan. 451 1578
v. Duncan, 49 Ind. 269 807, 809, 811
v. Eclipse C. Co., 60 Mo. App. 28 2467
v. Foord, 96 Cal. 152 2319
v. Groves, 5 Man. & G. 613 3919, 4556
v. Hall, 26 Conn. 392 749, 754
v. Hirsh, 94 Fed. 177 4447, 4453
v. Imperial E. Co., 127 App. Div. (N. Y.) 885 1341, 4548
v. King, 76 App. Div. (N. Y.) 308 3450
v. Lewis, 10 Mich. 483 678, 4278
v. Miles, 4 M. & S. 101 16, 3936
Rose v. Mynatt, 7 Yerg. 30 2490
v. O'Riley, 111 Mass. 57 2665
v. Pearson, 41 Ala. 690 4336, 4337
v. Pickrell, 1 Cal. Ind. Acc. Comm. Dec. (No. 6, 1914) 5173
v. Post, 56 N. Y. 603 305, 1719, 1732
v. Rose, 7 Barb. 174 639
v. Stoddard, 181 Ill. App. 405 3233
v. Story, 1 Pa. 190 4159, 4290, 4511
v. Taunton, 119 Mass. 100 2069
v. Wallace, 11 Ind. 112 1847, 2447, 4413
v. Wynn, 42 Ark. 257 3183, 3189, 3196
Rosecrans v. Asay, 49 Neb. 512 4321
Rosecrantz v. Shoemaker, 60 Mich. 4 1289
Rosema v. Porter, 112 Mich. 13 813
Rosen v. Lindsay, 17 Manitoba 251 4407
Rosenbaum v. Drumm C. Co., 176 Ill. App. 205 1118
v. Goodman, 78 Va. 121 2855, 2857
v. Gunter, 3 E. D. Smith 203 2825
v. McThomas, 34 Ind. 331 1521
v. Pendleton, 9 Ohio Dec. 642 1201
v. Roche, 46 Tex. Civ. App. 237 4529
v. Shoffner, 98 Tenn. 624 113, 4893
v. Stiebel, 137 App. Div. (N. Y.) 912 4244
Rosenbaum G. Co. v. Pond Creek M. & E. Co., 22 Okla. 555 2392
Rosenbaums v. Weeden, 18 Gratt. 785 2241, 2243
Rosenberg v. Delaware, L. & W. R. Co., 88 N. Y. Misc. 1 3329
Rosenberger v. Marsh, 108 Iowa 47 1363
v. Pacific Coast R. Co., 111 Cal. 313 2542, 2561
v. Pacific Exp. Co., 129 Mo. App. 105 1110
Rosenblatt v. Rosenberg, 1 Neb. (Unof.) 656 4647
Rosenbloom v. Maas (Misc.), 97 N. Y. Supp. 211 2696
Rosenblum v. Riley (Misc.), 84 N. Y. Supp. 884 3198
Rosencrance v. Johnson, 191 Pa. 520 2460
v. Kelley, 74 W. Va. 100 1397, 1399
Rosenfeld v. Express Co., 1 Woods 131 3425
v. Peoria, etc., R. Co., 103 Ind. 121 3334, 3413
Rosenheimer v. Standard G. L. Co., 36 App. Div. (N. Y.) 1 3839, 3840, 3882, 3905
Rosenkovitz v. United R. & E. Co., 108 Md. 306 3506
Rosenkrans v. Barker, 115 Ill. 331 449, 1344, 3829, 4622, 4649
Rosenkrantz v. Durling, 29 N. J. L. 191 1555
Rosenkranz v. Jacobowitz, 50 N. Y. Misc. 580 4210, 4221
v. Lindell R. Co., 108 Mo. 9 4652, 4748, 4755
Rosenquest v. Noble, 21 App. Div. (N. Y.) 583 1790, 3663
Rosenstein v. Fair Haven & W. R. Co., 78 Conn. 29 1444, 1449
Rosenthal v. Boaz, 27 Ill. App. 430 1743
v. Empire B. & S. Co., 123 App. Div. (N. Y.) 503 2277
v. Goldsboro, 149 N. C. 128 6
v. Rambo, 165 Ind. 584 1828
v. Rudnick, 84 App. Div. (N. Y.) 611 697
v. Taylor, etc., R. Co., 79 Tex. 325 3759

[REFERENCES ARE TO PAGES]

Rosenthal v. Weir, 170 N. Y. 148 3340
Rosenzweig v. Frazer, 82 Ind. 342 4287
Rosetti v. Lozano, 96 Tex. 57 996
Rosevelt v. Hanold, 65 Mich. 414 1359
Rosewater v. Hoffman, 24 Neb. 222 4515, 4525
Rosewell v. Prior, 2 Salk. 459 397, 402
Rosman v. Bankers' Surety Co., 126 Minn. 435 2741
Ross v. Austin, 4 Hen. & Munf. 502 1226
v. Bolte, 165 Iowa 499 4391
v. Burlter, 19 N. J. Eq. 294 3839
v. Chicago, etc., R. Co., 149 Ill. App. 286 4939
v. Chicago, etc., R. Co., 119 Mo. App. 290 3433
v. Crane, 74 Iowa 375 709
v. Dysart, 33 Pa. 452 3182
v. Elizabethtown R. Co., 20 N. J. L. 230 3146, 4091
v. Great Northern R. Co., 101 Minn. 122 4676
v. Hatch, 5 Iowa 149 1576, 1577
v. Hicks, 11 Barb. 481 589
v. Hixon, 46 Kan. 550 4639
v. Kansas City, 48 Mo. App. 440 4744
v. King, 32 Can. Sup. Ct. 532 1040
v. Kohler, 163 Ky. 583 4835, 4840
v. Langworthy, 13 Neb. 492 4635, 4637
v. Leggett, 61 Mich. 445 1300, 4836, 4841
v. Loescher, 152 Mich. 386 862, 888
v. Longmuir, 15 Abb. Pr. 326 559
v. Louisville, etc., Co., 70 Miss. 725 2
v. McDuffie, 91 Ga. 120 4290
v. McLauchlan, 7 Gratt. 86 742
v. Malone, 97 Ala. 529 1368
v. Metropolitan St. R. Co., 116 App. Div. (N. Y.) 507 1504, 4826
v. Milne, 12 Leigh 204 416
v. Missouri, etc., R. Co., 4 Mo. App. 582 3534
v. Overton, 3 Call 309 3150
v. Pye, Yelv. 207 2192
v. Robinson, 12 Vict. L. R. 764 [1886] 1980, 1989
v. Ross, 5 B. Mon. 20 1499, 4549
v. Russell, 31 N. H. 376 1215
v. St. Louis, I. M. & S. R. Co., 185 Mo. App. 154 52
v. St. Louis & S. F. R. Co., 93 Kan. 517 5084, 5087
v. Saylor, 39 Mont. 559 2004
v. Schrieves, 199 Mass. 401 1444
v. Scott, 15 Lea 479 3779, 3788
v. Sheldon, — Iowa —, 154 N. W. 499 5037, 5062, 5063, 5064, 5069
v. Stamford, 88 Conn. 260 327, 476, 4787
v. Stockwell, 19 Ind. App. 86 3236, 3243
v. Thompson, 78 Ind. 90 38
v. Weber, 26 Ill. 221 372
v. Western U. Tel. Co., 81 Fed. 676 3575
v. Wharton, 10 Yerg. 190 644
v. Wood, 70 N. Y. 8 17
Ross' Appeal, 9 Pa. 497 2207
Ross' Estate, 18 Pa. Dist. 429 1032
Rossano v. Kaminsky (N. Y. Misc.), 134 N. Y. Supp. 895 2452
Rossbach v. Fincher M. C. Co., 178 Ill. App. 559 2422
Rosseau v. Cull, 14 Vt. 83 728
Rossend Castle, The, 30 Fed. 462 3311
Rosser v. Bunn, 66 Ala. 89 3827
v. Depriest, 5 Gratt. 6 1127
v. Timberlake, 78 Ala. 162 39, 305
Rossey v. Lawrence, 123 La. 1053 1519, 4816
Rossi v. Jewell Jellico Coal Co., 157 Ky. 332 1492
Rossier v. Metropolitan St. R. Co., 125 Mo. App. 159 4681, 4742
Rossiter v. Chester, 1 Doug. (Mich.) 154 3036, 3294
v. Cooper, 23 Vt. 522 2235
v. Cossitt, 15 N. H. 38 3728
v. Schultz, 62 Wis. 655 697
Rossitti v. Valente (Misc.), 127 N. Y. Supp. 319 3809
Rost v. Brooklyn Heights R. Co., 10 App. Div. (N. Y.) 477 1470, 4835
Rosted v. Great Northern R. Co., 76 Minn. 123 3472
Rosum v. Hodges, 1 S. D. 308 4241
Roswell v. Barnhart, 96 Ga. 521 4915
v. Davenport, 14 N. M. 91 135
Roswell Nursery Co. v. Mielenz, 18 N. M. 417 2236, 2258
Rotan v. Nichols, 22 Ark. 244 532, 564, 2456
Roth v. Bien, 33 Ohio Cir. Ct. 480, aff'd 87 Ohio St. 483 4876
v. Buettell, 142 Iowa 212 4790
v. Felt, 60 N. Y. Misc. 116 4327
v. Reiter, 213 Pa. 400 531
v. Rosenthal, 160 App. Div. (N. Y.) 39 1764
v. Smith, 54 Ill. 431 467
v. Spero, 48 N. Y. Misc. 506 258, 259, 2482
v. Taysen, 1 Com. Cas. 306, [1896] 73 L. T. 628, 8 Asp. Marit. Cas. 120 2256
v. Union D. Co., 13 Wash. 525 108, 4804
v. Wells, 29 N. Y. 486 360
v. Yara, 19 N. M. 8 4347
Roth T. Co. v. Champ S. Co., 146 Mo. App. 1 3207, 3249
v. New Amsterdam C. Co., 161 Fed. 709 2898
Rotham D. Co. v. Kermis, 79 Mo. App. 111 1784
Rothmiller v. Stein, 9 N. Y. Misc. 167 4380, 4405
v. Stein, 143 N. Y. 581 2377, 2383, 4405
Rothrock v. Hunter, 66 Wash. 543 1437, 2303
Rothschild v. Currie, 1 Q. B. 43 1150, 1152
v. Grit, 31 Mich. 150 2780
v. Interborough Rapid Transit Co., 162 App. Div. (N. Y.) 532 4056
v. Mack, 42 Hun 75 2830
v. Williamson, 83 Ind. 387 1363
Rotograph Co. v. Cressman, 14 Pa. Super. 14 2274
Roubs v. Bank, 94 Tenn. 57 1871
Roulain v. McDowall, 1 Bay 490 1570
Roulhac v. Miller, 90 N. C. 174 1399
Rounds v. Baxter, 4 Me. 454 2013, 2525
v. Delaware, etc., R. Co., 64 N. Y. 129 1329, 3511
v. McDaniel, 133 Ky. 669 2468
Roundtree v. Charleston, etc., R. Co., 72 S. C. 474 1432
Roundy v. Thatcher, 49 N. H. 526 2516
Rounsaville v. Central R. Co., 87 N. J. L. 371 5029

[REFERENCES ARE TO PAGES]

Rountree v. Atlantic C. L. R. Co., 73 S. C. 268 3450
v. I. N. L. Lime Co., 106 Cal. 62 1806
v. Robinson, 98 N. C. 107 987
Rourke v. Central Massachusetts E. Co., 177 Mass. 46 3965
Rouse v. Detroit E. R. Co., 128 Mich. 149 4869, 4896, 4903
v. Melsheimer, 82 Mich. 172 4765, 4778
v. Metropolitan St. R. Co., 41 Mo. App. 298 3513
v. Western W. Works, 66 Ill. App. 647, aff'd 169 Ill. 536 1103
Rousey v. Wood, 57 Mo. App. 650 1536
Roushlange v. Chicago & A. R. Co., 115 Ind. 106 3913
Rousillon v. Rousillon, 14 Ch. Div. 351 1145
Rouss v. Creglow, 103 Iowa 60 2749
Roussain v. Norton, 53 Minn. 560 1443
Routh v. Caron, 64 Tex. 289 2394, 2447
v. Texas T. Co. (Tex. Civ. App.), 148 S. W. 1152 4101, 4107, 4124, 4157
Routt v. Dils, 40 Colo. 50 2589
Rouvert v. Patton, 12 S. & R. 253 1814
Rouyer v. Miller, 16 Ind. App. 519 797, 1917
Rowan v. Lee, 3 J. J. Marsh. 97 1358
v. People, 18 Ill. 159 1520
v. Pope, 14 B. Mon. 102 1807
v. Rowan, 29 Pa. 181 423
v. Sussdorff, 147 App. Div. (N. Y.) 673 1459
v. Western U. Tel. Co., 149 Fed. 550 3642
Rowand v. Bellinger, 3 Strobh 373 1363
Rowe v. Australian U. S. N. Co., 9 Aust. Com. L. R. 1 1497
v. Baber, 93 Ala. 422 3233, 3254, 3258
v. Chicago & N. R. Co., 102 Iowa 286 3775, 3780
v. Crutchfield, — Tex. Civ. App. —, 168 S. W. 444 4161, 4622
v. Granite B. Co., 21 Pick. 344 5
v. Hardy, 97 Va. 674 1227
v. Heath, 23 Tex. 614 2148
v. Johnson, 19 Me. 146 3724
v. Langley, 49 N. H. 395 586
v. Moses, 9 Rich. 423 4775
v. New York, etc., Tel. Co., 66 N. J. L. 19 4941
v. Northport S. & R. Co., 35 Wash. 101 3855
v. Peabody, 207 Mass. 226 327, 1569, 2600, 2741
v. Pulp Co., 42 W. Va. 551 4109
v. Rand, 111 Ind. 206 768
v. Richards, 35 S. D. 201 5119, 5120
v. St. Paul, etc., R. Co., 41 Minn. 384 8
v. Schertz, 74 Mo. App. 602 1875
v. School Board, 36 Ch. Div. 619 1979
v. Whatcom County R. & L. Co., 44 Wash. 658 327
v. Young, 2 Brod. & Bing. 165 806
Rowell v. Crothers, 75 Conn. 124 1393
v. Estate of Lewis, 72 Vt. 163 719
v. Mitchell, 68 Me. 21 827
v. Western U. Tel. Co., 166 Ala. 651 3632
v. Western U. Tel. Co., 75 Tex. 26 352, 3625, 3643
Rowland v. Isaacs, 15 Conn. 115 1634
v. Little, 140 Ky. 309 4769
v. Maddock, 183 Mass. 360 10, 1031
v. Miller, 3 W. & S. 393 2208
Rowland v. Murphy, 66 Tex. 534 428
v. Shelton, 25 Ala. 217 294, 1101, 2048, 2395
v. Wood, 4 Dana 194 1600
Rowlands v. Samuel, 11 Q. B. 39 4613, 4623
Rowlett v. White, 18 Tex. Civ. App. 688 1607
Rowley v. Ball, 3 Cow. 303 811
v. Erickson A. L. Co., 178 Ill. App. 222 1522
v. Gibbs, 14 Johns. 385 1664, 4334, 4338
v. Goddard, 1 Low. 154 2720
v. Hager, 63 Ore. 246 1981, 1988
v. Jewett, 56 Iowa 492 2810
v. London, etc., R. Co., L. R. 8 Ex. 221 4878, 4912, 4951
v. Rice, 11 Metc. (Mass.) 337 4204
v. Rowley, 193 Fed. 390 4488
v. Stoddard, 7 Johns. 207 773, 778, 781
Rown v. Christopher, etc., R. Co., 34 Hun 471 4836
Rowning v. Goodchild, 2 W. Bl. 906 101
Rowntree v. Jacob, 2 Taunt. 141 2067
Roy v. Baucus, 43 Barb. 310 691
v. Duke of Beaufort, 2 Atk. 190 892, 921
v. Goings, 112 Ill. 656 1321, 1481, 1482, 4634, 4645
Royal v. Miller, 3 Dana 55 1032
v. Smith, 40 Iowa 615 332, 3662, 3676, 3678
Royal Bristol P. B. Soc. v. Bomash, 35 Ch. Div. 390 2041, 2042
Royal British Permanent B. Soc., 35 Ch. Div. 390 3107
Royal Ins. Co. v. Clark, 61 Minn. 476 2916
v. McIntyre, 99 Tex. 170 3013
Royal Live Fish Co. v. Central Fish Co., 159 App. Div. (N. Y.) 151 376
Royal Loan Ass'n v. Forter, 68 Kan. 486 1161
Royal Neighbors of America v. Spore, 160 Ky. 572 3085
Royal Victoria L. Ins. Co. v. Richards, 31 Ont. 483 834
Royall v. McKenzie, 25 Ala. 363 1461
Royalton v. Royalton & W. T. Co., 14 Vt. 311 415, 1365
Royce v. Guggenheim, 106 Mass. 201 3121, 3123, 3125, 3127
Royer v. Foster, 62 Iowa 321 2082
v. Shultz B. Co., 45 Fed. 51 4447
Royse v. May, 93 Pa. 454 1392, 1535
Royston v. Illinois Cent. R. Co., 67 Miss. 376 74
Roza v. Smith, 65 Fed. 592 4841
Rozet v. McClellan, 48 Ill. 345 630
Ruabon S. Co. v. London Assurance, [1900] App. Cas. 6 487
Rubber Co. v. Goodyear, 6 Wall. 153 1767
v. Goodyear, 9 Wall. 788 4455, 4458, 4464
Rubelman H. Co. v. Greve, 18 Mo. App. 6 1763
Ruben v. Lewis, 20 N. Y. Misc. 583 4415
Rubens v. Hill, 213 Ill. 523 3235, 3236
Rubenstein v. Hudson (Misc.), 86 N. Y. Supp. 750 3234
Rubin v. Sturtevant, 80 Fed. 930 2390, 2394, 2422
Ruble v. McDonald, 7 Iowa 90 1481
v. Murray, 4 Hayw. 27 821, 823, 831
v. Norman, 7 Bush 532 712

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Rubon v. Stephan, 25 Miss. 253 1556, 1749
Ruck v. Chicago, M. & St. P. R. Co., 153 Wis. 158 5065
Rucker v. Barker (Tex. Civ. App.), 151 S. W. 871 4837, 4839, 4841
v. Campbell, 35 Tex. Civ. App. 178 887, 929
v. Donovan, 13 Kan. 251 2273
v. Freeman, 50 N. H. 420 111
v. Huntington, 66 W. Va. 104 104
v. McNeeley, 4 Blackf. 179 1390, 3825
v. Smoke, 37 S. C. 377 1343, 1348
Ruckman v. Pitcher, 20 N. Y. 9 1102, 1117
Rudd v. Rounds, 64 Vt. 432 4976, 4980, 4981
Ruddell v. Ambler, 18 Ark. 369 978
v. Seaboard A. L. R., 75 S. C. 290 437
Rudder v. Koopman, 116 Ala. 332 100
v. Price, 1 H. Black. 550 384
Ruddy v. McDonald, 149 Ill. App. 111 1252
v. McDonald, 244 Ill. 494 1051
Rude v. Fakes, 143 Ill. App. 456 1289, 1387
v. Westcott, 130 U. S. 152 4440
Rudell v. Grand Rapids C. S. Co., 136 Mich. 528 325
Rudiger v. Chicago, etc., R. Co., 94 Wis. 191 4955
v. Chicago, etc., R. Co., 101 Wis. 292 4873, 4880
Rudolf v. Malone, 104 Wis. 470 2859
Rudolph v. Pennsylvania, etc., R. Co., 186 Pa. 541 4000, 4098, 4125
Rudomin v. Interurban St. R. Co., 111 App. Div. (N. Y.) 548 1382
Rudon v. San Juan L. & T. Co., 4 Porto Rico Fed. 515 4903
Rudulph v. Wagner, 36 Ala. 698 819, 1235
Rued v. Cooper, 119 Cal. 463 748, 768
Ruehl v. Lidgerwood Rural Tel. Co., 23 N. D. 6 4877
Rueping v. Chicago & N. W. R. Co., 116 Wis. 625 4669, 4796, 4824
v. Chicago & N. W. R. Co., 123 Wis. 319 1314, 1338, 1516, 4827
Ruff v. Georgia S. & F. Ry. Co., 67 Fla. 224 1417
v. Jarrett, 94 Ill. 474 536
v. Rinaldo, 55 N. Y. 664 535, 1369, 2626
Ruffner v. Hewitt, 7 W. Va. 585 2905, 2970, 2975
Rufner v. McConnel, 14 Ill. 168 2056
Rugeley v. Smalley, 12 Tex. 238 710
Ruger v. Firemen's Fund Ins. Co., 90 Fed. 310 3000
Rugg v. Minett, 11 East 210 2307
v. Rohrbach, 110 Ill. App. 532 410
v. Tolman, 39 Utah 295 1281
Ruggeno v. Leuchtenburg, 61 N. Y. Misc. 298 1997
Ruggles v. Keeler, 3 Johns. 263 1147
v. Patton, 8 Mass. 480 781
v. Wilson, 162 Mo. App. 372 413
Ruiz v. Norton, 4 Cal. 355 2230, 2275
v. Santa Barbara G. & E. Co., 164 Cal. 188 1395
Ruland v. Waukesha W. Co., 52 App. Div. (N. Y.) 280 2558, 2562
Rule v. McGregor, 115 Iowa 323 4614
v. McGregor, 117 Iowa 419 242, 243, 408
Rule v. Sioux County, 94 Neb. 736 3961, 4138
v. Tait, 38 Kan. 765 2562
Rulison v. Collins, 5 Ind. Terr. 282 4643
Rumberg v. Cutler, 86 Conn. 8 1414, 1417
Rumbold v. Penn Mut. L. Ins. Co., 7 Mo. App. 71 3090
Rumley Co. v. Dollarhide, 86 Ill. App. 477 1869
Rummel v. Otis, 60 Mo. 365 4540
Rumsey v. Barber, 78 Ill. App. 88 626
v. Livers, 112 Md. 546 1442
v. Mathews, 1 Bibb 242 976
v. New York, etc., R. Co., 133 N. Y. 79 3753, 3757
v. Northeastern R. Co., 14 C. B. (N. S.) 641 2465
v. Sargent, 21 N. H. 397 534
Runciman v. Star Line S. S. Co., 35 New Bruns. 123 1500, 4911
Rund v. Blatt, 170 Mass. 469 4284
Rundell v. Lakey, 40 N. Y. 513 2147
Rundle v. Moore, 3 Johns. Cas. 36 2922, 2923, 2933
v. Slate Belt E. St. R. Co., 33 Pa. Super. Ct. 233 149, 1478, 4728
Rundlett v. Small, 25 Me. 29 712
Runge v. Franklin, 72 Tex. 590 4608
Runlett v. Bell, 4 N. H. 433 39
Runnels v. Bullen, 2 N. H. 532 14
Runnells v. Webber, 59 Me. 488 2147, 2153, 2175, 2181
Runt v. Herring, 2 N. Y. Misc. 105 23
Runyan v. Bordine, 14 N. J. L. 472 16
v. Central R. Co., 65 N. J. L. 228 3440, 3446
Runyon v. Latham, 5 Ired. 551 710
v. Nichols, 11 Johns 547 2484
v. Snell, 116 Ind. 164 656, 698
Rupp v. Sampson, 16 Gray 398 2513
Ruppel v. Adrian F. Mfg. Co., 96 Mich. 455 1454
v. Allegheny Valley R., 167 Pa. 166 3390, 3428
v. Missouri Guarantee S. & B. Ass'n, 158 Mo. 613 825
v. United R., 1 Cal. App. 666 4860, 4911
Ruscomb St., In re, 30 Pa. Super. Ct. 476 12
Ruse v. Pittsburgh Rys. Co., 247 Pa. 295 4694
Rush v. Fister, 23 Ill. App. 348 686
v. Masonic T. Ass'n, 157 Ala. 601 1416
v. Metropolitan St. R. Co., 157 Mo. App. 504 1374
v. Rush, 170 Ill. 623 2925
Rushforth, Ex parte, 10 Ves. 420 2837
Rushing v. Citizens' Nat. Bank of Plainview, — Tex. Civ. App. —, 162 S. W. 460 1921
v. Seaboard A. L. R. Co., 149 N. C. 158 1501, 4659, 4690, 4720, 4730, 4747
Rushton v. Rowe, 64 Pa. 63 1221, 1224
Russ v. Gilbert, 19 Fla. 54 1407
v. Ship Active, 2 Wash. C. C. 226 3034
v. Steamboat War Eagle, 14 Iowa 363 412, 3495
v. Steele, 40 Vt. 310 2095, 2148, 2189
v. Telfener, 57 Fed. 973 1944
Russell v. Annable, 109 Mass. 72 2813, 2832
v. Barrow, 7 Port. 106 493
v. Blake, 2 Pick. 505 3709, 3710
v. Bradley, 50 Fed. 515 4621

[REFERENCES ARE TO PAGES]

Russell v. Brown, 63 Me. 203 401, 402, 414, 3846, 3858,
v. Butterfield, 21 Wend. 300 430, 1676, 1680
v. Camp, 9 Ga. App. 691 2308
v. Carne, 1 Salk. 119 1390
v. Carrington, 42 N. Y. 118 2226
v. Chamberlain, 12 Idaho 299 4608, 4633
v. Chambers, 31 Minn. 54 4964, 4967, 4968, 4973
v. Clark, 7 Cranch 69 2745, 4374, 4392
v. Cole, 167 Mass. 6 4287
v. Conway, 11 Cal. 93 586, 589, 591
v. Copeland, 30 Me. 332 1984
v. Corning Mfg. Co., 49 App. Div. (N. Y.) 610 2432
v. Dennison, 45 Cal. 337 1495, 4620, 4624
v. Erie R. Co., 70 N. J. L. 808 3340
v. Excelsior S. & Mfg. Co., 120 Ill. App. 23 391, 564
v. Fabyan, 23 N. H. 543 3131
v. Failor, 1 Ohio St. 327 2838, 2852, 2870, 2871
v. Farley, 105 U. S. 433 1713, 1714, 1716, 1719
v. Fernandez, 131 La. 76 208
v. Giblin, 16 Daly 258 2645, 3241
v. Hankey, 6 T. R. 12 2927
v. Hester, 10 Ala. 535 677
v. Horn, etc., Mfg. Co., 41 Neb. 567 265
v. Hubbard, 59 Ill. 335 1520
v. Landstoffe, 2 Doug. 514 2781, 2937
v. La Roque, 13 Ala. 149 673, 676
v. Little, 22 Idaho 429 1446, 3232, 3249
v. Lucas, Hemp. C. C. 91 1214
v. Lytle, 6 Wend. 390 753, 762
v. Mayor, 2 Den'o 461 11
v. Metropol'tan St. R. Co., 35 N. Y. Misc. 293 4706, 4707
v. Miner, 25 Hun 114 2570, 2972
v. Missouri, etc., R. Co., 12 Tex. Civ. App. 627 3460
v. Olson, 22 N. D. 410 1368, 3189, 3208
v. Palmer, 2 Wils. 325 495, 2942
v. Perry, 49 N. H. 547 2147
v. Polk County A. Co., 87 Iowa 233 372
v. Quincy, O. & K. C. R. Co., 177 Mo. App. 186 3535
v. Roberts, 3 E. D. Smith 318 867
v. St. Louis S. R. Co., 71 Ark. 451 3992
v. St. Paul, etc., R. Co., 33 Minn. 210 4038
v. Shepherd, Hardin 44 1059, 1182
v. Shuster, 8 W. & S. 398 506
v. Smith, 14 Kan. 366 4328, 4334
v. Splater, 47 Vt. 273 1835
v. State, 32 Ind. App. 243 162
v. Stevenson, 34 Wash. 166 752
v. Stoops, 106 Md. 138 1270, 4390, 4430
v. Sunbury, 37 Ohio St. 372 4939
v. Toml'nson, 2 Conn. 206 443, 3938
v. Turner, 7 Johns 189 495, 2934
v. Wash'ngton Post Co., 31 App. Cas. (D. C.) 277 4531, 4544
v. Western U. Tel. Co., 3 Dak. 315 345, 352, 353, 3642
v. Western U. Tel. Co., 57 Kan. 230 3555
v. Williams, 2 Cal. 158 1805
v. Wylly (Misc.), 119 N. Y. Supp. 155 2463
Russell v. Young, 94 Fed. 45 2462
Russell Miller Milling Co. v. Bastasch, 70 Ore. 475 2245
Rust v. Carpenter, 158 Ky. 672 1935
v. Eckler, 41 N. Y. 488 2390
v. Larue, 4 Litt. 411 2490
v. Victoria G. D. Co., 36 Ch. Div. 113 3887, 3888, 3931
Rust L. & L. Co. v. Wheeler 189 Fed. 321 2113, 2132
Rutan v. Hinchman, 29 N. J. L. 112 2309, 2330, 2331
v. Ludlam, 29 N. J. L. 398 2405, 2410
Ruth, The, 178 Fed. 749 4661, 5017
Ruth v. Krone, 10 Cal. App. 770 1824
v. St. Louis T. Co., 98 Mo. App. 1 4615, 4616, 4620
Rutherford v. Brachman, 40 Ohio St. 604 2750
v. Irby, 1 Ga. App. 499 4400
v. Montgomery, 14 Tex. Civ. App. 319 2093
v. Moore, 24 Ind. 311 1742
v. Prudent'al Ins. Co., 34 Ind. App. 531 621
v. Schattman, 119 N. Y. 604 628
v. Shreveport & H. R. Co., 41 La. Ann. 793 1333
v. Williamson, 70 W. Va. 402 3956, 4028, 4107
Rutherfurd, In re, 133 App. Div. (N. Y.) 89 1080
In re, 196 N. Y. 311 1079, 1083
Ruthven v. Beckwith, 84 Iowa 715 1690, 1695
Rutland v. Dayton, 60 Ill. 58 3162
v. Southern R., 81 S. C. 448 3350
Rutland R. Co. v. Chaffee, 72 Vt. 404 3711
Rutland & W. R. Co. v. Middlebury Bank, 32 Vt. 639 4190, 4300, 4302
Rutledge v. Quinlan, 127 Mo. App. 419 3235
v. Smith, 1 McCord 231 1026
v. Smith, 1 McCord Ch. 399 1025, 1967
v. Tarr, 95 Mo. App. 265 4368
Rutledge & K. Realty Co. v. Gartside, 128 Mo. App. 580 2474
Ruttan & D. & C. N. R. Co., In re, 12 Ont. L. R. 187 3996
Rutter v. Blake, 2 Harr. & J. 353 2391
v. Collins, 103 Mich. 143 3666, 3676
Ruttle v. Foss, 161 Mich. 132 2482, 2514
Ruttledge v. Rowland, 161 Ala. 114 4746
Ryal v. Rich, 10 East 47 816
Ryall v. Allen, 143 Ala. 222 1444
v. Prince, 82 Ala. 264 377, 384
Ryan v. Agricultural Ins. Co., 188 Mass. 11 3047
v. Akeley, 42 Mich. 216 1674
v. Anderson, 24 Ill. 652 1719, 1732
v. Baldrick, 3 McCord 294 1097
v. Becker, 136 Iowa 273 425
v. Burger & H. B. Co., 13 N. Y. Supp. 660 4567
v. City of Chicago, 181 Ill. App. 642 1474, 4801
v. Dayton, 25 Conn. 188 2528, 2534
v. Dumphy, 4 Mont. 342 521
v. Dunlap, 111 Mo. 610 2042
v. Fitzgerald, 87 Cal. 345 4324
v. Krusor, 76 Mo. App. 496 2843, 2847, 2851
v. Logan County Bank, 132 Ky. 625 2797
v. Massey, 2 Ir. C. L. 642 1553

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Ryan v. Miller, 153 Ill. 138 2705
v. Miller, 12 Daly 177 153
v. Miller, 236 Mo. 496 4391
v. New York Cent. R. Co., 35 N. Y. 210 68
v. Oakland G., L. & H. Co., 21 Cal. App. 14 4661, 4665, 4673, 4683, 4745, 4748
v. O'Neil, 49 Mich. 281 623, 725
v. Oshkosh G. L. Co., 138 Wis. 466 4873, 4874, 4905
v. Remmey, 57 N. J. L. 474 2697, 2701
v. Tipperary, South Riding, County Council, [1912] W. C. & Ins. Rep. 195, 5 B. W. C. C. 578, 46 Ir. L. T. 69 5173
v. Ward, 48 N. Y. 204 761
v. Webb, 39 Hun 435 1789
v. Young, 147 Ala. 660 4218, 4285
Ryan C. Co. v. Gardner, 154 Ill. App. 565 172
Ryan D. Co. v. Hvambsahl, 92 Wis. 62 1012
Ryans v. Hospes, 167 Mo. 342 2464, 2478
Ryburn v. Pryor, 14 Ark. 505 4211
Ryder v. Hathaway, 21 Pick. 298 360, 361, 4263
v. Mayer, 50 N. Y. Super. Ct. 220 4810
v. Neitge, 21 Minn. 70 2377
v. Phoenix Ins. Co., 98 Mass. 185 3009
v. Thayer, 3 La. Ann. 149 2919, 2922
v. Townsend, 7 D. & R. 119 809
v. Wall, 29 N. Y. Misc. 377 2000
Ryer, In re, 120 App. Div. (N. Y.) 154 1249
Ryer v. Turkel, 75 N. J. L. 677 2501
Ryers v. Wheeler, Hill & D. Supp. 389 3696
Ryerson v. Chapman, 66 Me. 557 303, 304, 306, 309, 2130, 2136, 2138, 2139, 2142, 3196
v. Marseillis, 16 N. J. L. 450 1363
v. Phelps, 163 Mich. 237 4668
v. Quackenbush, 26 N. J. L. 236 3133
v. Willis, 81 N. Y. 277 2194
Ryland v. Brown, 2 Head 270 1825
v. Chesapeake & O. R. Co., 55 W. Va. 181 3343, 4221
v. Heney, 130 Cal. 426 1032
Rynearson v. Turner, 52 Mich. 7 2863

S

S. A. McCaulley, The, 116 Fed. 107 4987
S. A. R. Co., G., H. v. Donahoe, 56 Tex. 162 1339, 1340
S. C. Schenck, The, 158 Fed. 54 2716, 2738
Saake v. Lederer, 174 Fed. 135 4478
Saam v. Saam, 4 Watts 432 482
Saase v. Rogers, 40 Ind. App. 197 4624
Sabella v. Brazileiro, 86 N. J. L. 505 5180
Sabin v. Vermont Cent. R. Co., 25 Vt. 363 3738
Sabine, The, 101 U. S. 384, 390, 25 L. ed. 982, 984 2727
Sabine Valley Tel. Co. v. Oliver, 46 Tex. Civ. App. 428 3654
Sabine, etc., R. Co. v. Brousard, 69 Tex. 617 3881
v. Joachimi, 58 Tex. 456 239, 3893, 3898
v. Johnson, 65 Tex. 389 3881, 3896, 3910
Sabioncell, The, 8 Bene. 90 3350
Sabre v. Mott, 88 Fed. 780 4828
Sac County Bank v. Foster, 77 Iowa 435 2056
Sacchi v. Bayside L. Co., 13 Cal. App. 72 56, 266, 3878, 3880, 3896, 3900, 3919, 3933
Sachra v. Manilla, 120 Iowa 562 4693, 4735
Sachs v. American S. Co., 72 App. Div. (N. Y.) 60, aff'd 177 N. Y. 551 1575, 2744, 2777
Sackett's Harbor Bank v. Blake, 3 Rich. Eq. 225 1077
Sackrider v. Beers, 10 Johns. 241 414, 3850
Sackville v. Storey (Tex. Civ. App.), 149 S. W. 239 314, 2257
Sacramento S. R. Co. v. Heilbron, 156 Cal. 408 4033, 4037, 4048
Sacramento T. Co. v. McDougal, 19 Cal. App. 562 4102
Sacramento, etc., R. Co. v. Moffatt, 7 Cal. 577 4094
Sacrest v. Jones, 30 Tex. 596 1523
Saddlery H. Mfg. Co. v. Hillsborough Mills, 68 N. H. 216 2339
Sadler v. Bean, 37 Iowa 439 2309, 4274
v. Great Western R. Co., [1896] App. Cas. 450, aff'g [1895] 2 Q. B. 688 434
Sadlier v. New York, 40 N. Y. Misc. 78 50, 3841
Sadowski v. Thomas Furnace Co., 157 Wis. 443 4871, 4878, 4879, 4880
Safely v. Gilmore, 21 Iowa 588 2329, 3118
Safety Insulated W. & C. Co. v. Mayor, 66 Fed. 140 231
Saffer v. Levy (Misc.), 88 N. Y. 144 3236
Saffin v. Thomas, Ohio C. C. 253 2463
Safford v. Drew, 3 Duer (N. Y.) 627 1394, 1395, 4852, 5120
v. Grout, 120 Mass. 20 4378, 4379
v. Kinsley, 40 Vt. 506 2920
v. Miller, 59 Ill. 205 1762
v. Stevens, 2 Wend. 158 1542
Sage v. Shepard & M. L. Co., 4 App. Div. (N. Y.) 290, aff'd 158 N. Y. 672 4220
v. Wilcox, 6 Conn. 81 2779
Sager v. Portsmouth, etc., R. Co., 31 Me. 228 3335
v. Schnewind, 83 Ind. 204 1194
v. Steinbrenner, 99 Ark. 626 979
v. Warley, Rice Ch. (S. C.) 26 742
Saginaw, The, 95 Fed. 703 5001, 5007
Saginaw, The, and Hamilton, The, 139 Fed. 906 1478, 4848
Sagola L. Co. v. Chicago T. & T. Co., 121 Ill. App. 292 2277
Saier's Est., In re, 158 Mich. 170 1121
Sailer v. Barnousky, 60 Wis. 169 684
Sailly v. Elmore, 2 Paige 497 828, 2795
Sailor's Bride, The, 1 Brown's Adm. 68 2717
Saindon v. Morrell, 78 Kan. 53 1493
St. Albans v. Failey, 46 Vt. 448 736
St. Albans S. B. Co. v. Wilkins, 8 Vt. 54 2524
St. Anthony & D. E. Co. v. Dawson, 20 N. D. 18 2380, 2398, 2399
St. Bernard v. Shane, 201 Fed. 453 4954
St. Charles v. Stookey, 154 Fed. 772 1447, 2667, 2670
St. Clair v. Cash G. M. & M. Co., 9 Colo. App. 235 3791
St. Clara Female Academy v. Northwestern Nat. Ins. Co., 98 Wis. 257 3012, 3044

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St. Helen's S. Co. v. Dominion A. Co., 42 Nova Scotia 385 2284
v. Tipping, 11 H. of L. Cas. 642 3846, 3848
St. James Military Academy v. Gaiser, 125 Mo. 517 4504
St. Joe, etc., R. Co. v. Orr, 8 Kan. 419 4097, 4101
St. John v. American Mut. L. Ins. Co., 13 N. Y. 31 3071
v. Mayor, 13 How. Pr. 527 257, 3209, 3213, 3822
v. Mayor, etc., 6 Duer 315 1369
v. O'Connel, 7 Port. 466 4273, 4275
v. Purdy, 1 Sandf. 9 655
v. Rykert, 10 Can. Sup. Ct. 278 961, 965
St. John River S. Co. v. Star Line S. Co., 40 New Bruns. 405 1415
St. Johns, The, 101 Fed. 469 3006
St. Johns v. Mayor, etc., 6 Duer 315 3918
St. John's G. Co. v. San Juan, 1 Porto Rico Fed. 160 3748
St. Johnsbury, etc., R. Co. v. Hunt, 55 Vt. 570 73, 4604
v. Willard, 61 Vt. 134 4052
St. Johnsville v. Smith, 184 N. Y. 341 4053, 4054
St. Joseph v. Hamilton, 43 Mo. 282 4147
v. Merlatt, 26 Mo. 233 1586
St. Joseph, etc., R. Co. v. Chase, 11 Kan. 47 68
v. Hedge, 44 Neb. 448 4795
v. Orr, 8 Kan. 419 4120
v. Shambaugh, 106 Mo. 557 3971, 3981, 4027
v. Wheeler, 35 Kan. 185 4935
St. Joseph School Board v. Hull, 72 Mo. App. 403 813, 816
St. Lawrence, etc., R. Co. v. Lett, 11 Can. Sup. Ct. 422 4857, 4890, 4900
St. Louis v. Alexander, 23 Mo. 484 1756
v. Bissell, 46 Mo. 157 2061, 2153, 2157, 2164, 2187
v. Brown, 155 Mo. 545 3952, 4013
v. Merchants' B. T. R. Co., 84 Ill. App. 116 3893
v. St. Louis G. L. Co., 82 Mo. 349 1713
St. Louis B. Ass'n v. Hayes, 107 Fed. 395 2792
v. McEnroe, 80 Mo. App. 429 2370
v. Miller, 138 Ill. 465 1464
St. Louis B. T. R. Ass'n v. Schultz, 226 Ill. 409 3893
St. Louis B. & T. R. Co. v. Mendonsa, 193 Mo. 518 3976
St. Louis C. R. Co. v. Postal Tel. Co., 173 Ill. 508 4067
St. Louis C. & Mfg. Co. v. Lookeba S. Bank, 35 Okla. 434 2940
St. Louis Elec. Terminal R. Co. v. MacAdaras, 257 Mo. 448 4100
St. Louis G. L. Co. v. St. Louis, 11 Mo. App. 55, 77 1043
St. Louis M Co. v. Miller (Ark.), 11 S. W. 958 3768
St. Louis Perpetual Ins. Co. v. Homer, 9 Metc. (Mass.) 39 1857
St. Louis Public Schools v. Boatmen's Ins. Co., 5 Mo. App. 91 3134
St. Louis R. Co. v. Haist, 71 Ark. 258 4901
v. Southern R. Co., 138 Mo. 591 4148
St. Louis Range Co. v. Kline-D. M. Co., 120 Mo. App. 438 2267
St. Louis S. R. Co. v. Acker, 44 Tex. Civ. App. 560 4718, 4719
v. Alexander (Tex. Civ. App.), 141 S. W. 135 87, 165
v. Baer, 39 Tex. Civ. App. 16 3893
v. Bowles, 32 Tex. Civ. App. 118 4899
v. Branch, 106 Ark. 269 3443, 3476
v. Brooksher, 86 Ark. 91 1433
v. Browning, 54 Tex. Civ. App. 521 1463
v. Bryant, 46 Tex. Civ. App. 601 143
v. Campbell, 32 Tex. Civ. App. 613 3456
v. Carstens, 19 Tex. Civ. App. 190 4872
v. Cates, 15 Tex. Civ. App. 135 3342, 3370
v. Chambliss, 93 Tex. 62 1140
v. Clay County G. Co., 77 Ark. 357 3286, 3310
v. Clayton, 54 Tex. Civ. App. 512 3847, 3878, 3924
v. Cleland, 50 Tex. Civ. App. 499 4670, 4747, 4793, 4807
v. Cochran, 77 Ark. 398 109
v. Foster, 46 Tex. Civ. App. 517 135, 3471
v. Franks, 52 Tex. Civ. App. 614 135, 3471
v. Groves, 44 Tex. Civ. App. 63 4809
v. Hammett, 96 Ark. 418 3485
v. Hawkins, 49 Tex. Civ. App. 545 4745
v. Horne (Tex. Civ. App.), 130 S. W. 1025 4724
v. Hoshall, 82 Ark. 387 3894
v. Huey (Tex. Civ. App.), 130 S. W. 1017 4860, 4921
v. Jackson, 93 Ark. 119 1471, 4720
v. Johnson, 38 Tex. Civ. App. 322 4720
v. Kilberry, 83 Ark. 87 3434
v. Knight, 81 Ark. 429 3456, 3460, 3461
v. Leder, 87 Ark. 298 3318
v. Lee (Tex. Civ. App.), 151 S. W. 331 459
v. Leflar, 104 Ark. 528 4673, 4799
v. Lewis, 91 Ark. 343 4675, 4789
v. Louisiana & T. L. Co., 50 Tex. Civ. App. 179 3323, 3425
v. McArthur, 31 Tex. Civ. App. 205 4548
v. Mackey, 95 Ark. 297 146, 3880, 3887
v. Mallard, 104 Ark. 641 3507, 3528
v. May (Tex. Civ. App.), 44 S. W. 408 172
v. Mitchell, 25 Tex. Civ. App. 197 4686, 4688
v. Morris, 76 Ark. 542 3896, 3937
v. Moss, 37 Tex. Civ. App. 461 1456
v. Murdock, 54 Tex. Civ. App. 249 87, 4688
v. Musick, 35 Tex. Civ. App. 591 3390
v. Myzell, 87 Ark. 123 1280, 1320, 3476
v. Nihlock, 53 Tex. Civ. App. 619 4690
v. Overton, 114 Ark. 98 4829
v. Pearson, 88 Ark. 200 3448, 3456, 3471, 3502
v. Phoenix C. O. Co., 88 Ark. 594 3345, 3387
v. Price, 44 Tex. Civ. App. 217 1502
v. Pruitt (Tex. Civ. App.), 157 S. W. 236 1473

[REFERENCES ARE TO PAGES]

St. Louis S. R. Co. v. Ricketts, 96 Tex. 68 1482, 3452
v. Royall, 75 Ark. 530 4060
v. Smith, 33 Tex. Civ. App. 520 3351
v. Smith, 11 Tex. Civ. App. 550 3387
v. Smith, 102 Ark. 562 4789
v. Thompson, 102 Tex. 89 167, 288, 1267, 1318, 1327, 1328
v. White, 99 Tex. 359 3443, 3471
St. Louis S. & R. Co. v. Wyman, 22 Fed. 184 1771
St. Louis Southwestern Ry. Co. v. Anderson, 117 Ark. 41 5066, 5067, 5083
v. Brothers, — Tex. Civ. App. —, 165 S. W. 488 5055, 5131
v. Brown, — Tex. Civ. App. —, 163 S. W. 383 1376, 4743, 4788
v. Burrus Mill & Elevator Co., — Tex. Civ. App. —, 168 S. W. 1028 3388
v. Reagan, 79 Ark. 484 476, 3440
v. Starks (Tex. Civ. App.), 109 S. W. 1003 1359
v. Waits, — Tex. Civ. App. —, 164 S. W. 870 4808
v. Wilson, — Ark. —, 177 S. W. 415 5106
v. Wynnegar, — Ark. —, 173 S. W. 427 4811
St. Louis T. Co. v. Bambrick, 149 Mo. 560 3878
v. Murmann, 90 Mo. App. 555 4683
St. Louis T. F. Co. v. Wisdom, 4 Lea 695 378, 724
St. Louis T. R. Co. v. Heiger, 139 Mo. 315 4033
St. Louis U. T. Co. v. St. Louis, etc., R. Co. (Tex. Civ. App.), 146 S. W. 348 1223
St. Louis, etc., R. Co. v. Adams, 74 Ark. 326 1516, 1518, 4778
v. Adams, 55 Tex. Civ. App. 245 3388
v. Alexander (Tex. Civ. App.), 141 S. W. 135 3820
v. Anderson, 39 Ark. 167 3980, 4025, 4119, 4120, 4130
v. Anderson, 62 Ark. 360 3847, 3878
v. Armstrong, — Tex. Civ. App. —, 166 S. W. 366 1429, 3435
v. Aubuchon, 199 Mo. 352 4126
v. Ayres, 67 Ark. 371 2810, 3775
v. Barnes, — Tex. Civ. App. —, 162 S. W. 373 3961, 3962
v. Barnsback, 234 Ill. 344 4019, 4138
v. Bass (Tex. Civ. App.), 140 S. W. 860 775, 782
v. Batesville & W. Tel. Co., 80 Ark. 499 360
v. Baty, 88 Ark. 283 3449, 3472, 3476
v. Berry, 86 Ark. 309 237, 285, 2620
v. Berry (Tex. App.), 15 S. W. 48 342
v. Biggs, 52 Ark. 240 391, 395, 3847, 3850
v. Biggs, 50 Ark. 169 1141, 4169, 4173
v. Billingsley, 79 Ark. 335 4664
v. Binn, 10 Kan. App. 468 4870
v. Bird, 106 Ark. 177 1503, 4745, 4747
v. Bolen (Tex. Civ. App.), 129 S. W. 860 4925
v. Brabbzon, 87 Ark. 109 1510
v. Bragg, 69 Ark. 402 78, 137
v. Brock, 69 Kan. 448 149
v. Brogan, 105 Ark. 533 4699, 4821
v. Brown, 58 Ill. 61 4124, 4127
v. Brown, 62 Ark. 254 3474
v. Brown, 100 Ark. 107 1513, 3450, 3473
St. Louis, etc., R. Co. v. Brown, 241 U. S. 223 5085, 5130, 5142
v. Buckner, 89 Ark. 58 56, 3477
v. Burgin, 83 Ark. 502 3333, 3337
v. Busick, 74 Ark. 589 48
v. Byers, 40 Tex. Civ. App. 533 3430
v. Campbell, 108 Ark. 432 3537, 3539
v. Cantrell, 37 Ark. 519 4730
v. Capps, 72 Ill. 188, 67 Ill. 607 3918, 3948, 4010
v. Caraway, 77 Ark. 405 4876, 4883
v. Cartan R. E. Co., 204 Mo. 565 3998
v. Cash. G. Co., 161 Ala. 332 1433, 1437
v. Cates, 87 Ark. 162 3464, 3466
v. Chaney, 77 Kan. 276 1473
v. Chapman, 38 Kan. 307 1457, 4141
v. Clark, 121 Mo. 169 3987, 4021, 4056, 4136, 4154
v. Cleere, 76 Ark. 377 1142, 4884
v. Clifford (Tex. Civ. App.), 148 S. W. 1163 4791, 4823
v. Colum, 72 Ark. 1 109, 110
v. Conarty, 106 Ark. 421, rev'd 238 U. S. 243 5044
v. Continental B. Co., 198 Mo. 698 3956, 3976, 3980, 3987, 4133
v. Coolidge, 73 Ark. 112 432, 3428
v. Cox, Peery & Murray, 40 Okla. 258 3337, 3385
v. Coy, 113 Ark. 265 4821
v. Craft, 237 U. S. 648, aff'g 115 Ark. 483 5107, 5108, 5110, 5120, 5121, 5122
v. Criner, 41 Okla. 256 1504
v. Cumbie, 101 Ark. 172 3407
v. Dallas, 93 Ark. 209 4792
v. Davis, 35 Kan. 464 749
v. Davis, 37 Okla. 340 135, 3450, 3472
v. Dawson, 68 Ark. 1 5108
v. Day, 86 Ark. 104 3451, 3457, 3460, 3527
v. Deshong, 63 Ark. 443 3428
v. Dickerson, 29 Okla. 386 3529, 3538
v. Dodgin (Tex. Civ. App.), 127 S. W. 847 4730
v. Dowgiallo, 82 Ark. 289 1329
v. Drummond, 205 Mo. 167 4125
v. Duke, 112 C. C. A. 564, 195 Fed. 306 4900
v. Dunham, 36 Okla. 724 1457, 3398
v. Dysart, 89 Ark. 261 1280
v. Edwards, 78 Fed. 745 1421, 1432
v. Farmers' Union G. Co., 34 Okla. 270 1530, 2624, 3332, 3343, 3344
v. Farr, 6 C. C. A. 211, 56 Fed. 994 4728
v. Fayetteville, 75 Ark. 534 4061
v. Fowler, 142 Mo. 670 4154
v. Freeland, 39 Okla. 60 3503
v. Freeman, 36 Ark. 41 4862, 4889, 4937
v. Freeman, 89 Ark. 326 1510, 4871, 4872
v. French, 56 Kan. 584 4941
v. Furlow, 81 Ark. 496 3471, 3472, 3476, 3520
v. Gaba, 78 Kan. 432 888, 3375
v. Garner, 96 Miss. 577 3504
v. Geer (Tex. Civ. App.), 149 S. W. 1178 4861, 4900
v. Glossup, 88 Ark. 225 3458, 3472, 4715
v. Goode, 42 Okla. 784 1502
v. Gordon, 92 Ark. 617 4919
v. Grant, 75 Ark. 579 1329, 4812

[REFERENCES ARE TO PAGES]

St. Louis, etc., R. Co. v. Grayson County, 31 Tex. Civ. App. 611 4031
v. Green, 44 Tex. Civ. App. 13 3398, 3532, 3536
v. Groce, 99 Ark. 420 3485
v. Grove, 39 Kan. 731 695
v. Gunter, 39 Tex. Civ. App. 129 1436, 3341, 3366, 3430
v. Guswelle, 236 Ill. 214 3976, 4135
v. Haist, 71 Ark. 258 4894, 4953
v. Hall, 186 Ala. 353 2647
v. Hall, 53 Ark. 7 1518
v. Hall, 71 Ark. 302 3742
v. Hammers, 51 Kan. 127 3979, 4021
v. Hammett, 98 Ark. 418 3476
v. Hannibal Union D. Co., 125 Mo. 82 4077
v. Hardie, 87 Ark. 475 3892, 3895, 3897
v. Hart, — Okla. —, 146 Pac. 436 4800
v. Hartung, 95 Ark. 220 4664
v. Henderson (Tex. Civ. App.), 32 S. W. 143 3955
v. Hesterly, 228 U. S. 702, 98 Ark. 240 4658, 4952, 5024, 5106, 5132
v. Hitt, 76 Ark. 227 1476, 4878, 4905
v. Hix, 101 Ark. 90 3459
v. Hook, 83 Ark. 584 52, 136, 3471
v. Hoover, 3 Kan. App. 577 3777
v. Hoshall, 82 Ark. 387 408, 3849, 3892, 3895
v. Hudson, 95 Ark. 506 4835
v. Hunt, 6 Ala. App. 434 2575
v. Hurst, 25 Ill. App. 98 769
v. Hutchinson, 101 Ark. 424 4905
v. Jacks, 105 Ark. 347 4908, 4911, 4921, 4925
v. Jacobs, 70 Ark. 401 1431
v. Jefferson S. Co., 90 Mo. App. 171 886
v. Jenkins (Tex. Civ. App.), 137 S. W. 711 4747
v. Jenkins, — Tex. Civ. App. —, 172 S. W. 984, rev'g 163 S. W. 621 4926, 4934, 4936
v. Johnston, 78 Tex. 536 4889, 4915
v. Keefe, 113 Ark. 215 1429
v. Kilpatrick, 67 Ark. 47 1330
v. Kirby, 104 Ill. 345 4027, 4039
v. Knox, — Tex. Civ. App. —, 151 S. W. 902 1429, 3346
v. Lamb, 95 Ark. 209 3371
v. Landa, — Tex. Civ. App. —, 149 S. W. 292 3430
v. Law, 68 Ark. 218 1430, 3337
v. League, 71 Kan. 79 143
v. Leamons, 82 Ark. 504 4661, 4719
v. Lesser, 46 Ark. 236 3334, 3394, 3412
v. Lieurance, 80 Kan. 424 3351, 3387
v. Lilly, 1 Ala. App. 320 3538
v. Long, 41 Okla. 177 4871, 4883, 4884
v. Lurton, 72 Ill. 118 2626
v. McAuliff, 43 Kan. 185 3980
v. McCain, 67 Ark. 377 4893
v. McCormick, 71 Tex. 660 4954
v. Mackie, 71 Tex. 491 316, 3464, 3474, 3498, 3500
v. McMichael, 115 Ark. 101 4652, 4661, 4725, 4729, 4746, 4750, 4806
v. McWhirter, 229 U. S. 265, 145 Ky. 427 125, 5071, 5137, 5138
v. Magness, 93 Ark. 46 1432, 1440, 3877
v. Mathis, 76 Ark. 184 1510, 4900
St. Louis, etc., R. Co. v. Maxfield, 94 Ark. 135 3963, 4042, 4135
v. Miggs, 50 Ark. 169 1138
v. Miller, 107 Ark. 276 3877
v. Moore, 101 Miss. 768 4865, 4876
v. Mounts, — Okla. —, 144 Pac. 1036 3338, 3339
v. Mudford, 44 Ark. 439 3342
v. Mudford, 48 Ark. 502 3349, 3352, 3367, 3378
v. Murphy, — Tex. Civ. App. —, 131 S. W. 306 3390
v. Murphy, 16 Minn. 500 4101
v. Myrtle, 51 Ind. 566 1480, 3519
v. Needham, 3 C. C. A. 219, 52 Fed. 371 4880, 4881
v. Neel, 56 Ark. 279 3323, 3326, 3327
v. Noland, 75 Kan. 691 432
v. North, 31 Mo. App. 345 3978, 4027
v. Nowland, 75 Kan. 691 3773
v. Nyce, 61 Kan. 394 4053, 4095
v. O'Baugh, 49 Ark. 418 420
v. Oliver, 17 Okla. 589 3976, 3979, 4153
v. Osborne, 95 Ark. 310 1424, 4724
v. Ozier, 86 Ark. 179 3321, 3329
v. Pearce, 82 Ark. 353 1452
v. Peery, 40 Okla. 432 3386
v. Pfau, 212 Mo. 398 3968, 3976, 4140
v. Phelps, 46 Ark. 485 3387, 3400, 3433
v. Philpot, 72 Ark. 23 1460
v. Piburn, 30 Okla. 262 126, 3345, 3427
v. Price, 83 Ark. 437 3527, 4652
v. Ramsey, 37 Okla. 448 3853, 3877
v. Rawley, 90 Ill. App. 653 4859
v. Reagan, 79 Ark. 484 3466
v. Reilly, 110 Ark. 182 766
v. Rich, — Tex. Civ. App. —, 162 S. W. 1194 1429, 3347, 3350, 3353, 3435, 4170, 4177
v. Richards, 23 Okla. 256 4793
v. Richardson, 45 Mo. 466 4110
v. Ritz, 33 Kan. 404 315, 316, 321, 3818
v. Roane, 93 Miss. 7 3457, 3470, 3502, 3528
v. Robertson, 103 Ark. 361 3506
v. Rodgers, 118 Ark. 263 5085, 5110, 5113, 5114
v. Rogers, 49 Tex. Civ. App. 304 1432, 3436, 4698, 4806
v. St. Louis Union S. U. Co., 120 Mo. 541 3958, 4131, 4132
v. Sanders, 91 Ark. 153 170, 2615
v. Saunders, 78 Ark. 589 3893, 3894
v. Saunders, 85 Ark. 111 3894
v. Schneider, 30 Mo. App. 620 1720, 1745, 1759
v. Scott, 102 Ark. 417 4925, 4926
v. Seale, 229 U. S. 156, rev'g — Tex. Civ. App. —, 148 S. W. 1099 5024, 5053, 5069, 5093, 5123, 5124, 5125, 5131
v. Sharp, 115 Ark. 308 5125
v. Sharp, 27 Kan. 134 315
v. Sharrock, 6 Ind. Ty. 458 3414
v. Shepard, 40 Okla. 589 3386
v. Shoemaker, 27 Kan. 677 840, 918
v. Shore, 89 Ark. 418 1444
v. Smith, 34 Tex. Civ. App. 612 4724
v. Smith, 41 Okla. 163 4178
v. Smith, 216 Ill. 339 3987
v. Smuck, 49 Ind. 302 3413
v. Snell, 82 Ark. 61 3528
v. South, 43 Ill. 176 1532
v. Sparks, 81 Ark. 187 4801
v. Stamps, 84 Ark. 241 1267, 4849, 4867

[REFERENCES ARE TO PAGES]

St. Louis, etc., R. Co. v. Standifer, 81 Ark. 275 4900, 4901
v. State, 112 Ark. 147 3286
v. Steed, 105 Ark. 205 4833
v. Steele, 37 Okla. 536 4188
v. Stell, 87 Ark. 308 1417, 3270
v. Stewart, 201 Mo. 491 4103
v. Stroud, 67 Ark. 112 3459
v. Taylor, 84 Ark. 42 78, 80, 163, 345, 3481, 4686
v. Taylor (Tex. Civ. App.), 134 S. W. 819 474, 4752
v. Taylor, 210 U. S. 281, rev'g 71 Ark. 445 5035, 5071, 5138
v. Teters, 68 Ill. 144 3964, 3976, 4094
v. Thomas (Tex. Civ. App.) 27 S. W. 419 3461
v. Tilby, — Ark. —, 174 S. W. 1167 3388
v. Trigg, 63 Ark. 536 3900
v. Trotter, 101 Ark. 183 1477, 4652
v. True, — Tex. Civ. App. —, 140 S. W. 837 3321
v. Tyus, 96 Ark. 325 4640
v. Waren, 65 Ark. 619 1504, 4652, 4657, 4726, 4755, 4817
v. Watkins, 45 Tex. Civ. App. 321 3437
v. Weakly, 50 Ark. 397 3412
v. Webster, 99 Ark. 265 4814
v. West (Tex. Civ. App.), 131 S. W. 839 3879, 3888, 3910
v. Wilhelm, 49 Tex. Civ. App. 639 3345, 3347
v. Williams, 100 Ark. 356 3451, 3459
v. Wilson, 70 Ark. 136, 144 1329
v. Wynne, H. & C. Co., 81 Ark. 373 3310, 3345
v. Yarborough, 56 Ark. 612 1439
v. Yount, 30 Okla. 371 3483
v. Zumwalt, 31 Okla. 159 1399, 1404
St. Martin v. Desnoyer, 1 Minn. 156 1480
St. Mary's College v. Meagher, 11 Ky. L. Rep. 112 2799, 2804
St. Mary's Hospital v. Perry, 152 Cal. 338 1122
St. Ores v. McGlashen, 74 Cal. 148 1269
St. Paul, The, 86 Fed. 340 2727, 2729, 2734
St. Paul v. Louisiana C. L. Co., 116 La. 585 3790, 4261
St. Paul B. Co. v. Kemp, 125 Wis. 138 361, 1445
St. Paul D. Co. v. Pratt, 45 Minn. 215 4368, 4405
St. Paul Division No. 1, Sons of Temperance v. Brown, 11 Minn. 356 792
St. Paul F. Co. v. Wegmann, 40 Minn. 419 2743
St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill. 598 3068
v. Kirkpatrick, 129 Tenn. 55 3046
v. Peck, 40 Okla. 396 3082
v. Stogner, 44 Tex. Civ. App. 60 3050
St. Paul Nat. Bank v. Cannon, 46 Minn. 95 687, 1817
St. Paul T. Co. v. Finch, 52 Minn. 342 1072
v. Strong, 85 Minn. 1 1121, 1124
St. Paul & M. T. Co. v. Leck, 57 Minn. 87 2830
St. Paul, etc., R. Co. v. Matthews, 16 Minn. 341 4094
v. Murphy, 19 Minn. 500 4125
St. Peter's Church v. Beach, 26 Conn. 355 223, 1282, 1313, 4190
Sainter v. Ferguson, 7 C. B. 716 839, 869, 887, 922
Saks v. Drake (Misc.), 138 N. Y. Supp. 631 760
Saladin v. Mitchell, 45 Ill. 79 2242
Salazar v. Taylor, 18 Colo. 538 947, 949, 1874
Salchert v. Reinig, 135 Wis. 194 3666, 3675, 3676
Saldal v. Jacobsen, 154 Iowa 630 2691
Sale v. Eichberg, 105 Tenn. 332 47
v. Smith, 147 Ky. 146 3166
Saleeby v. Central R. Co., 99 App. Div. (N. Y.) 163 3532, 3535
Salem v. Anson, 40 Ore. 339 832, 837, 840, 841, 862, 866, 884
v. McClintock, 16 Ind. App. 656 1597, 2764
Salem Bank v. Gloucester Bank, 17 Mass. 1 647
Salem I. Co. v. Lake Superior C. I. Mines, 112 Fed. 239 2248
Salem India R. Co. v. Adams, 23 Pick. 256 566
Salem T. T. Co. v. McGraw, 66 W. Va. 321 1241
Salida v. McKinna, 16 Colo. 523 4739
Salina v. Kerr, 7 Kan. App. 223 1361
v. Trosper, 27 Kan. 544 339, 345, 4662, 4672
Salina M. Co. v. Stiefel, 82 Kan. 7 4390
Salinas v. Ellis, 26 S. C. 337 813, 826, 827
Saling v. Bolander, 125 Fed. 701 1185, 4319
Salinger v. Salinger, 69 N. H. 589 209, 2324, 2326
v. Western U. Tel. Co., 147 Iowa 484 1417, 3591
Salisbury v. Herchenroder, 106 Mass. 458 4678
v. Van Hoesen, 3 Hill 77 1642
v. Western, etc., R. Co., 98 N. C. 465 3741, 3746
Salkold v. Skelton, Cro. Jac. 519 4348
Salladay v. Dodgeville, 85 Wis. 318 4785
Sallden v. Little Falls, 102 Minn. 358 3974, 4031
Salle v. Light, 4 Ala. 700 2394
Sallee v. St. Louis, 152 Mo. 615 1433
Saller v. Friedman S. Co., 130 Mo. App. 712 4793
Salley v. Manchester & A. R. Co., 54 S. C. 481 1459
v. Seaboard A. L. R., 76 S. C. 173 3330
Salmon v. Blasier Mfg. Co., 123 App. Div. (N. Y.) 171 391, 1392
v. Chicago & A. R. Co., 181 Mo. App. 414 1365, 1378
v. Helena B. Co., 147 Fed. 408 2249
v. Helena B. Co., 158 Fed. 300 2236
v. Richardson, 30 Conn. 360 4369
v. Smith, 1 Saund. 202 3129
Salmons v. Western U. Tel. Co., 133 N. C. 541 3568
Salo v. Smith, 25 Cal. App. 295 4842
Salomon v. Pioneer Co-op. Co., 21 Fla. 374 663, 670
Salsbury v. Ware, 183 Ill. 505 2902, 2971
Salstrom v. Orleans B. G. M. Co., 153 Cal. 551 3761, 3764, 3768, 3798
Salt Fork C. Co. v. Eldridge C. Co., 170 Ill. App. 268 2280
Salt Lake City v. East Jordan I. Co., 40 Utah 126 4048, 4067
v. Hollister, 118 U. S. 256, 261 1331
Salt Springs Nat. Bank v. Sloan, 135 N. Y. 371 2787, 2788
Salter v. Howard, 43 Ga. 601 123

[REFERENCES ARE TO PAGES]

Salter v. Parkhurst, 2 Daly 240 1101
v. Shove, 60 Minn. 483 794
v. Utica, etc., R. Co., 86 N. Y. 401 1143
Salters v. Ralph, 15 Abb. Pr. 273 860
Saltmarsh v. Chicago, etc., R. Co., 122 Mich. 103 4257
v. Planters', etc., Bank, 14 Ala. 668 984
v. Planters', etc., Bank, 17 Ala. 761 984
Saltus v. Everett, 20 Wend. 267 457, 826
v. Kipp, 12 How. Pr. 342 461, 509
Saltzer v. Alexander S. Co., 108 Ill. App. 210 2556
Saluda Mfg. Co. v. Penninghton, 2 Spears 735 2598, 2624, 2635
Salvesen v. Rederi Aktiebolaget Nordstjerman, [1905] App. Cas. 302 303, 2928
Salvin, In re, [1912] 1 Ch. 332 1078
Salyer v. Blessing, 151 Ky. 459 4394
v. State, 5 Ind. 202 1653
Salyers v. Ross, 15 Ind. 130 1653
v. Smith, 67 Ark. 526 1965
Salzgeber v. Mickel, 37 Ore. 216 389, 3190, 3192
Sam Chak v. Campbell, 45 Nova Scotia 1 4835, 4843
Samarra v. Allegheny Valley St. R. Co., 238 Pa. 469 4686, 4764, 4667
Samieloff v. New York, etc., R. Co., 122 App. Div. (N. Y.) 770 1338
Sammis v. Clark, 13 Ill. 544 1108
Sammons v. American Home F. Ins. Co., 94 S. C. 366 3044
Sample v. Cochran, 82 Ind. 260 2805
v. Farson, 174 Ill. App. 334 549
Sampson v. Commonwealth, 202 Mass. 326 1031, 2741
v. Henry, 11 Pick. 379 4669, 4775
v. Henry, 13 Pick. 36 1390, 3823
v. Neely, 106 Ill. App. 129 1118
v. St. Louis, etc., R. Co., 156 Mo. App. 419 1468
Samson, The, 217 Fed. 344 4993
Samson v. Rose, 65 N. Y. 411 360
v. Thornton, 3 Metc. (Mass.) 275 2768, 2779
v. Zimmerman, 73 Kan. 654 295, 2131
Samuel v. Bond, Litt. Sel. Cas. 158 4581
v. de la Sota, 54 Pa. Super. Ct. 1 2252
v. Fidelity & C. Co., 76 Hun 308 384, 389
v. Minter, 3 A. K. Marsh. 480 1061
v. Samuel, 151 Ky. 235 721
v. Zacherv, 4 Ired. 377 2863, 2864
Samuel H. Crawford, The, 6 Fed. 906 2721
Samuels v. California St. Cable R. Co., 124 Cal. 294 1384
v. Evening Mail Ass'n, 6 Hun 5 4555
v. Evening Mail Ass'n, 9 Hun 288, 75 N. Y. 604 1290, 1332, 4544, 4545
v. Fidelity & C. Co., 49 Hun 122 3089
v. King, 50 Ind. 527 645, 647
v. New York City R. Co., 52 N. Y. Misc. 137 3476
v. Richmond, etc., R. Co., 35 S. C. 493 1268, 3502
Samuelson v. Glickman, 113 App. Div. (N. Y.) 654 1997
San Antonio v. Alamo Nat. Bank (Tex. Civ. App.), 155 S. W. 620 1054, 1235
v. Estate of Mackey, 22 Tex. Civ. App. 145 3863, 3887, 3888
v. Marshall (Tex. Civ. App.), 85 S. W. 315 1538
San Antonio v. Stevens (Tex. Civ. App.), 126 S. W. 666 1221
San Antonio B. Ass'n v. Brents, 39 Tex. Civ. App. 443 3110
San Antonio F. Co. v. Drish, 38 Tex. Civ. App. 214 4720
San Antonio Light P. Co. v. Lewy, 52 Tex. Civ. App. 22 4510
San Antonio St. R. Co. v. Muth, 7 Tex. Civ. App. 443 4734
San Antonio T. Co. v. Cassanova (Tex. Civ. App.), 154 S. W. 1190 56, 1484, 1505, 4705, 4732, 4740
v. Corley (Tex. Civ. App.), 154 S. W. 621 4678, 4821
v. Crisp, — Tex. Civ. App. —, 162 S. W. 422 4726
v. Emerson (Tex. Civ. App.), 152 S. W. 468 4767, 4768, 4814
v. Probandt, 59 Tex. Civ. App. 265 4705
v. White, 94 Tex. 468 4872
v. Young (Tex. Civ. App.), 141 S. W. 572 4925
San Antonio, etc., R. Co. v. Addison, 96 Tex. 61 1240, 1357, 3401
v. Beauchamp, 54 Tex. Civ. App. 123 1373, 4683, 4809
v. Belt, 24 Tex. Civ. App. 281 4763
v. Bobo, — Tex. Civ. App. —, 163 S. W. 377 3962, 3967
v. Bowles, 88 Tex. 634 1543
v. Bracht, — Tex. Civ. App. —, 172 S. W. 1116 3420
v. Chittim (Tex. Civ. App.), 135 S. W. 747 3388, 3390
v. Corley, 87 Tex. 432 77, 94, 4663, 4666, 4[illegible]
v. Grady, — Tex. Civ. App. —, 171 S. W. 1019 3[illegible]
v. Green, 20 Tex. Civ. App. 5 4[illegible]
v. Grier, 20 Tex. Civ. App. 138 1278, 134[illegible]
v. Griffin, 20 Tex. Civ. App. 91 4616, 4837, 484[illegible]
v. Gurley, 37 Tex. Civ. App. 283 3889, 3924, 3936, 3937
v. Houston Packing Co., — Tex. —, 167 S. W. 228 3370
v. Houston Packing Co., — Tex. Civ. App. —, 169 S. W. 642 3371
v. Jackson, 38 Tex. Civ. App. 201 4719
v. Josey (Tex. Civ. App.), 71 S. W. 606 3329
v. Kivlin, 42 Tex. Civ. App. 633 4753
v. Kniffen, 4 Tex. Civ. App. 484 1387, 2471
v. Littleton, — Tex. Civ. App. —, 180 S. W. 1194 5081, 5082, 5106, 5126, 5128
v. Long, 87 Tex. 148 1395, 4885, 4896
v. Mohl (Tex. Civ. App.), 37 S. W. 22 3879
v. Moore, 31 Tex. Civ. App. 371 4732
v. Moya, — Tex. Civ. App. —, 173 S. W. 608 5020
v. Polka (Tex. Civ. App.), 124 S. W. 226 768
v. Pratt, 89 Tex. 310 3346
v. Spencer, 55 Tex. Civ. App. 456 1464, 4750, 4793, 4806
v. Thigpen, — Tex. Civ. App. —, 152 S. W. 848 3442
v. Timon (Tex. Civ. App.), 110 S. W. 82 1359
v. Weigers, 22 Tex. Civ. App. 344 4683, 4748
v. Wilson, 4 Tex. Civ. App. 178 4240

[REFERENCES ARE TO PAGES]

San Bernardino, etc., R. Co. v. Haven, 94 Cal. 489 4015, 4119
San Bois Coal Co. v. Resetz, 43 Okla. 384 1478, 4751, 4877, 4883
Sanborn v. Bay, 114 C. C. A. 242, 194 Fed. 351 3669, 3676
v. Benedict, 78 Ill. 310 230, 2238, 2276
v. Chamberlin, 101 Mass. 409 1936, 1938
v. Emerson, 12 N. H. 57 1503
v. Firemen's Ins. Co., 16 Gray 448 2999
v. Neal, 4 Minn. 126 2981
v. Plowman, 13 Tex. Civ. App. 95 2458
v. Stark, 31 Fed. 18 741
Sanchez v. Forster, 133 Cal. 914 1641
Sancliff v. Palmeter, 18 Ind. 321 4614
San Cristobal, The, 215 Fed. 615 2716, 2717, 2721
Sandback v. Quigley, 8 Watts 460 3724
v. Thomas, 1 Stark 306 306, 1999
Sandell v. Sherman, 107 Cal. 397 4646
Sanderlin v. Willis, 94 Ga. 171 541, 1943, 1956, 1957, 2009, 2200, 2340
Sanders v. Allen, 124 Ga. 684 1492, 2274
v. Bagwell, 37 S. C. 145 1243, 1485
v. Bank, 2 Met. (Ky.) 327 1608
v. Bond, 23 Ky. L. Rep. 2084 2248
v. Branch Bank, 13 Ala. 353 755, 761
v. Brock, 230 Pa. 609 2013
v. Bryer, 152 Mass. 141 2046
v. Carter, 91 Ga. 450 836, 841, 847, 862, 885, 919
v. Charleston & W. C. R. Co., 97 S. C. 50 5058
v. Cline, 22 Okla. 154 436, 437, 3824
v. Coleman, 97 Va. 690 3684
v. Dunn, — Tex. Civ. App. —, 158 S. W. 1041 4407
v. Gillett, 8 Daly 183 590
v. Graves, 105 Fed. 894 2480
v. Hall, 22 Tex. Civ. App. 282 4506, 4511
v. Hamilton, 2 Hayw. 282 2130
v. Hamilton, Mart. & Hayw. 458 2886
v. Herndon, 128 Ky. 437 2851
v. Herndon, 122 Ky. 760 2853, 2856, 2861
v. Johnson, 6 Blackf. 53 471, 473, 4549
v. Kentish, 8 T. R. 162 2316, 4251, 4252
v. Lake Shore & M. R. Co., 94 N. Y. 641 1007, 1185
v. Logan, 2 Fish. Pat. Cas. 168 4441
v. McKim, 138 Iowa 122 863, 918
v. Mosbarger, 159 Mo. App. 488 823, 1229
v. O'Callaghan, 111 Iowa 574 1428, 4744
v. Palmer, 5 C. C. A. 77, 55 Fed. 217 4645
v. Peck, 131 Ill. 407 816
v. Riddick, 127 Tenn. 701 2495
v. Rives, 1 Stew. 109 1558
v. Scott, 68 Ind. 130 1116
v. Smith, 5 N. Y. Misc. 1 3250
v. Stuart, 1 C. P. Div. 326 196, 3559
v. Thornton, 2 Ind. Ty. 92 3699
v. Vance, 7 T. B. Mon. 209 4211
v. Weelburg, 107 Ind. 266 2866
Sanderson, In re, 74 Cal. 199 1121
In re, 150 Fed. 236 677
Sanderson v. Aston, L. R. 8 Ex. 73 1592, 2771, 2795
v. Caldwell, 45 N. Y. 398 4506, 4518, 4533
v. Frazier, 8 Colo. 79 1495
Sanderson v. Marine Ins. Co., 2 Cranch 218 3032
v. Northern Pac. R. Co., 88 Minn. 162 80, 4686
v. Pennsylvania C. Co., 102 Pa. 370 3918
v. Read, 75 Ill. App. 190 368, 369, 1015, 1094
v. Stevens, 116 Mass. 133 2767
Sandford v. Catawissa, etc., R. Co., 24 Pa. 378 3285
v. Dillaway, 10 Mass. 52 2937
v. Eighth Ave. R. Co., 23 N. Y. 343 3511
Sandham v. Grounds, 94 Fed. 83 28, 288
San Diego L. & T. Co. v. Neale, 78 Cal. 63 4019, 4046, 4048, 4127, 4132
San Diego W. Co. v. Pacific Coast S. Co., 101 Cal. 216 1721, 1728
Sandlin v. Wilder, 142 Ga. 131 2447
Sandord v. City Nat. Bank, 15 Ky. L. Rep. 607 953
Sandovahl v. Randolph, 222 U. S. 161, 56 L. ed. 143 2902
Sandoval v. United States F. & G. Co., 12 Ariz. 348 2734, 2835
Sandringham, The, 10 Fed. 556, 573 2726, 2731
Sands v. Lilienthal, 46 N. Y. 541 3348
v. Lyon, 18 Conn. 18 786, 802, 803, 805
v. Potter, 165 Ill. 397 2458, 2461
v. Smith, 1 Neb. 108 1159
v. Taylor, 5 Johns. 395 2225, 2227, 2248, 2379
Sandstrom v. Oregon, Washington R. & Nav. Co., 75 Ore. 159 3982, 3983
Sandwich v. Dolan, 141 Ill. 430 4657, 4748
v. Fish, 2 Gray 298 707, 1588
Sandy v. Lake St. R. Co., 235 Ill. 194 141, 1510
Sandy River Bank v. Merchants' & M's Bank, 1 Biss. 146 656
Sandy River C. C. Co. v. White House C. C. Co., 125 Ky. 278 4261
Sandy River Nat. Bank v. Miller, 82 Me. 137 646, 670
Sandy Valley, etc., R. Co. v. Bentley, 161 Ky. 555 3961, 4032, 4034, 4100, 4131, 4132
Sanford v. Abrams, 24 Fla. 181 759, 763
v. Augusta, 32 Me. 536 4762
v. Barney, 50 Hun 108 1071
v. Brown, 134 App. Div. (N. Y.) 652 2440
v. Bulkley, 30 Conn. 344 808, 809, 810
v. Clark, 29 Conn. 457 457
v. Clarke, 29 Conn. 457 709, 736
v. Cloud, 17 Fla. 532, 554 1989, 2008
v. East Riverside Dist., 101 Cal. 275 245
v. First Nat. Bank, 94 Iowa 680 832, 840, 865, 919
v. Kunz, 9 Idaho 29 992
v. Liehtenberger, 62 Neb. 501 998
v. Lundquist, 80 Neb. 408 1202, 1203
v. Peck, 63 Conn. 486 1453
v. Rowley, 93 Mich. 119 4530
v. Van Arsdall, 53 Hun 70 714, 715, 735
v. Willetts, 29 Kan. 647 1690
San Francisco B. Co. v. Dunbarton L. & I. Co., 119 Cal. 272 2693
San Francisco Stevedoring Co. v. Pillsbury, 170 Cal. 321 5178
San Francisco & S. H. B. Soc. v. Leonard, 17 Cal. App. 254 1360, 1386, 1535, 1536, 2924

[REFERENCES ARE TO PAGES]

San Francisco, etc., R. Co. v. Caldwell, 31 Cal. 367 3945, 3956, 3962
v. Leviston, 134 Cal. 412 3959, 4154
v. Mahoney, 29 Cal. 112 4097, 4101
v. Taylor, 86 Cal. 246 4053
Sang v. City of St. Louis, 262 Mo. 454 4748
Sangamon, etc., R. Co. v. Henry, 14 Ill. 156 3328, 3353
Sanger v. Fincher, 27 Ill. 346 537
v. Henderson, 1 Tex. Civ. App. 412 4284
v. Price, 114 App. Div. (N. Y.) 78 2955
v. Smith, — Tex. Civ. App. —, 135 S. W. 189 3236, 3242, 3243, 3244, 3248
Sangster v. Commonwealth, 17 Gratt. 124 406, 1598, 1600
Sanguinett v. Webster, 153 Mo. 343 1128
Sanitary C. Co. v. McKinney, 52 Ind. App. 379 4780
Sanitary Dist. v. Boening, 267 Ill. 118 3961, 3993, 4107, 4135, 4136, 4137
v. Burke, 88 Ill. App. 196 2484
v. Chapin, 226 Ill. 499 4102
v. Chicago & A. R. Co., 267 Ill. 252 3034, 3961, 4018, 4019, 4032
v. Cook, 169 Ill. 184 3255
v. Loughran, 160 Ill. 362 4003, 4037
v. McGuirl, 86 Ill. App. 392 12
v. McMahon, 110 Ill. App. 516 175, 294, 2692
v. Pearce, 110 Ill. App. 592 1449, 3877
v. Pittsburgh, etc., R. Co., 216 Ill. 575 4073, 4131
v. Ray, 85 Ill. App. 115 3852, 3872
v. Ray, 199 Ill. 63 3960, 4003, 4145
San Joaquin, etc., Co. v. Stevenson, 26 Cal. App. 274 4044, 4102
San Jose F. P. Co. v. Cutting, 133 Cal. 237 1735
San Jose, etc., R. Co. v. Mayne, 83 Cal. 566 3959, 4102, 4119
San Juan v. St. John's G. Co., 195 U. S. 510, 25 Sup. Ct. 108 600, 758
San Marcos E. L. & P. Co. v. Compton, 48 Tex. Civ. App. 586 432, 1534, 4860, 4861
San Mateo County v. Coburn, 130 Cal. 631 4120
Sannes v. Ross, 105 Ind. 558 1687
San Pedro L. Co. v. Reynolds, 111 Cal. 588 796
San Pedro, etc., R. Co. v. Board of Education, 32 Utah 305 4129, 4144
v. Davide, 210 Fed. 870 5057
San Rafael, The, 72 C. C. A. 388, 141 Fed. 270 4816, 4882
Sans v. Joerris, 14 Wis. 663 4587, 4600
Santa Ana v. Harlin, 99 Cal. 538 4048, 4130, 4135
Santa Clara M. Ass'n v. Meredith, 49 Md. 389 2468, 2499
Santa Clara Valley M. & L. Co. v. Prescott, 238 Ill. 625 1054, 1055, 1056
Santa Fe P. & P. R. Co. v. Grant Bros. Const. Co., 228 U. S. 177 5117
Santa Fe St. R. Co. v. Schutz, 37 Tex. Civ. App. 14 862, 899
Santa Rosa Bank v. Paxton, 149 Cal. 195 1806
Santurce, The, 136 Fed. 682 2725
Sanz v. Lavin, 6 Philip. Isl. 299 1417
Saperstone v. Rochester R. Co., 25 App. Div. (N. Y.) 285 4718
Sapp v. Aiken, 68 Iowa 699 2843
v. Bradfield, 137 Ky. 308 311, 318, 538, 2421, 2453
Sappington v. Atlanta, etc., R. Co., 127 Ga. 178 39, 95, 137, 3481
Sapsford v. Fletcher, 4 T. R. 511 503
Sapwell v. Bass, [1910] 2 K. B. 486 233, 240, 269
Saragossa, The, 1 Bene. 553 2729
Sarah Thorp, The, 46 Fed. 816 5008
Saratoga, The, 1 Lush. 321 2720
Saratoga, The, 2 Gall. 164 3288
Saratoga T. R. Co. v. Standard Acc. Ins. Co., 143 App. Div. (N. Y.) 852 1249, 2872
Sarazin v. Union R. Co., 153 Mo. 479 5101
Sard v. Rhodes, 1 M. & W. 153 658, 764
Sargeant v. Downey, 49 Wis. 524 2945
v. Kellogg, 10 Ill. 273 556
v. Sargeant, 20 Vt. 297 1780
Sargent v. —, 5 Cow. 106 4957, 4968
v. Ashe, 23 Me. 201 3097, 3102
v. Boston & L. R. Co., 115 Mass. 422 3280
v. Carnes, 84 Tex. 156 4774
v. Currier, 49 N. H. 310 2381
v. Franklin Ins. Co., 8 Pick. 90 2318, 2330
v. Graham, 5 N. H. 440 802, 803, 804
v. Hampden, 38 Me. 581 1141
v. Machias, 65 Me. 591 4095
v. Mason, 101 Minn. 319 172, 190, 3247
v. Merrimac, 196 Mass. 171 3962, 3976, 4035, 4036, 4051
v. Pomroy, 33 Me. 388 1810
v. St. Mary's Asylum, 190 N. Y. 394 1729
v. Salmond, 27 Me. 539 2831
v. State Bank, 11 Ohio 472 1485, 1486
v. Tuttle, 67 Conn. 162 1065
v. Yale Lock Mfg. Co., 17 Blatch. 249 4442, 4471
Sarment, Estate of, 123 Cal. 331 1120
Saros v. Avenue T. Co., 172 Mich. 238 3202
Sarquy v. Hobson, 2 B. & C. 7 2999
Sarraille v. Calmon, 142 Cal. 651 699
Sarrls v Beckman, 55 Ind. App. 638 2094, 2096, 2131
Sartin v. Wer, 3 Stew. & P. 421 1711
Sartwell v. Moses, 62 N. H. 355 780
v. Parker, 141 Mass. 405 4610
Saseer v. Young, 6 G. & J. 243 2820
Sasse v. Rogers, 40 Ind. App. 197 4603, 4614, 4641
Sasseen v. Clark, 37 Ga. 242 161
Sassen v. Haegle, 125 Minn. 441 3256
Sasser v. State, 13 Ohio 453 1485
Sasserath v. Metzgar, 30 Abb. N. C. 407 2059
Satchfield v. Laconia Levee Dist., 74 Ark. 270 758
Satchwell v. Williams, 40 Conn. 371 257, 537, 564, 2581
Satterfield v. Rowan, 83 Ga. 187 478
Satterlee v. Matthewson, 16 S. & R. 191, 2 Pet. 380 1193, 1194
v. United States, 30 Ct. of Cls. 31 2607, 2642
Satilla Mfg. Co. v. Cason, 98 Ga. 14 4614
Sauer v. McClintic-Marshall Const. Co., 179 Mich. 618 2285, 2290
v. Mayor, 44 App. Div. (N. Y.) 305 4022
v. Schulenberg, 33 Md. 288 3663
Sauerman v. Fidelity & Deposit Co. of Maryland (Misc.) 145 N. Y. Sup. 114 1678

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Saulters v. Victory, 35 Vt. 351 1627, 1987
Saunders v. Anderson, 2 Hill (S. C.) 486 2564
v. Brosius, 52 Mo. 50 4264
v. Clark, 106 Mass. 331 2305, 4225, 4261
v. Davis, 153 Ala. 375 4841
v. Frost, 5 Pick. 259 786, 800, 812, 813, 1235
v. Gilbert, 156 N. C. 463 1305, 1309, 1324, 4662
v. Graham, Gow, 121 790
v. Lanier, 128 Tenn. 693 2793
v. McCarthy, 8 Allen 42 936
v. Mills, 6 Bing. 213 4576, 4596
v. Post-Standard Pub. Co., 107 App. Div. (N. Y.) 84 4502, 4505, 4544, 4548, 4582
v. Quigg, 112 Pa. 546 1617
v. Rowe, 20 Ky. L. Rep. 1082 2093
v. Saunders, 90 Me. 284 2464, 2470
v. Smith, 6 Pa. Co. Ct. 257 1617
v. Southern R. Co., 167 N. C. 375 5034, 5063, 5073, 5106
v. Stevens, 116 Mass. 133 2755
v. United States M. Co., 25 Wash. 475 2320
Sauntry v. Dunlap, 12 Wis. 364 692
Sauter v. New York, etc., R. Co., 66 N. Y. 50 139, 326, 1477
Savage v. Bauland Co., 42 App. Div. (N. Y.) 285 4815
v. Beecher (N. Y. Misc.), 139 N. Y. Supp. 173 951
v. Brewer, 16 Pick. 453 4606
v. Cauthorn, 109 Va. 694 2094, 2192
v. Chicago & J. R. Co., 142 Ill. App. 342 4656
v. Corn Exch. Ins. Co., 36 N. Y. 655 3022, 3025
v. Drs. K. & K. Medical & S. Ass'n, 59 Mich. 400 2706
v. Everman, 70 Pa. 315 747, 764
v. Fox, 60 N. H. 17 2743, 2825, 2826
v. Glenn, 10 Ore. 440 2592, 2602, 2626, 2634, 2636
v. Hayes, 142 Ill. App. 316 4870, 4938
v. New York Ins. Co., 4 Cow. 248 3032
v. Savage, 12 Ore. 459 2902
v. Savage, 141 Fed. 346 1079
v. Stevens, 126 Mass. 207 4380
Savannah Chemical Co. v. D. Bragg & Son, 14 Ga. App. 371 2456
Savannah E. Co. v. Badenhoop, 6 Ga. App. 371 3459, 3476, 3506, 3527, 4778
v. Bell, 124 Ga. 663 4907, 4917
v. Wheeler, 128 Ga. 550 56, 1333
Savannah & O. C. Co. v. Bourquin, 51 Ga. 378 414, 3759, 3850
Savannah & W. R. Co., 69 Fed 683 3317
Savannah, etc., R. Co. v. Callahan, 56 Ga. 331 906
v. Collins, 77 Ga. 376 3412
v. Davis, 25 Fla. 917 413, 3760
v. Godkin, 104 Ga. 655 1514, 1521
v. Grogan, 117 Ga. 461 4742
v. Harper, 70 Ga. 119 1514
v. Holland, 82 Ga. 257 1385, 1386
v. Parish, 117 Ga. 893 3882, 3903
v. Pritchard, 77 Ga. 412, 418 207, 3364, 3403
v. Ono, 103 Ga. 125 3468
v. Williams, 133 Ga. 679 3983
Saveland v. Green, 36 Wis. 612 2976, 2977
v. Western Wisconsin R. Co., 118 Wis. 267 2237
Saveljich v. Lytle L. & M. Co., 97 C. C. A. 443, 173 Fed. 277 4856
Savercool v. Farwell, 17 Mich. 308 1436, 1437, 2221, 2303
Savery v. Ingersoll, 46 Hun 176 244, 268
Savery H. Co. v. Under-Feed S. Co., 178 Fed. 806 2373, 2389
Saville v. Roberts, 1 Lord Raym. 374 4603, 4612, 4614
Savings Bank v. Ashbury, 117 Cal. 96 180, 281
v. Benton, 2 Met. (Ky.) 240 2464
v. Sprunt, 86 S. C. 8 1019
Savings & T. Co. v. Pennsylvania R. Co., 229 Pa. 484 3990, 4038
Savoie v. Scanlan, 43 La. Ann. 967 4502
Savory v. Underwood, 23 L. T. (Q. B.) 141 2169
Sawdon v. Andrew, 30 L. T. 23 2350
Sawyer v. Chambers, 44 Barb. 42 1826, 1866
v. Child, 68 Vt. 360 947
v. Colgan, 102 Cal. 283 1040
v. Commonwealth, 182 Mass. 245 4023, 4024
v. Commonwealth, 185 Mass. 356 4006
v. Dean, 114 N. Y. 469, 478 2224, 2249
v. Eifert, 2 N. & McC. 511 471
v. Hopkins, 22 Me. 268 4519
v. Kellogg, 9 Fed. 601 4488
v. Lauer, 10 Kan. 466 1269
v. McGillicuddy, 81 Me. 318 3234
v. Mayhew, 51 Me. 398 2916
v. Norfolk & S. R. Co., 142 N. C. 1 4509
v. Perry, 88 Me. 42 4850
v. Steele, 4 Wash. 227 416
v. Stilson, 146 Iowa 707 741, 1583
v. Warner, 36 Iowa 333 1987, 1995
v. Williams, 72 Fed. 296 1798
v. Wiswell, 9 Allen 39 522, 531, 533
Sax v. Detroit, etc., R. Co., 125 Mich. 252 1479
Saxe v. Penokee L. Co., 159 N. Y. 371 2275, 2290
Saxlehner v. Eisner, 140 Fed. 938 4487
v. Siegel-C. Co., 179 U. S. 42 4490
Saxonia M. & R. Co. v. Cook, 7 Colo. 569 2548, 2550, 2561
Saxton v. Bacon, 31 Vt. 540 75
v. New York E. R. Co., 139 N. Y. 320 4081
Sayen v. Ryan, 9 Ohio C. C. 631 338
Sayer v. Keene, 47 N. H. 173 399
v. Wagstaff, 5 Beav. 415, 423 667
Sayers v. Gerard, Cal. Ind. Acc. Comm. Dec. (No. 19, 1914) 48 5176
v. Holmes, 2 Cold. 259 4353
v. Missouri Pac. R. Co., 82 Kan. 123 2801, 3893, 3894, 3931
Sayles v. Bemis, 57 Wis. 315 40
v. Foley, — R. I. —, 96 Atl. 340 5150
v. Quinn, 196 Mass. 492 564, 570
Saylor v. Daniels, 37 Ill. 331 991, 993
v. Pennsylvania C. Co., 183 Pa. 167 17
Sayre v. Austin, 3 Wend. 496 1051
v. Jewett, 12 Wend. 135 1527
v. King, 17 W. Va. 562 2846
v. Roseville Motor Co., 75 N. J. L. 10 3232
v. Sayre, 25 N. J. L. 235 4572, 4573, 4574
v. Sheffield L. I. & C. Co., 106 Ala. 440 2074, 2087
v. State, 123 N. Y. 291 1042, 3889
v. Wisner, 8 Wend. 66 1189
Sayward v. Dexter, 72 Fed. 758 948

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Scace v. Wayne County, 72 Neb. 162 4124
Scahill v. Aetna Ind. Co., 157 Mich. 310 448, 1350
Scalingo v. First Nat. Bank, 39 Tex. Civ. App. 154 4285
v. Knollin, 94 Ill. App. 443 2980, 2982
Scally v. Garratt, 9 Cal. App. 194 4724
v. Garratt, 11 Cal. App. 138 4699, 4747, 4792, 4793
Scammell v. Clark, 31 New Bruns. 250 41
Scammon v. Campbell, 75 Ill. 223 3717
v. Germania Ins. Co., 101 Ill. 621 3018
v. Wells, Fargo & Co., 84 Cal. 311 3412
Scandinavian Am. Bank v. Washington H. & I. Co., 70 Wash. 223 1219
Scanlan v. Cowley, 2 Hilt. 489 4634
v. Guiling, 63 Ark. 540 485
Scanland v. Houston, 5 Yerg. 310 1214
v. Musgrove, 91 Ill. App. 184 3800
v. Settle, Meigs 169 2798
Scantlin v. Allison, 12 Kan. 85 555, 556, 2089
Scaramanga v. English, 1 Com. Cas. 99 183
Scarboro v. Goethe, 118 Ga. 543 4222
Scarborough v. Parker, 53 Me. 254 1559
v. State, 24 Ark. 20 1634
v. Thornton, 9 Pa. 451 1556, 1557
Scarfe v. Morgan, 4 M. & W. 280 827
Scarlett v. Norwood, 115 N. C. 284 4960, 4964
Scarratt v. Cook B. Co., 117 Ga. 181 1555, 2792, 2827
Scarritt-C. F. Co. v. Hudspeth, 19 Okla. 429 684
Scattergood v. Wood, 14 Hun 269 4324
Schaaf v. Pennsylvania R. Co., 77 N. J. L. 115 3815
Schaben v. Brunning, 74 Iowa 102 757
Schadewald v. Milwaukee, etc., R. Co., 55 Wis. 569 4935, 4939
Schaefer v. American B. & T. Co., 137 Ill. App. 168 1804
v. Anchor Mut. F. Ins. Co., 133 Iowa 205 3050
v. Dickinson, 141 Ill. App. 234 4239
v. Gildea, 3 Colo. 15 2666
Schaeffer v. Empire L. Co., 28 App. Div. (N. Y.) 469 546
v. Hodges, 54 Ill. 337 2783
v. Marienthal, 17 Ohio St. 183 432
Schaeffer P. Mfg. Co. v. National F. E. Co., 148 Fed. 159 1455, 2632
Schafer v. Ostmann, 148 Mo. App. 644 437, 1267, 1318
v. Ostmann, 172 Mo. App. 602 434, 1317
Schaffer v. Baker T. Co., 29 App. Div. (N. Y.) 459 4929
Schaffler v. Miehling, 13 N. Y. Misc. 520 2146
Schaffner v. Ehrman, 139 Ill. 109 277
Schagun v. Scott Mfg. Co., 162 Fed. 209 761
Schaible v. L. S. & M. S. R. Co., 10 Ohio Dec. 334 4056, 4103
Schaidler v. Chicago & N. R. Co., 102 Wis. 564 4914
Schalk v. Kingsley, 42 N. J. L. 32 3838
Schall's Estate, 17 Pa. Dist. 471 1088
Schaller v. Chicago & N. R. Co., 97 Wis. 31 3333
Schalscha v. Third Ave. R. Co., 19 N. Y. Misc. 141 4186
Schanler v. Porter, 7 Iowa 482 1480
Schanzenbach v. Brough, 58 Ill. App. 526 2548
Schaper v. Sutter, 63 Ill. App. 257 3607
Scharff v. Meyer, 133 Mo. 428 2294
Scharpf v. Union O. Co., 191 Cal. App. 100 4663
Schars v. Barnd, 27 Neb. 94 4334
Schattgen v. Holnback, 149 Ill. 646 4614, 4645
Schattler v. Daily Herald Co., 162 Mich. 115 4508, 4520, 4537, 4597
Schaub v. Hannibal, etc., R. Co., 106 Mo. 74 4906
Schaufele v. Central R. Co., 6 Ga. App. 660 4698
Schautz v. Kearney, 47 N. J. L. 56 589
Schayer v. Commonwealth L. Co., 163 Mass. 322 803, 826
Schearff v. Dodge, 33 Ark. 340 827, 828
Scheele v. Lafayette Bank, 120 Mo. App. 611 275
Scheelky v. Koch, 119 N. C. 80 3110
Scheer v. Keown, 34 Wis. 349 4649
v. Kriesel, 109 Wis. 125 3827
Scheerer v. Scheerer, 109 Ill. 11 639
Scheerschmidt v. Smith, 74 Minn. 224 1980, 3200
Scheffel v. Weiler, 41 Ill. App. 85 3694
Scheffenacker v. Hoopes, 113 Md. 111 760
Scheffer v. Railroad Co., 105 U. S. 249 131, 137, 139
v. Robinson, 159 Mo. App. 527 4974
Scheffler v. Minneapolis, etc., R. Co., 32 Minn. 518 4935, 4939
v. Robinson, 159 Mo. App. 527 4978
Scheffler Press v. Perlman, 130 App. Div. (N. Y.) 576 3204
Scheible v. Slagle, 89 Ind. 323 2059, 2112
Scheinesohn v. Lemonck, 84 Ohio St. 424 2497
Scheinle v. Eckels, 227 Pa. 305 3737
Schell v. Cochran, 107 U. S. 625 1256
v. Plumb, 55 N. Y. 592 244, 375, 388, 401, 410, 415, 2551, 2554, 2595
v. Stetson, 12 Phila. 187 1055, 1182
Schempp v. Beardsley, 83 Conn. 34 1361, 2516
Schening v. Cofer, 97 Ala. 726 1727, 1743
Schenk v. Forrester, 102 Mo. App. 124 295, 3254
Schenkel v. Pittsburg & B. T. Co., 194 Pa. 182 4748
Schenuit v. Brueggestradt, 8 Mo. App. 46 4312
Scherer v. Schlaberg, 18 N. D. 421 109, 4929, 4941
Schermerhorn v. Anderson, 2 Barb. 584 457
v. Los Angeles Pac. R. Co., 18 Cal. App. 454 405
v. Talman, 14 N. Y. 93 978
Scherrer v. Baltzer, 84 Ill. App. 126 3739, 3810
Schertz v. Indianapolis, etc., R. Co., 107 Ill. 577 75
Schery v. Welstead (Misc.), 93 N. Y. Supp. 466 2575
Schetter v. Southern Oregon Co., 19 Ore. 192 3714
Scheu v. Pennsylvania R., 141 Fed. 495 1510, 4809
Scheunert v. Kaehler, 23 Wis. 523 549
Schick v. Fleischhauer, 26 App. Div. (N. Y.) 210 3250
v. Suttle, 94 Minn. 135 2902

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v. Stewart, 1 Johns. Ch. 620 1123, 1126, 1203, 1216
Schierl v. Baumel, 75 Wis. 69 660, 670
Schierloh v. Interurban St. R. Co., 115 App. Div. (N. Y.) 455 1511
Schiff v. Pottlitzer, 51 N. Y. Misc. 611 3243
Schiffman v. Peerless M. C. Co., 13 Cal. App. 600 243, 245, 261, 284
Schildt v. Board of Com'rs, 52 Colo. 509 4230, 4235
Schildwachter v. Mayor, 12 N. Y. Misc. 52 3147
Schile v. Brokhahus, 80 N. Y. 614 257, 265, 3214, 3815, 4268
Schilling v. Holmes, 23 Cal. 227 3099
Schillinger v. Bosch-R. G. Co., 145 Iowa 750 2658
v. Thompson-S. Co., 171 Ill. App. 319 2599
v. Verona, 96 Wis. 456 106
Schillo v. McEwen, 90 Ill. 77 2663
Schimmelfenig v. Donovan, 13 Ill. App. 47 1322
Schimmelpfenning v. Brunk, 153 Iowa 177 2165
Schindel v. Schindel, 12 Md. 108 4176
Schippel v. Norton, 38 Kan. 567 1322, 4629, 4644
Schlater v. Gay, 28 La. Ann. 340 3788
Schlemmer v. Buffalo, R. & P. R. Co., 205 U. S. 1 5024
v. Buffalo, R. & P. Ry. Co., 220 U. S. 590 5076
Schlecte v. Chicago E. T. Co., 157 Ill. App. 181 1464, 1467
Schlegal v. Allerton, 65 Conn. 260 2501
Schleifenbaum v. Rundbaken, 81 Conn. 623 2511
Schleiff v. Berglas (Misc.) 110 N. Y. Supp. 265 2555
Schlemmer v. North, 32 Mo. 206 3205
v. Schendorf, 20 Ind. App. 447 635
Schlesinger v. Arline, 31 Fed. 648 1924
v. Bedford, [1893] W. N. 57 1736
v. Gilhooley, 189 N. Y. 1 981
v. Lehmaier, 191 N. Y. 69 981
Schlessinger v. Schlessinger, 39 Colo. 44 748
Schleuter v. Sherman, 169 Ill. App. 386 2404, 2416, 2428, 2454
Schley v. Lyon, 6 Ga. 530 4234
Schlichting v. Rowell, 140 Iowa 731 2387
Schlitz v. Meyer, 61 Wis. 418 763
Schlitz B. Co. v. Compton, 142 Ill. 511 3850, 3853, 3859, 3872
Schloss v. Feltus, 96 Mich. 619 2271
v. Josephs, 98 Minn. 442 2264
v. Rovelsky, 107 Ala. 596 1699
v. White, 16 Cal. 65 1600
Schlumbrecht v. Chicago City R. Co., 153 Ill. App. 254 4724
Schlumpf v. Sasake, 38 Wash. 278 833, 835
Schmaltz v. Weed, 27 App. Div. (N. Y.) 309 1937, 1941, 2300
Schmeling v. Rockford A. Co., 154 Ill. App. 308 741
Schmelzer v. Chester T. Co., 218 Pa. 29 4764
Schmertz v. Dwyer, 53 Pa. 335 368, 2920, 2922, 2954
Schmid v. Eppers, 17 Pa. Dist. 1064 861
v. Lisiewski, 53 N. J. Eq. 670 1398
Schmidt v. Bickenbach, 29 Minn. 122 531
v. Briarcliff Lodge Ass'n, 147 N. Y. Supp. 911 1093
Schmidt v. Chicago, etc., R. Co., 108 Minn. 329 1493
v. Cleveland, 15 Ohio C. C. (N. S.) 589 4021
v. Cleveland, etc., R. Co., 25 Ky. L. Rep. 11 3443, 3445
v. Cook, 12 N. Y. Misc. 449 3905
v. Coulter, 6 Minn. 492 2865
v. Durnham, 46 Minn. 227 3666, 3688
v. Kentucky River Mills, 142 Ky. 80 4796
v. Limehouse, 2 Bailey 276 1105, 1110, 1880
v. Menasha W. Co., 99 Wis. 300 4859
v. Mesmer, 116 Cal. 267 4365
v. Milwaukee, etc., R. Co., 23 Wis. 186 3527
v. Mitchell, 84 Ill. 195 61, 157
v. Mitchell, 95 Ky. 342 1792
v. Nunan, 63 Cal. 371 1135, 1136
v. Pennsylvania, The, 4 Fed. 548 3368, 3378
v. Rankin, 193 Mo. 254 2382
v. St. Louis T. Co., 163 Mo. App. 412 1364, 1378
v. Schmaelter, 45 Mo. 502 2779
Schmied v. Frank, 86 Ind. 250 1823
Schmieder v Kingsley, 6 N. Y. Misc. 107 858, 876
Schmisseur v. Kreilich, 92 Ill. 347 4544
Schmit v. Mitchell, 59 Minn. 251 4962
Schmitt v. Kurrus, 234 Ill. 578, aff'g 140 Ill. App. 132 1261, 1317, 4733, 4735, 4775
v. Milwaukee St. R. Co., 89 Wis. 195 3457, 4687, 4700
v. Postal Tel. Cable Co., 164 Iowa 654 3621
Schmittdiel v. Moore, 120 Mich. 199 4286
Schmitz v. Langhaar, 88 N. Y. 503 2787
v. St. Louis, etc., R. Co., 119 Mo. 256 4673, 4706
v. St. Louis, etc., R. Co., 46 Mo. App. 380 4768, 4770
v. St. Louis, etc., R. Co., 55 Mo. App. 576 4717
v. South Covington & C. St. R. Co., 131 Ky. 207 2495
Schmoe v. Cotton, 167 Ind. 364 395, 1434, 3762, 3912, 3913. 3914
Schmulbach v. Caldwell, 196 Fed. 16 888, 932, 2657
Schnabel v. Waggener, 118 Ky. 362 1545
Schnable v. Providence Public Market, 24 R. I. 477 4931
Schnaderbeck v. Worth, 8 Abb. Pr. 37 550
Schnatz v. Philadelphia & R. R., 160 Pa. 602 4895
Schnebly v. Shirtcliff, 7 Phila. 236 2238
Schneider, In re, 136 App. Div. (N. Y.) 444 4096
Schneider v. Augusta, 118 Ga. 610 307, 434
v. Hosier, 21 Ohio St. 98 60, 1274, 1345, 4765
v. Local Union, 116 La. 270 98, 1270
v. McGill, 23 Ky. L. Rep. 585 4840
v. Patterson, 38 Neb. 680 3209
v. Schneider, 36 Colo. 518 3959
v. Seely, 40 Ill. 257 1360
v. Wallingford, 4 Colo. App. 150 1710
Schneider-D. Co. v. Hart, 23 Tex. Civ. App. 529 2749
Schnerr v. Lemp, 19 Mo. 40 2524
Schnider v. Montross, 158 Mich. 263 1267, 4640, 4841
Schnitzer v. Russell, 81 N. J. L. 146 4311, 4313, 4314, 4324, 4344
Schnur v. Hickox, 45 Wis. 200 821, 1411

[REFERENCES ARE TO PAGES]

Schnurmacher v. Kennedy (Misc.) 88 N. Y. S. 943 2399, 2417
Schoellhamer v. Rometsch, 26 Ore. 394 4434
Schoen v. Kansas City, 65 Mo. App. 134 3933
Schoenberger v. Elgin, 164 Ill. 80 1044
Schoeneman v. Martyn, 68 Ill. App. 412 1582
Schoepf v. Bender, 147 App. Div. (N. Y.) 894 2404
Schoepflin v. Coffey, 162 N. Y. 12 157
Schofield v. Baldwin, 102 Ill. App. 560 4542
v. Ferrers, 46 Pa. 438 1385, 1387, 4318, 4326, 4330
v. Iowa H. Co., 32 Iowa 317 2057, 2083, 2086
v. Palmer, 134 Fed. 753 1048, 1060
Schofield's Estate, 99 Ill. 513 1122
Scholes v. North London R. Co., 21 L. T. (N. S.) 835 153, 160
Scholfield G. & P. Co. v. Scholfield, 71 Conn. 1 4378, 4384, 4387
Scholl v. Albany, etc., I. Co., 101 N. Y. 602 3303, 3304
v. Grayson, 147 Mo. App. 652 327, 1374
Schomberg v. Walker, 132 Cal. 224 4504, 4506, 4509, 4543
Schon-K. M. & G. Co. v. Snow, 43 Colo. 538 2274
School Directors v. Birch, 93 Ill. App. 499 2564
v. Kimmel, 31 Ill. App. 537 2561
v. Mathis, 168 Ill. App. 174 1729, 1758
v. Trustees, 66 Ill. 247 1719
School District v. Boston, etc., R. Co., 102 Mass. 552 3335
v. Burress, 2 Neb. (Unof.) 554 40, 499, 1626
v. Dauchy, 25 Conn. 530 2607
v. Dreutzer, 51 Wis. 153 1038
v. Green, 134 Mo. App. 421 2793
v. McDonald, 39 Iowa 564 1617
v. McDonald, 68 Neb. 610 2552, 2555, 2561, 2566
v. Rogers, 8 Iowa 316 1952
v. Shoemaker, 5 Neb. 36 4347
School Dist. No. 1 of Clark Co. v. Massachusetts Bonding & Insurance Co., 92 Kan. 53 2758
School Dist. of Ogden v. Smith, 113 Ark. 530 3996, 4103
School Street, In re, 162 App. Div. (N. Y.) 158 3960
School Town v. Grant, 104 Ind. 168 646
School Trustees v. Bennett, 27 N. J. L. 513 2607
Schoole v. Noble, 1 H. Black. 23 590, 591
Schooler v. Hutchings, 66 Tex. 324 4215
Schools, Trustees of, v. Cowden, 240 Ill. 39 1578, 1583
v. Kuhn, 261 Ill. 190 4043
v. Peak, 43 Ill. App. 50 1586
Schooner Catharine, The, v. Dickinson, 17 How. 170 4999
Schooner Lively, 1 Gall. 314 236
Schoonmaker v. Roosa, 17 Johns. 300 1829
Schoonover v. Osborne, 108 Iowa 453 737, 2753
Schopen v. Baldwin, 83 Hun 234 2474
Schorr v. Carter, 120 Mo. 409 3703
Schott v. La Compagnie Generale Trans-Atlantique, 52 Misc. (N. Y.) 236 2549, 2556
v. Stone, 35 Wash. 252 2242
v. Youree, 142 Ill. 233 1675
Schotte v. Meredith, 192 Pa. 159 1935
Schoultz v. Eckardt Mfg. Co., 112 La. 568 114
Schouten v. Alpine, 77 N. Y. Misc. 19 287, 435
Schrader v. Beatty, 206 Pa. 184 702
v. Lillis, 10 Ont. 358 913
v. Wolflin, 21 Ind. 238 1664
Schram v. Werner, 85 Hun 293 2855
Schramm v. Boston S. R. Co., 146 Mass. 211 2237
Schrandt v. Young, 2 Neb. (Unof.) 546 243, 408
v. Young, 62 Neb. 254 4312, 4347, 4350, 4351, 4355
Schreckengast v. Ealy, 16 Neb. 510 3677
Schreiber v. Depew, 137 App. Div. (N. Y.) 433 1359
v. Gunby, 81 Kan. 459 4503
v. Klingenstein (Misc.), 95 N. Y. Supp. 549 2545, 2556
Schreiner v. Great Northern R. Co., 86 Minn. 245 162
Schrepfer v. Rockford Ins. Co., 77 Minn. 291 1091
Schrimper v. Heilman, 24 Iowa 505 4514
Schrimpf v. Tennessee Mfg. Co., 86 Tenn. 219 846, 898
Schriver v. Johnstown, 71 Hun 232, aff'd 148 N. Y. 758 266
Schroeder v. Boyce, 127 Mich. 33 1055, 1541
v. California Yukon T. Co., 95 Fed. 296 883, 2511, 2548, 2556, 2560, 2566
v. Chicago, etc., R. Co., 47 Iowa 375 1462, 1468
v. Crawford, 94 Ill. 357 73, 158
v. De Graff, 28 Minn. 299 3757
v. Detroit, etc., R. Co., 174 Mich. 684 3473, 3480, 3487, 3523
v. Joliet, 189 Ill. 48 3928
v. Pissis, 128 Cal. 209 819
v. Spreckles, 147 Cal. 186 41
Schroeppell v. Shaw, 3 N. Y. 446 2795, 2814
v. Shaw, 5 Barb. 580 2804
Schryver v. Teller, 9 Paige 173 571
Schubert v. Harteau, 34 Barb. 447 558
Schuchard v. Seattle, 51 Wash. 41 4111
Schuchardt v. Allens, 1 Wall. 359 2396
v. Mayor, 53 N. Y. 202 4030
Schuchmann v. Knoebel, 27 Ill. 175 556, 1846, 2198
Schuelenberg v. Martin, 2 Fed. 747 737
Schuerger v. City Water Co., 183 Ill. App. 469 1464
Schuessler & Sons v. Still, 169 Ala. 239 1687, 1706
Schufeldt v. Schintzler, 21 Hun 462 4377
Schug v. Wagner, 77 N. Y. Misc. 186 2416
v. Wagner (Misc.), 135 N. Y. Supp. 1078 2453
Schulenburg v. Harriman, 2 Dill. 398, 21 Wall. 44 360, 4257
Schuler v. Board of Supervisors, 12 S. D. 460 1434, 3970, 3976, 4016
v. Golden, 37 Nev. 281 2644, 2646
v. Israel, 120 U. S. 506 2830
Schuller v. Robison, 139 App. Div. (N. Y.) 97 748
Schult v. Strother, 117 Mo. App. 64 3826
Schulte v. Louisville & N. R. Co., 128 Ky. 627 1140, 1280, 4158, 4171, 4172
v. Schleeper, 210 Ill. 357 61
Schultz v. Bower, 57 Minn. 493 3913
v. Bower, 64 Minn. 123 3913
v. Brenner, 24 N. Y. Misc. 522 251

[REFERENCES ARE TO PAGES]

Schultz v. Frankfort Marine A. & P. G. Ins. Co., 151 Wis. 537 460, 501
v. The Nancy, 1 Newb. 139 2718
v. Third Ave. R. Co., 46 N. Y. Super. Ct. 211 1355, 3525
Schulz v. Union R. Co. (N. Y. Misc.), 104 Supp. 722 1500
Schulze v. Great Eastern R. Co., 19 Q. B. Div. 30 3356
v. Jalonick, 18 Tex. Civ. App. 296 4563, 4574
Schumacher v. Edward P. Allis Co., 70 Ill. App. 556 664
v. Moffitt, 71 Ore. 79 748, 760
v. St. Louis, etc., R. Co., 39 Fed. 174 4803
v. Shawhan Distillery Co., 178 Mo. App. 361 1279, 3912
Schumaker v. Heinemann, 99 Wis. 251 238, 243, 261
v. Nichols, 6 Gratt. 592 828
v. St. Paul & D. R. Co., 46 Minn. 39 112, 148, 3450, 4679
Schumann v. Wager, 36 Ore. 65 2407
Schurmeier v. English, 46 Minn. 306 2453
Schurr v. Savigny, 85 Mich. 144 2484
Schusler v. Clark, 50 Pa. Super. Ct. 459 4425, 4433
Schuss v. City of Chehalis, 82 Wash. 595 3970
Schuster v. Sanitary Dist., 177 Ill. 626 4134
v. Weiss, 114 Mo. 158 1784, 1788
Schutzman v. Lehman, 61 N. Y. Misc. 648 2343
Schuyler v. Sylvester, 28 N. J. L. 487 1704, 1711
Schuyler County v. Donaldson, 9 Mo. App. 385 1716
v. Missouri B. & I. Co., 173 Ill. App. 435 2592
Schuylkill N. Co. v. Farr. 4 W. & S. 362 3881
v. Freedley, 6 Whart. 109 4020
v. Thoburn, 7 S. & R. 411 3975, 4098
Schwab v. Cleveland, 28 Hun 458 3881
v. Emporium Forestry Co., 167 N. Y. App. Div. 614, aff'd 111 N. E. 1099 (mem. dec.) 5206
v. Owens, 10 Mont. 381 4359
Schwabacker v. Riddle, 84 Ill. 517 449, 4425
Schwandt v. Metzger L. O. Co., 93 Ill. App. 365 3250
Schwanenfeldt v. Metropolitan St. R. Co., 187 Mo. App. 588 4757
Schwann v. Sanders, 121 La. 462 1719
Schwantowsky v. Dykowsky (Tex. Civ. App.), 132 S. W. 373 796
Schwanzer v. Brooklyn Heights R. Co., 18 App. Div. (N. Y.) 205 4779
Schwartz v. Applc, 21 N. Y. Misc. 513 3250
v. Atlantic, etc., Tel. Co., 18 Hun 157 3554
v. Burton, 1 Tex. Civ. Cas. 698 1700
v. Davis, 90 Iowa 324 1322, 1690, 1700
v. Kuhn, 71 N. Y. Misc. 149 536, 559, 2597, 2600
v. Saunders, 46 Ill. 18 2608
Schwartzbauer v. Great Northern R. Co., 112 Minn. 356 1511
Schwartzel v. Karnes, 2 Kan. App. 782 507, 2458
Schwarz v. Harris, 209 Fed. 1000 1051
v. Judd, 28 Minn. 371 1396
v. Kennedy, 142 Fed. 1027 4285
Schwarzel v. Holenshade, 2 Bond 29 4451
Schwarzel v. Holenshade, 3 Fish. Pat. Cas. 116 4451
Schwarzschild & S. Co. v. Weeks, 72 Kan. 190 52
Schweer v. Schwabacher, 17 Ill. App. 78 40, 1657, 1671, 1676
Schweickhart v. Stuewe, 71 Wis. 1 542
Schweider v. Lang, 29 Minn. 254 752
Schweitzer v. Connor, 57 Wis. 177 1539
Schwerin v. McKie, 51 N. Y. 180 1135
Schwier v. New York Cent., etc., R. Co., 90 N. Y. 558 1414
Schwind v. Chicago, etc., R. Co., 140 Wis. 1 75, 4810
Schwing v. Dunlap, 130 La. 498 4550, 4573
Schwinger v. Raymond, 83 N. Y. 192 316, 3301
Schwingschlegl v. Monroe, 113 Mich. 683 4676
Schwitters v. Springer, 236 Ill. 271 940, 4391
Scientific American C. Department v. Gillespie, 4 Ala. App. 590 413
Scigliano v. Palmer, 217 Mass. 555 4177
Scioto Valley T. Co. v. Graybill, 8 Ohio C. C. (N. S.) 469 3505, 3527
v. Graybill, 29 Ohio C. C. 95 3506
Scobey v. Finton, 39 Ind. 275 2189, 2192
Scoffins v. Grandstaff, 12 Kan. 467 2082
Scofield v. Churchill, 72 N. Y. 565 1639, 1647, 1648
v. Day, 20 Johns. 102 616, 1147, 1878, 1881, 1907
v. Ferrers, 46 Pa. 438 4319
v. May, 62 N. Y. Misc. 243 3414
v. Milwaukee Free Press Co., 126 Wis. 81 4506
v. Pennsylvania Co., 149 Fed. 601 4935, 4940
v. Tompkins, 95 Ill. 190 858, 883
Scofield's Estate, 99 Ill. 513 1117
Scoggin v. Hudgins, 78 Ark. 531 2097
Scollans v. Rollins, 179 Mass. 346 1054
Scotland, The, 105 U. S. 24 3393, 5015
Scotland, The, 118 U. S. 507 1005, 1053, 1143, 3401
Scotland County v. Hill, 132 U. S. 107 1146, 1211
Scott v. Armstrong, 146 U. S. 499 2830
v. Austin, 36 Minn. 460 979
v. Avery, 5 H. of L. Cas. 811 3017
v. Bankers' Union, 73 Kan. 575 1818
v. Bay, 3 Md. 431 3839, 3910
v. Beach, 172 Ill. 273 815
v. Bevan, 2 B. & Ad. 78 615, 616, 1889, 1902
v. Boston, etc., Co., 106 Mass. 468 217, 3349
v. Bryson, 74 Ill. 420 1269, 4169, 4173, 4174
v. Bush, 26 Mich. 418 834
v. Chicago Great Western R. Co., 113 Iowa 381 4710
v. Chicago, R. I. & P. R. Co., 160 Iowa 306 1478, 4755
v. Cleveland, 33 Miss. 447 738
v. Colson, 156 Ala. 450 3699
v. Dennett S. C. Co., 51 App. Div. (N. Y.) 321 4607, 4638, 4641
v. Dickson, 108 Pa. 6 3070
v. Dixon, 29 L. J. (Ex.) 62 4386
v. Donald, 165 U. S. 58 1266, 1288, 1349
v. Donora Southern R. Co., 222 Pa. 634 4124, 4127
v. Elliott, 63 N. C. 45 1136
v. Elliott, 63 N. C. 215 4314

[REFERENCES ARE TO PAGES]

Scott v. Engineering News Pub. Co., 47 App. Div. (N. Y.) 558 2518
v. Fisher, 4 T. B. Mon. 387 703, 704, 710, 738
v. Fleming, 16 Ill. App. 539 4783, 4784
v. Fletcher, 1 Overt. 488 4613, 4649
v. Flowers, 60 Neb. 675 4836, 48.0
v. Foley, 5 Com. Cas. 53 194
v. Four Hundred Tons of Coal, 39 Fed. 285 2718
v. Frank, 121 Iowa 218 1716
v. Geiser Mfg. Co., 70 Kan. 498 1826, 2371
v. Gilkey, 153 Ill. 168 656, 664
v. Gilmore, 3 Taunt. 226 1850
v. Grant, 37 Tex. Civ. App. 169 621
v. Hamblin, 3 Sm. & M. 285 1839
v. Hamilton, 71 Ill. 85 4657
v. Haverstraw C. & B. Co., 135 N. Y. 141 3162, 3163
v. Henley, 1 M. & Rob. 227 1630
v. Hix, 2 Speed 192 2380
v. Hughes, 9 B. Mon. 104 4336
v. Hunter, 46 Pa. 192 72
v. Kenton, 81 Ill. 96 112, 549
v. Kittaning C. Co., 89 Pa. 231 2259
v. Lewis, 177 Mo. App. 8 1413
v. Libby, 2 Johns. 336 3294, 3299
v. Liddell, 98 Ga. 24 1199
v. Longwell, 139 Mich. 12 320
v. McAlpine, 6 Up. Can. C. P. 302 4254
v. McKinnish, 15 Ala. 664 4577
v. McPherson, 168 Cal. 783 4712
v. Manhattan R. Co., 60 N. Y. Super. Ct. 233 4083
v. Mayfield, 153 Ky. 278 886
v. Montague, 16 Vt. 164 2228
v. Montells, 109 N. Y. 1 920, 3123
v. Montgomery, 95 Pa. 444 4653, 4662, 4669, 4690, 4730, 4744, 4748
v. Morris, 9 S. & R. 123 1222
v. Nevada, 56 Mo. App. 189 3875
v. Newington, 1 M. & Rob. 252 4175
v. O'Brien, 129 Ky. 1 4978, 4979, 4981, 4982, 4983
v. O'Leary, 157 Iowa 222 1425
v. Peebles, 2 Sm. & M. 546 1529
v. Peebles, 10 Miss. 546 4599
v. Perlee, 39 Ohio St. 63 1166
v. Rawls, 159 Ala. 399 474, 748
v. Ray, 18 Pick. 268 659
v. Ray, 18 Pick. 360 724
v. Rayment, L. R. 7 Eq. 112 2050
v. Reikel, 15 Up. Can. C. P. 200 1989
v. Riddle (Tex. Civ. App.), 153 S. W. 408 1522
v. Rogers, 31 N. Y. 676 368, 2922, 2952, 4246
v. Rowland, 14 Tex. Civ. App. 370 2861
v. Sampson, 8 Q. B. Div. 491 4573, 4575, 4579
v. Schnadt, 70 Ill. App. 25 2514
v. Scott, 1 A. K. Marsh. 217 2381
v. Scott, 91 Kan. 372 3699, 3708, 3709
v. Scott, 70 Pa. 244 2095
v. Shepherd, 2 W. Bl. 892 153, 3509, 3818
v. Simons, 54 N. H. 426 3127
v. Simpson, 1 Sandf. 601 4640
v. State, 2 Md. 284 1556
v. Stone, 72 Kan. 545 2165
v. Sun P. & P. Ass'n, 74 Hun 284 4549
v. Twiss, 4 Neb. 133 2055
v. Tyler, 14 Barb. 202 2873, 2885
Scott v. Uxbridge & R. R. Co., L. R. 1 C. P. 596 808
v. Vulcan I. Works Co., 31 Okla. 334 4314
v. Wight, 138 Ill. App. 105 2482
v. Williams, 1 Dev. 376 272
v. Williams, 100 Ga. 540 978
v. Yazoo, etc., R. Co., 103 Miss. 522 1501
Scott G. Co. v. Kelly, 14 Tex. Civ. App. 136 4268, 4297, 4646
Scott L. Co. v. Hafner-L. Mfg. Co., 91 Wis. 667 2237, 2241
Scotten v. Shutter, 37 Mich. 526 2225
Scottish-Am. M. Co. v. Wilson, 24 Fed. 310 998
Scottish Marine Ins. Co., In re, 5 Ch. App. 737 258
Scottish Union & Nat. Ins. Co. v. Moore Mill & Gin Co., 43 Ok'a. 370 3052, 3056
Scout, The, 180 Fed. 628 2725
Scoville v. Canfield, 14 Johns. 338 1174
v. Griffith, 12 N. Y. 509 3342
Scow No. 190 & Four Hundred & Fifty Bales of Cotton, 88 Fed. 320 3295
Serafina v. Galveston, etc., R. Co. (Tex. Civ. App.), 42 S. W. 142 149
Scragg v. Sallee, 24 Cal. App. 133 4794
Scramek v. Sklemar, 73 Kan. 450 3663
Scranton v. Clark, 39 Barb. 273 2380, 2383
v. Clark, 39 N. Y. 220 2380
v. Mechanics' T. Co. 37 Conn. 130 2405
v. Tilley, 16 Tex. 183 2405, 2409, 2414, 2421, 2454
Scranton G. & W. Co. v. Scranton, 214 Pa. 586 4058
Scrapp v. Sallee, 24 Cal. App. 133 4829
Screws v. Watson, 48 Ala. 628 4167
Scribner v. Adams, 73 Me. 541 2865
v. Palmer, 81 Wash. 470 4424
v. Schenkel, 128 Cal. 250 2214, 2241
Scripps v. Foster, 41 Mich. 742 4598
v. Reilly, 38 Mich. 10 1282, 1300, 1318, 4547, 4550, 4598
Scrivani v. Dondero, 128 Cal. 31 4647
Scroggs v. Cunningham, 81 Ill. 110 1107
Scruggs v. Gass, 8 Yerg. 175 648, 651
v. Luster, 1 Heisk. 150 611
v. Riddle, 171 Ala. 350 2236
Scrugham v. Carter, 12 Wend. 131 4359
Scudder v. Andrews, 2 McLean 464 1835
v. Bradford, 14 Pick. 13 3034, 3036
v. Morris, 2 N. J. L. 419 1105
v. Waddingham, 8 Mo. App. 26 1937, 1941
v. Worster, 11 Cush. 573 2227
Scull v. Briddle, 2 Wash. C. C. 150 4211
v. Idler, 79 N. J. Eq. 466 981
Scullane v. Kellogg, 169 Mass. 544 4735
Scullin v. Wabash R. Co., 184 Mo. 695 4807
v. Wabash R. Co., 192 Mo. 6 1250
Scully v. Dodge, 40 Kan. 395 656
v. Kirkpatrick, 79 Pa. 324 1560
v. Scully, 28 Iowa 548 2473
v. United States, 197 Fed. 327 1039
v. Williamson, 26 Okla. 19 2503, 2509
Scurich v. Ryan, 14 Cal. App. 750 1416, 3207
Scurlock v. Boone, 142 Iowa 684 4730, 4737, 4739, 4750
Scurvin Ditch Co. v. Roberts, 58 Colo. 533 3961, 4032, 4034, 4047
Sea v. Carpenter, 16 Ohio 412 2511
Sea Gull, The, Chase's Dec. 145 4991
Seaboard A. L. R. v. Bishop, 132 Ga. 71 1141, 1514

[REFERENCES ARE TO PAGES]

Seaboard A. L. R. v. Brown, 158 Ala. 630 1430, 3741
v. Chamblin, 108 Va. 42 4140
v. Duvall, 152 N. C. 524 5137, 5138, 5140
v. Duvall, 225 U. S. 477 5137, 5138, 5140
v. Harris, 121 Ga. 707 3327
v. Hewlett, 94 S. C. 478 1655, 1681
v. Horton, 233 U. S. 492, rev'g 162 N. C. 424 5024, 5036, 5072, 5075, 5076, 5083, 5090
v. Horton, 239 U. S. 595, aff'g 157 N. C. 146, 162 N. C. 424 5075, 5077, 5079, 5082
v. Kenney, 240 U. S. 289, aff'g 167 N. C. 14 5097, 5098, 5099
v. Koennecke, 239 U. S. 352, aff'g 101 S. C. 86 5052, 5127
v. McMichael, 143 Ga. 689 5055
v. Main, 132 N. C. 445 296
v. Miller, 5 Ga. App. 402 4652, 4795, 4807
v. Moseley, 60 Fla. 186 4863, 4870
v. O'Quin, 124 Ga. 357 1321, 3506
v. Padgett, 236 U. S. 668, aff'g 99 S. C. 364 5059, 5136, 5137, 5138
v. Patrick, 10 Ala. App. 341 467
v. Phillips, 108 Md. 285 3425, 4210, 4295, 4298
v. Randolph, 129 Ga. 796 1514
v. Reid, 6 Ga. App. 18 4715
v. Renn, 241 U. S. 290, aff'g — N. C. —, 84 S. E. 964 5127, 5138
v. Scarborough, 52 Fla. 425 3447, 3461
v. Standifer, — Ala. —, 67 So. 391 3457
v. Tilghman, 237 U. S. 499, rev'g 167 N. C. 163 5073, 5084
Seaboard B. Co. v. Bonacci, 153 App. Div. (N. Y.) 43 2276, 2285
Seaboard L. Co. v. Cornelia P. M. Co., 122 Ga. 370 2404
Seabridge v. McAdam, 119 Cal. 460 4646
Seabrook v. Moyer, 88 Pa. 417 3124
v. Raft of Railroad Cross-Ties, 40 Fed. 596 5007
Seaburn v. Zachmann, 99 App. Div. (N. Y.) 218 2524, 2577
Seabury v. Am Ende, 152 U. S. 561 4458, 4459
v. Hungerford, 2 Hill 80 2778
v. Ross, 69 Ill. 533 4325
Seahill v. Aetna Ind. Co., 157 Mich. 310 60
Seal v. Holcomb, 48 Tex. Civ. App. 330 40, 1322
Seale v. Baker, 70 Tex. 283 4370, 4388
Sealing v. Knollin, 94 Ill. App. 443 2398, 2401
Seals v. Augusta Southern R. Co., 102 Ga. 817 134
v. Cummings, 8 Humph. 442 4273
Seaman v. Adler, 37 Fed. 268 3288
v. Haskins, 2 Johns. Cas. 195 763
v. Luce, 23 Barb. 240 430, 1680
v. Paddock, 55 Mo. App. 296 1561
v. Vawdrey, 16 Ves. 390 1978, 2052
Seamans v. Smith, 46 Barb. 320 3799
Seamonds v. McGinnis, 3 Gratt. 319 2048
Seamons v. White, 8 Ala. 656 1561, 1568
Seamore v. Harlan, 3 Dana 410 1986
Searcy v. Vance, Mart. & Y. 225 1888
Searing v. Berry, 58 Iowa 20 2799
Searl v. School Dist., 133 U. S. 553 3052, 3711, 4055
Searle v. Adams, 3 Kan. 515 958
v. Lackawanna, etc., R. Co., 33 Pa. 57 3975, 4037, 4133
Searle v. Scovell, 4 Johns. Ch. 218 3296
Searles v. Flora, 225 Ill. 167 2754
v. Sadgrove, 85 Eng. C. L. 639, 5 El. & Bl. 639 802
v. Western Assur. Co., 88 Miss. 260 3022
Sears v. Atlantic Coast Line R. Co., 169 N. C. 446 5067, 5083
v. Conover, 3 Keyes 113 27
v. Dewing, 14 Allen 413 595
v. Lydon, 5 Idaho 358 4179, 4227
v. Lyons, 2 Stark. 317 1269, 3827
v. Seattle Con. R. Co., 6 Wash. 227 4815
v. Seattle Con. St. R. Co., 7 Wash. 286 1788
v. Stinson, 3 Wash. 615 1986, 1987, 2061, 4397
v. Van Dusen, 25 Mich. 351 2788, 2807
v. Wingate, 3 Allen 103 540
Seaside & B. Bridge E. R. Co., 83 Hun 143 3985
Seasongood v. Tennessee & O. R. T. Co., 21 Ky. L. Rep. 1142 3311
Seat v. Cannon, 1 Humph. 471 1636
v. Moreland, 7 Humph. 575 39
Seaton v. Jamison, 7 Watts 553 3723
v. Scovill, 18 Kan. 433 1924
Seattle v. Atwood, 59 Wash. 112 4126
v. Board of Home Missions, etc., 138 Fed. 307 3980, 4034, 4039, 4108, 4111, 4112, 4129
v. Byers, 54 Wash. 518 4036
v. McNamara, 81 Fed. 863 4444
v. Puget Sound I. Co., 47 Wash. 22 299
v. Regan, 52 Wash. 262 299
v. Saulez, 47 Wash. 365 299
v. Seattle, R. & S. R. Co., 83 Wash. 94 4031
Seattle C. Co. v. Haley, 6 Wash. 302 1686, 1687, 1694, 1701, 1707
Seattle E. Co. v. Hartless, 144 Fed. 379 4882
Seattle T. Co. v. Pitner, 18 Wash. 401 1017, 1078, 1111
Seattle & M. R. Co. v. Corbett, 22 Wash. 189 4053
v. Gilchrist, 4 Wash. 509 3977, 4019, 4026, 4136
v. Joergenson, 3 Wash. 622 1807
v. Murphine, 4 Wash. 448 4026, 4046
v. Roeder, 30 Wash. 244 3963, 3988, 4037
v. Scheike, 3 Wash. 625 4089
Seattle, etc., R. Co. v. Land, 81 Wash. 206 3962, 4019, 4020, 4033, 4131
Seaver v. Hall, 50 Neb. 878 1981, 1983, 2031
v. Hall, 52 Neb. 316 2031
v. Morse, 20 Vt. 620 543
v. Ray, 137 Mo. App. 78 985
Seavey v. Dennett, 69 N. H. 479 4171, 4178
v. Shurick, 110 Ind. 494 2602
Seavey Co. v. Union T. Co., 106 Wis. 394 3426
Seawell v. Buckley, 54 Ala. 592 1639
v. Carolina Cent. R. Co., 133 N. C. 515 3467
v. Henry, 6 Ala. 226 790, 801
Seay v. Greenwood, 21 Ala. 491 1705
v. Marks, 23 Ala. 532 4300
Sebastian v. Cheney, 86 Tex. 497 4637, 4646
v. Chicago C. B. Co., 144 Ill. App. 504 4747
Sebree v. Board of Education, 254 Ill. 438 3112

[REFERENCES ARE TO PAGES]

Sebree v. Smith, 2 Idaho 329 4315
Sebring v. Harris, 20 Cal. App. 56 4837
v. Keith, 2 Hill (S. C.) 340 1024
Secard v. Rhinelander L. Co., 147 Wis. 614 4923
Sechrist v. Jahn, 11 Pa. Super. Ct. 59 4668
Seckerson v. Sinclair, 24 N. D. 326 1442
v. Sinclair, 24 N. D. 625 1137
Seckinger v. Philibert & J. Mfg. Co., 129 Mo. 590 4681
Secklemore v. Thistleton, 6 M. & S. 9 1528
Second Nat. Bank v. Bank of Alma, 99 Ark. 386 1459, 2929, 2938
v. Claney, 178 Ill. App. 427 1398
v. Diefendorf, 90 Ill. 396 2753
v. Fitzpatrick, 23 Ky. L. Rep. 610 712
v. Hill, 76 Ind. 223 2809
v. Merrill Co., 69 Wis. 501 3256
v. Poucher, 56 N. Y. 348 828, 2808
v. Spottswood, 10 N. D. 114 687
Second Nat. Bank of New Hampton v. Lanin, 164 Iowa 512 4615, 4624, 4632, 4646
Second St., Harrisburg, In re, 66 Pa. 132 4156
Secor v. Babcock, 2 Johns. 203 4639
v. Harris, 18 Barb. 425 4503
v. Sturgis, 16 N. Y. 548 378, 382, 383, 384, 385, 386
v. Taylor, 41 Hun 123 4778, 4789
Secord v. John Schroeder Lumber Co., 160 Wis. 1 4871, 4877, 4878, 4880
Security Co. v. Eyer, 36 Neb. 507 1922
Security Ins. Co. v. Kentucky Ins. Co., 7 Bush 81 3039
v. Slack, 183 Ill. App. 579 3052
Security Sav. Bank v. Smith, 144 Iowa 203 4379, 4385
Security State Bank v. Waterloo Lodge, 85 Neb. 255 817, 826
Security T. & S. D. Co. v. Duross (Del.), 86 Atl. 209 1825
Sedalia P. M. & L. Co. v. Swift, 129 Mo. App. 471 3138
Sedalia, etc., R. Co. v. Smith, 27 Mo. App. 371 2759
Sedam v. Taylor, 3 McLean 547 1607
Seddon v. Tutop, 6 T. R. 607 372
v. Western U. Tel. Co., 146 Iowa 743 3638, 3654
Sedgwick v. Hollenback, 7 Johns. 317 3183
v. Richardson, 3 Lev. 374 1573
Sedgwick & Bailey Aves., In re, 213 N. Y. 438, rev'g in part 162 App. Div. (N. Y.) 236 4056
Sedgworth v. Overend, 7 T. R. 279 4176
Sedro V. Co. v. Kwapil, 62 Wash. 385 226, 231, 1414, 2339, 2342
Seed v. Johnston, 63 App. Div. (N. Y.) 340 2545
Seeds G. & H. Co. v. Conger, 83 Ohio 169 760
Seefeld v. Thacker, 93 Wis. 518 2279
Seeger Refrigerator Co. v. American Car & Foundry Co., 219 Fed. 565, rev'g 212 Fed. 745 4457, 4465
Seeley v. Bishop, 19 Conn. 128 16
v. Bridgeport, 53 Conn. 1 1398
v. Brown, 14 Pick. 177 1625
v. Central Vermont R. Co., 88 Vt. 178 1471
v. New York Cent. & H. R. R. Co., 8 App. Div. (N. Y.) 402 4941
Seely v. Alden, 61 Pa. 302 3850, 3863, 3931
Seely v. Cole, Wright (Ohio) 681 4593
v. Cram, 5 N. J. L. 35 2490
Seeman v. Biemann, 108 Wis. 365 847, 864, 868, 891, 892
v. Feeney, 19 Minn. 79 170, 4190
Seevers v. Gabel, 94 Iowa 75 3151
Segaer v. Barhamsted, 22 Conn. 290 4662
Segal v. Ensler, 16 N. Y. Misc. 43 3110
Segar v. Parrish, 20 Gratt. 672 2511
Segars v. Segars, 82 S. C. 196 4312
Segbel v. Metz, 120 App. Div. (N. Y.) 291 759
Seger v. Barkhamsted, 22 Conn. 290 334, 3474, 3475, 3484, 3647, 4536
v. Edwards, 11 Leigh 213 2902
Segrist v. Crabtree, 131 U. S. 287 666
Seibel v. Purchase, 134 Fed. 484 2025
Seibert v. Bergman, 91 Tex. 411 2173
v. True, 8 Kan. 52 2867
Seibert's Assignee v. Ragsdale, 103 Ky. 206 1071
Seibles v. Blackwell, 1 McMull. 56 2405, 2415
Seibold v. Rogers, 110 Ala. 438 4285
Seidler v. Burns, 84 Conn. 111 4616, 4629
v. Burns, 86 Conn. 249 1303, 4613, 4614, 4621
Seifert v. Dillon, 83 Neb. 322 3845
v. Mueller, 156 Wis. 629 2516
v. Western U. Tel. Co., 129 Ga. 181 3588, 3625, 3642
Seifke v. Koch, 31 How. Pr. 383 3133
Seigworth v. Leffel, 76 Pa. 476 2370
Seim v. Krause, 13 S. D. 530 883, 892
Seiple v. Irwin, 30 Pa. 513 684
v. Seiple, 133 Pa. 460 700
Seith v. Commonwealth E. Co., 241 Ill. 252 157
Seither v. Philadelphia T. Co., 125 Pa. 397 773
Seitz v. Brewers' R. Co., 141 U. S. 510 2373, 2376
v. People's Sav. Bank, 140 Mich. 106 2136, 2139
Seitzinger's Estate, 170 Pa. 531 3723
Selby v. Hutchinson, 9 Ill. 319 2662
v. McCullough, 26 Mo. App. 66 663
v. Matson, 137 Iowa 97 833, 840, 863, 889
Selden v. Cashman, 20 Cal. 56 3789, 4159
v. Jacksonville, 28 Fla. 558 3949
v. James, 6 Rand. 465 1025, 2133
v. Preston, 11 Bush 191 1227
Selders v. Brothers, 88 Neb. 61 60, 4729, 4767
v. Brothers, 88 Neb. 152 4766
Seldon v. Jones, 74 Ark. 348 2055, 2095, 2096, 2146
v. Jones, 89 Ark. 234 2150, 2152
Selfridge v. Northampton Bank, 8 W. & S. 320 711
Seligman v. Beecher, 36 Pa. Super. Ct. 475 4
Selkirk v. Cobb, 13 Gray 313 4211
Sell v. Mississippi River L. Co., 88 Wis. 581 4416
v. Ward, 81 Ill. App. 675 4181, 4235
Selland v. Nelson, 22 N. D. 14 1386
Sellar v. Clelland, 2 Colo. 532 1437, 2296, 4389, 4414
Sellars v. Kinder, 1 Head 133 4973
Selleck v. Janesville, 100 Wis. 157 1469, 4787
v. Janesville, 104 Wis. 570 1428, 1476, 4740, 4743, 4756, 4758, 4759, 4763, 4787
v. Sugar Hollow T. Co., 13 Conn. 453 703, 704, 728

[REFERENCES ARE TO PAGES]

Selleck v. Tallman, 11 Daly 141 1026, 2037
Sellen v. Norman, 4 C. & P. 80 702
Seller v. Jones, 16 M. & W. 112 2749
Sellers v. Greer, 172 Ill. 549 2047
v. Jones, 22 Pa. 423 677
v. Mann, 113 Ga. 643 1522
Sellick v. Hall, 47 Conn. 260 441, 3939
Sellman v. Bowne, 8 Gill & J. 55 3720
Selma R. v. Camp, 45 Ga. 180 4094
Selma R. Co. v. Lacey, 49 Ga. 106 4846
Selma, etc., R. Co. v. Keith, 53 Ga. 178 4135
v. Lacy, 43 Ga. 461 4954
Selman v. Barnett, 4 Ga. App. 375 2, 1267, 1324
Selover v. Bryant, 54 Minn. 434 2485
v. Freeman, 111 Minn. 318 4407
v. Harpending, 18 Abb. New Cas. 252 2873
v. Harpending, 54 N. Y. Super. 251 2892
Selser v. Brock, 3 Ohio St. 320 2818
Selsor v. Chesapeake & O. R. Co., 148 Ky. 39 3502
Seltzer v. Coleman, 32 Pa. 493 658
v. Davenport F. A. Co., 74 Conn. 46 1353
v. Saxton, 71 Ill. App. 229 1470, 4767, 4770
Selz v. Guthman, 62 Ill. App. 624 2891
Semi-Tropic Spiritualists' Ass'n v. Johnson, 163 Cal. 639 1019, 2463
Semmes v. Boykin, 27 Ga. 47 711
v. Wilson, 5 Cr. C. C. 285 1873
Semon v. Adams, 79 Conn. 81 4206
Semple v. Bank, 5 Sawyer 394 3708, 3709
v. United R. Co., 152 Mo. App. 18 4713
v. Whorton, 68 Wis. 626 2065, 2069, 2091
Seneca Road Co. v. Auburn, etc., R. Co., 5 Hill 175 43
Senft v. McIlvain, 43 Pa. Super. Ct. 518 4158
v. Vanek, 209 Ill. 361 295
Sengel v. Patrick, 80 Ark. 384 715
Senglaup v. Acker P. Co., 121 App. Div. (N. Y.) 49 3881, 3890
Sensenig v. Lancaster, 12 Pa. Dist. 387 12
v. Parry, 113 Pa. 115 1723
v. Pennsylvania R. Co., 229 Pa. 168 27
Sensinger v. Boyer, 153 Pa. 628 4197
Sentance v. Hawley, 13 C. B. (N. S.) 458 2970
Sentell v. New Orleans & C. R. Co., 166 U. S. 698 1459
Senter v. Bowman, 5 Heisk. 14 1148
v. Monroe, 77 Cal. 347 2987, 2992
Sentinel Co. v. Smith, 143 Wis. 377 2749
Septimo, In re, 219 Mass. 430 5210, 5211
Sequoia, The, 132 Fed. 625 486, 5007, 5008
Serano v. New York Cent., etc., R. Co., 188 N. Y. 156 1498
Serdan v. Falk Co., 153 Wis. 169 4905
Serensen v. Northern Pac. R. Co., 45 Fed. 407 1363, 1395, 4943
Seretto v. Rockland, etc., R. Co., 101 Me. 140 294, 542, 2684, 2693, 2695, 2701
Serfling v. Andrews, 106 Wis. 78 3190, 3199, 3208
Serio v. Murphy, 99 Md. 545 6
Seriver v. Myers, 9 Up. Can. C. P. 225 2057
v. Smith, 100 N. Y. 471 2189
Serle v. Norton, 2 Mood. & Rob. 401 671
Servatius v. Pichel, 34 Wis. 292 4522, 4540, 4679
Serviss v. Ferguson, 84 Fed. 202 2738
Serwe v. Northern Pac. R. Co., 48 Minn. 78 3457, 3461, 3474
Sesler v. Rolfe C. & C. Co., 51 W. Va. 318 4779
Sessinghaus M. Co. v. Hanebrink, 247 Mo. 212 1413, 2323
Sessions v. Hartsook, 23 Ark. 519 2392
v. New York, etc., R. Co., 78 Hun 541 3539
v. Pintard, 18 How. 106 1765, 1768, 1770, 1777, 1788
v. Romadka, 145 U. S. 29 4465, 4466
Setiner v. Zwickey, 41 Minn. 448 1953
Seton v. Hoyt, 34 Ore. 266 948, 1041, 1048, 1185
Settegast v. Houston, etc., R. Co., 38 Tex. Civ. App. 623 400
Settlement of Peters, In re, 128 Mo. App. 666 1131
Setzler v. Pennsylvania, etc., R. Co., 112 Pa. 56 3977
Seufferle v. Macfarland, 28 App. D. C. 94 4020
Sevearingham v. State, 4 Har. & McHen. 38 1079
Seven Brothers, The, 170 Fed. 126 4986, 4992
Seventy-third St. B. Co. v. Jencks, 19 App. Div. (N. Y.) 314 2151, 2152, 2175
Severance v. Hilton, 32 N. H. 289 4513
v. Hilton, 24 N. H. 147 4531
Severns v. Brainard, 61 Minn. 265 4629
Sevey v. Blacklin, 2 Mass. 543 1655, 1657
Sewall v. Sparrow, 16 Mass. 24 452, 781
Sewall's Falls Bridge v. Fisk, 23 N. H. 171 257, 265
Seward v. The Vera Cruz, L. R. 10 App. Cas. 59 4852
Sewell v. Atchison, etc., R. Co., 78 Kan. 1 23
v. Chicago T. T. R. Co., 177 Ill. 93 4139
v. Lancaster Bank, 17 S. & R. 285 4207
Sewell's Case, 37 Mo. 448 1051
Sewing v. Harrison County, 156 Iowa 229 4814
Sexson v. Hoover, 1 Ind. App. 65 4621, 4628
Sexton, In re, 61 N. Y. Misc. 569 1130
Sexton v. Brock, 15 Ark. 345 4520
v. Murdock, 36 Iowa 516 1000
v. Newark Dist. Tel. Co., 84 N. J. L. 85 5155, 5163, 5164, 5167, 5170
v. Sikking, 90 Ill. App. 667 2381, 2382
Sexton R. & I. Co. v. Sexton, 48 Tex. Civ. App. 190 432, 774, 782, 3193
Seybel, In re (App. Div.), 105 N. Y. Supp. 145 4150
In re, 120 App. Div. (N. Y.) 291 1199
Seybold v. Grand Forks Nat. Bank, 5 N. D. 460 1815
Seyfert v. Bean, 83 Pa. 450 3209
Seyfried v. Knoblauch, 44 Colo. 86 2056, 2060, 2132
Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67 3008, 3012
Seymour v. Billings, 12 Wend. 286 4362
v. Chicago, etc., R. Co., 3 Biss. 43 3503
v. Davis, 2 Sandf. 239 553, 2231
v. Fellows, 77 N. Y. 178 2479

[REFERENCES ARE TO PAGES]

Seymour v. Goodrich, 80 Va. 303 753
v. Greenwood, 7 H. & N. 355 1330, 1332, 1335, 3508, 3509
v. Harvey, 8 Conn. 63 1617, 1811
v. Ives, 46 Conn. 109 4238
v. Jaffe, 78 Wash. 1 1986, 1995, 1997
v. Lewis, 19 Wend. 512 638
v. McCormick, 16 How. 480 4439, 4441, 4443, 4445, 4447, 4450, 4465, 4475, 4493
v. Merrills, 1 Root 459 4529
v. Mickey, 15 Ohio St. 575 2779
v. Minturn, 17 Johns. 169 748, 753, 764, 767, 783
v. Oelrichs, 162 Cal. 318 1095
v. Oelrichs, 156 Cal. 782 2551, 2554
v. Sexton, 10 Watts 255 725, 728, 729, 736
v. Smith, 114 N. Y. 481 683
v. Spokane, 6 Wash. 362 1045
v. Union S. Y. & T. Co., 224 Ill. 579 129
v. Van Slyck, 8 Wend. 403 707, 728, 1588
Shaaber v. Reading, 150 Pa. 402 4090
Shaber v. St. Paul, etc., R. Co., 28 Minn. 103 4874, 4906, 4935, 4939, 4943, 4944
Shackamaxon Bank v. Yard, 143 Pa. 129 2750
v. Yard, 150 Pa. 351 2756, 2770
Shackelton v. Lawrence, 65 Ill. 175 536
Shackford v. Goodwin, 13 Mass. 187 495, 2934
Shackleford v. Bennett, 237 Ill. 523 1715
v. Hamilton, 93 Ky. 80 3683, 3684
v. He'm, 1 Dana 338 1225
v. New Orleans, etc., R. Co., 37 Miss. 202 2468
Shadbolt & B. I. Co. v. Topliff, 85 Wis. 513 2343
Shadden v. Butler, 164 Iowa 1 4643
Shaddock v. Clifton, 22 Wis. 114 4762
Shade v. Ash Grove Lime & Portland Cement Co., 92 Kan. 146 5147
v. Northern Pac. Ry. Co., 206 Fed. 353 5123, 5124
v. Sisson M. & L. Co., 115 Cal. 357 2465
v. Wigan Coal & Iron Co., 3 B. W. C. C. 81 5196
Shadock v. Alpine P. Co., 79 Mich. 7 1376
Shadwell v. Hutchinson, 2 B. & Ad. 97 3834
Shaeffer v. Clendenin, 100 Pa. 565 2865
v. Hodges, 54 Ill. 337 1873
Shaenfield v. Hull S. & F. Co. (Tex. Civ. App.), 157 S. W. 462 2260
Shafer v. First Nat. Bank, 53 Kan. 614 978, 1048
v. McIlhaney, 1 Pa. Dist. 765, 154 Pa. 58 1133
v. Sloan, 3 Cal. App. 335 887
v. Smith, 7 Har. & J. 67 4184
v. Wilson, 44 Md. 268 257, 3227, 3249, 3918
Shaffer v. Austin, 68 Kan. 234 459, 1322
v. Chernyk, 130 Iowa 686 738
v. Lee, 8 Barb. 412 376, 415, 3155
Shaffer & Co. v. Chicago, R. I. & P. Ry. Co., 185 Ill. App. 615 3339
Shaier v. Broadway I. Co., 22 App. Div. (N. Y.) 102 4743
Shall v. Detroit & M. R. Co., 152 Mich. 463 3392
Shallenberger v. Standard S. Mfg. Co., 223 Pa. 220 2696
Shallies v. Wilcox, 4 Thomp. & C. 591 3257
Shallue v. Long Tunnel G. M. Co., 10 Vict. L. R. (law) 56 4869
Shambach v. Middlecreek E. Co., 45 Pa. Super. Ct. 300 4855
Shamokin Bank v. Street, 16 Ohio St. 1 1885
Shamp v. Lambert, 142 Mo. App. 567 1461
Shanahan v. Perry, 130 Mass. 460 2189
Shand, The, 16 Fed. 520 3423
Shand v. Grant, 15 C. B. (N. S.) 324 3289
Shandy v. McDonald, 38 Mont. 393 1267, 4271
Shane v. Palmer, 43 Kan. 481 689
v. Shearsmith's Est., 137 Mich. 32 2514
Shank v. Case, 1 Ind. 170 4569
v. Groff, 45 W. Va. 543 802, 816
v. Koen, 10 Ohio N. P. (N. S.) 513 773
Shankland v. Hamilton, 1 Thomp. & C. 239 1786
Shanklin v. Cooper, 8 Blackf. 41 1150, 1152
v. Gray, 111 Cal. 88 37
Shanks v. Delaware, L. & W. R. Co., 239 U. S. 556, aff'g 214 N. Y. 413 5043, 5049
v. Delaware, L. & W. R. Co., 163 N. Y. App. Div. 565, aff'd 239 U. S. 556 5065
v. Griffin, 14 B. Mon. 153 2607
v. Whitney, 66 Vt. 405 4375, 4393
Shannahan v. Waterbury, 63 Conn. 420 4105
Shannon v. Boston, & M. R. R., 77 N. H. 349 5122
v. Bruner, 33 Fed. 871 4466
v. Cohlhepp, 37 Pa. Super. 241 1049
v. Comstock, 21 Wend. 457 1937, 1938, 2556, 2558, 2567
v. Dodge, 18 Colo. 164 1786, 1789
v. Georgia State B. & L. Ass'n, 78 Miss. 955 1159, 1161
v. Loeb, 65 Wash. 640 3101, 3107
v. McMullen, 25 Gratt. 211 2804
v. McNabb, 29 Okla. 829 320
v. Marmaduke, 14 Tex. 217 2903
v. Marselis, 1 N. J. Eq. 412 572, 2211
v. Northern Pac. R. Co., 44 Wash. 321 3450, 3528
v. Portsmouth, 54 N. H. 183 694
v. Simms, 146 Ala. 673 4644, 4836, 4844
v. Swanson, 208 Ill. 52 436, 4973, 4974
Shannon C. Co. v. Potter, 14 Ariz. 481 1529
Shano v. Fifth Ave., etc., B. Co., 189 Pa. 245 3981, 4025
Shant v. Southern, 10 Iowa 415 825, 1229
Shapiro v. Michelson, 19 Tex. Civ. App. 615 4782
v. Weir, 128 App. Div. (N. Y.) 245 3414
Shapman M. & R. Co. v. Sussman (App. Div.), 131 N. Y. Supp. 645 2012
Sharon v. Mosher, 17 Barb. 518 359, 2405, 2415, 2420, 2448, 4370, 4413
v. Winnebago F. Mfg. Co., 141 Wis. 185 125
Sharp v. Behr, 136 Fed. 795 2163
v. Carroll, 66 Wis. 62 624
v. Fleming, 75 Ark. 556 664
v. Hawkins, 129 Mo. App. 80 2225
v. McBride, 134 La. 249 379

[REFERENCES ARE TO PAGES]

Sharp v. Mauston, 92 Wis. 629 746
v. Milligan, 23 Beav. 419 3255
v. National B. Co., 179 Mo. 553 4858, 4863, 4923
v. Powell, L. R. 7 C. P. 258 4320, 4679
v. Speckenagle, 3 S. & R. 464 779
v. Todd, 38 N. J. Eq. 234 804, 819
v. United States, 191 U. S. 341 4124, 4134
v. Wyckoff, 39 N. J. Eq. 376 786
Sharpe v. Barney, 114 Ala. 361 4218
v. Bettis, 17 Ky. L. Rep. 673 2404, 2414
v. Graydon, 99 Ind. 232 4296
v. Harding, 65 Mo. App. 28 1715, 1721
v. Johnson, 41 How. Pr. 400 2660
v. Johnston, 76 Mo. 660 4636, 4639
v. Larson, 67 Minn. 428 4506
v. Larson, 74 Minn. 323 4586
v. Lee, 14 S. C. 341 961
v. San Paulo R. Co., L. R. 8 Ch. 597 2235, 2654
v. Southern R. Co., 130 N. C. 613 233, 234, 3344
v. United States, 50 C. C. A. 597, 112 Fed. 893 4128, 4135
v. White, 25 Ont. L. R. 298 487, 2276
v. Williams, 41 Kan. 56 435
Sharpless v. Murphy, 17 Del. Co. Rep. (Pa.) 22 3166
Sharpless Co., P. E. v. Lawrence, 213 Fed. 423 4494
Sharpley v. Brown, 43 Hun 374 4789
Sharpsville F. Co. v. Snyder, 223 Pa. 372 2236, 2258
Sharrod v. London, etc., R. Co., 4 Ex. 580, 585 3508
Shartle v. Hutchinson, 3 Ore. 337 4568
v. Minneapolis, 17 Minn. 308 1495, 4684, 4794
Shatto v. Crocker, 87 Cal. 629 1379, 4613
Shattuc v. McArthur, 29 Fed. 136 4537, 4538, 4543, 4549
Shattuck v. Adams, 136 Mass. 34 2895
v. Green, 104 Mass. 42, 45 2380, 2381
v. Lamb, 65 N. Y. 499 2096, 2188
v. Lovejoy, 8 Gray 204 3170
v. Myers, 13 Ind. 46 4971
v. Stoneham, etc., R., 6 Allen 115 2305, 4116, 4132, 4134
v. Wilton R. Co., 23 N. H. 269 1063, 4153
Shaubut v. St. Paul, etc., R. Co., 21 Minn. 502 16
Shaul v. Board of Education, 108 App. Div. (N. Y.) 19 1031, 2555
Shauver v. Phillips, 7 Ind. App. 12 4093
Shaver v. Ehle, 16 Johns. 201 2383
v. Gillespie, 46 N. Y. St. Rep. 772 3309
v. Pennsylvania Co., 71 Fed. 931 24, 25
Shaver Transp. Co. v. Columbia Contract Co., 208 Fed. 347 5000, 5012
Shavlik v. Walla, 86 Neb. 768 8, 3847
Shaw v. Becket, 7 Cush. 442 1065
v. Berry, 31 Me. 478 161
v. Boston & W. R. Co., 8 Gray 45 4810
v. Brown, 41 Tex. 446 1269
v. Camp, 160 Ill. 425 1827
v. Chairitie, 3 C. & K. 25 2526
v. Charleston, 57 W. Va. 433 4846
v. Charlestown, 2 Gray 107 1443, 3957
Shaw v. Chicago & G. T. R. Co., 123 Mich. 629 4813
v. Chicago, etc., R. Co., 173 Ill. App. 107 4794
v. Clark, 6 Vt. 507 637
v. Cummiskey, 7 Pick. 76 3889
v. Etheridge, 3 Jones 301 414
v. Faires, — Tex. Civ. App. —, 165 S. W. 501 2503
v. Gilbert, 111 Wis. 165 1134, 4365, 4379, 4392, 4394, 4397, 4398
v. Gookin, 7 N. H. 16 673
v. Hoffman, 21 Mich. 151 1363, 1367
v. Hoffman, 25 Mich. 163 3220
v. Holland, [1900] 2 Ch. 305 4254, 4365
v. Holland, 15 M. & W. 116 2317
v. Holland, 15 M. & W. 136 368
v. Holland, 15 M. & W. 145 4251
v. Jones, 133 Ga. 446 2322, 2323
v. Laughton, 20 Me. 266 4340
v. Loud, 12 Mass. 447 2834
v. Missouri & K. D. Co., 56 Mo. App. 521 4188
v. New York E. R. Co., 187 N. Y. 186 4139
v. Norfolk County R. Co., 16 Gray 407 1205
v. Nudd, 8 Pick. 9 2276
v. Outwater, 77 Hun 87 1869
v. Peckett, 26 Vt. 482 1064
v. Philadelphia, 169 Pa. 506 3984, 4006
v. Picton, 7 D. & R. 201, 4 B. & C. 715 703, 704, 727, 1034, 2906
v. Pilling, 175 Pa. 78 4485, 4486, 4487
v. Postal Tel. & C. Co., 79 Miss. 670 3556
v. Pratt, 22 Pick. 305 778
v. Prina County, 2 Ariz. 399 694
v. Reed, 12 Pick. 132 2937
v. Republic Ins. Co., 69 N. Y. 286 2568
v. Rigby, 84 Ind. 375 959, 962, 1181, 1184
v. Sears, 3 Kan. 242 807, 809
v. Seattle, 39 Wash. 590 1506
v. Shaw, 6 Vt. 69 2007
v. Smith, 45 Kan. 334 2439, 2456
v. South Carolina R. Co., 5 Rich. 462 3389
v. Southern Pac. R. Co., 157 Cal. 240 1375, 4723, 4793
v. Spooner, 9 N. H. 197 1849, 1850
v. Stone, 8 Bosw. 157 4379
v. Turnpike Co., 2 P. & W. 454 376, 2231
v. Turnpike, 3 P. & W. 445 2524, 2708
v. Western U. Tel. Co., 151 N. C. 638 3622, 3639
v. White, 13 Johns. 179 3718
v. Wilkins, 8 Humph. 647 1981
Shaw B. B. Co. v. Maybell, 86 Minn. 241 2383
Shaw Bros. v. Guthrie, 14 Ga. App. 303 2095
Shawbut v. St. Paul, etc., R. Co., 21 Minn. 502 3935
Shawe v. Felton, 2 East 109 3007
Shawhan v. Long, 26 Iowa 488 2032
v. Van Nest, 25 Ohio St. 490 2259
Shawmut, The, 155 Fed. 476 2735
Shawmut Nat. Bank v. Boston, 118 Mass. 125 3142
Shawnee v. Freauff, 36 Okla. 280 1046, 1225
v. Slankard, 29 Okla. 133 1477
Shawneetown v. Mason, 82 Ill. 337 4114

[REFERENCES ARE TO PAGES]

Shay v. Thompson, 59 Wis. 540 463, 1291, 4655, 4783
Shea v. Cloquet L. Co., 92 Minn. 348 4646
v. Cloquet L. Co., 97 Minn. 41 4613
v. Kerr, 1 Penne. 530 2547
v. Massachusetts Ben. Ass'n, 160 Mass. 289 623
v. Minneapolis, etc., R. Co., 63 Minn. 228 3386, 3411
v. Potrere, etc., R. Co., 44 Cal. 415 4779
v. Sewerage & W. Board, 124 La. 299 2655, 2656, 2683, 2688
Sheafe v. O'Neil, 9 Mass. 13 2181, 3716
Sheahan v. Barry, 27 Mich. 217 1299, 3662, 3663, 3682, 3689
v. Collins, 20 Ill. 325 471, 4529, 4530, 4574, 4577
Sheahen v. Toronto R. Co., 25 Ont. L. R. 310 4833
Shealy v. Edwards, 73 Ala. 175 2216
Sheanon v. Pacific Mut. L. Ins. Co., 77 Wis. 618 3013
Sheard v. Horan, 30 Ont. 618 (1899) 2398
v. United States F. & G. Co., 58 Wash. 29 888, 2873, 2876, 2885, 2890
v. Welburn, 67 Mich. 387 2018
Shearer v. Buckley, 31 Wash. 370 109, 143, 1472
v. Guardian T. Co., 136 Mo. App. 229 2970
v. Park N. Co., 103 Cal. 415 2406, 2412, 2444, 3780
v. Ranger, 22 Pick. 447 2147
v. Shearer, 98 Mass. 107 3729
v. Taylor, 106 Va. 26 2873, 2882
Shearman v. Akins, 4 Pick. 283 2970
Sheary v. Adams, 18 Hun 181 3235
Sheckley v. Illinois Cent. R. Co., 257 Ill. 491 3737
Shed v. Brett, 1 Pick. 401 789
v. Pierce, 17 Mass. 623 456, 780, 781, 782
Shedd v. Moran, 10 Ill. App. 618 4952
v. Wilson, 27 Vt. 478 736
Sheedy v. Union Press B. Works, 25 Mo. App. 527 17
Sheehan v. Dalrymple, 19 Mich. 239 594, 606
v. Edgar, 58 N. Y. 631 4730
v. Fall River, 187 Mass. 356 3983, 4055, 4093
v. Taft, 110 Mass. 331 2813
Sheehy v. Mandeville, 6 Cranch 253 658, 753
v. Mandeville, 7 Cranch 208 1108
Sheels v. Davies, 4 Camp. 119 517, 540
Sheen v. Rickie, 5 M. & W. 175 1527, 1529
Sheeran v. Ford G. Co., 71 Wash. 604 2922
Sheets v. Andrews, 2 Blackf. 274 2060
v. Hays, 36 Ind. App. 106 1718
v. Joyner, 11 Ind. App. 205 3189
v. Selden, 7 Wall. 416 3139, 3165
Sheetz v. Longlois, 69 Ind. 491 2130
Sheffey v. Gardiner, 79 Va. 313 2095, 2098
Sheffield v. Central U. Tel. Co., 36 Fed. 164 108
v. Hanna, 136 Iowa 579 1136, 4325
v. Linn, 62 Mich. 151 2956
v. Page, 1 Sprague 285 2564
Sheffield Co. v. Harris, 183 Ala. 357 4774, 4792, 4806
Sheffill v. Van Deusen, 15 Gray 485 4594, 4596
Sheftall v. Zipperer, 133 Ga. 488 1327, 3827
Sheibley v. Ashton, 130 Iowa 195 4505, 4508
v. Dixon County, 61 Neb. 409 749
v. Huse, 75 Neb. 811 4597
v. Nelson, 84 Neb. 393 4507, 4512, 4581
Sheik v. Hobson, 64 Iowa 146 1350
Sheill v. McNitt, 9 Paige 101 925
Shelbourne v. Law I. & Ins. Corp., [1898] 2 Q. B. 626 3000
Shelby v. Clagett, 46 Ohio St. 549 1425
v. Metropolitan St. R. Co., 141 Mo. App. 514 3468, 3506
v. Missouri Pac. R. Co., 77 Mo. App. 205 311, 3403
Shelbyville, etc., R. Co. v. Lewark, 4 Ind. 471 65, 4186
Sheldon v. Baumann, 19 App. Div. (N. Y.) 61 3827
v. Carpenter, 4 N. Y. 578 4613, 4618, 4620
v. Davidson, 85 Wis. 138 4378
v. Egan, 18 Manitoba 221 1057
v. Haxtun, 91 N. Y. 124 1158, 1168, 1178
v. Kibbe, 3 Conn. 214 632
v. Leahy, 111 Mich. 29 2670, 2671
v. Mickel, 40 Iowa 19 990, 994
v. Pruessner, 52 Kan. 579 971
v. Sherman, 42 Barb. 368 2468
v. Southern Exp. Co., 48 Ga. 625 4285
v. Steere, 5 Conn. 181 985
v. Upham, 14 R. I. 493 1607, 1671
v. Wright, 80 Vt. 298 1424
Shelfer v. City of London, El. L. Co., [1895] 1 Ch. 287 3931
Shell v. Hummel, 1 Pearson 19 1675
v. Sanders, 46 Ga. 469 1522
Shellabarger v. Morris, 115 Mo. App. 566 78, 357, 3820, 3906
Shelley v. Cody, 187 N. Y. 166 1201, 3810, 3813
Shelton v. American S. Co., 127 Fed. 736 2792
v. Bornt, 77 Kan. 1 342
v. Farmer, 9 Bush 314 2870
v. French, 33 Conn. 489 2330, 2331
v. Gill, 11 Ohio 417 712, 872, 977, 1922
v. Hurd, 7 R. I. 403 2795
v. Jackson, 20 Tex. Civ. App. 443 752, 755, 859
v. O'Brien, 76 Ga. 820 1485
v. Railroad Co., 29 Ohio St. 214 3464
v. Simmons, 12 Ala. 466 4568
v. State, 53 Ind. 331 1133, 1578
v. Wallace, 41 Okla. 325 1949
Shemel v. Givan, 2 Blackf. 312 1108
Shenandoah Nat. Bank v. Ayres, 87 Iowa 526 2821
Shenandoah Valley R. Co. v. Shepherd, 26 W. Va. 672 4002, 4020, 4033
Shenango, etc., R. Co. v. Braham, 79 Pa. 447 3964, 4033, 4098
Shepard v. Ashley, 10 Allen 542 2478
v. Butterfield, 41 Ill. 76 1663
v. Chicago, etc., R. Co., 77 Iowa 54 3474, 3476, 3482
v. Manhattan R. Co., 169 N. Y. 160 4080, 4081
v. Merrill, 13 Johns. 475 469, 4581
v. Metropolitan E. R. Co., 48 App. Div. (N. Y.) 452 4082
v. Milwaukee G. L. Co., 15 Wis. 318 265, 2450, 3218, 3919

[REFERENCES ARE TO PAGES]

Shepard v. Missouri Pac. R. Co., 85 Mo. 629 1462
v. Palmer, 6 Conn. 94 2666
v. Pebbles, 38 Wis. 373 1639, 2862
v. Pettit, 30 Minn. 481 4256
v. Phears, 35 Tex. 71 2787
v. Platt, 158 Mich. 181 59
v. Pratt, 16 Kan. 209 1391, 4212
v. Shepard, 6 Conn. 37 2835
v. State, 3 Gill 289 1598
v. Telegraph Co., 143 N. C. 244 3656
v. Wakeman, 1 Sid. 79 4556
v. Western U. Tel. Co., 143 N. C. 244 3547, 3635
Shepherd v. Baltimore & O. R. Co., 130 U. S. 426 2620
v. Chicago, etc., R. Co., 77 Iowa 56 2486
v. Gambill (Ky.), 96 S. W. 1104 1748
v. Gilroy, 46 Iowa 196 2386
v. Hampton, 3 Wheat. 200 2276
v. Johnson, 2 East 211 2316, 4251, 4252, 4255
v. Kain, 5 B. & Ald. 240 2388
v. McQuilkin, 2 W. Va. 90 1135
v. Shepherd's Est., 108 Mich. 82 1115
v. Taylor, 105 Ala. 507 4290
v. Temple, 3 N. H. 455 1828, 1861, 1865
v. Templeman, 143 Ky. 334 58
v. Willis, 19 Ohio 142 1436
v. Wysong, 3 W. Va. 46 823
Shepp v. Reading B. R., 211 Pa. 425 3980, 4003
Sheppard v. Dowling, 103 Ala. 563 2648
v. Taylor, 5 Pet. 675 1227
v. Wardell, 1 N. J. L. 452 3722
Sheppard Pub. Co. v. Pres. Pub. Co., 10 Ont. L. R. 243 426, 4390
Sheppard's Home v. Wood, — Tex. Civ. App. —, 143 S. W. 988 3101
Sherburne v. Hirst, 121 Fed. 998 858
v. Sanford, 113 Me. 66 4015
Sheredine v. Gaul, 2 Dall. 190 802
Sheridan v. Brooklyn & N. R. Co., 36 N. Y. 39 151, 153
v. Mann, 5 How. Pr. 201 1543
v. New Quay Co., 4 C. B. (N. S.) 618 4284
v. Peoria R. Co., 241 Ill. 469 1806
v. Smith, 2 Hill 538 820, 822
v. Van Winkly, 43 N. J. L. 125 1132
Sherlag v. Kelley, 200 Mass. 232 1355, 4658, 4846, 4847
Sherley v. Billings, 8 Bush 147 1347, 3507
Sherlock v. Alling, 44 Ind. 184 489, 4885
v. Alling, 93 U. S. 99 5023
v. Chicago, etc., R. Co., 85 Mo. App. 46 3535
v. Kimmell, 75 Mo. 77 2468
v. Powell, 26 Ont. App. 407 2665, 2666
Sherman v. Ballou, 8 Cow. 304 770
v. Billings, 90 Hun 544 2408
v. Blodgett, 28 Vt. 149 1461
v. Champlain T. Co., 31 Vt. 162 2524
v. Clark, 24 Minn. 37 4328, 4332, 4356
v. Commercial P. Co., 29 Mo. App. 31 1513
v. Connor, 88 Tex. 35 2590
v. Dutch, 16 Ill. 283 1269, 1276, 3814, 3822
v. Fall River I. Co., 5 Allen 213 430, 494
v. Fall River I. Works, 2 Allen 524 3889
v. Gassett, 9 Ill. (4 Gil.) 521 1176, 1178
Sherman v. Gray, 11 Cal. App. 348 861, 868
v. Harbin, 125 Iowa 174 2796
v. Hudson River R. Co., 64 N. Y. 254 3349
v. Indianapolis T. Co., 48 Ind. App. 623 4676, 4786
v. Johnson, 56 Barb. 59 2382
v. Mayor, 1 N. Y. 316 2531, 2685
v. Milwaukee, etc., R. Co., 40 Wis. 645 414, 3859
v. Pullman Co., 79 N. Y. Misc. 52 3533
v. Rawson, 102 Mass. 395 3663, 3669
v. St. Paul, etc., R. Co., 30 Minn. 227 1434
v. Wells, 28 Barb. 403 3389, 3400
v. Whiteside, 190 Ill. 576 2471, 2472
v. Williams, 113 Mass. 48 3125
Sherman Center T. Co. v. Leonard, 46 Kan. 354 312, 315, 476
Sherman G. & E. Co. v. Belden (Tex.), 123 S. W. 119 3848, 3877, 3885, 3905, 3937
Sherman House H. Co. v. Cirkle, 136 Ill. App. 381 3229
Sherman Mach. Co. v. Dun, 28 Okla. 447 4552
Sherman N. Co. v. Aughenbaugh, 93 Minn. 201 2255
Sherraden v. Parker, 24 Iowa 28 2816
Sherred v. Cisco, 4 Sandf. 480 1022
Sherrell v. Goodrum, 3 Humph. 419 1614
Sherrick v. Wyland, 14 Tex. Civ. App. 299 4430
Sherrill v. Hopkins, 1 Cow. 103 1147
v. Western U. Tel. Co., 109 N. C. 527 3608
v. Western U. Tel. Co., 116 N. C. 655 3621
v. Western U. Tel. Co., 155 N. C. 250 3608, 3638, 3656
Sherrod v. Langdon, 21 Iowa 518 2447, 2448, 4413
v. Rhodes, 5 Ala. 683 2860
Sherry v. Frecking, 4 Duer 452 1495, 1513, 1528
v. Madler, 123 Wis. 621 2678, 2683
v. Oke, 3 Dowl. Pr. 349 1990
v. Schuyler, 2 Hill 204 486, 4202
Sherwin v. Shakespear, 5 De G., M. & G. 517, 536, 17 Beav. 267 2041
Sherwood v. Chicago & N. W. R. Co., 82 Mich. 374 4744
v. Gibson, 5 Up. Can. Q. B. 205 1521
v. Haight, 26 Conn. 432 710
v. Hamilton, 37 Up. Can. Q. B. 410 105
v. Hauser, 94 N. Y. 626 2482
v. Johnson, 28 Ind. App. 277 2150, 2187
v. Kyle, 125 Cal. 652 4549
v. Lafayette, 109 Ind. 411 4093
v. Moore, 35 Fed. 109 958
v. St. Paul, etc., R. Co., 21 Minn. 122 4008, 4101, 4125
v. Seaman, 2 Bosw. 127 3233
v. Sioux Falls, 10 S. D. 405 1469
v. Stone, 14 N. Y. 267 2957
v. Sutton, 5 Mason 1 4410
v. Titman, 55 Pa. 77 502, 4972
Sherwoods, In re, 127 C. C. A. 304, 210 Fed. 754 3119, 3121
Shetelworth v. Neville, 1 T. R. 454 510
Shettler v. Southern Oregon Co., 19 Ore. 192 3710
Shevalier v. Doyle, 88 Neb. 560 2493, 2497

[REFERENCES ARE TO PAGES]

Shevalier v. Postal Tel. Co., 22 Pa. Super. Ct. 506 4099, 4151
Shewalter v. Bergman, 124 Ind. 155 4968, 4969, 4972
Shibley v. Gendron, 25 R. I. 519 4171
Shick v. Suttle, 94 Minn. 135 538
Shickle v. Watts, 94 Mo. 410 1055, 1077
Shickler's Est., 13 Phila. 504 1131
Shieder v. Southern R., 83 S. C. 455 1310, 3322
Shields v. Batts, 5 J. J. Marsh. 13 3716
v. Cincinnati T. Co., 13 Ohio N. P. (N. S.) 133 27, 489
v. Dale, 168 Ill. App. 362 4861
v. Davis, 6 Taunt. 65 3294
v. Doty L. & S. Co., 48 Wash. 679 4210, 4224
v. Klopf, 70 Wis. 69 701
v. Lozear, 34 N. J. L. 496 827
v. Pettie, 4 N. Y. 122 2220
v. Pflanz, 19 Ky. L. Rep. 648 1601
v. Rowland, 151 Ky. 136 1316, 1317, 4661, 4775, 4783
v. Shields C. Co., 81 N. J. Eq. 286 859
v. Smith, 8 Bush 601 1638
v. Washington Tel. Co., 9 West L. J. 5, 283 3559, 3605
v. Whitaker, 82 N. C. 523 1514
Shiell v. McNitt, 9 Paige 101 860
Shiland v. Loeb, 58 App. Div. (N. Y.) 565 807
Shilling v. Carson, 27 Md. 175 471, 4519, 4530, 4572, 4573, 4574, 4576
Shimer v. Easton R. Co., 205 Pa. 648 4107, 4108
Shingleur v. Western U. Tel. Co., 72 Miss. 1030 3611, 3616
Shinizy v. Guernsey, 111 Ga. 346 2049
Shinkle v. First Nat. Bank, 22 Ohio St. 516 629
Shinn v. Bodine, 60 Pa. 182 376
v. Roberts, 20 N. J. L. 435 1945
Shinnabarger v. Shelton, 41 Mo. App. 147 4392, 4410
Shinnick v. Clover Farms Co., 169 N. Y. App. Div. 236 5204
Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221 4002, 4015, 4019, 4021
Ship Compta, The, 5 Saw. 137 3330, 3350, 3408
Ship Hooper, The, 3 Sumn. 542 3287
Ship Packet, The, 3 Mason 255 1208
Ship Potomac, The, 2 Black 581 416
Shipherd v. Field, 70 Ill. 438 2911, 2961
Shipley v. Baltimore, etc., R. Co., 34 Md. 336 4119
v. Fifty Associates, 101 Mass. 251 3234
v. Hacheney, 34 Ore. 303 1044, 1048, 1185
v. Hammond, 5 Esp. 114 1033
v. Pittsburg, etc., R. Co., 216 Pa. 512 4012, 4013
Shipman v. Bailey, 20 W. Va. 140 962, 1147, 1158
v. Burroughs, 1 N. Y. Super. Ct. 442 4529
v. Burrows, 1 Hall 399 4531, 4540, 4556
v. Fletcher, 95 Va. 585 1056
v. Fletcher, 20 D. C. 245 4601, 4613
v. Miller, 2 Root 405 1134
v. State, 43 Wis. 381 537, 538, 697
v. State, 44 Wis. 458 1101
v. Thompson, Willes 103 526
Shipp v. McCraw, 3 Murph. 463 4502
v. Stacker, 8 Mo. 145 630, 791, 801
Shippen v. Bowen, 122 U. S. 581 2387, 4384
Shippen's App., 80 Pa. 391 1478, 3725
Shippey v. Kansas City, 254 Mo. 1 774
Shipsey v. Bowery Nat. Bank, 59 N. Y. 485 1929
Shipton v. Thornton, 9 Ad. & El. 314 3297
Shires v. O'Connor, 4 Pa. Super. 465 384, 2659, 2665
Shirk v. Lingeman, 26 Ind. App. 630 1960, 1996
v. Neible, 156 Ind. 66 2490
Shirley v. Cedar Rapids, etc., R. Co., 74 Iowa 169 3881, 3925
v. Jacobs, 2 Bing. N. C. 88 509
v. Keathy, 4 Cold. 29 469, 4570, 4581, 4590
v. Landram, 3 Bush 552 1537
v. Spencer, 9 Ill. 583 872, 980
v. Terrell, 134 Ga. 61 1556
Shiverick v. Gunning, 58 Neb. 29 4181
Shobes v. Carr, 3 Munf. 10 1079
Shock v. Cooling (Mich.), 141 N. W. 675 1472
v. McChesney, 2 Yeates 473 4517
Shockey v. Glasford, 6 Dana 16 1059
v. McCauley, 101 Md. 461 4502, 4544, 4592
Shockley v. Southern R. Co., 93 S. C. 533 3503
Shoe v. Maerky, 35 Pa. Super. 270 2374, 2404
Shoe & L. Bank v. Wood, 142 Mass. 563 1146
Shoemaker v. Acker, 116 Cal. 239 242, 244, 245, 247, 248, 367, 408, 409
v. Central R. of New Jersey, — N. J. L. —, 89 Atl. 518 47, 4733
v. Crawford, 82 Mo. App. 487 250, 408
v. Jackson, 128 Iowa 488 404, 461, 4770
v. Sonju, 15 N. D. 518 1288, 1387, 1391, 4713, 4731, 4747
v. Stiles, 102 Pa. 549 767
v. United States, 147 U. S. 282 4118, 4145, 4152, 4154
Shoenfeld v. Fleisher, 73 Ill. 404 2914
Sholin v. Skamania B. Co., 56 Wash. 303 3933
Shollenberger v. Brinton, 52 Pa. 1 602
Shook v. Peters, 59 Tex. 393 1305, 1309
Shoop v. Fidelity & Deposit Co. of Maryland, 124 Md. 130 1004, 1228
Shoptaugh v. St. Louis, etc., R. Co., 147 Mo. App. 8 3319
Shore v. Powell, 71 W. Va. 61 696
Shores v. Brooks, 81 Ga. 468 474, 3831, 4159
v. Southern R., 72 S. C. 244 3858, 3895
Shores L. Co. v. Starke, 100 Wis. 498 3314, 3320, 3346
Short v. Abernathy, 42 Tex. 94 2336
v. Acton, 33 Ind. App. 361 4502, 4507, 4543
v. Coffeen, 76 Ill. 245 1873, 1923, 2783
v. Currier, 153 Mass. 182 3685
v. Hubbard, 2 Bing. 348 1654
v. Kalloway, 11 A. & E. 28 304, 2139, 2848, 2885, 3161
v. McCarthy, 3 B. & Ald. 626 410
v. Matteson, 81 Iowa 638 2416
v. Millard, 68 Ill. 292 2506
v. Moore, 19 Ky. L. Rep. 1225 2597
v. St. Louis, etc., R. Co., 150 Mo. App. 359 3449, 3501

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Short v. Skipwith, 1 Brock. 103 273, 1143, 2911
v. Spokane, 41 Wash. 257 4676
v. Trabue, 4 Metc. (Ky.) 299 1147, 1151, 1905
Shorthill v. Ferguson, 44 Iowa 249 2068
Shortridge v. Scarritt Est. Co., 145 Mo. App. 295 4652, 4669
Shotland v. Mulligan, 133 N. Y. Supp. 471 3236, 3258
Shotwell v. Denman, 1 N. J. L. 174 1237
v. Dodge, 8 Wash. 337 3893
v. Jefferson Ins. Co., 5 Bosw. 247 3062
v. Wendover, 1 Johns. 65 4273, 4301, 4302
Shoulty v. Miller, 1 Ind. 544 4580
Shoup v. Marks, 128 Fed. 32 4227
Shouse v. Neiswaanger, 18 Mo. App. 236 2289, 2344
Shover v. Myrick, 4 Ind. App. 7 388, 2595
Show v. Alton, etc., T. Co., 152 Ill. App. 552 4833
Showen v. J. L. Owens Co., 182 Mich. 264 1418, 2307
Shows v. Pendry, 93 Ala. 248 1781
Shrack v. McKnight, 84 Pa. 26 2975
Shrader v. Cleveland, etc., R. Co., 242 Ill. 227 3983
Shreck v. Pierce, 3 Iowa 360 1953, 2052
Shreffler v. Nadelhoffer, 133 Ill. 536 2745
Shreve v. Brereton, 51 Pa. 175 857, 884, 908
Shreveport, City of v. United States F. & G. Co., 131 La. 933 1806
Shreveport & R. R. Valley R. Co. v. Hinds, 50 La. Ann. 781 3963
Shreves v. Gibson, 76 Kan. 709 1559
v. Stokes, 8 B. Mon. 453 3767
Shrewsbury v. Bawtlitz, 57 Mo. 414 1536
Shrieve v. Stokes, 8 B. Mon. 453 3917
Shrigley v. Chicago, etc., R. Co., 158 Ill. App. 473 3774
Shriver v. Frawley, 167 Iowa 419 4622, 4623, 4627, 4629
Shropshire v. Adams, 40 Tex. Civ. App. 339 233, 2458, 2512, 2515
Shrout v. Chesapeake & O. Ry. Co., 157 Ky. 1 399, 3871
Shroyer v. Bash, 57 Ind. 349 1811
Shryer v. Morgan, 77 Ind. 479 627, 2006
Shubert v. Sonheim, 138 App. Div. (N. Y.) 800 832, 888
Shuck v. Chicago, etc., R. Co., 73 Iowa 333 807
v. Pfenninghausen, 101 Mo. App. 697 1530
v. Wight, 1 G. Greene 128 870, 871, 985, 1000, 1002
Shuemaker v. Nissley, 225 Pa. 430 1934
Shufelt v. Moore, 93 Mich. 564 2857
Shugart v. Egan, 83 Ill. 56 61, 158, 159
Shulte v. North Pac. T. Co., 50 Cal. 592 16
Shulters v. Searls, 48 Mich. 550 2688
Shultis v. Rice, 114 Mo. App. 274 2380, 2394, 2399
Shultz v. Griffith, 103 Iowa 150 1377
v. Morrison, 3 Met. (Ky.) 98 1727
Shultz's App., 11 S. & R. 182 1035, 1249
Shuman v. Smith, 100 Ga. 415 3189
Shuman's Est., 45 Pa. Super. 587 702
Shumway v. Collins, 6 Gray 227 3121, 3123
v. Rutter, 8 Pick. 443 361
v. Walworth & N. Mfg. Co., 98 Mich. 411 4676
Shunick v. Thompson, 25 Ill. App. 619 1794
Shupack v. Gordon, 79 Conn. 298 1302
Shurter v. Butler, 43 Tex. Civ. App. 353 193, 2346, 2347
Shuster v. Central Dist. & P. T. Co., 34 Pa. Super. Ct. 513 4019
Shut v. Proctor, 2 Marsh. 226 1572
Shute v. Dorr, 5 Wend. 204 2517
v. Taylor, 5 Metc. (Mass.) 61 533, 861, 919, 925
Shutt v. Lockner, 77 Neb. 397 3189, 3210, 3216
Shutts v. Franke, 42 Ind. App. 275 2472
Sias v. Reed City, 103 Mich. 312 4721
Sibbald v. Bethlehem I. Co., 83 N. Y. 378, 383 2501, 2507
Sibely v. Tutt, 1 McMull. Eq. 320 1898
Sibert v. Hostick, 91 Neb. 255 3189, 3200
v. Kelly, 6 T. B. Mon. 669 1541
Sibi le v. Eastham, 136 La. 557 3789
Sibley v. Aldrich, 33 N. H. 553 161
v. Hulbert, 15 Gray 509 4392, 4401
v. McAllister, 8 N. H. 389 2814
v. Nason, 196 Mass. 125 371, 492, 4659, 4704, 4734
v. Pine County, 31 Minn. 201 622
v. Prescott Ins. Co., 57 Mich. 14 3020
v. Rider, 54 Me. 463 375, 388, 1555
v. Ross, 10 Ohio Dec. 683 3127
v. Smith, 46 Ark. 275 1463
Sibree v. Tripp, 15 M. & W. 23 626, 658, 747, 749, 752, 753, 759
Sickels v. Borden, 3 Blatch. 535, 545 4446
v. Borden, 4 Blatch. 14 4439
v. Herold, 149 N. Y. 332 1113
v. Pattison, 14 Wend. 257 2542, 2658
Sickra v. Small, 87 Me. 493 4572, 4574, 4577, 4580
Sidway v. American M. Co., 119 Ill. App. 502, aff'd 222 Ill. 270 1128, 2511, 2905
v. Missouri L., etc., Co., 187 Mo. 649 2466
Siebel v. Purchase, 134 Fed. 484 1953
v. Springfield, 9 L. T. (N. S.) 324 4295
Sieber v. Great Northern R. Co., 76 Minn. 269 4934, 4936, 4941
Siebert v. Dunn, 157 App. Div. (N. Y.) 387 384, 1032
Sieberts v. Spangler, 140 Iowa 236 1031, 2541
Siebolt v. Konatz S. Co., 15 N. D. 87 1442, 1655, 1670, 1765
Siebrecht (Misc.), 130 N. Y. Supp. 1005 3972
Siedler v. Seely, 8 Colo. App. 499 4049
Sieferer v. St. Louis, 141 Mo. 586 3701
Siegel v. Drumm, 21 La. Ann. 8 1921
v. New York & H. R. Co., 62 App. Div. (N. Y.) 290 4085
v. Riebolt, 110 Minn. 344 2387
Siegele v. Des Moines Mut. Hail Ins. Ass'n, 28 S. D. 142 748
Sieger v. Sieger, 209 Pa. 65 1030
Siegle v. Rush, 173 Ill. 559, aff'g 72 Ill. App. 485 1290
Sievers v. Brown, 34 Ore. 454 3097
Siff v. Forbes (N. Y. Misc.), 84 N. Y. Supp. 169 1880
Sigafus v. Porter, 179 U. S. 116 4408, 4424
Sigel-C. L. S. Co. v. Holly, 44 Colo. 580 809, 4210
Sigerson v. Kahmann, 39 Mo. 206 2225
Sigler v. Interest, 3 N. J. L. 724 423
Sigmon v. Golstone, 116 App. Div. (N. Y.) 490 2546

[REFERENCES ARE TO PAGES]

Sigmund v. Howard Bank, 29 Md. 324 3183, 3261
Sigourney v. Williams, 1 Gray 623 2821
Sikes v. Paine, 10 Ired. 280 2629
v. Tippins, 85 Ga. 231 4974
v. Wild, 1 B. & S. 587, 4 B. & S. 421 284, 355, 1972, 1977, 2002
Silander v. Gronna, 15 N. D. 552 757
Silber v. Larkin, 94 Wis. 9 1493, 3182
Silberberg v. Chipman, 42 Colo. 20 2500
Silberman v. Silberman, 10 New South Wales St. Rep. 554 330
Silberstein v. Duluth News-Tribune Co., 68 Minn. 430 2697, 2698
v. Wicke Co., 29 Abb. N. C. 291 4938
Silcock & Sons v. Golightly, [1915] 1 K. B. 748, [1915] W. C. & Ins. Rep. 164 5211
Silica, The v. The Lord Warden, 30 Fed. 845 5006
Silka v. Quinn, 46 Colo. 596 226, 1751
Silkstone & D. C. & I. Co. v. Joint Stock C. Co., 35 L. T. Rep. (N. S.) 668 2260, 2262, 2263, 2265
Sill v. Burgess, 134 Ill. App. 373 658, 1006
Silliman v. Gano, 90 Tex. 637 288, 1440, 4421
Sillivant v. Reardon, 5 Ark. 140 1570
Sills v. Cochems, 36 Colo. 524 2480.
Silsbury v. McCoon, 3 N. Y. 379, 6 Hill 425 362, 363, 364, 366, 3783, 3787, 4256, 4263
Silsby v. Foote, 20 How. 378 4450, 4476
v. Michigan C. Co., 95 Mich. 204 4694, 4696, 4707
Silsby Mfg. Co. v. State, 104 N. Y. 562 3853
Siltz v. Springer, 236 Ill. 276 1134, 4391, 4394
Silurian M. S. Co. v. Kuhn, 65 Neb. 646 233
Silva v. Bair, 141 Cal. 599 3110
v. Homen, 9 Hawaii 14 4210
v. Souza, 14 Hawaii 46 312, 1431, 1499
Silver v. Clay County, 76 Kan. 228 102
v. Dominion Tel. Co., 2 Russ. & G. (Nova Scotia) 17 1269
v. Kent, 60 Miss. 124 3370, 3424
v. Realty I. & I. Co., 15 Pa. Dist. 685 1493
Silver Bow County v. Davies, 40 Mont. 418 1592
Silver King Consol. Min. Co. v. Silver King Coalition Min. Co., 204 Fed. 166 1128, 3790, 3793
Silver Spray's Boilers, The, 1 Brown 349 2718
Silver Springs, etc., R. Co. v. Van Ness, 45 Fla. 559 227, 284
Silverblatt v. Brooklyn Tel. & M. Co., 73 N. Y. Misc. 38 55, 2437
v. Brooklyn Tel. & M. Co., 150 App. Div. (N. Y.) 268 117
Silverman v. St. Louis, etc., R. Co., 51 La. Ann. 1785 3387
v. Shattuck, 33 R. I. 67 958
Silvey v. Silvey, 96 Miss. 137 4982
Silz v. Springer, 236 Ill. 276 4398
Simes v. Zane, 1 Phila. 500 674
Siminoff v. Goodman Bank, 18 Cal. App. 5 277
Simkins v. Western U. Tel. Co., 97 S. C. 413 1366
Simmang v. Smith (Tex. Civ. App.), 150 S. W. 494 1806
Simmes v. Marine Ins. Co., 2 Cranch C. C. 618 3279
Simmer v. St. Paul, 23 Minn. 408 4194
Simmonds v. Bradford, 15 Mass. 82 1625
v. Henchy, 16 L. R. Ir. 467 1615
v. Long, 80 Kan. 155 2979
Simmons, In re, 66 N. Y. Misc. 204 4042
In re, 130 App. Div. (N. Y.) 356 4034, 4049, 4050
In re, 141 App. Div. (N. Y.) 120 4044
In re, (Misc.) 127 N. Y. Supp. 940 4142
Simmons v. Brown, 5 R. I. 299 213, 267, 3815, 3918
v. Camp, 71 Ga. 54 2865, 2866
v. Carvill, 68 Mo. 416 1450
v. Cates, 56 Ga. 609 722
v. Clark (Tex. Civ. App.), 130 S. W. 619 4410
v. Cutreer, 12 Sm. & M. 584 533, 2456
v. Davenport, 140 N. C. 407 2462
v. Everson, 124 N. Y. 319 3940
v. Faulds, 65 J. P. 371, 17 L. R. 352 5173
v. Fish, 210 Mass. 563 1482, 1494
v. Gardner, 46 Wash. 282 4644
v. Garrett, McCahon 82 1540, 1570
v. Hass, 56 Md. 153 1363
v. London Joint Stock Bank, [1891] 1 Ch. 284, 60 L. J. (Ch.) 313 2316, 4252, 4253
v. McConnell, 86 Va. 494 4890
v. New Bedford, etc., S. Co., 97 Mass. 361 3469
v. Ocean Causeway, 21 App. Div. (N. Y.) 30 2688
v. Oneth, 140 Mo. App. 269 2501
v. Pitman, 11 Wis. 193 2580
v. Reid, 31 S. C. 389 583, 591
v. Sharpe, 2 Ala. App. 385 1559, 1794, 1795, 2743
v. Simmons, 8 Mich. 318 3682
v. Swift, 5 B. & C. 857, 862 2225
v. Terrell, 75 Tex. 275 1920
v. Western U. Tel. Co., 63 S. C. 425 3628, 3630
Simms v. Clark, 11 Ill. 137 647
Simon v. Lanius, 9 Ky. L. Rep. 59 883, 892, 2626
v. Levinson (Misc.), 126 N. Y. Supp. 659 2696, 2706
v. Nance, 45 Tex. Civ. App. 480 6, 395
v. Queen Ins. Co., 120 La. 477 3039
Simonds v. Coster, 3 New Bruns. Eq. 329 1119
v. Essex P. R. Co., 57 N. J. Eq. 349 1965, 1966
v. Merritt, 33 Iowa 537 1818
Simone v. Rhode Island Co., 28 R. I. 186 87, 4688, 4739
Simoneau v. Pacific E. R. Co., 159 Cal. 494 4882
Simoni v. New York, etc., R. Co., 36 Hun 214 4694
Simons v. American Legion of Honor, 178 N. Y. 263 759
v. Burrows, 6 La. Ann. 358 1807
v. Busby, 119 Ind. 13 4965
v. Cissna, 52 Wash. 115 4380, 4415
v. Diamond M. Co., 159 Mich. 241 2092, 2094, 2146, 2150
v. Mason City, etc., R. Co., 128 Iowa 139 3979, 3984, 4137
v. Monier, 29 Barb. 419 1431
v. Patchett, 7 El. & B. 568 2989, 2990
v. Walter, 1 McCord 70, 97 1116, 2385
v. Wittmann, 113 Mo. App. 357 328, 2584, 2587, 2596, 2600

[REFERENCES ARE TO PAGES]

Simons v. Ypsilanti P. Co., 77 Mich. 185 2232, 2296
Simonson v. Blake, 12 Abb. Pr. 331 1355
v. Chicago, etc., R. Co., 49 Iowa 87 1477
v. Grant, 36 Minn. 439 2767, 2873
v. Lovewell, — Ark. —, 175 S. W. 407 471
v. Minneapolis, etc., R. Co., 88 Minn. 89 162
Simonton v. Gray, 34 Me. 50 3727
Simper v. Carroll, 12 Ohio C. C. (N. S.) 140 4836, 4837
Simpkins v. Low, 49 Barb. 382 1419, 1457
v. Low, 54 N. Y. 179 604, 606, 1457, 2306
Simplex R. App. Co. v. Western R. & B. Co., 173 Ind. 1 3822, 3823
Simpson v. Alexander, 35 Kan. 225 4211, 4212
v. Ball, 145 Mo. App. 268 2554, 2561
v. Bantley, 142 Mo. App. 490 4210, 4215, 4232
v. Black, 27 Wis. 206 3671
v. Bloss, 7 Taunt. 246 18
v. Clarke, 2 Cr., M. & R. 342 494, 1820
v. Crane, 149 Mich. 352 2454
v. Crippin, L. R. 8 Q. B. 14 2231, 2232, 2276
v. Dollar, 109 Fed. 814 2734
v. Eggington, 10 Ex. 845 679
v. Feltz, 1 McCord's Eq. 213 1134
v. Foundation Co., 201 N. Y. 479 4654, 4778, 4791
v. Grayson, 54 Ark. 404 4960, 4971
v. Griffin, 9 Johns. 131 1927
v. Hall, 47 Conn. 417 1192, 1195
v. Hawkins, 1 Dana 303 2094, 2209, 2211
v. Hefter, 42 N. Y. Misc. 482 1168
v. Jennings, 15 Neb. 671 529
v. Kansas City, 111 Mo. 237 4148
v. Keokuk, 34 Iowa 568 312, 3867, 3923
v. London, etc., R. Co., 1 Q. B. Div. 274 197, 199, 3317, 3364, 3366
v. McCaffrey, 13 Ohio 508 3833
v. McDonald, 2 Ark. 570 2666
v. McFarland, 18 Pick. 427 1676
v. Markwood, 6 Baxter 340 1388
v. Moulden, 3 Cold. 429 1888
v. New Orleans, 109 La. 897 646
v. New York, etc., R. Co., 16 N. Y. Misc. 613 3532, 3535, 3536
v. Pennsylvania R. Co., 210 Pa. 101 4693, 4716
v. Peoria R. Co., 179 Ill. App. 307 1467, 4676
v. Pitman, 13 Ohio 365 1495
v. Robinson, 104 La. 180 4550
v. Robinson, 12 Q. B. 513 4570
v. White, 187 Fed. 418, — C. C. A. —, 887
Simpson Brick-Press Co. v. Marshall, 5 S. D. 528 172
Simpson Logging Co. v. American Bonding Co. of Baltimore, 76 Wash. 533 2754
Sims v. Glazeneer, 14 Ala. 695 4183
v. Goudelock, 7 Rich. 23 1019
v. Harris, 8 B. Mon. 55 1556
v. Howell, 49 Ga. 620 2375
v. Marryat, 17 Q. B. 281 2382
v. Three States L. Co., 135 Fed. 1019 760
Sims v. Western U. Tel. Co., 89 S. C. 237 3568
v. Willing, 8 S. & R. 103 1019
Simson v. Cooke, 8 Moore 588 2755, 2767
v. Hart, 14 Johns. 63, 75 580, 588
v. Ingham, 2 B. & C. 65 725, 738
Sinai v. Louisville, etc., R. Co., 71 Miss. 547 4003
Sinamaker v. Rose, 62 Ill. App. 118 4291
Sinclair v. Bowles, 4 Man. & R. 3, 9 B. & C. 92 494, 2541
v. Eldred, 4 Taunt. 7 1999, 4605
v. Hathaway, 57 Mich. 60 2377
v. Jackson, 8 Cow. 585 2983
v. Learned, 51 Mich. 335 793
v. Redington, 56 N. H. 146 2869
v. Stanley, 64 Tex. 67 3753
v. Tallmadge, 35 Barb. 602 356, 2666
v. Wismann, 183 Mo. App. 709 2853
Sinclair's App., 116 Pa. 316 946
Sines v. Superintendents of Poor, 58 Mich. 503 2522
Singer v. Farnsworth, 2 Ind. 597 233
v. Pearson-P. Co., 58 Ore. 526 1439, 4210, 4224, 4267
Singer Co. v. Bryant, 105 Va. 403 4629
Singer Mfg. Co. v. Armstrong, 7 Kan. App. 314 2755
v. Bryant, 105 Va. 403 1267, 1316, 1318, 4628, 4634, 4639
v. Christian, 211 Pa. 534 294, 2695, 2702
v. Cramer, 109 Fed. 652 4439
v. Fleming, 39 Neb. 679 15
v. Holdfodt, 86 Ill. 455 1344, 1345, 1494
v. Littler, 56 Iowa 601 2768, 2769
v. Potts, 59 Minn. 240 1353, 2548
v. Reeves, L. Co., 95 Ark. 363 2693
v. Taylor, 150 Ala. 574 4509
Singer S. M. Co. v. Lee, 105 Md. 663 752
v. Phipps, 49 Ind. App. 116 1332, 4652
v. Robertson, 87 Neb. 542 4312
v. Yaduskie, 11 Pa. Dist. 571 4209, 4210
Single v. Barnard, 29 Wis. 463 360
v. Schneider, 24 Wis. 301, 30 Wis. 570 363, 364, 1667, 3788, 3792, 4259, 4260, 4263, 4331, 4344, 4346
Singleton v. Allen, 2 Strobh. Eq. 166 2087, 2089
v. Bolton, 3 Doug. 293 4485
v. Boone County Ins. Co., 45 Mo. 250 3052
v. Eastern Counties R. Co., 7 C. B. (N. S.) 287 151
v. Kennedy, 9 B. Mon. 222 1270
v. Lewis, 2 Hill 408 1206, 1212
v. Singleton, 5 Dana 97 1121
v. Southwestern R., 70 Ga. 464 3527
v. Williamson, 7 H. & N. 410 161
v. Wilson, 85 Tenn. 344 2699
Sinker v. Diggins, 76 Mich. 557 537, 570, 2405, 2415
v. Kidder, 123 Ind. 528 2433
Sinkler's Est., 10 Pa. Dist. 399 1121
Sinnickson v. Perkins, 231 Ill. 492 2786, 2801
Sinnott v. Mullin, 82 Pa. 333 2608, 2610
Sinsheimer v. Tobias, 53 N. Y. Super. 508 2892
Sinski v. Brust, 66 App. Div. (N. Y.) 34 4321
Sioux City R. Co. v. Brown, 13 Neb. 317 1063, 4154
v. Finlayson, 16 Neb. 578 1464, 4828

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Sioux Nat. Bank v. Norfolk State Bank, 5 C. C. A. 448, 56 Fed. 139 4379
Sipe v. Taylor, 106 Va. 231 741
Sipes v. Puget Sound E. R., 54 Wash. 47 152
Sipley v. Stickney, 190 Mass. 43 2578, 2905
Sipola v. Winship, 74 N. H. 240 4380
Sipp v. Coleman, 179 Fed. 997 4502
v. Siegel-Cooper Co., 23 N. Y. Misc. 141 1451
Sipple v. Laclede G. Co., 125 Mo. App. 81 4900
Sir William Armstrong, The, 53 Fed. 145 2719
Sirius, The, 57 Fed. 851, rev'g 53 Fed. 611 2718, 2719
Sirk v. Emery, 184 Mass. 22 1440, 1443, 1449
Sirlott v. Tandy, 3 Dana 142 1928, 2330
Sisk v. Hurst, 1 W. Va. 53 4648
v. Rosenberger, 82 Mo. 46 2821
v. Woodruff, 15 Ill. 15 2094
Sissing v. Beach, 99 Mich. 439 4675, 4686
Sisson v. Barnum, 157 App. Div. (N. Y.) 149 796
v. Cleveland, etc., R. Co., 14 Mich. 489 217, 284, 1419, 1436, 1452, 2367, 2954, 3349, 3375, 3389, 3428
v. Lampert, 159 Mich. 509 1267, 1350
Sistare v. Best, 88 N. Y. 527 2977
Siter v. Robinson, 2 Bailey 274 809
Sitka, The, 156 Fed. 427 5012, 5013
Sitton v. Macdonald, 25 S. C. 68 173
Six Carpenter's Case, 8 Coke, 146a 828
Six Hundred and Thirty Casks, 14 Blatch. 517 3385
Sixteen Hundred Tons Nitrate of Soda v. McLeod, 61 Fed. 849 3302
Sixth Ave. R. Co. v. Metropolitan E. R. Co., 138 N. Y. 548 4138
Sizer v. Melton, 129 Ga. 143 2274, 2277
Sizer & Co. v. Dopson, 89 S. C. 535 1363, 1368, 4240
Skaaraas v. Finnegan, 31 Minn. 48 32 Minn. 107 1989, 2008, 2009, 2992
Skaggs v. Emerson, 50 Cal. 3 3122, 3123
Skagit R. & L. Co. v. Cole, 2 Wash. 57 252, 294
Skaife v. Jackson, 3 B. & C. 421 749
Skally v. Shute, 132 Mass. 367 3125, 3127
Skeel v. Spraker, 8 Paige 182 571
Skeele C. Co. v. Arnold, 200 Fed. 393 2255, 2256
Skeen v. Springfield E. & T. Co., 42 Mo. App. 158 4273
Skeffington v. Eylward, 97 Minn. 244 4641
Skelton v. London, etc., R. Co., L. R. 2 C. P. 631 161
Skilding v. Warren, 15 Johns. 270 1825
Skile's Est., 211 Pa. 631 2853
Skiles v. St. Louis, etc., R. Co., 130 Mo. App. 162 4778
Skinker v. Smith, 48 Mo. App. 91 586, 589
Skinn v. Reutter, 135 Mich. 57 152, 2447
Skinner v. Allison, 54 App. Div. 47 42
v. Australian & B. L. D. & A. Co., 15 Vict. L. R. 674 2053
v. Franklin County, 179 Fed. 862 955
v. Gibson, 86 Kan. 431 189, 357, 3217
v. Grant, 12 Vt. 456 4599
Skinner v. Kerwin O. G. Co., 103 Mo. App. 650 2374
v. London Marine Ins. Co., 14 Q. B. Div. 882 114
v. Mulligan, 56 Ill. App. 47 2390
v Phillips, 4 Mass. 68 1598, 1600, 1634
v. Pinney, 19 Fla. 42 4211
v. Powers, 1 Wend. 451 4576, 4596
v. Santa Rosa, 107 Cal. 464 1045
v. Shew, [1894] 2 Ch. 581 244
v. Skinner, 38 Neb. 756 3097
v. Tinker, 34 Barb. 333 291
v. Valentine, 59 N. Y. 473 2768
v. Walker, 98 Ky. 729 717
Skipper v. Clifton Mfg. Co., 58 S. C. 143 1348
Skipweth v. Clinch, 2 Call 253 1068
Skipworth v. Morton, 3 Call 234 695
Skirm v. Hilliker, 66 N. J. L. 410 172
Skoglund v. Minneapolis St. R. Co., 45 Minn. 330 3518
Skonieczny v. Churchman, 7 Pennew. (Del.) 226 4947
Skoog v. Mayer, 122 Minn. 209 2404
Skookum O Co. v. Thomas, 162 Cal. 539 2014
Skottowe v. Oregon S. L., etc., R. Co., 22 Ore. 430 4909
Skow v. Green Bay & W. R. Co., 141 Wis. 21 4700
Skowhegan W. Co. v. Skowhegan, 102 Me. 323 2668, 2676, 4067
Skrainka v. Dertel, 14 Mo. App. 474 1720
v. Rohan, 18 Mo. App. 340 2852
Slachert v. Reining, 135 Wis. 194 3665
Slack v. Lowell, 3 Taunt. 157 1880
v. McLagan, 15 Ill. 242 2198
v. Milwaukee-Mechanics' Ins. Co., 186 Ill. App. 565 3048, 3052
v. Stephens, 19 Colo. App. 538 1749, 1761
Slacum v. Pomery, 6 Cranch 221 1146, 1150, 1151, 1905
Slade v. Halsted, 7 Cow. 322 1829, 1865
v. Mutrie, 156 Mass. 19 642
Slagle v. Entrekin, 44 Ohio St. 637 1639
Slasson v. Davis, 1 Aik. 73 628
Slater v. Hayward R. Co., 26 Conn. 128 3036
v. Kimbro, 91 Ga. 217 4625
v. Mersereau, 64 N. Y. 147 433
v. Rawson, 1 Metc. (Mass.) 450 2055, 2058
v. Sherman, 5 Bush 206 1269, 4657
v. Skirving, 51 Neb. 108 1404
v. Walter, 148 Mich. 656 4644
Slatter v. Meek, 35 Ala. 528 3719
Slatterly v. Police Jury, 2 La. Ann. 444 2816
Slattery v. Rhud, 23 N. D. 274 3812, 4168
v. St. Louis, 120 Mo. 183 3964
v. Schapero, — Mass. —, 104 N. E. 440 1601
Slaughter v. American Baptist P. Soc. (Tex. Civ. App.), 150 S. W. 224 431, 4177, 4191, 4192, 4198
v. Denmead, 88 Va. 1019 172
v. Gerson, 13 Wall. 379 4381
v. Goldberg, Bowen & Co., 26 Cal. App. 318 4877
v. Johnson, 181 Ill. App. 693 4524
v. Marlow, 3 Ariz. 429 2241
v. Metropolitan St. R. Co., 116 Mo. 269 1374
v. Slaughter, 7 Houst. 482 623
v. Standard Mach. Co., 148 N. C. 471 527, 538
v. Swift, 67 Ala. 494 827

[REFERENCES ARE TO PAGES]

Slavin v. State, 152 N. Y. 45 3887, 3922
Slayback v. Jones, 9 Ind. 472 531, 541, 550
Sledge v. Arcadia Orchards Co., 77 Wash. 477 910, 925, 2585, 2634
v. Weldon L. Co., 140 N. C. 459 1477
Sleepy Eye Milling Co. v. Hartman, 184 Ill. App. 308 531, 554
Sleet v. Sleet, 109 La. 302 735
Sleght v. Rhinelander, 1 Johns. 192 816, 825
Sleight v. Ogle, 4 E. D. Smith 445 4839
Slette v. Great Northern R. Co., 53 Minn. 341 4827
Sletten v. Madison, 122 Wis. 251 1370, 4690
Sleuter v. Wallbaum, 45 Ill. 43 2293
Slevin v. Morrow, 4 Ind. 425 674
Slifer v. State, 114 Ind. 291 1624
Slight v. Gutzlaff, 35 Wis. 675 3750
Sligo F. Co. v. Hobart-L. T. Co., 153 Mo. App. 442 3788, 3792, 4256
Slingerland v. Bennett, 66 N. Y. 611 2849, 4401, 4412, 4432
v. Morse, 8 Johns. 474 796, 802, 803
v. Swart, 13 Johns. 255 1132
Sloan v. Alleghany Co., 91 Md. 501 2278, 2403
v. Baird, 162 N. Y. 327, aff'g 12 App. Div. (N. Y.) 481 1094, 1455, 1941, 1998
v. Coburn, 26 Neb. 607 4360
v. Dale, 90 Mo. App. 87 2472
v. Edwards, 61 Md. 89 138, 1268, 1316, 1375, 4662, 4669, 4682, 4742, 4775, 4780
v. Gibbes, 56 S. C. 480 2781, 2844, 2855, 2861, 2863
v. Hanson Mfg. Co., 150 Ill. App. 544 1110
v. Hart, 150 N. C. 269 1368, 3182, 3189, 3192
v. Langert, 6 Wash. 26 1687, 1689, 1699, 1701
v. McKane, 131 App. Div. (N. Y.) 244 2318
v. Petrie, 16 Ill. 262 791, 822, 4569
v. Pierce, 74 Kan. 65 1327
v. Speaker, 63 Mo. App. 321 4774
v. Wolf, 124 Fed. 196 2390, 2392, 2403
Sloan's App., 168 Pa. 422 1085
Sloane v. Southern California R. Co., 111 Cal. 668 86, 90, 135, 136, 371, 1512, 3439, 3452, 3457, 3461, 3465, 3472, 3474, 3476, 3477, 3484, 3521, 3528, 3529, 4667, 4686, 4688
Slocomb v. Lurty, Hempst. C. C. 431 664, 666
Slocum v. Bracy, 55 Minn. 249 2053
v. Riley, 145 Mass. 370 1618
Sloggy v. Crescent C. Co., 72 Minn. 316 172, 2452
Sloman v. Walter, 1 Brown Ch. 418 839, 1556
v. Western R. Co., 67 N. Y. 208 3534
Sloo v. Cool, 15 Ill. 47 2854
Sloop v. Wabash R. Co., 93 Mo. App. 605 3345
Sloss Marblehead L. Co. v. Smith, 11 Ohio C. C. 213 1366
Sloss-Sheffield Steel & Iron Co. v. Devaney, — Ala. —, 66 So. 523 4616, 4650, 4838
v. Dickinson, 167 Ala. 211 1379
v. Drane, 160 Fed. 780 4867
Sloss-Sheffield Steel & Iron Co. v. Dunn, 9 Ala. App. 524 38, 4691
v. Holway, 144 Ala. 280 4887
v. McCullough, 177 Ala. 448 3852, 3877
v. Mitchell, 161 Ala. 278 475, 3767, 3769, 3849, 3854, 3923
v. Mitchell, 181 Ala. 576 3860, 3873, 3877, 3880, 3883, 3884, 3887, 3911, 3922, 3931
v. Mitchell, 167 Ala. 226 3880, 3884
v. O'Neal, 169 Ala. 83 4637, 4647
v. Salser, 158 Ala. 511 3818
v. Stewart, 172 Ala. 516 39, 4718
v. Tacony Iron Co., 183 Fed. 645, aff'd 188 Fed. 896 1146
v. Vinzant, 153 Ala. 212 4767, 4768
v. Webb, 184 Ala. 452 1427, 1442
Slosson v. Beadle, 7 Johns. 72 838, 889
Sloteman v. Thomas & W. Mfg. Co., 69 Wis. 499 524
Sluby v. Champlin, 4 Johns. 460 2832
Sluder v. St. Louis T. Co., 189 Mo. 107 108, 4721
Slusser v. Burlington, 47 Iowa 300 2650
Slutter v. Kirkendall, 100 Pa. 307 1763
Sluyter v. Smith, 2 Bosw. 573 1530
Smale v. Wrought Washer Mfg. Co., 160 Wis. 331 4821
Small v. Burke, 92 App. Div. (N. Y.) 338 860 931
v. Chicago, R. I. & P. R. Co., 55 Iowa 582 68
v. Clark, 97 Me. 304 3189
v. Herkimer Mfg. Co., 2 N. Y. 330, 340 874
v. Hicks, 81 Ga. 691 2809
v. Lee, 4 Ga. App. 395 2668, 2679
v. McGovern, 117 Wis. 608 4645
v. Reeves, 14 Ind. 163 1956, 2209
v. Rush (Tex. Civ. App.), 132 S. W. 874 664
Smalley v. Appleton, 75 Wis. 18 4795
v. Kerfoot, 2 Strange 1094 1390
v. Smalley, 81 Ill. 70 1269, 3827
v. Vogt, — Tex. Civ. App. —, 166 S. W. 1 4391
Smalling v. Jackson, 133 App. Div. (N. Y.) 382 268, 4158
Smalls v. Brennan, 14 Ga. App. 84 2340
Smallwood v. Norton, 21 Me. 83 1660, 1663
Smart v. Allegart, 14 Phila. 179 3124, 3185
v. Blanchard, 42 N. H. 151 4506
v. Kansas City, 209 Mo. 162 4659, 4675
v. McKay, 16 Ind. 45 939
v. O'Callaghan, 4 Vict. L. R. (law) 448 1251
v. Wabash R. Co., 164 Mo. App. 61 4731, 4732
Smead v. Green, 5 Ind. 308 712
v. Mead, 3 Conn. 253 1145
Smedes v. Bank, 20 Johns. 372 2929
v. Hooghtaling, 3 Caines 48 1567, 1571
Smedley, The, 216 Fed. 926 5000
Smedley v. Soule, 125 Mich. 192 4519, 4531, 4532
Smeed v. Foord, 1 E. & E. 602 174, 197, 217, 225, 327, 476, 1366, 2339, 2365, 2366, 2603, 2641
Smeltzer v. White, 92 U. S. 390 1873
Smethurst v. Woolston, 5 W. & S. 106 2309, 2318
Smetz v. Kennedy, Riley 218 1020
Smid v. Bernard, 31 N. Y. Misc. 35 4552
Smiddy v. Pearlstine, 201 Mass. 246 4538
Smiley v. East St. Louis & S. R. Co., 169 Ill. App. 29 4933, 4936

[REFERENCES ARE TO PAGES]

Smiley v. Meir, 47 Ind. 559 1918
v. Smiley, 18 Ohio St. 543 779
Smith, Estate of, 1 N. Y. Misc. 253 1117
Smith, In re, 97 App. Div. (N. Y.) 157 1128
Smith v. Ackerman, 5 Blackf. 541 1845, 2153
v. Adams, 27 Tex. 30 4609
v. Addleman, 5 Blackf. 406 3717
v. Adelberg, 72 Wash. 434 2501
v. Alabama, 124 U. S. 465 5023, 5034
v. American B. Co., 160 N. C. 574 1691, 1696
v. American Exp. Co., 108 Mich. 572 3414, 3415
v. American O. Co. v. Abbott, 1 Pa. Dist. 174 3176
v. Anderson, 70 Vt. 424 4296, 4303
v. Ankrim, 13 S. & R. 39 3138
v. Applegate, 1 Daly 390 717
v. Appleton, 155 App. Div. (N. Y.) 520 1454, 4391
v. Arthur, 116 N. C. 871 1790
v. Atchison, etc., R. Co., 122 Mo. App. 85 346, 3481
v. Atkinson, 18 Colo. 255 1717, 1741
v. Atlantic Coast Line R. Co., 210 Fed. 761 5078, 5083
v. Atlas-P. C. Co., 66 W. Va. 599 243, 2695
v. Austin, 49 Mich. 286 4645
v. Bagwell, 19 Fla. 117 1268, 1305, 4656
v. Baker, 20 Fed. 709 146, 302
v. Baker, L. R. 8 C. P. 350 4235
v. Ballou, 1 R. I. 496 749
v. Bangham, 156 Cal. 359 1987
v. Bartholomew, 1 Metc. (Mass.) 276 749, 778
v. Bell, 91 Ky. 655 3697, 3712
v. Bergengren, 153 Mass. 236 837
v. Berry, 18 Me. 122 291, 1985, 2309, 2329
v. Berry, 37 Me. 298 1606
v. Bing, 3 Ohio 33 2857
v. Board of Education, 208 N. Y. 84 1046
v. Bohon, 12 Bush 448 1548
v. Bolles, 132 U. S. 125 57, 4389, 4398, 4408, 4424
v. Bond, 10 Bing. 125, 2 Dowl. & L. 460 1555
v. Bowers, 2 Neb. (Unof.) 613, 91 N. W. 521 1671
v. Bowers, 2 Neb. (Unof.) 611, 89 N. W. 596 1673
v. Bowman, 32 Utah 33 2754
v. Boyer, 2 Watts 173 525
v. Brady, 17 N. Y. 173 2665, 2674, 2683
v. Braum, 37 La. Ann. 225 3663, 3681
v. Briggs, 3 Denio 73 2683
v. Brinker, 17 Mo. 148 3134
v. British, etc., Co., 86 N. Y. 408 135
v. Bromley, 2 Doug. 695 712
v. Brooke, 49 Pa. 147 742
v. Brooks, 18 Ga. 440 1826, 1866
v. Brown, 3 Hawks 580 752
v. Brown, 164 Mass. 584 861, 2323
v. Bryant, 1 Kan. App. 754 4321, 4322
v. Buchanan, 1 East 6 1147, 1878
v. Burrus, 106 Mo. 94 4609
v. Butler, 176 Mass. 38 1008
v. Butler, 48 Mo. App. 663 4781
v. C. C. & D. R. Co., 38 Iowa 518 315
v. C. H. & D. R. Co., 3 Ohio Dec. 192 (Cincinnati Super. Ct.) 3532
Smith v. C. & N. W. R. Co., 60 Iowa 522 2485
v. Caldwell, 22 Mont. 331 4241
v. Carney, 127 Mass. 179 2156
v. Case T. M. Co., 50 Pa. Super. Ct. 92 4285, 4291
v. Cauthen, 98 Miss. 746 2010
v. Charter Oak L. Ins. Co., 64 Mo. 330 3084
v. Chatham, 3 Caines 56 1480, 1481, 1482
v. Chicago City R. Co., 165 Ill. App. 190 1473, 4718, 4792
v. Chicago City R. Co., 169 Ill. App. 570 147, 4743
v. Chicago, R. I. & P. R. Co., 42 Okla. 577 4861
v. Chicago, R. I. & P. R. Co., 183 Mo. App. 180 3346
v. Chicago & A. R. Co., 108 Mo. 243 4730
v. Chicago & A. R. Co., 119 Mo. 246, 252 4702, 4705
v. Chicago & A. R. Co., 127 Mo. App. 160 4169, 4185
v. Chicago, etc., R. Co., 38 Iowa 518 284, 316, 408, 3803, 3893
v. Chicago, etc., R. Co., 81 Neb. 186 3893
v. Chicago, etc., R. Co., 112 Mo. App. 610 3334
v. Chilton, 84 Va. 840 749
v. Cissel, 22 App. Cas. (D. C.) 318 4861, 4929
v. Clark, 38 Colo. 89 1250
v. Claussen Park D. & L. Dist., 229 Ill. 155 3986
v. Cleveland, 6 Met. 332 1528
v. Clopton, 48 Miss. 66 2795
v. Coe, 170 N. Y. 162 2369, 2373
v. Colonial Mut. F. Ins. Co., 6 Vict. L. R. 200 3067
v. Columbia Ins. Co., 17 Pa. 253 3047
v. Commonwealth, 25 Gratt. 780 1597
v. Commonwealth, 210 Mass. 259 4034, 4043, 4048
v. Commonwealth Ins. Co., 49 Wis. 322 3021
v. Compton, 3 B. & Ad. 407 296, 297, 298, 307, 2109, 2885, 3161
v. Compton, 55 Cent. L. J. 409 3684
v. Compton, 67 N. J. L. 548 3676, 3680
v. Condry, 1 How. 28 161, 212, 4194
v. Connell, 32 Me. 126 2147
v. Consumers' C. O. Co., 86 Fed. 359 2612
v. Consumers' I. Co., 52 N. Y. Super. Ct. 430, 857 4186
v. Cook (Tex. Civ. App.), 142 S. W. 26 3699
v. Coolidge, 68 Vt. 516 624, 2336
v. Coon, 89 Neb. 776 4935
v. Coopers, 9 Iowa 376 977, 994
v. Corege, 53 Ark. 295 1869, 1870
v. Cowen, 3 App. Div. 230, aff'd 157 N. Y. 714 2606
v. Cozart, 2 Head 526 2386, 2387, 2406
v. Crocker, 5 Mass. 538 1559
v. Crouse, 24 Barb. 433 1783, 1786
v. Curran, 138 Fed. 150 233, 2702, 2872, 4382
v. Curry (Ky.), 146 S. W. 434 253
v. Curry, 148 Ky. 166 2275
v. Davis, 150 Ala. 106 2598, 2670, 2695, 2701
v. Davis, 45 N. H. 566 2462, 2484, 2489

[REFERENCES ARE TO PAGES]

Smith v. Day, 21 Ch. Div. 421 1714, 1722, 1737, 1740
v. Day, 136 Fed. 964 1510, 4653, 4797
v. Delano, 179 Mo. 242 3426, 3525
v. Des Moines, 84 Iowa 685 4827
v. Des Moines Nat. Bank, 107 Iowa 620 716
v. Dickenson, 3 B. & P. 630 860
v. Dillingham, 33 Me. 384 1661, 4350, 4352, 4353
v. Dinkelspiel, 91 Ala. 528 4185
v. Dittman, 16 Daly 427 4796
v. Dixon, 27 Ohio St. 471 2115, 2159
v. Dobson, 3 M. & Gr. 59 161
v. Dodge, 37 Mich. 354 4315
v. Duffy, 57 N. J. L. 679 4395, 4409
v. Duke, 6 Ga. App. 75 4219
v. Dukes, 5 Minn. 373 1505
v. Dunlap, 12 Ill. 184 2318, 2330, 2331
v. Eakin, 2 Sneed 456 1685, 1700
v. Eastern B. & L. Ass'n, 116 N. C. 73 4646
v. Elliott, 9 Pa. 345 3842, 3845
v. Elrod, 122 Ala. 269 746
v. Erwin, 5 Yerg. 296 1798
v. Eubanks, 72 Ga. 280 3211, 3212
v. Fagan, 2 Dev. 292 1636
v. Fahey, 63 W. Va. 346 1267
v. Ferrand, 7 B. & C. 19 667, 673
v. Fibre Coal Co., [1913] 1 Scot. L. T. 263, [1913] W. C. & Ins. Rep. 343 5187
v. Fields, 139 Ky. 60 4644, 4647
v. Findley, 34 Kan. 316 3282
v. First Cong. Meeting House, 8 Pick. 178 2676
v. Flanders, 129 Mass. 322 1221, 2703, 2714
v. Foote, 81 Hun 128 2379, 2408
v. Fordyce, 190 Mo. 1 152, 4808
v. Foster, 36 Vt. 705 2230
v. Foster, 18 Vt. 182 4289
v. Franklin, 1 Mass. 480 422
v. French, 141 N. C. 1 527
v. Freyler, 4 Mont. 489 2814
v. Gardner, 36 Neb. 741 698
v. General Motor Cab Co., Ltd., [1911] App. Cas. 188 5176
v. German Bank, 60 Miss. 69 1226
v. Giddy, [1904] 2 K. B. 448 3
v. Glynn (Mo. App.), 144 S. W. 149 4646
v. Goff, 29 R. I. 439 4227, 4285
v. Gonder, 22 Ga. 353 362, 363, 364, 4256, 4260
v. Goodlett, 92 Tenn. 230 1874
v. Goodman, 75 Ga. 198 124
v. Graves — Ind. App. —, 108 N. E. 168 4620
v. Green, 1 C. P. Div. 92 172, 197, 294, 2447, 2448, 4371
v. Green, 128 Ga. 90 548
v. Gregg, 9 Neb. 212 1725
v. Griffith, 3 Hill 333 1435, 1438, 2297, 3408, 3434
v. Griswold, 15 Hun 273 1460
v. Gugerty, 4 Barb. 614 39, 1419, 2664, 2666, 2667
v. Gulf, C. & S. F. R. Co., 177 Mo. App. 269 3385
v. Gunn (Tex. Civ. App.), 122 S. W. 919 34
v. Gunn, 57 Tex. Civ. App. 339 2627
v. Hall, 69 Conn. 651 3672
v. Hallahan, 75 N. H. 534 1392
v. Harrison, 1 F. & F. 565 4590
v. Hartog, 23 N. Y. Misc. 353 4302
v. Hatcher, 102 Ga. 158 4915, 4917
Smith v. Havens, 6 Colo. 297 1355
v. Haverhill Mut. F. Ins. Co., 1 Allen 297 3018
v. Hawkins, 6 Conn. 444 1529
v. Healey, — N. Y. Misc. —, 121 Supp. 230 434, 4300
v. Hewitt-L. L. Co., 55 Wash. 357 4722, 4785
v. Hicks, 14 N. M. 560 175, 244, 1450, 2617, 3242
v. Hicks, 5 Wend. 48 2862
v. Hightower, 76 Ga. 630 1828
v. Hill, 13 Ark. 173 2489, 2529
v. Hill, 22 Barb. 656 1419
v. Hilton, 147 Ala. 642 4207
v. Hintrager, 67 Iowa 109 4609
v. Hiscock, 14 Me. 449 1818
v. Hobleman, 12 Neb. 502 658
v. Hockenberry, 138 Mich. 129 4977
v. Hodges, 8 Ga. App. 785 2404
v. Holbrook, 82 N. Y. 562 1961
v. Holcomb, 99 Mass. 552 334, 339, 1296, 4662, 4668
v. Holmes, 167 N. C. 561 32
v. Holmes, 54 Mich. 104 2645
v. Horlock, [1913] W. C. & Ins. Rep. 441, 6 B. W. C. C. 638 5176
v. Howell, 6 Ex. 730 302, 403, 2892, 3161
v. Hubbell, 142 Mich. 637 4502, 4518, 4523, 4524, 4531, 4533
v. Hudson, 45 Ga. 208 2199
v. Huesman, 30 Ohio St. 662 1788, 1790
v. Hughes, 50 Wis. 620 2059, 2073, 2074, 2084, 2087, 2150
v. Hughey, 66 Ore. 408 476, 3208
v. Hunt, 50 Ind. App. 592 2404
v. Hurd, 12 Metc. (Mass.) 371 127
v. Hurley, 29 R. I. 489 4221
v. Hyndman, 10 Cush. 554 4611, 4612
v. Industrial Acc. Commission of California, 26 Cal. App. 560 5033, 5070
v. Ingram, 134 Ga. 523 4259
v. Ingram, 8 Ired. 175 3733, 3734
v. Ins. Co., 7 Metc. (Mass.) 448 3014
v. Jackson, 2 Edw. Ch. 28 3729
v. Jansen, 8 Johns. 111 1556, 1811
v. Jefts, 44 N. H. 482 2056, 2058, 2153
v. Johnson, 23 Cal. 63 1020
v. Johnson, 8 Tex. 418 1524
v. Johnson, 30 S. D. 200 2047
v. Johnson, 15 T. L. Rep. 179 (1899) 2437
v. Johnson, 45 Iowa 348 2473, 2474
v. Jones, 15 Johns. 229 372
v. Jones, 97 Ky. 670 2205
v. Jones, 11 Tex. Civ. App. 18 344, 3203, 3207
v. Kansas City, 128 Mo. 23 3768, 4031
v. Kaufman, 30 Pa. Super. Ct. 265 2699
v. Keeley, 146 Iowa 660 2144, 2145
v. Keels, 15 Rich. 318 790
v. Keith & P. C. Co., 36 Mo. App. 567 2231, 2232, 2250
v. Kelley, 27 Me. 237 795
v. Kendall, 9 Mich. 241 1902
v. Kidd, 68 N. Y. 130 688
v. King, 62 Conn. 515 4639, 4645, 4646
v. Kirkpatrick, 79 Ga. 410 4396, 4397, 4421
v. Knight, 88 Iowa 257 1073, 1075
v. Kozlolek, 51 Pa. Super. Ct. 211 4639

[REFERENCES ARE TO PAGES]

Smith v. Lander (Tex. Civ. App.), 89 S. W. 19 1941, 1970
v. Lascelles, 2 T. R. 187 2914, 2915
v. Latour, 18 Pa. 243 1528
v. Lawrence, 98 Me. 92 2511
v. Lehigh Valley R. Co., 177 N. Y. 379 4861
v. Leo, 92 Hun 242 341, 342
v. Lewis, 3 Johns. 157 17
v. Lewis, 25 Conn. 624 2256
v. Lewiston S. Mill, 66 N. H. 613 741
v. Liscomb, 13 Tex. 532 2231
v. Lisher, 23 Ind. 500 1678
v. Livingstone, 111 Mass. 342 1825
v. Lockwood, 34 Wis. 72 1798
v. Long Island R. Co., 102 N. Y. 190 2464
v. Los Angeles & P. R. Co., 98 Cal. 210 284, 286, 2619
v. Lovelace, 1 Duv. 215 4522, 4529
v. Lowden, 1 Sandf. 696 591
v. Loyd, 11 Leigh 512 730, 736, 737
v. Lumber Co., 142 N. C. 26 377, 379, 2547, 2556, 2561
v. Lumpton, 8 Dana 73 1123
v. Luse, 30 Ill. App. 37 1204
v. McCarty, 119 Mass. 519 3728
v. McClosky, 45 Barb. 610 1943
v. McEnany, 170 Mass. 26 3121, 3154
v. McGregor, 10 Ohio St. 461 1655
v. McGuire, 3 H. & N. 554 3269
v. McKean, 99 Ind. 101 2804, 2816
v. McKenney, 22 Ohio St. 200 605, 606
v. McLean, 123 Ill. 210 3138, 3143
v. McLeod, 3 Ired. Eq. 390 2798
v. McMillan, 46 W. Va. 577 978
v. McNair, 19 Kan. 330 2383
v. Macomber, 23 R. I. 248 1267, 4841
v. Macon, 1 Hill Ch. (S. C.) 339 740
v. Maginnis, 75 Ark. 472 161
v. Manufacturers' Ins. Co., 7 Metc. (Mass.) 448 3016, 3028
v. Mapleback, 1 T. R. 441 456, 781
v. Marrable, 11 M. & W. 5 3140
v. Mason, 44 Neb. 610 2843, 2851, 2854, 2861, 2863
v. Masten, 15 Wend. 270 502, 4972
v. Matthews, 152 N. Y. 152 4544
v. Mauch Chunk, 3 Pa. Super. Ct. 495 4653, 4830, 4831
v. Mayor, 37 N. Y. 518 693
v. Merchants' & F.'s Bank, 14 Ohio C. C. 199 639
v. Metropolitan St. R. Co., 92 App. Div. (N. Y.) 213 1511
v. Metropolitan St. R. Co., 169 Mo. App. 610 4745
v. Meyers, 52 Neb. 70 4974
v. Michigan B. Co., 175 Ill. 619, 66 Ill. App. 516 4608
v. Michigan Cent. R. Co., 35 Ind. App. 188 4921, 4945
v. Michigan R. & C. Co., 175 Mich. 600 4402
v. Middleton, 23 Ky. L. Rep. 2010 1277, 4948
v. Milam, — Tex. Civ. App. —, 143 S. W. 293 3194, 3231
v. Milburn, 17 Iowa 30 4971, 4972
v. Miller, 43 N. Y. 171, 52 N. Y. 546 669, 671
v. Miller, 8 N. J. L. 175 1541
v. Miller, 145 Ill. App. 606 4317
v. Milwaukee B.'s & T.'s Exch., 91 Wis. 360 4744
v. Mine & S. S. Co., 32 Utah 21 1454
Smith v. Minnesota-M. Co., 168 Fed. 777 407, 410
v. Molleson, 148 N. Y. 241 2743, 2745, 2747
v. Monteith, 13 M. & W. 427 754
v. Montgomery, 3 Tex. 199 2753
v. Moore Co., 19 Ohio C. C. 617 2764
v. Morgan, 73 Wis. 375 1136
v. Morgantown I. Co., 159 N. C. 151 1270, 1288
v. Mosby, 98 Ind. 445 1673
v. Mould, 87 Misc. (N. Y.) 199 704, 826, 827
v. Myers, 207 Ill. 126 1815, 1905
v. Nashville & K. Ry. Co., 88 Tenn. 611 4095
v. National C. & I. Co., 135 Ky. 671 4853
v. Neale, 2 C. B. (N. S.) 67 2382
v. Neeley, 2 Indian T. 651 989
v. Nettles, 9 La. Ann. 455 733
v. New Haven & N. R. Co., 12 Allen 531 2368, 3349, 3353, 3354, 3387
v. New Orleans, etc., R. Co., 106 La. 11 3395, 3427
v. Newell, 37 Fla. 147 833, 840, 883, 1941
v. Newton, 38 Ill. 228 1654
v. Norman, 3 Tenn. Cas. 419 (1875) 1892
v. North German Lloyd S. S. Co., 151 Fed. 222 3416
v. Northern Pac. Ry. Co., 79 Wash. 448 142
v. Northwestern Nat. L. Ins. Co., 123 Wis. 586 1090
v. O'Donnell, 8 Lea 468 183, 2695, 2697
v. Old Dominion B. & L. Ass'n, 119 N. C. 257 803, 827
v. Osborn, 143 Mass. 185 172
v. Overby, 30 Ga. 241 334, 4666
v. Owens, 21 Cal. 11 655, 669
v. Packard, 98 Fed. 793 1711
v. Packard, 152 Iowa 1 4383, 4391
v. Parker, 148 Ind. 127 41, 274
v. Parsons, 55 Minn. 520 1163
v. Parsons, 33 W. Va. 644 2144
v. Paul, 21 Mo. 51 1584
v. Peat, 9 Ex. 161 2587, 3155, 3167
v. Pennsylvania R. Co., 205 Pa. 645 4133
v. Pennsylvania R. Co., 246 Pa. 370 4659, 4725
v. Perry, 13 Ky. L. Rep. 683 (Ky. Super. Ct.) 1391
v. Pettus, 1 Stew. & P. 107 2211
v. Philadelphia, etc., R. Co., 87 Md. 48 1281, 1288, 1326, 3503
v. Phillips, 16 Ky. L. Rep. 615 3190, 3211
v. Phillips, 8 Phila. 10 3924, 3925, 3932
v. Phillips, 47 Wis. 202 4360
v. Pickham, 8 Tex. Civ. App. 326 1921, 1923
v. Pilcher, 130 Ga. 350 797, 1489
v. Pitts, 167 Ala. 461 668, 753, 2842, 2843
v. Pittsburgh & W. R. Co., 90 Fed. 783 335, 411, 1371, 1493, 4652, 4664, 4795
v. Pittsburgh, etc., R. Co., 23 Ohio St. 10 341, 3474, 3478, 4662
v. Plomer, 15 East 607 4208
v. Pond, 11 Gray 234 2192
v. Postal Tel.-C. Co., 174 Mass. 576 345

[REFERENCES ARE TO PAGES]

Smith v. Postal Telegraph-Cable Co., 167 N. C. 248 31, 49, 312
v. Postal Tel.-C. Co., 104 Tex. 171 3655
v. Preston, 104 Me. 156 3842
v. Price, 2 F. & F. 748 2914
v. Pryor, 2 Sawyer 461 4475
v. Pullman Co., 138 Mo. App. 238 342, 3543
v. Putnam, 107 Wis. 155, 168 1071
v. Railroad, 126 N. C. 712 4665
v. Raleigh, 3 Camp. 513 3125
v. Richards, 29 Conn. 232, 240 4959
v. Richardson, 3 Caines 221 3401
v. Robey, 6 Heisk. 546 4350
v. Robinson, 10 Allen 130 991
v. Robinson, [1893] 2 Q. B. 53 3120
v. Rockwell, 2 Hill 482 811
v. Rogers, 17 Johns. 340 670
v. Rogers, 14 Ind. 324 2768
v. St. Joseph, 55 Mo. 456 4757, 4758
v. St. Joseph, 122 Mo. 643 4108
v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727 3085
v. St. Louis S. W. R. Co., 186 Mo. App. 401 3420
v. St. Louis T. Co., 133 Mo. App. 202 390
v. St. Louis, etc., R. Co., 127 Mo. App. 53 3459, 3481, 3502, 3528
v. St. Paul, etc., R. Co., 30 Minn. 169 50, 148
v. St. Paul, etc., R. Co., 39 Wash. 355 13, 3952, 3984
v. Salt Lake City, 83 Fed. 784 2656
v. San Antonio (Tex. Civ. App.), 57 S. W. 881 3908
v. Sanborn, 6 Gray 134 361
v. Sanborn State Bank, 147 Iowa 640 276, 343, 716
v. Sanitary Dist. of Chicago, 260 Ill. 453 400
v. Savin, 141 N. Y. 315 2954, 4244, 4287
v. School Dist., 89 Kan. 225 2548
v. Scott, 2 C. & K. 580 4598
v. Screven, 1 McCord 368 719
v. Seattle, 18 Wash. 484 395
v. Seattle, 20 Wash. 613 3913, 3914
v. Sedalia, 182 Mo. 1 3846, 3877, 3880, 3905
v. Sedalia, 244 Mo. 107 3852, 3869, 3875, 3877, 3947
v. Shaffer, 50 Md. 132 1101, 1105
v. Shaw, 2 Wash. C. C. 167 616, 1902
v. Shepard, 15 Pick. 147 3122
v. Sherman, 4 Cush. 408 293, 1369, 3669
v. Sherwood, 2 Tex. 460 1269
v. Shumway, 2 Tyler 74 4572
v. Silvers, 32 Ind. 321 871
v. Sillyman, 3 Whart. 589 2047, 2207
v. Simon, 69 Mich. 481 463
v. Sloss Marblehead L. Co., 51 Ohio St. 518 2238, 2275
v. Smith, 116 App. Div. (N. Y.) 165 2555, 2574
v. Smith, 105 Ga. 717 718
v. Smith, 2 Hill 351 794
v. Smith, 20 Hun 559 4623
v. Smith, 2 Johns. 235 1147, 1878, 2337
v. Smith, 4 Johns. Ch. 284 1124
v. Smith, 50 N. H. 212 1391
v. Smith, 50 N. J. 218 3779
v. Smith, 18 R. I. 722 1074
v. Smith, 33 S. C. 210 960
v. Smith, 30 Vt. 139 1835
Smith v. Smith, 45 Vt. 433 2637
v. Smith, 25 Wend. 405 807
v. Snyder, 77 Va. 432 2294
v. Snyder, 15 Wend. 324 4349
v. South & W. R. Co., 151 N. C. 479 772
v. Southern R. Co., 88 S. C. 421 3447
v. Spokane, 16 Wash. 403 1466, 4804
v. Spooner, 3 Taunt. 246 4566
v. Sprague, 40 Vt. 43 2148
v. State, 17 Ind. 167 1627
v. State, 46 Md. 617 2868
v. Steele, 25 Vt. 427 2865
v. Stevens, 33 Colo. 427 4314
v. Stevens, 14 Colo. App. 491 4312, 4314
v. Stewart, The, Crabbe 218 2726
v. Stewart, 6 Johns. 46 3098
v. Stewart, 83 N. C. 406 2043
v. Stewart, 5 Pa. 372 4599
v. Stoddard, 10 Mich. 148 985, 992, 993
v. Story, 4 Humph. 172 1700
v. Stratton, 34 Tex. Civ. App. 171 368
v. Strong, 14 Pick. 128 2054, 2056, 2060, 2069, 2071
v. Strout, 63 Me. 205 675
v. Suechting, 156 Iowa 712 4569
v. Sun P. & P. Ass'n, 55 Fed. 240 4511, 4538, 4543
v. Teer, 21 Up. Can. Q. B. 412 2892
v. Thackerah, L. R. 1 C. P. 564 3917
v. Thielen, 17 La. Ann. 239 3210
v. Third Ave. R. Co., 10 App. Div. (N. Y.) 409 4830
v. Thomas, 2 Bing. N. C. 380 4540
v. Thomas, 149 N. C. 100 4640
v. Thompson, 8 C. B. 44, 65 Eng. C. L. 44 287, 357, 2570
v. Thompson, 55 Md. 5 3735, 3827
v. Times Co., 4 Pa. Dist. 399 4511, 4521, 4523, 4543, 4549, 4568
v. Todd, 3 J. J. Marsh. 306 1051, 1059, 1252
v. Tolan, 158 Mich. 89 4644
v. Tucker, 25 Tex. 594 1525
v. Turner, 33 Ore. 379 1875
v. Turner, 101 Md. 584 2744
v. Union Bank, 5 Pet. 518 745
v. United States, 11 Ct. of Cls. 707 2714
v. Velie, 60 N. Y. 106 1108, 2441
v. Walker, 1 Call. 24 608
v. Wall, 12 Colo. 363 527
v. Walton, 5 Houst. 141 789
v. Ward, 66 W. Va. 190 2114
v. Watson, 14 Vt. 337 2464
v. Waugh, 84 Va. 806 681
v. Way, 6 Allen 212 289
v. Webster, 23 Mich. 298 1330
v. Wedgwood, 74 Me. 457 860, 861, 923
v. Weed S. M. Co., 26 Ohio St. 562 1521
v. Werkheiser, 152 Mich. 177 2455, 4391
v. Western U. Tel. Co., 154 Ill. App. 499 3574
v. Western U. Tel. Co., 83 Ky. 104 170, 3564, 3605
v. Western U. Tel. C. Co., 57 Mo. App. 259 3546, 3547
v. Western U. Tel. Co., 80 Neb. 395 3563, 3565
v. Western U. Tel. Co., 150 Pa. 561 281, 3331, 3590
v. Western U. Tel. Co., 84 Tex. 359 3558
v. Wheeler, 7 Ore. 49 2259

[REFERENCES ARE TO PAGES]

Smith v. Whitaker, 23 Ill. 367 870, 871, 976, 1003
v. White, 73 Kan. 607 773
v. White, 165 Mo. 590 3694
v. White, 71 W. Va. 639 2113, 2151, 2182
v. Whiting, 11 Mass. 445 568
v. Whiting, 100 Mass. 122 35, 39, 1655, 1657
v. Whittlesey, 79 Conn. 189 1373, 1501, 4707, 4718, 4731
v. Wilbur, 35 Vt. 133 797
v. Williams, 117 Ga. 782 2124, 2389, 2395
v. Willoughby, 24 N. D. 1 4359
v. Wilmington & W. R. Co., 130 N. C. 304 3480, 3483
v. Winston, 10 Mo. 299 4349
v. Winter, 4 M. & W. 454 2823
v. Wise, 58 Ill. 141 3122
v. Wood, 1 N. J. Eq. 74 709, 711, 742
v. Woodfine, 1 C. B. (N. S.) 660 3677
v. Woolf, 169 Ala. 644 39
v. Wright, 1 Caines 43 3034, 3036
v. Wunderlich, 70 Ill. 426 257, 1282, 1315, 3209, 3217, 3220, 3733, 3734, 3735
v. Wyman, 16 Me. 13 4514
v. Yaryan, 69 Ind. 445 4971
v. Zent, 83 Ind. 86 4169
Smith Bros. v. Stern, — Misc. — (N. Y.), 148 N. Y. Supp. 1 379
Smith County v. Labore, 37 Kan. 480 4124
Smith G. Co. v. Newall, 22 R. I. 295 925
Smith R. & C. Co. v. Mitchell, 117 Ga. 772 673
Smith Sand & Gravel Co. v. Corbin, 81 Wash. 494 2527
Smith Timber Co. C. A. v. Auld, 134 C. C. A. 512, 218 Fed. 824 3792
Smith & Belfast Co., In re [1910] 2 Irish 285 127
Smith & Egge Mfg. Co. v. Webster, 87 Conn. 74 1369, 4270
Smitha v. Gentry, 20 Ky. L. Rep. 171 115, 118, 270
Smithers v. Hooper, 23 Md. 273 1127
Smithies v. Harrison, 1 Ld. Raym. 727 507
Smiths v. McConathy, 11 Mo. 518 3839
Smithson v. Southern Pac. Co., 37 Ore. 74 4748
Smithwick v. Hall, 59 Conn. 261 4305
v. Ward, 7 Jones 64 467
Smock v. Ripley, 62 Ind. 814 1918
v. Smock, 37 Mo. App. 56 2294
Smolenski v. Eastern Coal Dock Co., 87 N. J. L. 26 5208
Smolikowski v. Laibe, 170 Ill. App. 181 1032
Smoot v. Checketts, 41 Utah 211 748, 756, 757
v. Consolidated C. Co., 114 Ill. App. 512 4259, 4263
v. Kansas City, 194 Mo. 513 1357, 1504
Smoot's Case, 15 Wall. 36 2231
Smoots v. Foster, 16 Ohio C. C. 612 2423
Smoothing I. H. Co. v. Blakely, 94 S. C. 224 2252, 2261
Smout v. Ilbery, 10 M. & W. 1, 9, 10 2980, 2983
Smuggler-Union M. Co. v. Kent, 47 Colo. 320 3208, 3210
Smuller v. Union C. Co., 37 Pa. 68 704
Smullin v. Wharton, 86 Neb. 553 1051
Smyser v. Smyser, 3 W. & S. 437 1086
Smyth v. Boroff, 156 Mo. App. 18 2093, 2094, 2099
v. Lichtenstein, 137 App. Div. (N. Y.) 335 1465
v. Stoddard, 203 Ill. 424 1051, 4210, 4232
v. Wright, 15 Barb. 51 3297
Smythe v. New England L. & T. Co., 12 Wash. 424 739, 742
v. United States, 107 Fed. 376, aff'd 188 U. S. 156 1578, 1581, 1616
Smythe's Est. v. Evans, 209 Ill. 376 1430
Snadon v. Salmon, 135 Ky. 47 2125
Snaggs v. Stone, 7 Jones 382 1586
Snaith v. Mingay, 1 W. & S. 87 1148
Snapp v. Commonwealth, 82 Ky. 173 1133, 1579
Snarr v. Granite C. & S. Co., 1 Ont. 102 3913
Snarski v. Washington State C. Co., 53 Wash. 221 2026
Snattinger v. Topeka, 80 Kan. 341 1592
Snead v. Jones, 169 Ala. 143 4602, 4617
Snead I. Works v. Merchants' L. & T. Co., 225 Ill. 442 2684
Snedecor v. Pope, 143 Ala. 275 3199, 3736, 3741, 3772, 3819, 3827
Sneed v. Jenkins, 8 Ired. 27 3122
v. McFathridge, 43 Tex. Civ. App. 592 1604
v. Marysville G. & E. Co., 149 Cal. 704 4921, 4934
v. Wiester, 2 A. K. Marsh. 277 723
Sneesby v. Lancashire R. Co., L. R. 9 Q. B. 263 161
v. Lancashire & Y. R. Co., 1 Q. B. Div. 42 111
Snell v. Bangor Nav. Co., 30 Me. 337 1485
v. Cottingham, 76 Ill. 161 196, 202, 234
v. Cottingham, 72 Ill. 124 704
v. Delaware Ins. Co., 4 Dall. 430 3022, 3024
v. Iowa H. Co., 59 Iowa 701 2074
v. Taylor, 182 Ill. 473, aff'g 79 Ill. App. 462 1075
Sneller v. Hall, 90 Neb. 100 3189, 3201
Snelling v. Atchison, 7 Ky. L. Rep. 752 1215
v Norton Hill Colliery Co., [1913] W. C. & Ins. Rep. 497 5202
Sneve v. Lunder, 100 Minn. 5 1310, 3673
Snider v. McKelvey, 27 Ont. App. 339 887
v. Newell, 132 N. C. 614 4959
v. St. Louis, etc., R. Co., 73 Mo. 465 1400
v. Snider, 13 C. P. 156 2168
v. Stone, 78 Ill. App. 17 715
Snively v. Fahnestock, 18 Md. 391 164, 1390, 4162, 4184
Snoddy v. Foster, 1 Met. (Ky.) 160 1621
Snodgrass v. Chicago, 152 Ill. 600 4037, 4049
v. Reynolds, 79 Ala. 452 1986, 1989, 3189
v. Shader, 113 Ark. 429 2795
v. Snodgrass, 1 Baxter 157 1642
Snohomish River B. Co. v. Great Northern R. Co., 57 Wash. 693 754
Snook v. Anaconda, 26 Mont. 128 4748

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v. Raglan, 89 Ga. 251 2310
v. Snetzer, 25 Ohio St. 516 15
Snouffer v. Chicago, etc., R. Co., 105 Iowa 681 4033, 4043, 4050
Snow v. Boston, etc., R. Co., 65 Me. 230 1443, 1444, 2305, 4133
v. Carpenter, 49 Vt. 426 1311
v. Carruth, 1 Sprague 324 3301, 3423
v. Chandler, 10 N. H. 92 425, 774, 781, 782
v. Goodrich, 14 Me. 235 1908
v. Grace, 25 Ark. 570 1354, 1357
v. Hazlewood, 179 Fed. 182 2903
v. Judson, 38 Barb. 212 4566
v. New York, etc., R. Co., 185 Mass. 321 135, 4680
v. Nowlin, 43 Mich. 383 1143, 4394
v. Perry, 9 Pick. 539 790, 801
v. Pulitzer, 142 N. Y. 263 251, 3196, 3202, 3209, 3214
v. Schomacker Mfg. Co., 69 Ala. 111 2405
v. Triesheimer, 220 Ill. 106 760
v. Union Ins. Co., 119 Mass. 592 3029
v. Union & Mut. M. Ins. Co., 119 Mass. 592 3014
v. Ware, 13 Metc. (Mass.) 42 356, 2666, 2676
Snowden v. Kittanning Ins. Co., 122 Pa. St. 502 3017
v. Shelby County, 118 Tenn. 725 4153
v. Waterman, 110 Ga. 99 1098, 1138
v. Waterman, 105 Ga. 384 1371, 2370, 2447, 2448
Snowdon v. Davis, 1 Taunt. 359 2993
Snyder v. Andrews, 6 Barb. 43 469
v. Blair, 33 N. J. Eq. 208 2835
v. Bougher, 14 Pa. Dist. 757 2241
v. Boviard, 122 Pa. 442 1043
v. Colorado Springs, etc., R. Co., 36 Colo. 288 113
v. Cowan, 50 Mo. App. 430 4154
v. Fidler, 135 Iowa 304 2511
v. Findley, 1 N. J. L. 48 4383
v. Frankenfield, 4 Pa. Dist. 767 1680
v. Fulton, 34 Md. 128 4544
v. Great Northern R. Co., 127 Minn. 518 4820
v. Griswold, 37 Ill. 216 991
v. Lake Shore, etc., R. Co., 131 Mich. 418 4926
v. Lane, 10 Ind. 424 2157
v. Lingo, 30 Pa. Super. 651 531
v. Louisville R. Co., 150 Ky. 816 1496
v. P., C. & St. L. R. Co., 11 W. Va. 14 3922
v. Pennsylvania R. Co., 55 Pa. 340 14
v. Pharo, 25 Fed. 398 754
v. Snyder, 6 Mich. 470 3728
v. Stemmons, 151 Mo. App. 156 4385
v. Tribune Co., 161 Iowa 671 459
v. Vaux, 2 Rawle 423 363, 4256
v. Wabash D. Co., 85 Mo. App. 495 3481
v. Walker, 13 Ohio C. C. 93 2575
v. Western Union R. Co., 25 Wis. 60 1434, 3970, 4133
v. Wiley, 33 Mich. 495 1850
Snyder L. L. & P. Co. v. Bowron (Tex. Civ. App.), 156 S. W. 550 4787
Sobieski v. St. Paul & D. R. Co., 41 Minn. 169 745, 4810
Société Anonyme v. Western D. Co., 46 Fed. 921 4491
Soderburg v. Chicago, St. P., M. & O. R. Co., 167 Iowa 123 3905
Soher v. Calveras County, 39 Cal. 134 1211
v. Supervisors, 39 Cal. 134 1041
Sohier v. Loring, 6 Cush. 537 783
v. Williams, 2 Curtis 195 1101
Sohman v. Metropolitan St. R. Co., 56 N. Y. Misc. 342 1359
Solberg v. Robinson, 34 S. D. 55 2134
Solen v. Virginia & T. R. Co., 14 Nev. 405 1050, 1495, 3527
Soley v. Jones, 208 Mass. 561 2696
Sollee v. Mengy, 1 Bailey 620 1019, 2767
Sollenberger's Est., 8 Pa. Dist. 626 1248
Sollund v. Johnson, 27 Minn. 455 4382, 4392
Solly v. Forbes, 2 Brod. & Bing. 38 769, 783
Solms v. Lias, 16 Abb. Pr. 311 1363, 1371, 3941
Solomon v. Bank of England, 13 East 135 595, 1818
v. Bates, 118 N. C. 311 4370
v. Chesley, 59 N. H. 24 1721
v. Dreschler, 4 Minn. 278 711
v. Merchants' & Planters' Nat. Bank, — Tex. Civ. App. —, 168 S. W. 1029 2794
v. Reese, 34 Cal. 28 828
v. Turner, 1 Stark. 51 1847, 1848
Solon v. Virginia, etc., R. Co., 14 Nev. 405 1050
Solotaroff v. Willner Edelstein Amusement Co. (Misc.), 147 N. Y. Supp. 938 2524
Soltau v. De Held, 2 Sim. (N. S.) 133 3839, 3848
Solway Prince, The, [1896] Prob. Div. 120 2718
Somers v. Johnson, 57 Vt. 274 2859
v. Musolf, 86 Ark. 97 209, 3189, 3194, 3229, 3232
v. Schmidt, 24 Wis. 417 2131
v. Wright, 115 Mass. 292 252, 1020, 2275, 2300
Somersworth Sav. Bank v. Worcester, 76 Me. 327 2815
Somerville, etc., R. Co. v. Doughty, 22 N. J. L. 495 3976, 3977, 4033, 4132
Sommer v. Adler, 36 App. Div. (N. Y.) 107 4330
v. Conhaim, 25 N. Y. Misc. 166 2511
Sommerfield v. St. Louis T. Co., 108 Mo. App. 718 1261, 3506
Sommerville v. Idaho I. Co., 21 Idaho 546 294, 1371
Sondes v. Fletcher, 5 B. & Ald. 835 357
Sondheim v. Gilbert, 117 Ind. 71 1849
Sonka v. Chatham, 2 Tex. Civ. App. 312 2257, 2260
Sonneberg v. Levy, 12 N. Y. Misc. 154 4223
Sonneborn v. Stewart, 2 Woods 599, rev'd 98 U. S. 187 4603, 4606, 4627, 4628
Sonnenberg v Riedel, 16 Minn. 83 752
Sonnenfeld M. Co. v. People's R. Co., 59 Mo. App. 668 1141
Sonnesyn v. Akin, 14 N. D. 248 4363
Sonniksen v. Hood River Gas & Electric Co., 76 Ore. 25 5020
Sonoma Valley Bank v. Hill, 59 Cal. 107 675
Sontag v. O'Hare, 73 Ill. App. 432 3250
Sooy v. State, 39 N. J. L. 136 2796
Sooysmith v. American S. Co., 28 App. Div. (N. Y.) 346 1692
Sopp v. Winpenny, 68 Pa. 78 3706
Sopris v. Webster, 1 Colo. 507 4325

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So Relle v. Western Union Tel. Co., 55 Tex. 308 3645, 3656
Sorenson v. Balaban, 4 N. Y. Ann. Cas. 7 4537
v. Balaban, 11 App. Div. (N. Y.) 164 4846, 4847
v. Case T. M. Co., 129 Wis. 366 4835
v. Keyser, 59 Fed. 163 3307
v. Northern Pac. R. Co., 36 Fed. 166 3392
v. Oregon P. Co., 47 Ore. 24 1102, 1141, 1502
Sorg v. Crandall, 129 Ill. App. 255 1103
Sornberger v. Canadian Pac. R. Co., 24 Ont. App. 263 1466, 1469
Sortor v. Strassheim, 8 Colo. 185 1719
Sosman v. Conklin, 65 Mo. App. 319 1777
Sotebier v. St. Louis T. Co., 203 Mo. 702 4732, 4749
Sotel v. New York, 81 N. Y. Misc. 344 1417
Sotham v. Drovers & T. Co., 239 Mo. 606 4522, 4550, 4582
Soucy v. Louis Obert Brewing Co., 180 Ill. App. 69 3232
Soudan P. Co. v. Stevenson, 100 Ark. 384 1060
Souder v. Schechterly, 91 Pa. 83 703, 728, 736
Soule v. Deering, 87 Me. 365 2512
v. Soule, 157 Mass. 451 1114
v. Union Bank, 45 Barb. 111, 30 How. Pr. 105 679
v. White, 14 Me. 436 430, 1620
Souleyret v. O'Gara C. Co., 161 Ill. App. 60 4652
Sour Lake T. Co. v. B. Deutser F. Co., 39 Tex. Civ. App. 86 2240, 2237, 2247
Souter v. Codman, 14 R. I. 119 3825
v. Drake, 5 B. & Ad. 992 1953
South v. Denniston, 2 Watts 474 4961
v. Leavy, Hardin 518 1108
v. State, 18 How. 396 1600
South African Territories v. Wallington, [1898] App. Cas. 309 273
South Bay, The, 139 Fed. 273 2725
South Bend v. Turner, 156 Ind. 418 1466
South Bend Mfg. Co. v. Liphart, 12 Ind. App. 185 442, 3940
South Bend P. Co. v. Fidelity & D. Co., 32 Ind. App. 255 2872
South Bend R. Co. v. Goller, 46 Ind. App. 531 4674
South Bound R. v. Burton, 67 S. C. 515 3984, 3947
South Buffalo R. Co. v. Krikover, 176 N. Y. 301 3951
South Carolina Ins. Co. v. Smith, 2 Hill (S. C.) 589 1583
South Carolina R. Co. v. Nix, 68 Ga. 572 4955
South Carolina S. Co. v. Wilmington, etc., R. Co., 46 S. C. 327 3935
South Carolina Soc. v. Johnson, 1 McCord 41 1583
South Chester Borough v. Garland, 162 Pa. 91 1044
South Covington, etc., Ry. Co. v. Bolt, 22 Ky. L. Rep. 906 4702
v. Burns, 150 Ky. 348 4799
v. Crutcher, 135 Ky. 698 149
v. Finan's Adm'x, 153 Ky. 340 5037, 5062, 5128
v. Gest, 34 Fed. 628 2409
v. Hardy, 152 Ky. 374 4743
v. Raymer, 132 Ky. 187 1357, 4732
v. Ware, 84 Ky. 267 149, 1377, 4658
South Fork C. Co. v. Gordon, 2 Abb. (U. S.) 479 1543
South Gardiner L. Co. v. Bradstreet, 97 Me. 165 2280, 2289, 2341, 2343
South Memphis L. Co. v. McLean H. L. Co., 179 Fed. 417 284, 285, 1962
v. McLean, etc., Co., 210 Fed. 257 2619
South Missouri L. Co. v. Rhodes, 54 Mo. App. 129 1158
South Omaha v. Ruthjen, 71 Neb. 545 1238, 1357, 1443
v. Sutliffe, 72 Neb. 746 336, 1376, 1477, 1511, 4877
South Omaha W. W. Co. v. Vocasek, 62 Neb. 710 4920
South Ottawa v. Foster, 20 Ill. 296 1404
South Park Com'rs v. Ayer, 237 Ill. 211 4038, 4137, 4142
v. Dunlevy, 91 Ill. 49 622, 1062, 1112, 4102
South Penn Oil Co. v. Stone (Tenn. Ch. App.), 57 S. W. 374 1735, 1748
South Side C. Co. v. Gross, 157 Ill. App. 218 759
South Side R. Co. v. St. Louis, etc., R. Co., 154 Mo. App. 364 143, 3877, 3887
South Staffordshire T. Co. v. Sickness & Acc. Assur. Ass'n, (1891) 1 Q. B. 402 3078
South Texas Tel. Co. v. Huntington (Tex. Civ. App.), 138 S. W. 381 286
v. Tabb, 52 Tex. Civ. App. 213 1471
South Twelfth St., In re, 217 Pa. 362 4036, 4042, 4099
South Yuba W. Co. v. Auburn, 16 Cal. App. 775 1045
South & N. A. R. Co. v. Davis, 185 Ala. 193 4056
v. Henlein, 52 Ala. 606 3412
v. McLendon, 63 Ala. 266 4662
v. Wood, 66 Ala. 167 3385
v. Wood, 72 Ala. 451 3387, 3433
Southall v. Farish, 85 Va. 403 2836
v. Rigg, 4 Eng. L. & Eq. 366, 20 L. J. (C. P.) 145 1827
Southard v. Latham, 18 N. M. 503 2794
v. Pope, 9 B. Mon. 264 796
v. Rexford, 6 Cow. 254 3671, 3676, 3688
Souther v. Hunt (Tex. Civ. App.), 141 S. W. 359 1455, 4235
v. How, Poph. 143 4485
Southern B. & L. Ass'n v. Price, 88 Md. 155 2607
v. Riggle, 4 Pa. Dist. 617 1164
Southern Bell Tel. & T. Co. v. Cassin, 111 Ga. 575 4850, 4854, 4915.5118
v. Clements, 98 Va. 1 4664
v. Davis, 12 Ga. App. 463 4672
v. Davis, 12 Ga. App. 28 4794
v. Earle, 118 Ga. 506 226, 387, 1407, 3548, 3619
v. McTyer, 137 Ala. 601 50
v. Shamos, 12 Ga. App. 463 4699, 4792
Southern C. O. Co. v. Heffin, 99 Fed. 339 2258, 2268
v. Henshaw, 89 Ala. 448 3705
v. Skipper, 125 Ga. 368 1373, 4690, 4747
Southern C. & F. Co. v. Adams, 131 Ala. 147 4602, 4629
v. Bartlett, 137 Ala. 234 4715
v. State, 133 Ala. 624 1066
Southern California R. Co., 111 Cal. 668 134

[REFERENCES ARE TO PAGES]

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Southern D. Co. v. Silva, 125 U. S. 247 4381
Southern Exp. Co. v. Briggs, 1 Ga. App. 294 3346, 3347, 3415, 3416
v. Brown, 67 Miss. 260 1344, 1385
v. Fox, 131 Ky. 257, 117 Ky. 270 3383, 3387, 3392, 3412, 3414
v. Gibbs, 155 Ala. 303 3437
v. Hanaw, 134 Ga. 445 3334, 3345, 3400, 3416
v. Jacobs, 109 Va. 27 3385, 3388, 3428, 3437
v. Keeler, 109 Va. 459 3416
v. Moon, 39 Miss. 822 3383, 3412
v. Newby, 36 Ga. 635 3386
v. Owens, 146 Ala. 412 3334, 3350, 3438
v. Platten, 36 C. C. A. 46, 93 Fed. 936 4663
v. Pope, 5 Ga. App. 689 3412
v. Rothenberg, 87 Miss. 656 3334, 3418
v. Sinclair, 130 Ga. 372 4207
v. Stevenson, 89 Miss. 233 3414
v. Womach, 1 Heisk. 256 3332
Southern F. & G. Co. v. McGeehan, 144 Wis. 130 2294
v. St. Louis G. Co., 11 Ga. App. 401 2241. 2255
Southern G. Co. v. Adams, 112 La. 60 1704
Southern Gas & Gasoline Engine Co. v. Adams & Peters, — Tex. Civ. App. —, 169 S. W. 1143 2272
Southern H. & S. Co. v. Standard E. Co., 158 Ala. 596 311, 4168, 4185
Southern I. & E. Co. v. Holmes L. Co., 164 Ala. 517 176, 2633, 2627
Southern Ice Co. v. Morris, 219 Fed. 551, aff'g 214 Fed. 168 4394
Southern Indiana Exp. Co. v. United States Exp. Co., 92 Fed. 1022 3286
Southern Indiana G. Co. v. Tyner, 49 Ind. App. 475 4794
Southern Indiana R. Co. v. Davis, 32 Ind. App. 569 1493, 4697
v. Moore, 34 Ind. App. 154 1442, 1484, 4923, 4924, 4925
Southern Ins. Co. v. White, 58 Ark. 277 1089, 3046
Southern Inv. Co. v. Postal Tel.-C. Co., 156 N. C. 259 303
Southern Iron & Steel Co. v. Boston, — Ala. —, 66 So. 684 4867
Southern Kansas R. Co. v. Clark, 52 Kan. 398 3532
v. Cox, 43 Tex. Civ. App. 79 3326
v. Crump, 32 Tex. Civ. App. 222 3346
v. Emmett (Tex. Civ. App.), 139 S. W. 44 129
v. Hinsdale, 38 Kan. 507 3475, 3476, 3482
v. Isaacs, 20 Tex. Civ. App. 466 312
v. Michaels, 57 Kan. 474 1466
v. Oklahoma City, 12 Okla. 82 4058
v. O'Loughlin L. & C. Co., — Tex. Civ. App. —, 127 S. W. 568 3318
v. Pavey, 57 Kan. 521 4757
v. Rice, 38 Kan. 398 3449, 3474, 3476
v. Wallace, — Tex. Civ. App. —, 152 S. W. 873 3526
Southern Kansas Ry. Co. of Texas v. Barnes, — Tex. Civ. App. —, 173 S. W. 880 4921, 4934
Southern M. Co. v. Darnell, 94 Ga. 231 3879, 3885
Southern Missouri & A. R. Co. v. Woodard, 193 Mo. 656 4138
Southern Oil Works v. Bickford, 14 Lea 651 3751
Southern P. Co. v. Oteri, 94 Ark. 318 2374, 2403
Southern P. L. Co. v. Arnold (Tex. Civ. App.), 139 S. W. 917 1997
Southern Pac. Co. v. American W. Works, 172 Ill. 9 2703
v. Anderson, 26 Tex. Civ. App. 518 3400
v. Arnett, 126 Fed. 75 3394, 3400
v. Cavin, 144 Fed. 348 1498, 4676, 4752
v. Fitchett, 9 Ariz. 128 1494, 1505
v. Hall, 100 Fed. 760 4707, 4714, 4731
v. Hetzer, 68 C. C. A. 26, 135 Fed. 272 4672
v. Milner, 45 Tex. Civ. App. 489 3482, 3626
v. Patterson, 7 Tex. Civ. App. 451 3465
v. Vaughn, — Tex. Civ. App. —, 165 S. W. 885 4883
Southern Pac. R. Co. v. A. J. Lyon & Co., — Miss. —, 66 So. 209 3346
v. A. J. Lyon & Co., 107 Miss. 777 3431
v. Blake (Tex. Civ. App.), 128 S. W. 668 4658
v. Maddox, 75 Tex. 300 3335
v. Meadows, 104 Tex. 469 3337
v. San Francisco Sav. Union, 146 Cal. 290 3997, 4038, 4094, 4095, 4130, 4141
v. Svendsen, 13 Ariz. 111 147
v. United States, 186 Fed. 737 377, 1116
v. United States, 200 U. S. 341 1934
Southern R. Co. v. Adams Mach. Co., 165 Ala. 436 430, 3394, 3425
v. Adkins, 133 Ky. 219 1477
v. Barlow, 104 Ga. 213 3448, 3487, 3499
v. Bennett, 233 U. S. 80, aff'g 98 S. C. 42 5140
v. Bowlin, 143 Ky. 268 1374
v. Branch, 9 Ga. App. 310 1448
v. Bretz, 181 Ind. 504 2797
v. Brewster, 9 Ala. App. 597 3333
v. Brock, 132 Ga. 858 1467, 1476,4794, 4806
v. Broughton, 128 Ga. 814 4730, 4833
v. Bryant, 105 Ga. 316 3473, 3504, 3528
v. Bulleit, 40 Ind. App. 457 1361
v. Bunt, 131 Ala. 591 1345
v. Cartledge, 10 Ga. App. 523 3459, 3502
v. Cash, 100 Va. 282 1498
v. Cassell, 122 Ky. 317 3472
v. Chambers, 126 Ga. 404 1316, 1329, 1343, 3322, 3424
v. Clariday, 124 Ga. 958 4714
v. Clarke, 106 Va. 496 1498
v. Cleveland, 169 Ala. 22 397, 3762
v. Cofer, 149 Ala. 565 3333
v. Coleman, 153 Ala. 266 226, 1280, 3344
v. Cook, 117 Ga. 286 3849, 3876
v. Covenia, 100 Ga. 46 4917, 4929, 4938
v. Crone, 51 Ind. App. 300 3473, 3507
v. Crowder, 135 Ala. 417 4539
v. Cunningham, 152 Ala. 147 1424, 1474, 1476
v. Daughdrill, 11 Ga. App. 603 143, 3472, 3452

[REFERENCES ARE TO PAGES]

Southern R. Co. v. Davis, 132 Ga. 812 1280, 4730, 4792
v. Decker, 5 Ga. App. 21 4915, 4953
v. Diseker, 13 Ga. App. 799 4863, 4865
v. Dunlop Mills, 76 Fed. 505 940
v. Gadd, 207 Fed. 277, aff'd 233 U. S. 572 5066
v. Gilmer, 143 Ala. 490 311, 4185
v. Glenn, 102 Va. 529 1119
v. Goddard, 121 Ky. 567 1280, 1310
v. Gore, 128 Ga. 627 478
v. Gray, 241 U. S. 333, rev'g 167 N. C. 433 5035, 5079, 5134
v. Greenville, 49 S. C. 449 1037
v. Grubbs, 115 Va. 876 1338, 1339
v. Harden, 101 Ga. 263 3504
v. Hatter, 165 Ala. 423 3370, 3390
v. Hawkins, 121 Ky. 415 1309, 1378, 3464, 3502, 3527
v. Hayes, 183 Ala. 465 3736, 3829
v. Herrington, 128 Ga. 438 3774
v. Hill, 125 Ga. 354 1267
v. Hobbs, 151 Ala. 335 1427, 1429, 4735
v. Hobbs, 118 Ga. 227 3456
v. Howerton, 182 Ind. 208 5123, 5132
v. Huckaba, 14 Ga. App. 311 3483
v. Hughston, 177 Ala. 559 2708
v. Humphries, 108 Ga. 591 3528
v. Hutcheson, 136 Ga. 591 4726
v. Jacobs, 116 Va. 189, aff'd 241 U. S. 229 5034, 5035, 5066, 5067
v. Jennings, 130 Tenn. 450 4089
v. Jones C. Co., 167 Ala. 575 432, 3390
v. Jordan, 129 Ga. 665 347, 1292, 1386, 1389
v. Kendrick, 40 Miss. 374 1311
v. King, 128 Ga. 383 109
v. Langley, 184 Ala. 524 3323
v. Lanning, 83 Miss. 161 3441
v. Lee, 167 Ala. 268 3467
v. Lewis, 165 Ala. 451 8, 167, 170, 187, 295, 3332, 3374, 3911, 3925
v. Lloyd, 239 U. S. 496, aff'g 166 N. C. 24 5133, 5136, 5139
v. McEntire, 169 Ala. 42 3754, 3755, 3826
v. McGowan, 149 Ala. 440 1467
v. McLellan, 80 Miss. 700 4779
v. Memphis, 126 Tenn. 267 4034, 4039, 4056, 4062, 4103
v. Michaels, 126 Tenn. 702 4040, 4103
v. Moody, 151 Ala. 374 481
v. Moody, 169 Ala. 292 3322
v. Moore, 133 Ga. 806 3311
v. Morris, 143 Ala. 628 1444
v. Myers, 87 Fed. 149 200, 334, 3455, 3497, 4699
v. Nappier, 138 Ga. 31 3502, 3503
v. Nowlin, 156 Ala. 222 3473
v. O'Bryan, 119 Ga. 147 1280, 1497
v. Oliver, 1 Ga. App. 734 1526
v. Pardue, 123 Tenn. 376 1740
v. Parham, 10 Ga. App. 531 1471, 1477
v. Parnell, 142 Ala. 146 1461
v. Peters, — Ala. —, 69 So. 611 5043, 5047, 5048, 5062, 5073, 5078, 5080, 5081, 5089, 5126
v. Petway, 7 Ga. App. 659 4746, 4752
v. Phillips, 119 Ga. 146 1385
v. Phillips, 136 Ga. 282 1317, 3502
v. Puckett, 16 Ga. App. 551 5070
v. Reeder, 152 Ala. 227 149, 311, 2482, 4302
v. Routh, 161 Ky. 196 3883, 3905
v. Scott, 128 Ga. 244 4833
Southern R. Co. v. Shipp, 169 Ala. 327 109
v. Shirley, 121 Ky. 863 4839
v. Smith, 107 Va. 553 4793, 4809
v. Stearnes, 8 Ga. App. 111 4168
v. Stockdon, 106 Va. 693 4721
v. Tharp, 104 Ga. 560 1439
v. Thompson, 129 Ga. 367 3736
v. Thurman, 121 Ky. 716 3498
v. United States, 222 U. S. 20 5024
v. Vessell, — Ala. —, 68 So. 336 5093
v. Ward, 110 Ga. 793 312
v. Webb, 143 Ala. 304 311, 3322, 3345, 3365, 3404, 4264, 4269
v. White, 108 Ga. 201 3341
v. Wood, 114 Ga. 140 3498, 3506
v. Wooley, 158 Ala. 447 3508
v. Wright, 6 Ga. App. 172 4747
Southern Ry. in Kentucky v. Owen, 156 Ky. 827 4667
Southern S. Co. v. Ducote, 120 La. 1052 2274
Southern T. & T. Co. v. Evans, 54 Tex. Civ. App. 63 1376
v. King (Ark.), 146 S. W. 489 1281
v. King, 103 Ark. 160 3571, 3643
Southern W. Mfg. & C. Co. v. Davenport, 50 La. Ann. 505 2113
Southold v. Daunston, Cro. Car. 269 4556
Southport, etc., R. Co. v. Platt Land, 133 N. C. 266 4108
Southside R. Co. v. Daniel, 20 Gratt. 344 4027, 4144
Southwestern B. & I. Co. v. Schmidt, 226 U. S. 162 4652, 4659, 4690, 5089, 5091
Southwestern, etc., Co. v. Cameron, 16 Ariz. 87 2655, 2689
v. Memphis Tel. Co., 111 Ark. 474 2695
Southwestern Mineral R. Co. v. Harvey, 8 Kan. App. 489 4021
Southwestern P. C. Co. v. Reitzer (Tex. Civ. App.), 135 S. W. 237 56, 159, 4837
Southwestern Port Huron Co. v. Wilber, 75 Kan. 175 2504, 2506
Southwestern R. Co. v. Paulk, 24 Ga. 356 148, 4862
v. Singleton, 66 Ga. 252 4824
v. Vellines, 14 Ga. App. 674 4696
Southwestern States P. C. Co. v. Young (Tex. Civ. App.), 140 S. W. 378 4750
Southwestern Surety Ins. Co. v. Clay & Nowlin, 112 Ark. 220 670
Southwestern Tel. & T. Co. v. Allen, — Tex. Civ. App. —, 146 S. W. 1066 3625
v. Andrews, — Tex. Civ. App. —, 169 S. W. 218 3622
v. Beatty, 63 Ark. 65 13
v. Bruce, 89 Ark. 581 432
v. Flood, 51 Tex. Civ. App. 340 3559, 3565, 3603
v. Gehring (Tex. Civ. App.), 137 S. W. 754 3658
v. Gotcher, 93 Tex. 114 3609, 3613, 3650
v. Gulf, etc., R. Co. (Tex. Civ. App.), 52 S. W. 106 4066, 4068, 4069
v. Luckett, — Tex. Civ. App. —, 127 S. W. 856 700, 794, 1259
v. Memphis Tel. Co., 111 Ark. 474 225, 2623
v. Pearson (Tex. Civ. App.), 137 S. W. 733 3626, 3628
v. Shirley (Tex. Civ. App.), 155 S. W. 663 153, 4793

[REFERENCES ARE TO PAGES]

Southwestern Tel. & T. Co. v. Smithdeal, 103 Tex. 128 3990
v. Solomon, 54 Tex. Civ. App. 306 187, 3573, 3587
v. Whiteman, 36 Tex. Civ. App. 163 3737, 3768, 3823
v. Wilcoxson, — Tex. Civ. App. —, 129 S. W. 868 3633, 3654
Southwick v. Estes, 7 Cush. 385 1330
v. Hare, 24 Ont. 528 4837
v. Himmelman, 109 Minn. 76 807, 4292
v. Sax, 9 Wend. 122 4289
v. Ward, 7 Jones 64 1309
Southworth v. Packard, 7 Mass. 95 4762
v. Smith, 7 Cush. 391 802, 803, 819
Sovereign Camp Woodmen of World v. Latham, — Ind. App. —, 107 N. E. 749 4419
Sovereign of the Seas, The, 139 Fed. 812 5007, 5012
Soward v. Palmer, 2 Moore, 276 621
Sowell v. Champion, 6 Ad. & E. 407 4202, 4302
Sowers v. Dukes, 8 Minn. 23 1419
v. Parker, 59 Kan. 12 4375
v. Sowers, 87 N. C. 303 1268, 1305, 4543
Sowles v. Witters, 40 Fed. 413 581, 589
Spaar v. Slakis, 180 Ill. App. 304 4212
Spackman v. Byers, 6 S. & R. 385 1503
Spada v. Pennsylvania R. Co., 86 N. J. L. 187 3339
Spade v. Lynn & B. R. Co., 168 Mass. 285 79, 166, 344, 3642, 4688
v. Lynn & B. R. Co., 172 Mass. 488 77, 96, 3452, 3467, 3477, 3479
Spader v. Frost, 4 Blackf. 190 1811
v. Mural Decoration Mfg. Co., 47 N. J. Eq. 18 13
Spadra Creek C. Co. v. Eureka A. C. Co., 104 Ark. 359 3887, 3902
Spaethe v. Anderson, 18 N. Z. 149 1883
Spafford v. Goodell, 3 McLean 97 39
v. McNally, 130 Wis. 537 2696
Spago's Case, L. R. 8 Ch. 407 628
Spahn v. Willman, 1 Penne. 125 2465
Spaids v. Barrett, 57 Ill. 289 4605
Spain v. Arnott, 2 Stark. 256 2526
v. Grove, Minor 177 1184
Spalding v. Lowe, 56 Mich. 366 4639
v. Millard, 17 Wend. 331 1556
v. Oakes, 42 Vt. 343 295, 2891
v. Roas, 71 N. Y. 40 2534
v. Vandercook, 2 Wend. 431 513, 518, 534, 822, 1839, 2577
Spangler v. St. Joseph, etc., R. Co., 68 Kan. 46 3470
Spann v. Baltzell, 1 Fla. 302 752
Spants v. Barrett, 57 Ill. 290 1259
Sparhawk v. Union, etc., R. Co., 54 Pa. 401 3839
v. Walpole, 21 N. H. 317 4146
v. Willis, 6 Gray 163 939
Sparkes v. Martindale, 8 East 593 2192
Sparkman v. Swift, 81 Ala. 231 440
v. Western U. Tel. Co., 130 N. C. 447 3626
Sparks v. Bassett, 49 N. Y. Super. 270 3236, 3244
v. Cherokee County, 76 Kan. 280 1596
v. Jasper County, 213 Mo. 218 703
v. Liverpool W. Works, 13 Ves. 428 873, 874
v. Lowndes County, 98 Ga. 284 1066
v. McCreary, 156 Ala. 382 266, 354, 1385, 4185
v. Ponder, 42 Tex. Civ. App. 431 4158
Sparks v. Purdy, 11 Mo. 219 4296
v. Reliable Dayton M. C. Co., 85 Kan. 29 2573
Sparks M. Co. v. Western U. Tel. Co., 9 Ga. App. 728 34
Sparrevohn v. Fisher, 2 Philip. Isl. 676 3107
Sparrow v. Bromage, 83 Conn. 27 1535
v. Chrisman, 9 B. & C. 241 1827, 1830
v. Paris, 7 H. & N. 594 862, 869, 895, 899
Spartali v. Benecke, 10 C. B. 212 2225
Spaulding v. Bank, 9 Pa. 28 674
v. Chicago, etc., R. Co., 98 Iowa 205 4906
v. Lord, 19 Wis. 533 944, 963
v. Mason, 161 U. S. 375 1097
v. Page, 4 Fish. Pat. Cas. 641, 1 Sawyer, 702 4446
v. Patterson, 46 Colo. 317 4304
v. Smith, — Tex. Civ. App. —, 169 S. W. 627 1980
v. Vandercook, 2 Wend. 431 825, 1411
v. Winslow, 74 Me. 534 104
Speake v. Hughes, [1904] 1 K. B. 138 4560
Speaker v. McKenzie, 26 Mo. 255 15
Speakman v. Price, 2 Boyce (Del.) 377 2241
Speaks v. Southern R. Co., 90 S. C. 358 3543
Spear v. Drainage Com'rs, 113 Ill. 632 1421, 1434
v. Hanson, 157 Mich. 485 2454
v. Hiles, 67 Wis. 350 1268, 1316, 4615, 4616, 4617, 4628, 4629, 4636, 4649
v. Smith, 1 Denio 464 861, 883
v. Stacy, 26 Vt. 61 295, 389, 391, 403
v. Sweeney, 88 Wis. 545 1316, 4776
v. Westbrook, 104 Me. 496 1381
Speare v. Hubinger, 129 Fed. 538 2241
Spearing v. Whitney-Cent. Nat. Bank, 129 La. 607 276, 502
Spearman v. McCrary, 4 Ala. App. 473 4672, 4688
v. McCrary, (Ala. App.) 58 So. 927 88
v. Texarkana, 58 Ark. 348 2462, 2468
Spears v. Armstrong (Tenn. Ch.), 42 S. W. 37 1741
v. Atlantic C. L. R. Co., 92 S. C. 297 4672, 4724
v. DuRant, 76 S. C. 19 537
v. Fields, 72 S. C. 395 171, 811, 4355
v. Henry F. Mitchell Co., Inc., 56 Pa. Super. Ct. 294 2236, 2258
Speck v. Commonwealth, 3 W. & S. 324 1558
v. Gray, 14 Wash. 589 1493, 4974
v. Kenoyer, 164 Ind. 431 4112
v. Philips, 5 M. & W. 279 504
Speckels v. Sax, 1 E. D. Smith, 253 3235
Spedding v. Nevell, L. R. 4 C. P. 212 2009, 2984, 2988
Speed v. Hollingsworth, 54 Kan. 436 4375, 4380, 4381, 4392
v. Willow Springs D. Co., 140 Ky. 269 2793
Speer v. Phoenix Mutual Life Ins. Co., 36 Hun 322 3088
Speers v. Sterrett, 29 Pa. 192 558
Speight v. Seaboard A. L. R., 161 N. C. 80 1478, 4930

[REFERENCES ARE TO PAGES]

Speirs v. Union D. F. Co., 180 Mass. 87 293, 377, 2687, 2688, 2697, 2698, 2703
Speiser v. Merchants' Exch. Bank, 110 Wis. 507 1127, 1128, 2471, 2472
Spellings v. Parks, 104 Tenn. 351 3663, 3686
Spellman v. Bannigan, 36 Hun 174 3250
v. Richmond, etc., R. Co., 35 S. C. 475 1386, 3502
Spence v. Barcley, 8 Ala. 581 2860
v. Board of Com'rs, 117 Ind. 573 2655
v. Duffield, 1 Vict. (law) 49 (1870) 2405, 2427
v. Geilfuss, 89 Wis. 499 4377
v. Hector, 24 Up. Can. Q. B. 277 2892
Spencer v. Bush, 50 N. Y. Misc. 284 2489
v. Cramblett, 56 Kan. 794 4618, 4620, 4624
v. Dearth, 43 Vt. 98 2897
v. Gates, 1 H. Bl. 78 1491
v. Haines, 73 N. J. L. 325 1526
v. Halstead, 1 Denio 606 1938
v. Hamilton, 113 N. C. 49 2349, 3249
v. Johnson, 176 Mich. 278 4739, 4746, 4752
v. Johnston, 58 Neb. 44 581, 587
v. Kilmer, 151 N. Y. 390 3769
v. McMasters, 16 Ill. 405 4568, 4570
v. Maxfield, 16 Wis. 179 962, 963, 1186
v. Metropolitan St. R. Co., 120 Mo. 154 3951, 4139
v. Minnick, 41 Okla. 613 459, 4582, 4583
v. Murphy, 6 Colo. App. 453 224
v. Perry, 18 Mich. 394 799, 1563
v. Prindle, 28 Cal. 276 602
v. Registrar, (1908) App. Cas. 235 2112
v. St. Paul, etc., R. Co., 21 Minn. 362 1363, 1368, 3942
v. San Francisco B. Co., 5 Cal. App. 126 1280
v. Simmons, 160 Mich. 292 3671, 3675, 3679
v. Storrs, 38 Vt. 156 2462
v. Tilden, 5 Cow. 144 857, 884
v. Vance, 57 Mo. 427 4210
v. Wilkinson, 11 Conn. 1 1634
v. World's Columbian Exp. 163 Ill. 117 3100
Spencer M. Co. v. Hall, 78 Ark. 336 228, 258, 2551
Spencer Sav. Bank v. Cooley, 177 Mass. 49 2873, 2892
Spencer's Case, 1 Smith's Lead. Cas., pt. 1, p. 179 2056
Spencer's Petition, 16 R. I. 25 1080
Spengler v. Davy, 15 Gratt. 381 4606
Sperb v. Metropolitan E. R. Co., 137 N. Y. 596 4081
v. Metropolitan E. R. Co., 137 N. Y. 155 4082
Sperier v. Ott, 116 La. 1087 4615, 4628
Sperry v. Fanning, 80 Ill. 371 2626
v. Horr, 32 Iowa 184 1924
v. O'Neill, 185 Fed. 231 271, 290
v. Seidel, 218 Pa. 16 1267, 3206, 3826
Speth v. Maxwell, 6 Ga. App. 630 4158
Spicer v. Chicago, etc., R. Co., 29 Wis. 580 412, 1512, 3528, 3529
v. Hoop, 51 Ind. 365 840, 922
v. Waters, 65 Barb. 227 4176, 4181, 4226
Spicers v. Harvey, 9 R. I. 582 2225, 2227
Spielberg v. Kuhn, 39 Utah 276 4509
Spiero v. New York, etc., R. Co., 64 Misc. (N. Y.) 53 3405
Spiers v. Halsted, 74 N. C. 620 2357
Spiers v. Houston, 4 Bligh (N. S.) 515 2767
Spies v. Gilmore, 1 N. Y. 321 2778
v. National City Bank, 174 N. Y. 222 2793
Spiglemoyer v. Walter, 3 W. & S. 540 1367
Spiking v. Consolidated R. & P. Co., 33 Utah 313 4874
Spiller v. Adams, 8 Mod. 25, Hetley 141 3721
v. Creditors, 16 La. Ann. 292 728, 731
v. Westlake, 2 B. & Ad. 155 1950, 1952
Spillman v. Duff, 15 B. Mon. 134 2843
Spink v. Mueller, 77 Mo. App. 85 328, 569, 2598, 2686
v. New York, etc., R. Co., 26 R. I. 115 1440, 3773, 3779
Spinner v. Dutton, 77 Misc. (N. Y.) 112 2622
Spinney v. Hill, 81 Minn. 316 2514, 2517, 2548
Spires v. Hamot, 8 W. & S. 17 739
Spiro v. Felton, 73 Fed. 91 4882
Spitz v. Morse, 104 Me. 447 661
Spitze v. Baltimore & O. R. Co., 75 Md. 162 25
Spiva v. Williams, 20 Tex. 442 1539
Spofford v. Rowan, 124 N. H. 108 525
Spohn v. Missouri Pac. R. Co., 116 Mo. 617 3480
Spokane v. Colby, 16 Wash. 610 4146
v. Costello, 33 Wash. 98 2899
v. Costello, 42 Wash. 182 1238
v. Ladies Benev. Soc., 83 Wash. 382 3954
v. Thompson, 69 Wash. 650 4017, 4110, 4113
Spokane-C. River R. & N. Co., In re, 70 Wash. 142 2472
Spokane Casket Co. v. Mitchell, 76 Wash. 425 313, 476
Spokane County v. Allen, 9 Wash. 229 1596
Spokane Falls & N. R. Co. v. Ziegler, 167 U. S. 65 4087
Spokane T. Co. v. Granath, 42 Wash. 506 4107, 4108, 4120
Spokane Truck & D. Co. v. Hoefer, 2 Wash. 45 1302
Spokane & I. E. R. Co. v. Campbell, 217 Fed. 518 5038
Spokane & I. L. Co. v. Loy, 21 Wash. 501 1570, 2771
Spokane & P. R. Co. v. Lieuallen, 2 Idaho 1101 4102
Spolek Denni Hlasatel v. Hoffman, 204 Ill. 532 4576
Sponatski, In re, 220 Mass. 526 5187, 5197
Spoonenburg v. Gloversville, 96 App. Div. (N. Y.) 157 1719
Spooner v. Brooklyn City R. Co., 54 N. Y. 230 160
v. Detroit Saturday Night Co., — Mich. — 153 N. W. 657 5198
v. Keeler, 51 N. Y. 527 4585, 4586
v. Washburn County, 124 Wis. 24 1045
Spoor v. Green, L. R. 9 Ex. 99 2057, 2174, 2175
v. Holland, 8 Wend. 445 4285
Sposato v. City of New York, 75 App. Div. (N. Y.) 304 3734
Spotten v. DeFreest, 140 App. Div. (N. Y.) 792 4395
Spottiswoode Est. Co., In re, 21 Vict. L. R. 334 1078

[REFERENCES ARE TO PAGES]

Sprague v. Atlee, 81 Iowa 1 4817
v. Barrels of Flour, 2 Story 195 2735
v. Booth, 21 Ont. L. R. 637 835
v. Brown, 40 Wis. 612 480, 4198, 4201, 4215, 4291, 4297, 4307
v. Craig, 51 Ill. 586 493, 3679, 3681, 3687, 3688
v. Griffin, 22 App. Div. (N. Y.) 223 2048
v. Hazenwinkle, 53 Ill. 419 736
v. Irwin, 27 How. Pr. 51 1393
v. Lea, 152 Mo. 327 2462
v. McKinzie, 63 Barb. 60 4296, 4307
v. Morgan, 7 Ala. 952 2458, 2461, 2556, 2698
v. New York, etc., R. Co., 68 Conn. 345 1400
v. Seymour, 15 Johns. 474 1556, 2894
v. Sprague, 80 Hun 285 1824
v. West, 1 Abb. Adm. 548 3302
v. Western U. Tel. Co., 6 Daly 200 3553, 3590, 3601
Sprangler v. Booze, 103 Va. 276 4608
v. Sweeney & Gray Co., 168 N. Y. App. Div. 403 5147, 5172
Spray v. Ammerman, 66 Ill. 309 1460
v. Ayotte, 161 Mich. 593 346
Spreckels v. Gorrill, 152 Cal. 383 4364, 4380, 4383, 4391
Sprenger v. Tacoma T. Co., 15 Wash. 660 3466, 3500
Spring v. Allen, 4 Allen 112 3400
v. Chase, 22 Me. 505 2012, 2117, 2133, 2157
v. Haskell, 4 Allen 112 2368, 3389
v. Insurance Co., 8 Wheat. 270 1253
v. Lovett, 11 Pick. 417 1866
Spring City G. L. Co. v. Pennsylvania, etc., R. Co., 167 Pa. 6 4016, 4019
Spring Garden Ass'n v. Tradesmen's L. Ass'n, 46 Pa. 493 726
Spring Valley W. W. v. Drinkhouse, 92 Cal. 528 4048
Springdale Ass'n v. Smith, 32 Ill. 252 537
Springett v. Colerick, 67 Mich. 362 1623
Springer v. Berry, 47 Me. 330 368, 2238, 2248
v. Borden, 154 Ill. 668, 54 Ill. App. 557 3113
v. Chicago, 135 Ill. 552 3955, 4135
v. Dwyer, 50 N. Y. 19 2828, 2830
v. Jenkins, 47 Ore. 502 509, 1392
v. Orr, 28 Ill. App. 558 2503
v. Puckett, 25 Colo. App. 547 2453
v. Riley (Tex. Civ. App.), 136 S. W. 577 226, 1689, 3229
v. Schultz, 205 Ill. 144 1363, 4742
v. Toothaker, 43 Me. 381 2795
Springer L. Co. v. Graves, 97 Iowa 39 2752, 2792
Springer T. Co. v. Smith, 16 Lea 498 1344, 3506
Springfield v. Dalby, 139 Ill. 34 3981
v. Griffith, 46 Ill. App. 246 3889
v. Schmook, 68 Mo. 394 1450, 1451, 4134, 4135
v. Southern R. Co., 152 N. C. 125 3334
Springfield Bank v. Merrick, 14 Mass. 322 1192
Springfield Con. R. Co. v. Hoeffner, 175 Ill. 634 4792
Springfield E. L. & P. Co. v. Calvert, 134 Ill. App. 285 1476, 4877
Springfield F. & M. Co. v. Homewood, 32 Okla. 521 3007, 3011
Springfield M. Co. v. Barnard & L. Mfg. Co., 81 Fed. 261 2456, 2589
Springfield M. & F. Ins. Co. v. Tincher, 30 Ill. 399 597
Springfield S. Co. v. Edgecomb M. Co., 52 Wash. 620 2379
Springfield S. R. Co. v. Schweitzer, 173 Mo. App. 650 3997
Springfield & M. R. Co. v. Allen, 46 Ark. 217 816
v. Rhea, 44 Ark. 258 3993, 4104, 4120, 4139
Springfield & N. T. Co. v. Warrick, 249 Ill. 470 1430
Springfield & S. R. Co. v. Calkins, 90 Mo. 538 4125, 4132, 4139
Springs v. Brown, 97 Fed. 405 2861
Springwells v. Detroit, etc., R., 140 Mich. 277 832, 866, 867, 888
Sprinkle v. Martin, 72 N. C. 92 703, 742
Sproat v. Cutler, Wright 157 1244
Sproule v. Legge, 1 B. & C. 16 1157, 1888
v. Samuel, 5 Ill. 135 709
Spruell v. Davenport, 5 Humph. 145 1981
Spruill v. Branning Mfg. Co., 130 N. C. 42 3736
Spruneberger v. Dentler, 4 Watts 126 762
Spry v. Missouri, etc., R. Co., 73 Mo. App. 203 3459
Spunner v. Roney, 122 Ill. App. 19 1509
Spurck v. Dean, 49 Neb. 66 2481
Spurgeon v. Smitha, 114 Ind. 453 828, 2807, 2808
Spurr v. Andrews, 6 Allen 420 2068, 2148
Spybey v. Hide, 1 Camp. 181 817, 818
Squier v. Gould, 14 Wend. 159 1370, 3942, 4708
v. Plunkett, 11 Gray 11 4425
Squire v. Gould, 14 Wend. 159 1363
v. Hollenbeck, 9 Pick. 551 474, 485, 486, 4204
v. Ordemann, 194 N. Y. 394 432
v. Somerville, 120 Mass. 579 4004, 4104
v. Western U. Tel. Co., 98 Mass. 232 193, 3558, 3579, 3600
v. Wright, 1 Mo. App. 172 2556, 2564
Squires v. Elwood, 33 Neb. 126 868
v. Job, 50 Pa. Super. Ct. 289 4633
Sramek v. Sklenar, 73 Kan. 450 3670
Staab v. Borax S. Co., 12 Colo. App. 286 2275
Staal v. Grand Rapids, etc., R. Co., 57 Mich. 239 4943
v. Grand St. & N. R. Co., 107 N. Y. 625 4718
v. Grand St. & N. R. Co., 36 Hun 208 4748
Staat v. Evans, 35 Ill. 455 825
v. Royal Ins. Co., 49 Pa. 14 3049
Staats v. Herbert, 4 Del. Ch. 508 1556, 2873
v. Ten Eyck, 3 Caines 111, 2 Am. Dec. 254 303, 1028, 1992, 2062, 2064, 2065, 2098, 2135, 2136, 2143
Stables v. Eley, 1 C. & P. 614 449
Stack v. Harris, 111 Ga. 149 3232
v. New York, etc., R. Co., 177 Mass. 155 1465, 1467
Stackpole v. Arnold, 11 Mass. 27 1853
v. Dakota L. & T. Co., 10 S. D. 389 2788, 2792
v. Keay, 45 Me. 297 709
Stacey v. Dolan, 88 Vt. 369 3661, 3688
v. Metropolitan E. R. Co., 15 App. Div. (N. Y.) 534 4081
Stacy v. Coleman, 10 Ky. L. Rep. 78 (Ky. Super. Ct.), 696

[REFERENCES ARE TO PAGES]

Stacy v. Kemp, 97 Mass. 166 534, 1837
v. Portland P. Co., 68 Me. 279 1322, 4542
v. Ross, 27 Tex. 3 1849
Stademann v. Heins, 78 App. Div. (N. Y.) 563 2458
Stadler v. Chicago City Ry. Co., 180 Ill. App. 313 1496
v. Grieben, 61 Wis. 500 3847, 3850, 3855
v. Milwaukee, 34 Wis. 98 3971
Stadwell v. Cooke, 38 Conn. 549 1235
Stae v. Call, 64 Fla. 144 1463
Staed v. Rossier, 157 Mo. App. 300 2127, 2133
Stafford v. Adams, 113 Mo. App. 717 1511
v. Anders, 10 Fla. 211 1806
v. Green, 1 Johns. 505 1527
v. Lang, 25 R. I. 488 4281
v. Maus, 38 Iowa 133 4379
v. Oskaloosa, 57 Iowa 748 1357
v. Oskaloosa, 64 Iowa 251 4692, 4720, 4744
v. Providence, 10 R. I. 567 4097
v. Rubens, 115 Ill. 196 4939
v. Union Bank, 16 How. 135, 17 How. 275 1767
v. Western U. Tel. Co., 73 Fed. 273 3575
Stafsky v. Southern R. Co., 143 Ala. 272 2236, 4208
Stagg v. Linnenfelser, 59 Mo. 336 2780
v. Taylor, 95 Ky. 651 4490
Staggenborg v. Bailey, 118 Ky. 301 2471
Stahl's Est., 25 Pa. Super. 402 1089
Stahler v. Philadelphia & R. R. Co., 199 Pa. 383 4885, 4895, 4898
Stahnka v. Krietle, 66 Neb. 829 448, 4766
Stahr v. Hickman G. Co., 132 Ky. 496 790, 2277, 2289
Staiger v. Soht, 116 App. Div. (N. Y.) 874 2379, 2392
Stainforth v. Lyall, 7 Bing. 169 3278
Staker v. Begole, 34 Neb. 107 1106
Stalcope v. Copner, 2 N. J. L. 131 1409
Staley v. Forest, 157 Iowa 188 1142
v. Hufford, 73 Kan. 686 2501
v. Illinois Cent. R. Co., 186 Ill. App. 593, rev'd 268 Ill. 356 5030, 5031, 5066
Stalker v. Drake, 91 Kan. 142 1266, 1276, 4628, 4629, 4632
v. Hayes, 81 Conn. 711 697
v. McDonald, 6 Hill 93 1819
Stallings v. Whittaker, 55 Ark. 494 4535, 4544
Stallworth v. Preslar, 34 Ala. 507 2869
Stalzman v. Wyman, 8 N. D. 108 686
Stambaugh v. Smith, 23 Ohio St. 584 2058, 2146, 2156, 2157, 2176, 2177
Stamey v. Western U. Tel. Co., 92 Ga. 613 3546, 3556
Stamford Bank v. Benedict, 15 Conn. 444 742, 2801
Stamford O. M. Co. v. Barnes, 55 Tex. Civ. App. 420 4704
Stamforth v. Lyall, 7 Bing. 169 492
Stamp v. Abbott, 21 Pa. Dist. 629 4693
Stamper v. Raymond, 38 Ore. 16 4635, 4637, 4639
Stamps v. Brown, Walker (Miss.) 526 732
v. Thomas, 7 Ala. App. 19 4209, 4221
Stanard v. Eldridge, 16 Johns. 254 555, 556, 2137, 2151, 2153, 2157
v. Sampson, 23 Okla. 13 1850
Stanberry v. Gibson, 35 Iowa 493 2498
Standard A. & Mfg. Co. v. Champion, 76 N. J. L. 771 3208
Standard Automobile Co. v. Thurston, 54 Pa. Super. Ct. 160 2409
Standard B. & P. Co. v. Cleveland, 2 Ohio C. C. (N. S.) 111 3937
Standard B. F. Co. v. Breed, 163 Mass. 10 862
Standard B. & P. Co. v. Cleveland, 25 Ohio C. C. 380 1057, 3856, 3937, 3938
Standard Brewery v. Schmalhausen, 175 Ill. App. 629 886
v. Sweeney, The, 185 Ill. App. 430 558
Standard C. Co. v. Brantley G. Co., 90 Miss. 16 2683
Standard D. & D. Co. v. Hill, 92 C. C. A. 83 166 Fed. 99 4733
Standard F. Co. v. St. Louis M. F. Co., 177 Mo. 559 226, 2924
Standard Fire Ins. Co. v. Wren, 7 Ill. App. 242 3020
Standard Forgings Co. v. Holmstrom, 58 Ind. 306 4861, 4922, 4923
Standard G. Co. v. Wood, 61 Fed. 74 930
Standard L. & P. Co. v. Muncey, 33 Tex. Civ. App. 416 143, 4936
Standard O. Co. v. Arnestad, 6 N. D. 255 2753
v. Bowker, 141 Ind. 12 3404, 3405
v. Denton, 24 Ky. L. Rep. 906 374, 381
v. Doyle, 118 Ky. 662 1534
v. Hoese, 57 Neb. 665 2749
v. Kinnaird, 13 Ky. L. Rep. 269 3850, 3912, 3923
v. Reagan, 15 Ga. App. 571 4876, 4877, 4879, 4880
v. Tierney, 92 Ky. 367 4657, 4691, 4810
v. Tierney, 96 Ky. 89 4779, 4811
v. Wakefield, 102 Va. 824 143
v. Weeks, 6 Ala. App. 161 235, 2351, 2352
Standard P. G. Co. v. Butler W. Co., 7 Pa. Super. Ct. 563 3770
Standard S. Co. v. Carter, 81 S. C. 181 233, 234, 254, 2364
Standard S. M. Co. v. Royal Ins. Co., 201 Pa. 645 3045
Standen v. Pennsylvania R. Co., 214 Pa. 189 4761
Standeven v. Murgatroyd, 27 L. J. (Ex.) 425 588
Standifer v. Codington, 35 La. Ann. 896 732
Standlee v. St. Louis, etc., R. Co., 25 Tex. Civ. App. 340 4906
Standley v. Atchison, etc., R. Co., 121 Mo. App. 537 3881
v. Northwestern Mut. L. Ins. Co., 95 Ind. 254 531
Stanfield, Matter of, 135 N. Y. 292 1081
Stanfield v. Phillips, 78 Pa. 73 1380
Stanford v. Grocery Co., 143 N. C. 419 4604, 4615, 4628, 4639
v. McGill, 6 N. D. 536 2255, 2256
v. National D. & Mfg. Co., 28 Okla. 441 2387
Stangeland v. Minneapolis, etc., R. Co., 105 Minn. 224 4922
Stanley v. Beatty, 4 Ind. 134 733
v. Carey, 89 Wis. 410 1690, 1691
v. Chicago, etc., R. Co., 112 Mo. App. 601 4734
v. Citizens' C. & C. Co., 24 Colo. 103 4285
v. Donoho, 16 Lea 492 4314
v. Gaylord, 1 Cush. 536 1680

[REFERENCES ARE TO PAGES]

Stanley v. Montgomery, 102 Ind. 102 833
v. Nye, 51 Mich. 232 283
v. Penny, 75 Kan. 179 1815
v. Stanley, 32 Wash. 489 1480, 4979
v. Sutherland, 54 Ind. 339 1482
v. Taylor, 160 Iowa 427 4659, 4692
v. Turner, 68 Vt. 315 3108, 3131
v. Twogood, 3 Bing. N. C. 4 3152
v. Westrop, 16 Tex. 200 712, 740
Stanley's App., 8 Pa. 431 1120
Stanley's Est., 160 Ind. 636 1121
Stanley Dollar, The, 160 Fed. 911 3443
Stannard v. Eldridge, 16 Johns. 254 2874
v. Reid, 118 App. Div. (N. Y.) 304 1093
Stansbury v. Stansbury, 24 W. Va. 634 998
Stansell v. Georgia L. & T. Co., 96 Ga. 227 1162
v. Western U. Tel. Co., 107 Fed. 668 3575, 3644
Stanton, In re, 41 N. Y. Misc. 278 1121
Stanton v. Eager, 16 Pick. 467 2227
v. Embrey, 93 U. S. 548 1446, 2478, 2486, 2491, 2510
v. French, 83 Cal. 194 685
v. Hart, 27 Mich. 539 1321, 4602, 4644, 4647
v. Haskin, 1 MacArthur 558 2490
v. Lapp, 113 Md. 324 389, 3736, 3741
v. Miller, 14 Hun 383 1986, 2047
v. New York & E. R. Co., 59 Conn. 272 33
v. Parkersburg, 66 W. Va. 393 4793
Stanwood v. Owen, 14 Gray 195 724
v. Whitmore, 63 Me. 209 1315, 4524
Staple v. Spring, 10 Mass. 74 3845, 3859, 3860, 3931
Staples v. Anderson, 3 Robert. 327 3260
v. Dean, 114 Mass. 128 2071
v. Flint, 28 Vt. 794 2095
v. Parker, 41 Barb. 648 919
v. Schmid, 18 R. I. 224 1336, 1338
v. White, 88 Tenn. 30 1753
Stapleton v. King, 40 Iowa 278 2311, 4239
Star-Chronicle Pub. Co. v. United Press Ass'n, 204 Fed. 217 2696
Star G. Co. v. Morey, 108 Mass. 570 560
Star M. & E. Co. v. Sale (Tex. Civ. App.) 145 S. W. 1037 2418
Star of Hope, The, 9 Wall 236 3036
Star of India, The, 1 Prob. Div. 466 5004
Star Pub. Co. v. Knosher, 62 Wash. 215 1414, 2690
Star St., In re, 73 Misc. (N. Y.) 383 4088
Star W. Co. v. Swezy, 63 Iowa 520 2814
Starbird v. Barrons, 43 N. Y. 200 549
v. Frankfort, 35 Me. 89 4762
Starbuck v. Lazenby, 7 Blackf. 268 1403
Starck v. Washington U. C. Co., 61 Wash. 213 4778
Stark v. Bare, 39 Kan. 100 16
v. Bindley, 152 Ind. 182 4601
v. Chitwood, 5 Kan. 141 15
v. Epler, 59 Ore. 262 1267, 1279, 1386
v. Huber Mfg. Co., 130 Wis. 432 2772, 2773
v. Johnson, 43 Colo. 243 341, 4973, 4974
v. McGowen, 1 N. & Mc. C. 387 3911
v. Muskegon T. & L. Co., 141 Mich. 575 70
v. Olney, 3 Ore. 88 1185, 1189
v. Parker, 2 Pick. 267 2524, 2541
v. Price, 5 Dana 140 1107
Stark v. Raney, 18 Cal. 622 2885
v. Starr, 94 U. S. 477 372
v. Starr, 1 Sawyer 15 3708, 3710
v. Thompson, 3 T. B. Mon. 296 679, 754
v. Western U. Tel. Co., 107 Miss. 332 3630
Stark G. Co. v. Harry Bros. Co., 57 Tex. Civ. App. 529 234, 2627, 2629
Starke v. Hill, 6 Ala. 785 556, 2195
v. Paine, 85 Wis. 633 4312, 4335
Starkey v. Bank of England, [1903] App. Cas. 114 2982, 2984
v. Kelley, 50 N. Y. 677 4178, 4231
v. Waite, 69 Vt. 193 4325
Starks v. Comer, — Ala. —, 67 So. 440 4513, 4535, 4581
v. Manistee & N. R. Co., 165 Mich. 518 3423
Starkweather v. Quigley, 7 Hun 26 1393
Starnes v. Pine Woods L. Co., 122 La. 284 1493
v. Railroad, 91 Tenn. 516 3422
v. Schofield, 5 Ind. App. 4 1917
Starr v. Bankers' Union, 81 Neb. 377 432
v. Gardner, 6 Up. Can. Q. B. (O. S.) 512 4532
v. Gregory C. M. Co., 6 Mont. 485 930
v. Jackson, 11 Mass. 519 3742
v. Light, 22 Wis. 414 2329, 2337
v. Missouri, etc., R. Co., 122 Mo. App. 26 3388
v. Moore, 3 McLean 354 633
v. Richmond, 30 Ill. 276 639, 735, 739, 740
v. Torrey, 22 N. J. L. 190 1826
Starr St., In re, 131 N. Y. Supp. 71 4140
Starrett v. Barber, 20 Me. 457 675, 703, 715, 728
v. Miley, 79 Ill. App. 658 2464
Startup v. Cortazzi, 2 Cr., M. & R. 165 2317, 2357
v. Macdonald, 6 M. & G. 593, 46 Eng. C. L. 623 789
State v. Adams, 101 Mo. App. 468 1582
v. Alden, 12 Ohio 59 1603
v. Allen, 124 Mo. App. 465 1705
v. Andrews, 39 W. Va. 35 1692
v. Atherton, 40 Mo. 209 1584, 1592
v. Atkinson, 17 Ind. 26 1607
v. Atlantic C. L. R. Co., 59 Fla. 612 3279
v. Autery, 1 Stew. 399 1309
v. Avery, 44 N. H. 392 1422
v. Baden, 11 Md. 317 495, 1618
v. Baltimore & O. R. Co., 36 Fed. 655 780
v. Baltimore, etc., R. Co., 24 Md. 84 4931
v. Banks, 76 Md. 136 2755
v. Barnes, 52 W. Va. 85 1604
v. Barrett, 121 Ind. 92 1652
v. Beackmo, 6 Blackf. 488 4025
v. Beard, 1 Ind. 460 2525
v. Beldsmeier, 56 Mo. 226 1707
v. Bennett, 24 Ind. 383 1634, 1636
v. Berg, 50 Ind. 502 1597, 1614
v. Berning, 74 Mo. 87 1643, 1646, 1650, 4273, 4306
v. Berry, 50 Ind. 496 1582
v. Binney, 127 Mo. App. 710 1707
v. Bird, 2 Rich. 99 1582
v. Blair, 76 N. C. 78 1578
v. Blake, 2 Ohio St. 147 1616
v. Blakemore, 7 Heisk. 651 2853
v. Bloxom, 1 Houst. 446 1634
v. Bobleter, 83 Minn. 479 1578, 1586
v. Boon, 44 Mo. 254 2755
v. Boughton, 58 Mo. App. 155 1606

[REFERENCES ARE TO PAGES]

State v. Bowen, 11 Wash. 432 1186
v. Bowman, 10 Ohio 445 1559
v. Bradley, 37 La. Ann. 623 521
v. Bradshaw, 10 Ired. L. 229 1786
v. Branch, 151 Mo. 637 1650
v. Briggs, 65 N. C. 159 816, 820
v. Brown, 11 Ired. 141 1601
v. Buck, 63 Ark. 218 6142
v. Burnham, 56 Vt. 445 463
v. Butler, 15 Lea 118 2499
v. Caldwell, 115 Ind. 6 1619
v. Campbell, 10 Mo. 724 1636
v. Cannon, 34 Iowa 322 1560
v. Carleton, 1 Gill 249 1597
v. Case, 77 Mo. 247 1626
v. Cassel, 2 Har. & G. 407 1891
v. Cayce, 85 Mo. 456 1603
v. Cecil County Com'rs, 54 Md. 426 4906
v. Central Pac. R. Co., 21 Nev. 247 809
v. Chadwick, 10 Ore. 423 735
v. Cheaney, 52 Mo. App. 258 1596
v. Cincinnati, etc., R. Co., 47 Ohio St. 130 3280
v. Citizens' Tel. Co., 61 S. C. 83 3546
v. Clark, 52 Mo. 508 694
v. Clarke, 109 Minn. 123 3789, 3792, 4216
v. Clausen, 65 Wash. 156 5151, 5156, 5158, 5159, 5160, 5164, 5167, 5168, 5169, 5170
v. Clementson, 69 Wis. 628 1489
v. Conover, 28 N. J. L. 224 1601
v. Coombs, 67 Mo. App. 199 1707
v. Copeland, 96 Tenn. 296 1581
v. Corey, 16 Ohio St. 17 1590
v. Corvin, 51 W. Va. 19 1719, 1721, 1722
v. Crane, 4 Wis. 400 1307
v. Creamer, 85 Ohio St. 349 5153, 5155, 5156, 5159, 5165, 5167
v. Crooks, 7 Ohio 573 1583, 1614
v. Cross, 6 Ind. 387 1557
v. Cunningham, — Miss. —, 65 So. 115 1601
v. Daly, 3 Ind. 431 1606
v. Daniels, 6 Jones 444 1597, 1614
v. Dart, 29 Conn. 153 1472
v. Davis, 96 Ind. 539 1595, 1600
v. Davis, 117 Ind. 307 1600
v. Dayton, 101 Md. 598 1604
v. Dennis, 58 Mo. App. 568 1650
v. Detroit, 113 Mich. 643 338, 4737
v. Dickman, 124 Mo. App. 653 1610
v. Dickmann, 146 Mo. App. 396 34, 39, 40, 1608, 1622
v. Dickson, 213 Mo. 66 1448, 1452
v. District Court, 41 Mont. 84 621
v. District Court, 42 Minn. 247 4059
v. District Court, 66 Minn. 161 4111
v. District Court, 129 Minn. 423 5202
v. District Court, 131 Minn. 352 5181, 5202
v. District Court, 129 Minn. 156 5207
v. District Court, 128 Minn. 486 5210
v. District Court, 129 Minn. 91 5206
v. District Court, 129 Minn. 502 5195
v. District Court, 128 Minn. 43 5147
v. Durkin, 65 Kan. 101 2345
v. Eagle, 13 Ohio 490 1486
v. Edwards, 10 Ired. 242 1621
v. Elliott, 157 Mo. 609 1650
v. Enslow, 41 W. Va. 744 1605
v. Estabrook, 29 Kan. 739 864
v. Evans, 83 Mo. App. 301 4836
v. Falls, 63 N. C. 188 1618
v. Fargo, 151 Mo. 280 1704, 1707
v. Farmer, 21 Mo. 160 1601
v. Fidelity & D. Co., 94 Mo. App. 184 4210
State v. Findley, 10 Ohio 51 1558
v. Finn, 87 Mo. 310 155
v. Finn, 23 Mo. App. 290 1615
v. Finn, 13 Mo. App. 285 1626
v. Folwell, 14 Kan. 105 1422
v. Ford, 5 Blackf. 393 1599
v. Foster, 84 Wash. 75 3993, 3995
v. Fox, 79 Mo. 109 1482
v. Fox, 79 Md. 514 4388, 4414, 4430
v. Fralick, 154 Mo. App. 690 40, 1608
v. Freeman, 5 Conn. 348 1482
v. Fricke, 102 Wis. 107 1006, 1037
v. Friedman, 74 W. Va. 11 1714, 1720, 1750, 1761, 1762
v. Gage, 52 Mo. App. 464 1482, 1690, 1705
v. Gaillard, 2 Bay 11 2047, 2201
v. Gatzweiler, 49 Mo. 17 1581
v. Glenn, 40 Ark. 332 1560
v. Gobin, 94 Fed. 48 1600, 1601
v. Goggin, 191 Mo. 482 2871
v. Goodhue, 74 Mo. App. 162 1705
v. Gramm, 7 Wyo. 329 1581
v. Grand Trunk R., 61 Me. 114 4850
v. Grays Harbor, etc., R. Co., 54 Wash. 530 4034, 4101
v. Green, 112 Mo. App. 108 33, 1608
v. Green, 124 Mo. App. 80 1623
v. Greer, 101 Mo. App. 669 1650
v. Gregory, 119 Ind. 503 1640
v. Grimsley, 19 Mo. 171 1614
v. Guenther, 87 Wis. 673 1007, 1185, 1186
v. Haines, 30 Me. 65 3839
v. Hallen, 165 Mo. App. 422 1609
v. Hamburg-Am. S. P. Co., 190 Fed. 240 4848
v. Hamilton, 33 Ind. 502 495, 496, 1619
v. Harper, 6 Ohio St. 607 1577, 1578
v. Harrington, 44 Mo. App. 301 1141
v. Harrington, 41 Mo. App. 439 1622
v. Harrington, 33 Mo. App. 476 4306
v. Harshaw, 84 Wis. 532 1578
v. Hascall, 6 N. H. 352 1483
v. Hastings, 10 Wis. 518 2981
v. Hawkins, 28 Mo. 366 2458
v. Heckert, 62 Mo. App. 427 1707
v. Henderson, 120 Ga. 780 423, 1595
v. Hill, 47 Neb. 456 596, 1586
v. Hinsdale-D. G. Co., 117 Ind. 476 2760
v. Hobson, 5 Ohio Dec. 442 1605, 1617
v. Holman, 93 Mo. App. 611 1650
v. Hope, 121 Mo. 34 4232
v. Hornton, 70 Neb. 334 1543
v. Houston, 78 Ala. 567 1581
v. Hudson, 86 Mo. App. 501 589
v. Huegin, 100 Wis. 189 442
v. Hulick, 33 N. J. L. 307 4086
v. Humes, 34 Wash. 347 4151, 4156
v. Immer, 52 Mo. App. 526 1705
v. Ingram, 5 Ired. 441 3162
v. Insurance Co., 106 Tenn. 282 622
v. Jackson, 1 Johns. Ch. 13 739, 1202, 1203, 1214
v. Jeandell, 5 Harr. 475 4513
v. Jennings, 4 Ohio St. 418 1600
v. Jennings, 14 Ohio St. 73 4311
v. Johnson, 55 Mo. 80 1590
v. Johnson, 7 Ired. 77 1600, 1607, 1614
v. Johnson, 1 Ind. 158 1619
v. Jungling, 116 Mo. 162 1281
v. Keadle, 63 W. Va. 645 1132
v. Keenan, 111 Iowa 286 4506
v. Kelly, 78 Kan. 42 40, 4297
v. Knittschnett, 4 Nev. 178 605
v. Knoxville, 115 Tenn. 175 1115

[REFERENCES ARE TO PAGES]

State v. Kurtzeborn, 78 Mo. 98 1597, 1614
v. Lackey, 3 Ired. 25 1583
v. Larson, 83 Minn. 124 864
v. Lawson, 2 Gill 62 1556, 1607
v. Lichtman, 184 Mo. App. 225 1688, 1704
v. Lines, 4 Ind. 351 1624
v. Long, 8 Ind. 415 1606
v. McAlpin, 6 Ired. 347 1556, 1598
v. M'Clane, 2 Blackf. 192 1599
v. McDaniel, 78 Miss. 1 1605
v. McDermitt, 72 W. Va. 291 728, 1132
v. McDonough, 9 Mo. App. 63 1602, 1604
v. McDuffe, 34 N. H. 523 1459
v. McFetridge, 84 Wis. 473 596, 1006, 1133, 1578
v. McGuire, 46 W. Va. 328 1558
v. McHale, 16 Mo. App. 478 1704, 1707
v. McKee, 1 Bailey 651 1307
v. McKeon, 25 Mo. App. 667 1687, 1692
v. McKinnon, 9 Ohio N. P. (N. S.) 513 1133, 2741
v. McKinnon, 11 Ohio N. P. (N. S.) 165 2, 26, 39, 1579, 2743
v. McKinnon, 15 Ohio C. C. (N. S.) 1 1578
v. McLeod, 1 Hawks 344 1482
v. Maine Cent. R. Co., 60 Me. 490 4850, 5120
v. Mann, 21 Wis. 684 1601
v. Marlier, 46 Mo. App. 233 436
v. Massachusetts Bonding & Insurance Co., 91 Kan. 74 2758
v. Matson, 44 Mo. 305 2821, 2822, 2823
v. Mayes, 28 Miss. 709 1043
v. Medary, 17 Ohio 554 2755
v. Medford, 34 W. Va. 633 1723
v. Meyer, 138 Mo. App. 507 1604
v. Middleton, 57 Tex. 185 1589
v. Miles, 149 Mo. App. 638 34, 1608, 1625
v. Miller, 180 Fed. 796 4931
v. Milne, 36 Neb. 301 694
v. Missouri Pac. R. Co., 71 Mo. App. 385 3533
v. Mobleter, 83 Minn. 479 1581
v. Moore, 19 Mo. 369 1601
v. Moore, 74 Mo. 413 1578
v. Moore, 56 Neb. 82 1583
v. Morrison, 60 Miss. 74 372
v. Morrison, 244 Mo. 193 1638, 1639
v. Moss, 18 S. C. 367 1557
v. Mullen, 50 Ind. 598 495, 1619
v. Multnomah County, 13 Ore. 287 1065
v. Murray, 24 Md. 310 1643
v. National Banks, 4 Ohio N. P. (N. S.) 245 1118
v. Nevin, 19 Nev. 162 1578
v. Newcomer, 109 Ind. 243 1619
v. Nichols, 10 Gill & J. 27 1636
v. Nutter, 44 W. Va. 385 2748
v. Ohio Nat. Bank, 7 Ohio N. P. (N. S.) 43 1118
v. O'Neill, 4 Mo. App. 221 1707
v. Overturf, 16 Ind. 261 1857
v. Pacific G. Co., 22 S. C. 50 3788
v. Page, 63 Ind. 209 1652
v. Parker, 2 Ohio C. C. (N. S.) 38, 25 Ohio C. C. 237 1056
v. Parsons, 109 Mo. App. 432 1452, 1453, 1691, 1705, 1707
v. Paul, 21 Mo. 51 1582, 1586
v. Pederson, 135 Wis. 31 1591
State v. Perkins, 10 Ired. 333 1559
v. Perkins, 114 La. 301 1579, 2801
v. Peterman, 66 Mo. App. 257 1653
v. Peterson, 142 Mo. 526 696
v. Pioneer Nurseries Co., 26 Idaho 332 2741
v. Pitman, 131 Mo. App. 299 1689, 1690
v. Pittinger, 37 Wash. 384 380
v. Pittsburgh, etc., R. Co., 45 Md. 41 4954
v. Porter, 76 Kan. 411 1447
v. Potter, 63 Mo. 212 2818
v. Powell, 44 Mo. 436 324
v. Purcell, 31 W. Va. 44 1737, 1763
v. Railroad Com., 140 Wis. 145 4074
v. Reece, 43 Mont. 291 1252
v. Reinhardt, 31 Mo. 95 1408
v. Reynolds, 137 Mo. App. 261 1555
v. Richardson, 29 Mo. App. 595 1129
v. Richeson, 36 Ind. App. 373 1538
v. Roberts, 11 Gill & J. 506 1066
v. Roberts, 68 Mo. 234 1597
v. Roberts, 12 N. J. L. 114 1614, 1615
v. Roche, 94 Ind. 372 696
v. Rollins, 29 Mo. 267 1606
v. Ruggles, 20 Mo. 99 1636
v. Ryland, 163 Mo. 280 1607
v. Ryley, 76 Mo. App. 412 1690
v. Sandusky, 46 Mo. 377 1569
v. Schaper, 152 Mo. App. 538 1604
v. Schoonover, 135 Ind. 526 1305
v. Schott, 9 Ohio N. P. (N. S.) 522 1133, 2741
v. Scroggin, 10 Ark. 326 1557
v. Seavey, 137 Mo. App. 1 1446, 1692, 1704
v. Shardlow, 43 Minn. 524 4059
v. Shinborn, 46 N. H. 497 1422
v. Shobe, 23 Mo. App. 474 1704
v. Smily, 37 Ohio St. 33 4506
v. Smith, 87 Miss. 551 1559
v. Smith, 26 Mo. 226 707, 1584, 1586 1588
v. Smith, 31 Mo. 566 4169, 4178, 4227, 4312
v. Smith, 139 Mo. App. 101 1644
v. Smith, 156 N. C. 628 122
v. Soale, 36 Ind. App. 73 30
v. Sooy, 39 N. J. L. 538 707, 1038
v. Spicer, 4 Houst. 100 803, 805
v. Spinney, 166 Ind. 282 1041
v. Stark, 75 Mo. 566 1560, 1690, 1707
v. State Journal Co., 75 Neb. 275 2580
v. Steen, 14 Tex. 396 1038
v. Stevens, 103 Ind. 55 1268, 1270, 1273, 1305
v. Stout, 43 Wash. 501 1041
v. Strange, 1 Ind. 538 1642
v. Suffield & T. B. Co., 82 Conn. 460 3956, 3963, 4144
v. Sullivan, 99 Mo. App. 616 3536, 4235
v. Superior Court, 44 Wash. 108 4124
v. Superior Court, 55 Wash. 64 4134, 4140
v. Superior Court, 70 Wash. 540 3986
v. Superior Court, 77 Wash. 593 3958
v. Superior Court, 84 Wash. 252 3999
v. Swinney, 60 Miss. 39 1597
v. Taylor, 29 Ind. 517 3839
v. Taylor, 10 Ohio, 378 872, 1922
v. Taylor, 10 S. D. 182 1567
v. Taylor, 67 W. Va. 585 1728
v. Thatcher, 56 Ill. 257 1722
v. Thomas, 19 Mo. 613 161, 178, 215
v. Thomas, 11 Ired. 251 741

[REFERENCES ARE TO PAGES]

State v. Thomas, 17 Mo. 503 1559
v. Thomas, 19 Mo. 613 1694, 1707
v. Timmons, 90 Md. 10 1602
v. Tittmann, 134 Mo. 162 1644
v. Toomer, 7 Rich. 216 1613
v. Turner, 101 Md. 584 1599
v. Turner, 8 G. & J. 125 1614
v. United F. G. Co., 81 Kan. 660 730, 1559, 1591
v. Van Pelt, 1 Ind. 304 1614
v. Votaw, 8 Blackf. 2 1556
v. Walford, 11 Ind. App. 392 1394, 1600, 1606
v. Wall, 9 Ired. 20 1600, 1614, 1615
v. Walsen, 17 Colo. 170 1133, 1578
v. Warner, 55 Wis. 271 1101
v. Washburn, 67 Conn. 187 1644
v. Watson, 44 Mo. 305 424
v. Watson, 7 Ired. 289 1607
v. Wayman, 2 Gill & J. 254 1599
v. Weeks, 92 Mo. App. 359 1583
v. Wells, 8 Nev. 105 1582
v. White, 88 Ind. 587 1600
v. White, 10 Rich. 442 1606
v. Will, 54 Wash. 453 1042
v. Williams, 39 Ind. App. 376 2767
v. Wood, 51 Ark. 205 1559
v. Wotring, 56 W. Va. 394 1595
v. Wright, 37 Iowa 522 1560
v. Wylie, 2 Strob. 114 1170
v. Yates, 104 Me. 360 3967
v. Young, 23 Minn. 551 1590
State Bank v. American H. L. Co., 121 Mo. App. 324 1913
v. Armstrong, 4 Dev. 519 716
v. Bartle, 114 Mo. 276 2792
v. Brennan, 7 Colo. App. 427 1608
v. Cook, 125 Iowa 111 1826
v. Dody, 71 Kan. 98 2446
v. Ensminger, 7 Blackf. 105 711
v. Fox, 3 Blatchf. 431 388
v. Gates, 114 Iowa 323 4377
v. Holcomb, 7 N. J. L. 193 1237
v. Locke, 4 Dev. 529 716, 1592
v. Showers, 65 Kan. 431 4312, 4313, 4314
v. Tweedy, 8 Blackf. 447 733
v. Watkins, 6 Ark. 123 2795
v. Wells, 3 Pick. 394 635
State Finance Co. v. Beck, 15 N. D. 374 1067
State Ins. Co. v. Belford, 2 Kan. App. 280 420
v. Jamison, 79 Iowa 245 2910, 2906, 2912, 2918
v. Taylor, 14 Colo. 499 3022, 3041, 3042, 3051
v. Todd, 83 Pa. 272 3021
State Nat. Bank v. Board of Com'rs, 121 La. 269 949
v. Commonwealth, 129 Ky. 637 953
State T. Co. v. Duluth, 70 Minn. 257 832, 866, 868
State Treasurer v. Mann, 34 Vt. 371 1583, 1596, 1614
State Trust Co. v. Cowdrey, 68 Hun 97 1056
State of California, The, 4 C. C. A. 393, 54 Fed. 404 5005, 5008, 5009
Staton v. Lapp, 113 Md. 324 3741
v. Prichard, 4 Hun 266 3785
Staudt v. Murphysboro E. R. L. H. & P. Co., 169 Ill. App. 276 3741, 4086
Stauff v. Bingenheimer, 94 Minn. 309 384
Stauffer v. Garrison, 61 Miss. 67 1707
v. Miller S. Co., 151 Pa. 330 3797
Staunton v. Goshorn, 36 C. C. A. 75, 94 Fed. 52 4643, 4644, 4645
Steadley v. Stuckey, 113 Mo. App. 582 1599, 1609, 2561
Steadman v. Western T. Co., 48 Barb. 97 3329
Steam Dredge No. 1, 87 Fed. 760 2458
Steam Herring Fleet v. Richards, 17 T. L. Rep. 731 (1901) 2626, 2635
Steam S. C. Co. v. Sheldons, 15 Fed. 608 4446, 4449
v. Windsor Mfg. Co., 17 Blatch. 24, 18 Blatch. 47 4453, 4458, 4459, 4460, 4473, 4476
Steamboat Co. v. Whilldin, 4 Har. 228 65
Steamboat John Owen v. Johnson, 2 Ohio St. 142 3425
Steamboat Wellsville v. Geisse, 3 Ohio St. 333 512, 524, 542, 569
Steamship Balmoral Co. v. Marten, [1902] App. Cas. 511, aff'g [1901] 2 K. B. 896 3006, 3038
Steamship Rutherglen Co. v. Howard Houlder & Partners, 122 C. C. A. 166, 203 Fed. 848 3319
Steamship Wellesley Co. v. Hooper, 185 Fed. 733 1058, 3403, 3424
Stearine, etc., Co. v. Heintzmann, 17 C. B. (N. S). 56 287, 368, 2922, 2956
Stearn v. Hesdorfer, 9 N. Y. Misc. 134 2059, 2066
Stearns v. Barrett, 1 Pick. 443 898, 923
v. Brown, 1 Pick. 530 1117, 1780
v. Cox, 17 Ohio 590 4513
v. Kennedy, 94 Minn. 439 4380, 4395
v. Lake Shore, etc., R. Co., 112 Mich. 651 2554
v. McGinty, 55 Hun 101 4188
v. Marsh, 4 Denio 227 539, 4287
v. Raymond, 26 Wis. 74 360
v. Reidy, 33 Ill. App. 246 4813
v. Richmond, 88 Va. 992 3913, 3917, 3969
v. Tappen, 5 Duer 294 765
Stearns L. Co. v. Inman, 154 Ky. 251 2696, 2706
Stebbing v. Metropolitan Board, 6 Q. B. 37 4040
Stebbins v. Central Vermont R. Co., 464 3404
v. Smity, 4 Pick. 97 662
v. Stebbins, 51 Ind. 595 645
v. Wolf, 33 Kan. 765 2098, 2111, 2121, 2133, 2137
Steber v. Chicago, etc., R. Co., 139 Iowa 153 3881, 3926
Stecher v. People, 217 Ill. 348 61, 429
Steckbauer v. Leykom, 130 Wis. 438 532, 1838, 4384
Stecker v. Weaver C. & C. Co., 116 App. Div. (N. Y.) 772 1366, 2278
Stedman v. Fortune, 5 Conn. 462 3716
v. Taylor, 3 Ware 52 3289
Steed v. McRae, 1 Dev. & Bat. 435 2539
Steeds v. Steeds, 22 Q. B. Div. 537 756
Steefel v. Rothschild, 64 App. Div. (N. Y.) 293 3147
Steel v. Bradfield, 4 Taunt. 227 1817
v. Dixon, 17 Ch. Div. 825 2865
v. Gordon, 14 Wash. 521 1726, 1752, 1759
v. Kurtz, 28 Ohio St. 191 4944
v. Metcalf, 4 Tex. Civ. App. 313 131
v. People's O. & G. Co., 147 Ill. App. 133 838, 842
v. Steel, 12 Pa. 64 526
v. Worthington, 1 Ohio 350 2067
Steele v. Andrews, 144 Iowa 360 2371, 2414
v. Anheuser-B. B. Ass'n, 57 Minn. 18 3098
v. Biggs, 22 Ill. 643 802
v. Davis, 75 Ind. 191 3739

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Steele v. Frierson, 85 Tenn. 430 1088
v. Gold Fissure M. Co., 42 Colo. 529 2468
v. Hammond, 136 App. Div. (N. Y.) 667 2485
v. Kellogg, 163 Mich. 132 1134, 1443, 4394
v. Mealing, 24 Ala. 285 2865
v. Pritchard, 17 Manitoba 226 4407
v. Reese, 1 Yerg. 263 1649
v. Sawyer, 2 McCord 459 1927
v. Thatcher, 56 Ill. 257 306, 1725, 1727
v. Thompson, 42 Mich. 594 448
v. Townsend, 37 Ala. 247 3386
v. United States, 19 Ct. of Cls. 181 4264
v. Western I. L. Nav. Co., 2 Johns. 283 1529
Steele-W. Co. v. Shodoc Pond P. Co., 153 Ill. App. 576 885
Steen v. Friend, 20 Ohio C. C. 459 4525
v. Ross, 22 Fla. 480 1685, 1688
v. Weisten, 51 Ore. 473 4381
Steenburgh v. McRorie, 60 N. Y. Misc. 510 3826
Steenerson v. Waterbury, 52 Minn. 211 2493
Steenrod v. Railroad Co., 27 W. Va. 1 1025, 1026, 1027
Steer v. Crowley, 14 C. B. (N. S.) 337 39
Steers v. Laird, 3 N. Y. Misc. 408 2000
v. Lashley, 6 T. R. 61 1825
v. Liverpool, etc., S. Co., 57 N. Y. 1 3415
Stees v. Leonard, 20 Minn. 494 2607
Steeve v. Smith, 153 Ill. App. 630 1280, 4735
Steffen v. Mississippi River, etc., R. Co., 156 Mo. 322 3313, 3370
Steffens v. Fisher, 161 Mo. App. 386 4169
Steger v. Barrett (Tex. Civ. App.), 124 S. W. 174 3743, 3809
v. Bush, Sm. & M. Ch. 172 677
Stehr v. Mason City, etc., R. Co., 77 Neb. 641 3951, 3952, 3982
Steidl v. Minneapolis, etc., R. Co., 94 Minn. 233 3425
Steiger v. Hillen, 5 Gill & J. 121 3719, 3725
Steigleman v. Jeffries, 1 S. & R. 477 534
Steiglider v. Missouri Pac. R. Co., 38 Mo. App. 511 383
Stein v. Automatic E. Co., 152 Ill. App. 392 757
v. Burden, 24 Ala. 130 38, 1431
v. C. & O. R. Co., 132 Ky. 322 3846, 3849, 3925
v. Cozart, 122 N. C. 280 1708
v. Kooperstein, 52 Misc. (N. Y.) 481 2542
v. Lafayette, 6 Ind. App. 414 3853
v. Passmore, 25 Minn. 256 2780
v. Steamboat Prairie Rose, 17 Ohio St. 472 387
v. Swenson, 44 Minn. 218 980
v. United R., 159 Cal. 368 125
v. Waddell, 37 Wash. 634 1953
Steinback v. State, 38 Ind. 483 1579, 1588
Steinberger v. Western U. Tel. Co., 97 Miss. 260 3618
Steinbock v. Evans, 122 N. Y. 551 1574, 1811
Steinbrunner v. Pittsburgh, etc., R. Co., 146 Pa. 504 1477
Steinburg v. Gebhardt, 41 Mo. 519 2458
Steiner v. Erie Dime S. & L. Co., 98 Pa. 591 623, 696
Steiner v. Moran, 2 Mo. App. 47 334
Steinhardt v. Baker, 163 N. Y. 410, aff'g 25 App. Div. (N. Y.) 197 2019
v. Doellner, 34 N. Y. Super. Ct. 218 2848
Steinhauer v. Colmar, 11 Colo. App. 494 1765
v. Witman, 1 S. & R. 438 2206
Steinke v. Bentley, 6 Ind. App. 663 3843, 3850
Steinman v. McWilliams, 6 Pa. 170 4530
v. Magnus, 11 East 390 747, 752, 753, 756
v. Midland S. & L. Co., 78 Kan. 479 1162
Steinmetz v. Kelly, 72 Ind. 145 4790
Stelle v. Lovejoy, 125 Ill. 352 1765
Stelwagon's Est., 17 Pa. Dist. 609 1088
Stemmer v. Scottish Ins. Co., 33 Ore. 65 1091, 3046
Stemmerman v. Nassau E. R. Co., 36 App. Div. (N. Y.) 218 1504
Stengel v. Preston, 11 Ky. L. Rep. 976 748
Stenger v. Carrig, 61 Neb. 753 1051
Stenzel v. Pennsylvania F. Ins. Co., 110 La. 1019 3038, 3041
Stephen v. Camden & P. S. Co., 75 N. J. L. 648 2547
v. Smith, 29 Vt. 160 1347
Stephens v. Argus, The, Bee 170 2732
v. Barnes, 30 Pa. Super. 127 1994, 2003
v. Board of Education, 79 N. Y. 187 638
v. Boulton, 23 Up. Can. Q. B. 16 2192
v. Cambria, etc., R. Co., 242 Pa. 606 3962, 3963, 4015, 4152
v. Crawford, 3 Ga. 499, 1 Ga. 574 1598, 1599
v. Elliott, 36 Mont. 92 1468, 1470, 1478
v. Ely, 162 N. Y. 79 3256
v. Essex County P. Com., 143 Fed. 844 929
v. Evans, 30 Ind. 39 555
v. Felt, 2 Blatch. 37 4448
v. Gravit, 136 Ky. 479 4633, 4635, 4648
v. Hannibal, etc., R. Co., 96 Mo. 207 4779
v. Head, 138 Ala. 455 11
v. Hendee, 80 Neb. 754 1595, 1604
v. Hudson Valley K. Co., 48 N. Y. St. Rep. 814 4795
v. Koonce, 103 N. C. 266 4232
v. Meek, 6 Lea 266 2854
v. Muir, 8 Ind. 352 980
v. Nashville, etc., R., 10 Lea 448 762
v. Pennsylvania Cas. Co., 135 Mich. 189 1226, 2893
v. Phoenix B. Co., 139 Fed. 248 894, 1093, 2670
v. Toronto R. Co., 11 Ont. L. R. 19 1511, 4921, 4922
v. White, 2 Wash. (Va.) 260 1354
v. Wilkinson, 2 B. & Ad. 320 541, 1830
Stephenson v. Allison, 123 Ala. 439 1919, 1920
v. Axson, Bailey's Eq. 274 1200
v. Corder, 71 Kan. 475 157
v. Essex County P. Com., 143 Fed. 844 833
v. Harrison, 3 Litt. 170 354, 1989, 2022
v. Harrison, 3 Head 729 1085
v. Jebeles & Colias Confectionery Co., 10 Ala. App. 431 32
v. Kilpatrick, 166 Mo. 262 819

[REFERENCES ARE TO PAGES]

Stephenson v. Little, 10 Mich. 433 360, 361, 4262
v. Piscataqua F. & M. Ins. Co., 54 Me. 70 3017
v. Price, 30 Tex. 715 4240
v. Repp, 47 Ohio St. 551 2229
v. Thayer, 63 Me. 143 4277
v. Wright, 111 Ala. 579 4168, 4200
Stephenville, etc., R. Co. v. Moore, 56 Tex. Civ. App. 553 4101
v. Yates, — Tex. Civ. App. —, 148 S. W. 836 3873, 3877
Stepina v. Conklin L. Co., 134 Ill. App. 173 1808
Stepp v. Croft, 18 Pa. Super. Ct. 101 4580
v. National Life, etc., Ass'n, 37 S. C. 417 1155, 3046
Sterling v. Forrester, 2 Bligh, 575 2823
v. Gregory, 149 Cal. 117 376
v. Head Camp, 28 Utah 526 806
v. Marine Bank, 120 Md. 396 4168, 4191, 4196
v. Mercantile Ins. Co. 32 Pa. 75 1839
v. Peet, 14 Conn. 245 2060, 2110, 3188, 3196
v. Union C. Co., 142 Mich. 284 125
v. Wolf, 163 Ill. 467, 61 Ill. App. 515 2754, 2760
Sterling H. Co. v. Galt, 81 Ill. App. 600 3878
Sterling O. Co. v. House, 25 W. Va. 64 259, 293, 2342
Sterling, The, and The Equator, 106 U. S. 647 4987
Stern v. Knowlton, 184 Mass. 29 303
v. People, 102 Ill. 540 1038, 1104, 1132
v. Rosenheim, 67 Md. 503 258, 2572
v. Sawyer, 78 Vt. 5 2793
v. Smith, 225 Ill. 430 1874
Sternbach v. Friedman, 34 App. Div. (N. Y.) 534 2802, 2805
Sternberg Mfg. Co. v. Miller, etc., Mfg. Co., 170 Fed. 298 4503
Sternberger v. Gowdy, 93 Ky. 146 738, 741
v. McGovern, 15 Abb. Pr. (N. S.) 257 2046, 2047
Sternburg v. Bowman, 103 Mass. 325 1848, 1850
Sterne v. Bank, 79 Ind. 549 2804, 2808
v. Benbow, 151 N. C. 460 2000
v. McKinney, 79 Ind. 578 2804, 2808
v. Talbott, 89 Hun 368 1765, 1766
Sterneman v. Springfield Traction Co., 178 Mo. App. 64 3470
Sternfels v. Metropolitan St. R. Co., 73 App. Div. (N. Y.) 494 435, 4859, 4877, 4901
Sterns v. Marks, 35 Barb. 565 2767
Sterrett v. Creed, 2 Ohio 442 1501
v. Delmar Ave. & C. R. Co., 108 Mo. App. 650 4148
v. Kaster, 37 Ala. 366 474
Sterry v. Foreman, 2 C. & P. 592 4556
Stetson v. Bangor, 73 Me. 357 3990
v. Chicago, etc., R. Co., 75 Ill. 74 3948
v. Faxon, 19 Pick. 147 16, 3741, 3918, 3935
v. Mackinac Transp. Co., 182 Mich. 355 4799
Steubenville v. Culp, 38 Ohio St. 18 694
Stevens v. Adams, 1 Thomp. & C. 587 429
v. Adams, 23 Wend. 57 2489
v. Adamson, 2 Stark 422 3685
v. Amsinck, 149 App. Div. (N. Y.) 220 42, 260, 1418
Stevens v. Anthony, 82 Kan. 179 4200
v. Barringer, 13 Wend. 639 1199, 1222
v. Beard, 4 Wend. 604 2660
v. Bradley, 22 Ill. 224 670
v. Bradley, 89 Iowa 174 2447
v. Briggs, 14 Vt. 44 1538
v. Cady, 2 Curt. 200 4479
v. Carroll, 131 Iowa 170 2872
v. Cheney, 36 Hun 1 60, 4789
v. Chicago F. Co., 178 Ill. App. 455 2559
v. Coffeen, 39 Ill. 148 1203, 3097
v. Cooper, 1 Johns. 425 571
v. Corbitt, 33 Mich. 458 1004
v. Crane, 37 Mo. App. 487 2546, 2564
v. Curran, 28 Mont. 366 4222
v. Danbury, 53 Conn. 9 3959, 4148
v. Davis, 3 Metc. (Mass.) 211 980
v. Dudley, 56 Vt. 158 53, 54, 55
v. Ellsworth, 95 Iowa 231 2485
v. Friedman, 58 W. Va. 78 1267, 1302, 1471, 4795
v. Fuller, 8 N. H. 463 4372
v. Gale, 113 Mich. 680 240, 2588
v. Gaylord, 11 Mass. 255 643
v. Gladding, 17 How. 447 4478, 4479
v. Gladding, 2 Curt. 608 4479
v. Goodell, 3 Metc. (Mass.) 34 1116
v. Gregg, 89 Ky. 461 1146
v. Gwathmey, 19 Mo. 628 1224
v. Handley, Wright 121 223
v. Hartwell, 11 Metc. (Mass.) 542 4562
v. Hay, 6 Cush. 229 1559
v. Hollister, 18 Vt. 294 3733
v. Howerton, 49 Ind. App. 151 4232
v. Kelley, 66 Conn. 570 1392
v. Lockwood, 13 Wend. 644 376
v. Low, 2 Hill. 132 4232, 4290, 4302
v. Lyford, 7 N. H. 360 1364, 2276, 2296
v. McIntire, 14 Me. 14 1847, 1866
v. Melcher, 152 N. Y. 551 1085, 1086
v. Miller, 13 Gray 283 566
v. Monges, 1 Harr. 127 2489
v. Nater, 4 Porto Rico Fed. 158 1288, 4841
v. New York, 111 App. Div. (N. Y.) 362 3099
v. New York E. R. Co., 130 N. Y. 95 4124
v. Norwich Union F. Ins. Co., 120 Mo. App. 88 3007, 3008, 3012, 3018
v. O'Neil, 51 App. Div. 364, 169 N. Y. 375 1341, 4841
v. Pantlind, 95 Mich. 145 3250
v. Pillsbury, 57 Vt. 205 887
v. Robins, 12 Mass. 180 2957
v. Rowe, 50 N. H. 578 17
v. Rowe, 3 Denio, 327 496
v. Sayward, 8 Gray 215 3287
v. Sheriff, 76 Kan. 124 2489
v. Springer, 23 Mo. App. 375 1435, 1451, 2301, 2302
v. State, 65 N. Y. Misc. 240 3887, 3923
v. Stevens, 96 Ga. 374 3738, 3819, 3827
v. Tittle, 2 Cal. Ind. Acc. Comm. Dec. (1915) 146 5173
v. Treasurer, 2 McCord 107 1559, 1613
v. Tucker, 87 Ind. 109 2859
v. Tuite, 104 Mass. 328 1664, 1668, 4355
v. Walker, 55 Ill. 151 2942

[REFERENCES ARE TO PAGES]

Stevens v. Whalen, 95 Ark. 488 531, 2403, 2421, 2455
v. Wiley, 165 Mass. 402 4289
v. Wisconsin Farm Land Co., 124 Minn. 421 1502
v. Wolf, 77 Tex. 215 2888
v. Worcester, City of, 219 Mass. 128 3994
Stevens I. Co. v. South Ogden W. Co., 20 Utah 267 1201
Stevenson v. Belknap, 6 Iowa 97 341, 1269
v. Davis, 23 Can. Sup. Ct. 629 1965, 1970
v. Ebervale C. Co., 201 Pa. 112 3890, 3901, 3925
v. Ebervale C. Co., 203 Pa. 316 3925
v. Fuller, 75 Me. 324 1985
v. Illinois Watch Case Co., 186 Ill. App. 418 5200, 5205
v. Loehr, 57 Ill. 509 1955
v. Lombard, 2 East 575 3125, 3132
v. Lord, 15 Colo. 131 4359
v. Love, 106 Fed. 466 1370
v. McLean, 11 Up. Can. C. P. 208 2767
v. Maxwell, 2 Sandf. Ch. 274, 2 N. Y. 408 1026, 1027, 1969, 3147
v. Montreal Tel. Co., 16 Up. Can. Q. B. 530 3606
v. Morgan, 67 Neb. 207 1560
v. Morris, 37 Ohio St. 10 4683
v. Morris Mach. Works, 69 Miss. 232 2522
v. Newman, 13 C. B. 285 1527
v. Palmer, 14 Colo. 565 1710
v. Ritter L. Co., 108 Va. 575 4847
v. Smith, 28 Cal. 102 1363, 1367
v. Stunkard, 44 Ind. App. 716 660
v. Wallace, 27 Gratt. 77 3752
v. Whitesell, 10 Pa. Super. 306 223, 4197
Steverman v. Boston E. R. Co., 205 Mass. 508 88, 147
Stewart v. Ahrenfeldt, 4 Denio 189 757
v. Alvis, 30 Ind. App. 237 427
v. American B. Co., 108 Md. 200 295, 1430, 2655
v. American Exch. Nat. Bank, 54 Neb. 461 2805
v. Anderson, 111 Iowa 329 3666
v. Arkansas S. R. Co., 112 La. 764 95
v. Baltimore, 33 W. Va. 88 1356
v. Baltimore & O. R. Co. (Misc.), 88 N. Y. Supp. 377 3443
v. Baltimore & O. R. Co., 168 U. S. 445 4952, 4953
v. Barnes, 153 U. S. 456 940, 1199, 1200
v. Beard, 4 Md. Ch. 319 3727
v. Bedell, 79 Pa. 336 838, 887
v. Blair, 171 Ala. 147 4602, 4615
v. Bock, 3 Abb. Pr. 118 537
v. Carey L. Co., 146 N. C. 47 1329, 1330, 1338
v. Cauty, 8 M. & W. 160 2256
v. Challacombe, 11 Ill. App. 379 2325
v. Clark, 11 Metc. (Mass.) 384 2192
v. Cole, 46 Ala. 646 4604
v. Colfax C. C. Co., 147 Iowa 548 3778, 3788, 3790, 3795
v. Council Bluffs, 84 Iowa 61 3951, 3957
v. Davis, 18 Ind. 74 678
v. Drake, 9 N. J. L. 139 303, 2094, 2115, 2134, 2151, 2153, 2157, 2159
v. Eden, 2 Cai. 121 783
v. Ellice, 2 Paige 604 1155, 1878
Stewart v. Fitch, 31 N. J. L. 17 1491
v. Fowler, 53 Kan. 537 2501
v. Gillett, 79 N. Y. Misc. 93 2031, 2032, 2037
v. Goulden, 52 Mich. 143 2863
v. Great Northern R. Co., 65 Minn. 515 4075
v. Greenock M. Ins. Co., 2 H. L. Cas. 159 3016
v. Grier, 7 Houst. 378 1812
v. Gromett, 7 C. B. (N. S.) 191, 97 Eng. C. L. 191 4604
v. Hadley, 55 Mo. 235 2068
v. Harris, 6 Ala. App. 518 4285
v. Henry County, 66 Fed. 127 622, 1018
v. Hidden, 13 Minn. 43 642
v. Hopkins, 30 Ohio St. 502 703, 710
v. Jack, 78 Iowa 154 1958, 4396
v. Joyce, 205 Mass. 371 49, 4364, 4397, 4422, 4424
v. L. & N. R. Co., 136 Ky. 717 4949
v. Laberee, 185 Fed. 471 664
v. Lanier House Co., 75 Ga. 582 251, 547, 1431, 3210, 3212, 3248, 3258
v. Levis, 42 La. Ann. 37 2755
v. Loring, 5 Allen 306 2534
v. McLaughlin's Est. 126 Mich. 1 1941
v. Maddox, 63 Ind. 51 340, 4836
v. Madison, 1 Call 416 1605
v. Martin, 2 Watts 200 1086
v. Martin, 16 Vt. 397 4201, 4306
v. Mathieson, 23 Up. Can. Q. B. 135 2122
v. Miller, 1 Mont. 301 1762
v. Noble, 1 G. Greene 26 1562
v. Patton, 65 Mo. App. 21 226, 231, 2773
v. Petree, 53 N. Y. 621 1202
v. Philadelphia, etc., R. Co., 8 Houst. 450 4653, 4730
v. Pittsburg & M. C. Co., 42 Mont. 200 1511
v. Postal Tel. C. Co., 131 Ga. 31 3566, 3610
v. Power, 12 Kan. 596 2276, 2343
v. Preston, 77 Wash. 559 2902
v. Puck S. Co., 154 Iowa 411 4378
v. Quincy, etc., R. Co., 142 Mo. App. 322 3810
v. Railroad Co., 41 Fed. 736 2500
v. Riley & Johnson, — Ala. —, 66 So. 488 4393
v. Ripon, 38 Wis. 584 334, 3643, 4669, 4679, 4700, 4748
v. Salisbury R. & I. Co., 159 N. C. 230 4406
v. Schell, 31 Fed. 65 1005
v. Sculthorp, 25 Ont. 544 181
v. Sefton, 108 Cal. 197 3737
v. Sims, 112 Tenn. 296 1129
v. Smith, 92 Wis. 76 4971
v. Sonneborn, 98 U. S. 187 4627, 4633, 4634, 4640, 4645
v. Spaulding, 72 Cal. 264 1055
v. Steele, 5 Scott N. R. 927 3027
v. Stephens, 7 Ga. App. 453 748
v. Strong, 20 Ind. App. 44 116
v. Tevri, 7 T. B. Mon. 109 1493
v. Thayer, 170 Mass. 560 2465
v. Thomson, 97 Ky. 575 15
v. United E. L. & P. Co., 104 Md. 332 4848, 4852, 4858
v. Voll, 81 N. J. L. 323 2379
v. Walker, 13 Pa. 293 2548
v. Watson, 133 Mo. App. 44 336, 339, 1363, 1379
v. Wells, 6 Barb. 81 435
v. West, 14 Pa. 336 2094

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Stewart v. West India, etc., Co., L. R. 8 Q. B. 88, 362 3034
v. Western U. Tel. Co., 93 S. C. 119 3654
v. Woodward, 50 Vt. 78 656
v. Wyoming C. R. Co., 128 U. S. 383 4380
Stewart's App., 3 Watts 476 779
Stichter v. Cox, 52 Neb. 532 2189
Stickel v. Atwood, 25 R. I. 456 4374, 4380
Stickford v. St. Louis, 7 Mo. App. 217 382, 405
Stickler v. Giles, 9 Wash. 147 1185
Stickley v. Chesapeake & O. R. Co., 93 Ky. 323 3936, 3953
Stickney v. Allen, 10 Gray 352 481, 4181, 4235, 4298
v. Bronson, 5 Minn. 215 1499
v. Chesapeake & O. R. Co., 93 Ky. 323 3947
v. Maidstone, 30 Vt. 378 105
v. Parmenter, 74 Vt. 58 936
Stickney Co., C. A., v. Sears, Roebuck & Co., 181 Ill. App. 486 1502
Stidham v. Laurie (Tex. Civ. App.), 133 S. W. 1082 861
Stiebel v. Grosberg, 202 N. Y. 266 768
Stiegleman v. Jeffries, 1 S. & R. 477 554
Stiewel v. Lally, 89 Ark. 195 2506
Stiger v. Bent, 111 Ill. 328 686
Stiles v. Comstock, 9 How. Pr. 48 4574, 4585
v. Haight, 124 App. Div. (N. Y.) 60 1075
v. Tilford, 10 Wend. 339 4966
v. Western U. Tel. Co., 2 Ariz. 308 3586
v. White, 11 Metc. (Mass.) 356 4392, 4410, 4433
Still v. Hall, 20 Wend. 51 537, 1197, 2575
v. Nassau E. R. Co., 32 App. Div. (N. Y.) 276 1512
Stille v. Beauchamp, 13 La. Ann. 474 1798
Stiller v. Bohn Mfg. Co., 80 Minn. 1 4818
Stillman v. Mitchell, 2 Robert 523 2507
v. Thompson, 80 Conn. 192 3112
Stillson v. Hannibal, etc., R. Co., 67 Mo. 671 151
Stillwell v. Barnett, 60 Ill. 210 1269, 1282, 3827
v. Bertrand, 22 Ark. 375 529
v. Biloxi C. Co., 78 Miss. 779 2456
v. Chappell, 30 Ind. 72 556
v. Farewell, 64 Vt. 286 4295, 4299, 4300
v. How, 46 Mo. 589 2860
v. Paepcke-L. L. Co., 73 Ark. 432 859, 868, 2591, 4223
v. Temple, 28 Mo. 156 835, 928
Stillwell & B. Mfg. Co. v. Phelps, 130 U. S. 520 2599
Stilson v. Gibbs, 53 Mich. 283 1300, 4159
Stilwell v. Mills, 19 Johns. 304 1642
Stimmel v. Brown, 7 Houst. 219 3913
Stimpson v. Wood, 57 L. J. (Q. B.) 484, 59 L. T. Rep. 218, 36 Week. Rep. 638 4876
Stimson v. Brookline, 197 Mass. 568 3847
v. Connecticut R. Co., 98 Mass. 83 3532
v. Farnham, L. R. 7 Q. B. 489 34
v. Farnham, L. R. 7 Q. B. 175, 41 L. J. (Q. B.) 52 1629
v. Railroad, 2 Wall. Jr. 164 1265
v. Rountree, 51 Ind. App. 207 1082, 1201
v. Vroman, 99 N. Y. 74 699
Stinnett v. Wilson, 19 Ill. App. 38 1725, 1726
Stinson v. Brennan, Cheves 15 2826
v. Chicago, etc., R. Co., 27 Minn. 284 4033, 4134
v. Sneed, — Tex. Civ. App. —, 163 S. W. 989 1941, 1965, 2028
v. Sumner, 9 Mass. 143 2072
v. Sumner, 8 Mass. 150 2088
Stirewell v. Martin, 84 N. C. 4 2822
Stirlin v. Neustadt, 50 Ill. App. 378 1758
Stirling v. Garritee, 18 Md. 468 4209, 4211
Stirna v. Beebe, 11 App. Div. (N. Y.) 206 624
Stirton v. Gummer, 31 Ont. 236 4594
Stiteler v. Ditzenberger, 45 Pa. Super. Ct. 266 2912, 2968
Stitzell v. Reynolds, 67 Pa. 54 4502
Stix v. Keith, 85 Ala. 465 4169
Stock v. Snell, 213 Mass. 449 2276
Stockbridge I. Co. v. Cone I. Works, 102 Mass. 80 364, 3703, 3786, 4259
Stockdale v. Tarte, 4 Ad. & E. 1016 4582
Stockham v. Malcolm, 111 Md. 615 460, 464, 1315, 1316
Stocking v. Howard, 73 Mo. 25 4614
v. Lincoln, 93 Neb. 798 3992
v. Sage, 1 Conn. 519 2976, 2977
Stockman, Ex parte, 70 S. C. 31 1113
Stockport W. W. Co. v. Potter, 7 H. & N. 160 38
Stockton v. Chicago, 136 Ill. 434 3957
v. Cook, 3 Munf. 68 2211
v. Frey, 4 Gill 406 3489
v. Guthrie, 5 Harr. 204 1067, 3147
v. John Ainsfield Co., 180 Mo. App. 126 2513
v. Pennsylvania R. Co., 182 Fed. 282 4860, 4936
v. Scobie, 1 J. J. Marsh. 6 1541
v. Stockton, 40 Ind. 225 2822
v. Turner, 7 J. J. Marsh. 192 1558
v. Wolverine G. M. Co., 144 N. C. 595 1399
Stockton, etc., R. Co. v. Galgiani, 49 Cal. 139 4101
Stockwell v. Byrne, 22 Ind. 6 1675, 1678
v. Phelps, 34 N. Y. 363 3698
v. Sargent, 37 Vt. 16 1779
v. Williams, 40 Conn. 371 539
Stoddard v. Gage, 41 Me. 287 2156
v. Kimball, 6 Cush. 469 1817
v. Mix, 14 Conn. 12 2229
v. Treadwell, 26 Cal. 294 512, 538, 558, 564
Stoddart v. Myers, 52 Pa. Super. 179 1142
Stodghill v. Chicago, etc., R. Co., 53 Iowa 341 3759
Stoecker v. Nathanson, 5 Neb. (Unof.) 435 4615, 4837, 4838
Stoehlke v. Hahn, 158 Ill. 79, 55 Ill. App. 496 3039
Stoher v. St. Louis, etc., R. Co., 91 Mo. 509 4893
Stoke v. Converse, 153 Iowa 274 4391
Stokely v. Thompson, 34 Pa. 210 1201, 1204
v. Trout, 3 Watts 163 1942
Stokes, Ex parte, De Gex 618 2869
Stokes v. Continental T. Co., 186 N. Y. 285 2321
v. Cooper, 3 Camp 514 3124
v. Little, 65 Ill. App. 255 2797
v. Morning Journal Ass'n, 72 App. Div. (N. Y.) 184 4519
v. Pease, 79 Hun 304 2470

[REFERENCES ARE TO PAGES]

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v. Recknagle, 38 N. Y. Super. Ct. 368 791, 819
v. Saltonstall, 13 Pet. 181 150
Stolle v. Stuart, 21 S. D. 643 2528, 2532
Stollenwerck v. Thacher, 115 Mass. 224 2956, 4293
Stoltze v. Milwaukee, etc., R. Co., 113 Wis. 44 3959, 4150
Stolze v. St. Louis T. Co., 122 Mo. App. 458 1251
v. Wabash R. Co., 188 Mo. 581 1511
Stomme v. Hanford P. Co., 108 Iowa 137 4752
Stone v. Argensinger, 32 App. Div. (N. Y.) 208 2522
v. Bennett, 8 Mo. 51 1197
v. Boston & A. R. Co., 171 Mass. 536 52, 58, 117, 129
v. Buckner, 12 Sm. & M. 73 2197, 2212
v. Chicago, etc., R. Co., 3 S. D. 330 4291, 4296
v. Clough, 41 N. H. 290 2897, 4277
v. Codman, 15 Pick. 297 130, 3352
v. Commercial R. Co., 4 Mylne & C. 122 4147
v. Cooper, 2 Denio 299 4506
v. Covell, 29 Mich. 359 1436, 2303
v. Crewdson, 44 Wash. 691 119
v. Crocker, 24 Pick. 81 4640
v. Dennison, 13 Pick. 1 2466, 2540
v. Denny, 4 Metc. (Mass.) 151 2388, 4394
v. Dickinson, 5 Allen 29 433, 438, 773
v. Evangelical Lutheran St. Paul's Church, 92 Ill. App. 77 664
v. Evans, 32 Minn. 243 349, 4757
v. First Nat. Bank, 72 W. Va. 171 1253
v. Fowle, 22 Pick. 166 1846
v. Gover, 1 Ala. 287 1956
v. Hammell, 83 Cal. 547 2743, 2844, 2846
v. Heath, 135 Mass. 561 4025
v. Heggie, 82 Miss. 410 436
v. Hooker, 9 Cow. 154 2891
v. Hubbardston, 100 Mass. 55 104
v. Hunter Tract I. Co., 68 Wash. 28 1741, 1742
v. Locke, 46 Me. 445 1202
v. Lyman, 15 Wend. 19 1588
v. Marshall O. Co., 208 Pa. 85 361, 3117
v. Omaha F. Ins. Co., 61 Neb. 834 2491
v. Peake, 16 Vt. 213 1827, 1835
v. Pendleton, 21 R. I. 332 104
v. Pentecost, 210 Mass. 223 4392
v. Perkins, 217 Mo. 586 3735
v. Pettus, 47 Tex. Civ. App. 14 714, 1206
v. Pittsburg, Binghamton & Eastern Ry. Co., 56 Pa. Super. Ct. 615 2741
v. Providence W. & G. Co., 13 Pa. Dist. 557 7
v. Quaal, 36 Minn. 46 361
v. Rockefeller, 29 Ohio St. 625 2787, 2790
v. St. Louis, etc., R. Co., 146 Mo. App. 298 1432
v. Seattle, 33 Wash. 644 4715
v. Seymour, 15 Wend. 19 704, 707, 728, 1582
v. Shultz, 69 Wash. 687 858
v. Sprague, 20 Barb. 509 803
v. Stevens, 12 Conn. 219 4601
v. Stone, 43 Vt. 180 2514, 2548
Stone v. Swift, 4 Pick. 389 1321
v. Talbot, 4 Wis. 442 715, 717, 721, 722
v. Union Pac. R. Co., 32 Utah 185 23, 56, 143, 4952
v. Varney, 7 Metc. (Mass.) 86 4529, 4572, 4573
v. Victor E. Co., 36 Colo. 370 2416
v. Woodruff, 28 Hun 534 3266, 3269, 3272
Stone Co. v. Postal Tel. C. Co., 35 R. I. 498 3546, 3556, 3599
Stone, Sand & Gravel Co. v. United States, 234 U. S. 270 928, 2643
Stonebraker v. Littleton, 119 Md. 173 1006
Stonebreaker v. Stonebreaker, 33 Md. 252 4487
Stonega C. & C. Co. v. Addington, 112 Va. 807 476
Stoneman v. Erie R. Co., 52 N. Y. 429 3534
Stoner v. Hunsicker, 47 Pa. 514 429
v. Keith County, 48 Neb. 279 1587
v. Patten, 132 Ga. 178 7
v. Shultz, 69 Wash. 687 845
v. Texas & P. R. Co., 45 La. Ann. 115 3767
Stony Creek L. Co. v. Fields, 102 Va. 1 884, 898
Stooke v. Taylor, 5 Q. B. Div. 569 528
Stoomvaart Maatschappy Nederland v. Peninsular & O. S. N. Co., L. R. 7 App. Cas. 795 4987
Stoomvart Maatschaffy Nederlandsche Lloyd v. Lind et al, 170 Fed. 918 320, 3309
Stoops v. Kittanning Tel. Co., 242 Pa. 556 4015
Stoothoff v. Brooklyn Heights R. Co., 50 App. Div. (N. Y.) 585 1435
Stopenhorst v. American M. Co., 36 N. Y. Super. 392 3247
Stopp v. Smith, 71 Pa. 285 1706, 1723, 4190, 4627
Storch v. Dewey, 57 Kan. 370 760
Storde v. St. Louis T. Co., 197 Mo. 616 4854
Storer v. Eaton, 50 Me. 219 2915
v. Elliot Ins. Co., 45 Me. 175 3056
v. Storer, 9 Mass. 37 1023
Storey v. Early, 86 Ill. 461 4525, 4577, 4586
v. Krewson, 55 Ind. 397 811, 812, 815, 827
v. Menzies, 3 Pin. 329 627
v. Wallace, 60 Ill. 51 4590
Stork v. American S. Co., 109 La. 713 1606
Storm v. Butte, 35 Mont. 385 4735
v. Green, 51 Miss. 103 1269
v. New York E. R. Co., 82 Hun 11 4082
v. Smith, 43 Miss. 497 2381
Storms v. Mundy, 46 Tex. Civ. App. 88 4395
v. Storms, 21 Ind. App. 191 2923
Storrs v. Grand Rapids, 110 Mich. 483 1376
v. Los Angeles T. Co., 134 Cal. 93 4719
v. Northern Pac. R. Co., 148 App. Div. (N. Y.) 403 4920
v. Robinson, 74 Conn. 443 4296
Storseth v. Folsom, 50 Wash. 456 41, 4389
Story v. Bird, 8 Mich. 316 1805
v. Chicago, etc., R. Co., 79 Iowa 402 73
v. Green, 164 Cal. 768 4778

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Story v. Kimbrough, 33 Ga. 21 992
v. Livingston, 13 Pet. 359 1214
v. New York El. R. Co., 90 N. Y. 122 3946, 4081, 4096
v. New York, etc., R. Co., 6 N. Y. 85 182, 2697
v. Norfolk & S. R. Co., 133 N. C. 59 3447
v. O'Dea, 23 Ind. 326 1664, 1675, 4352
Story L. Co. v. Southern R. Co., 151 N. C. 23 189, 3367
Stotler v. Chicago & A. R. Co., 200 Mo. 107 109, 4717, 4738
Stott v. Harrison, 73 Ind. 17 2645
Stoudenmeier v. Williamson, 29 Ala. 558 2421
Stoudenmire v. De Bardelaben, 85 Ala. 85 3836
Stoudt v. Shepherd, 73 Mich. 558 4967
Stouffer v. Fletcher, 146 Mich. 341 1826
Stout v. Caruthersville H. Co., 131 Mo. App. 520 2216
v. Folger, 34 Iowa 71 2189, 2893
v. Jackson, 2 Rand. 132 2098, 2099, 2409
v. Kansas City T. R. Co., 172 Mo. App. 113 350
v. Merrill, 35 Iowa 47 4379
v. Noblesville & E. G. R. Co., 83 Ind. 466 12
v. United States, 27 Ct. of Cls. 385 2697, 2711
v. Vanse, 1 Rob. (Va.) 169 2859
v. Wren, 1 Hawks 420 463
Stoutemeyer v. Sharp, 89 Ark. 175 3935
Stoughton v. Lynch, 2 Johns. Ch. 209 1214
v. Porter, 13 Allen 191 299
Stovall v. Banks, 10 Wall. 583 1639
v. Caverly, 139 Ga. 243 170
v. Smith, 4 B. Mon. 378 1272, 3831
Stoveld v. Eade, 4 Bing. 154 710
Stover v. Bluehill, 51 Me. 441 4787
v. Spielman, 1 Pa. Super Ct. 526 887, 892
Stow v. Bozeman, 29 Ala. 401 2048
v. Converse, 3 Conn. 325 4520, 4531
v. Converse, 4 Conn. 42 4528
v. Hamlin, 16 How. Pr. 452 2484
v. Russell, 36 Ill. 18 817, 822
v. Steel, 45 Ill. 328 3727
v. Tifft, 15 Johns. 458 3727
v. Yarwood, 14 Ill. 424 537, 560
Stowe v. Bank of Cape Fear, 3 Dev. 408 495
v. Buttrick, 125 Mass. 449 2463
v. Heywood, 7 Allen 118 341, 1296, 1305
v. La Conner T. & T. C., 39 Wash. 28 1377
v. United States Exp. Co., 179 Mich. 349 779
Stowell v. Greenwich Ins. Co., 20 App. Div. (N. Y.) 188, rev'd 163 N. Y. 299 2572
v. Lincoln, 11 Gray 434 35, 39
v. Manufacturers' & M's. Ins. Co., 61 App. Div. (N. Y.) 58 2573
Stowers v. Gilbert, 156 N. Y. 600 3850, 3851, 3860
v. Singer, 24 Ky. L. Rep. 395 4964, 4972
Stowers F. Co. v. Brake, 158 Ala. 639 1330, 1340, 4158
Strafford v. Welch, 59 N. H. 46 811
Strahorn-H. E. C. Co. v. Western U. Tel. Co., 101 Mo. App. 500 3571, 3576
Straight Creek C. Co. v. Huddleston's Adm'r, 147 Ky. 94 1281
Straight Creek C. & C. Co. v. Straight Creek M. Co., 135 Ky. 536 1241
Strain v. Babb, 30 S. C. 342 1447, 1613
v. Pauley, 80 Ky. 622 2369
Strait v. Wilkins, 23 Cal. App. 774 32, 40
Straker v. Graham, 4 M. & W. 721 1482
v. Hartland, 2 H. & M. 570 1143
Stranahan Co. v. Coit, 55 Ohio St. 398 2387, 2447
Strand v. Great Northern R. Co., 101 Minn. 85 1506, 1511
v. Grinnell A. G. Co., 136 Iowa 68 4739
v. Young, 36 Md. 246 1321
Strang v. Hirst, 61 Me. 15 661
v. Holmes, 7 Cow. 224 764
v. Whitehead, 12 Wend. 64 1363, 1380
Strange v. Atlantic C. L. R. Co., 77 S. C. 182 3537
v. Bodcaw L. Co., 79 Ark. 490 104
v. Cleveland, etc., R. Co., 151 Ill. App. 478 3853
v. Cleveland, etc., R. Co., 245 Ill. 246 3874, 3875
v. Missouri Pac. R. Co., 61 Mo. App. 586 3480
Strasberger v. Barber, 38 Md. 103 4179
v. Western U. Tel. Co., Allen's Tel. Cas. 661 3565
Strasburger, In re, 56 Hun 164, 132 N. Y. 128 3185
Strater v. Flynn, — N. J. Eq. —, 91 Atl. 591 1949
Strathgarry, The, [1895] Prob. 264 2718
Strathnevis, The, 76 Fed. 855 2724, 2725
Straton v. Rastall, 2 T. R. 366 749
Strattman v. Moore, 134 Ill. App. 275 59
Stratton v. Dole, 45 Neb. 472 3676, 3679, 3680, 3681, 3686
v. Hussey, 62 Me. 286 591
v. Lyons, 53 Vt. 641 3741
v. McMakin, 84 Ky. 641 646
v. Meredith, 45 Neb. 622 4390
v. Spaeth, 146 App. Div. (N. Y.) 461 2411
Stratton Audley, The, 3 Bene 241 2717
Stratton's Independence v. Dines, 68 C. C. A. 161, 135 Fed. 449 4363, 4407
Straub v. St. Louis, 175 Mo. 413 151
Straus v. Buchman, 96 App. Div. (N. Y.) 270 2579, 2597
v. Norris, 77 N. J. Eq. 33 2031
v. Young, 36 Md. 246 4634, 4639, 4648
Strauss v. Allentown, 215 Pa. 96 9
v. Atlantic C. L. R. Co., 94 S. C. 324 4654
v. Gilbert, 135 Ill. App. 130 1131
v. Gilbert, 232 Ill. 441 1133
v. Hoch, 162 App. Div. (N. Y.) 569 32
v. Labsap, 59 Mo. App. 260 2241, 2247
v. Meerteif, 64 Ala. 299 384, 2559, 2561, 2563
v. Newburgh E. R. Co., 6 App. Div. (N. Y.) 264 108
v. New York, etc., R. Co., 91 App. Div. (N. Y.) 583 4954
Strawberry Point Bank v. Lee, 117 Mich. 122 1905, 1923, 1924
Strawbridge v. Cartledge, 7 W. & S. 399 2068

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v. Strawn, 50 Ill. 256 3727
Strayer v. Quincy, etc., R. Co., 170 Mo. App. 514 143
Streeper v. Abeln, 59 Mo. App. 485 2182
v. Ferris, 64 Tex. 12 4612
v. Williams, 48 Pa. 450 848, 857, 899, 908
Street v. Augusta, etc., Ins. Co., 12 Rich. 13 3000
v. Blay, 2 B. & Ad. 456 494, 516, 1847, 2390
v. Chapman, 29 Ind. 142 2454
v. Chicago, W. & S. Co., 157 Ill. 605 2841
v. Hall, 29 Vt. 165 660
v. Laumier, 34 Mo. 469 4186
v. Laurens, 5 Rich. Eq. 227 1586
v. Sinclair, 71 Ala. 110 483, 4176, 4183, 4201
v. Thompson, 229 Ill. 613 2521
Street R. Co. v. Doyle, 88 Tenn. 747 4096
Streeter v. Rush, 25 Cal. 67 858, 860, 883, 885, 891, 922
v. Streeter, 43 Ill. 155 541, 555
Strehlow v. Pettit, 96 Wis. 22 4602, 4614
Streng v. Ibert B. Co., 50 App. Div. (N. Y.) 542 1428
Stresovich v. Freeman & Sons Mfg. Co., 115 Wis. 648 2214
v. Kesting, 63 Mo. App. 57 2237
Streubel v. Milwaukee, etc., R. Co., 12 Wis. 67 26
Strever v. Woodward, 160 Iowa 332 1500
Streyer v. Georgia S. & F. R. Co., 90 Ga. 56 3988
Stribbling v. Ross, 16 Ill. 122 3727
Stribley v. Welz, 1 Ohio Dec. 621, 624, 8 Ohio C. C. 571 3669, 3670, 3673, 3679
Strickland, Matter of, 10 N. Y. Misc. 486 2471
Strickland v. Bank of Cartersville, 111 Ga. 565 531
v. Hamlin, 87 Me. 81 692
v. Hardie, 82 Ala. 412 709
v. Holbrook, 75 Cal. 268 946
v. McCulloch, 8 New South Wales (law) 324 (1887) 2214, 2242, 2247
v. Miller, 12 Ga. App. 671 4256, 4263
v. Turner, 7 Ex. 208 1828
v. Wedgeworth, 154 Ala. 654 426
v. Williams, [1899] 1 Q. B. 382 837, 839
Strickler v. Leathers, 68 Miss. 803 3424
Striegel v. Moore, 55 Iowa 88 3788
Stringer v. Coombs, 62 Me. 160 616
v. Stevens' Est., 146 Mich. 181 1078
Stringfellow v. Powers, 4 Tex. Civ. App. 199 2508
Stringfield v. Hirsch, 94 Tenn. 425 1706, 1723, 1736, 1759
v. Southern R. Co., 152 N. C. 125 3418
Strobel S. Co. v. Sanitary Dist., 160 Ill. App. 554 930, 2626
Stroble v. Large, 3 McCord 112 1552
Strobridge L. Co. v. Randall, 78 Mich 195 1489
Strock v. Brigantine T. Co., 23 N. Y. Misc. 358 814
v. Russell, 148 App. Div. 483 40, 4977
v. St. Louis Transit Co., 197 Mo. 616 5118
v. Smith, 66 Ore. 163 841, 869, 889
Stroebel v. Kerr S. Co., 164 N. Y. 303 9
Stroh v. Kimmel, 8 Watts 157 2875
Strohecker v. Farmers' Bank, 6 Watts 96 1248, 1249
Strohen v. Franklin S. & L. Ass'n, 115 Pa. 273 708
Stroher v. Elting, 97 N. Y. 102 449
Strohm v. New York, etc., R. Co., 96 N. Y. 305 412, 1428, 4746, 4749
v. New York, etc., R. Co., 32 Hun 20 4771
Strohmeyer v. Hartley S. Mfg. Co., 130 App. Div. (N. Y.) 102 2274
Strohn v. Hartford Ins. Co., 37 Wis. 625 3039
Stroker v. St. Joseph, 117 Mo. App. 350 3962
Strom v. American Dist. Steam Co., 84 Misc. (N. Y.) 197 1465
Stromer v. Van Orsdel, 74 Neb. 132 2494
Stroms Bruks Aktie Bolay v. Hutchinson, [1905] App. Cas. 515 1363, 3320
Strong v. American Cent. L. Ins. Co., 4 Mo. App. 7 3092
v. Blake, 46 Barb. 227 802, 803
v. Campbell, 11 Barb. 135 124
v. Deforest, 15 Abb. Pr. 427 1719
v. Farmers', etc., Bank, 4 Mich. 350 800
v. Grannis, 26 Barb. 152 2825
v. Hart, 6 B. & C. 160 667
v. Harvey, 3 Bing. 304 798, 799, 807, 811
v. Hasterlik, 146 Ill. App. 346 1692
v. Hooe, 41 Wis. 659 1503
v. International B. L. & I. Union, 183 Ill. 97, 82 Ill. App. 426 2493
v. King, 35 Ill. 9 669
v. McConnell, 10 Vt. 231 628
v. Manufacturers' Ins. Co., 10 Pick. 40 2049, 3026
v. Mitchell, 19 Vt. 644 2864
v. New York F. Ins. Co., 11 Johns. 323 3033, 3034
v. Strong, 102 N. Y. 69 4416
v. West, 110 Ga. 382 2495
v. Western U. Tel. Co., 18 Idaho 389 3551
v. White, 19 Conn. 238 1636
v. Williams, 12 Mass. 392 639, 640
Stroock P. Co. v. Talcott, 150 App. Div. (N. Y.) 343 2260, 2264, 2270, 2373
Stroth B. Co. v. Schmitt, 1 Ohio C. C. (N. S.) 177, 25 Ohio C. C. 231 3849, 3881
Strother v. South Carolina & G. R., 47 S. C. 375 4916
Stroud v. Gwyer, 28 Beav. 130 1085
v. Pierce, 6 Allen 413 2388
Stroup v. Bridger, 124 Iowa 401 4221
Stroupe v. Hewitt, 90 Kan. 200 4391
Strouss v. Wabash, etc., R. Co., 17 Fed. 209 3534, 3535
Strout v. Hubbard, 104 Me. 366 2501
Stroyan v. Knowles, 6 H. & N. 454 411, 3917
Strubbee v. Trustees Cincinnati R. 78 Ky. 481 4263, 4346
Strubble v. Burlington, etc., R. Co., 128 Iowa 158 4808
v. De Witt, 89 Neb. 726 1425, 4738
Struby-E. M. Co. v. Kyes, 9 Colo. App. 190 4635
Struckmeyer v. Lamb, 64 Minn. 57 4389
Strudgeon v. Sand Beach, 107 Mich. 496 1363, 1375, 1463, 4717
Strugis v. Warren, 11 Vt. 433 3772
Strunk v. Ocheltree, 11 Iowa 158 1601
Struss v. Masonic Sav. Bank, 89 Ky. 61 2805, 2816
Struthers v. Clark, 30 Pa. 210 2774
v. Henry, 33 Ont. 365 2747
v. Philadelphia, etc., R. Co., 174 Pa. 291 3975

[REFERENCES ARE TO PAGES]

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Stryker v. Cassidy, 76 N. Y. 50 2482
Stuart v. Abbey, 62 N. Y. Misc. 84 1567
v. Bank, 57 Neb. 569 4369, 4387, 4434
v. Chapman, 104 Me. 17 434
v. Columbian Ins. Co., 2 Cranch C. C. 442 3027
v. Davidson, Peck 203 1358
v. Havens, 17 Neb. 211 1462, 1464
v. Hurt, 88 Va. 343 1050
v. Lancaster, 84 Va. 772 2815
v. Matheison, 23 Up. Can. Q. B. 135 2137
v. News P. Co., 67 N. J. L. 317 4576
v. Pennis, 100 Va. 612 1987
v. Phelps, 39 Iowa 14 361, 4258
v. Stuart, 182 Pa. 543 1071
v. Telegraph Co., 66 Tex. 580 3646
v. Trotter, 75 Iowa 96 1675
v. Western U. Tel. Co., 66 Tex. 580 352, 3621, 3640
v. Wilkins, 1 Doug. 18 357
Stubbings v. Evanston, 136 Ill. 37 3146
v. O'Connor, 102 Wis. 352 1211
v. World's Col. Exp. Co., 110 Ill. App. 210 2692, 2702
Stubbins v. Mitchell, 82 Ky. 535 2843
Stubblefield v. McAuliff, 20 Wash. 442 730
Stubbs v. Mulholland, 168 Mo. 47, 4601, 4613, 4639, 4644
v. Page, 2 Me. 378 2060
Stuckey v. Atlantic C. L. R. Co., 60 S. C. 237 4862
v. Middle States L., B. & C. Co., 61 W. Va. 74 979
v. Savannah, etc., R. Co., 102 Ga. 782 4633
Studabaker v. White, 21 Ind. 212 859
Stude v. Koehler (Tex. Civ. App.), 138 S. W. 193 1032, 2664, 2682, 2683
Studebaker v. New Castle G. Co., 7 Pa. Super. Ct. 641 3827
Studley v. Baker, 2 Low. 205 2722
Stuebing v. Marshall, 10 Daly 406 771
Stuhr v. Butterfield, 151 Iowa 736 2150
Stull v. Beddeo, 78 Neb. 114 1721, 1752
Stultz v. Locke, 47 Md. 562 3152
Stum v. Hadrich, 7 Cal. App. 241 2227
Stumm v. Hummell, 39 Iowa 483 4974
v. Western U. Tel. Co., 140 Wis. 528 252, 270, 407, 2462, 2551, 3592
Stump v. Hornback, 109 Mo. 272 3695
Stumpf v. Cohen, 78 N. Y. Misc. 158 1414
v. Merz, 50 N. Y. Misc. 543 2696, 2706
Stunz v. Stunz, 131 Ill. 210 1049, 3723
Stuppy v. Hof, 82 Mo. App. 272 4669, 4748
Sturdevant v. Pike, 1 Ind. 277 2903
Sturdivant v. Memphis Nat. Bank, 60 Fed. 730 1149, 1163
v. Raines, 1 Leigh 481 1636
Sturgeon v. St. Louis, etc., Co., 65 Mo. 569 3349, 3353
v. Sturgeon, 4 Ind. App. 232 1494
Sturgeon Sav. Bank v. Riggs, 72 Mo. App. 239 718
Sturges v. Bridgman, 11 Ch. Div. 852 3847
v. Hart, 45 Ill. 103 1749
v. Keith, 57 Ill. 451 2331, 4220, 4230, 4235, 4239
v. Knapp, 36 Vt. 439 1252, 1742
Sturges & Burn Mfg. Co. v. Root Dairy Supply Co., 186 Ill. App. 52 569
Sturgess v. Bissell, 46 N. Y. 462 217, 2367, 2954, 3389, 3406
Sturgis v. Allis, 10 Wend. 354 1542
v. Boyer, 24 How. 110 4987
v. Clough, 1 Wall. 269 5003, 5009
v. Frost, 56 Ga. 188 4632
v. Knapp, 33 Vt. 486 1713, 1718
v. Kountz, 165 Pa. 358 146
v. Law, 3 Sandf. 451 2716
v. Slocum, 140 Iowa 25 2057
Sturgis Nat. Bank v. Smith, 9 Tex. Civ. App. 540 996, 1919
Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77 3006
v. Consolidated C. Co., 155 Ill. App. 1 4730
v. Consolidated C. Co., 248 Ill. 20 4747
v. Kingsland B. Co., 74 N. J. L. 492 2214, 2435
Stuttgart & R. B. R. Co. v. Kocourek, 101 Ark. 47 3976, 4033
Stutz v. Armstrong, 25 Fed. 147 4440, 4446
v. Chicago & N. R. Co., 73 Wis. 147 3474, 3482, 3484, 3487, 3652
Stutzke v. Consumers' I. & F. Co., 156 Mo. App. 1 4706
Stuyvesant v. Hall, 2 Barb. Ch. 151 572
v. Hone, 1 Sandf. Ch. 419 572
v. Wilcox, 92 Mich. 233 1300
Styles v. Decatur, 131 Mich. 443 4732
Stynes v. Boston E. R. Co., 206 Mass. 75 4712, 4713
Styria, The, 101 Fed. 728 3346, 3421
Suber v. Vanlew, 2 Spear 126 2524
Suburban, etc., Co. v. Arlington, 219 Mass. 539 3961, 4131, 4135, 4136, 4137
Success, The, 7 Blatch. 551 3360
Sucklinge v. Coney, Noy 74 804
Suckstorf v. Butterfield, 54 Neb. 757 4359
Sucrerie Centrale Coloso v. Esteves, 4 Porto Rico Fed. 25 558, 564
Sudden v. Morse, 48 Wash. 101 1371
Suderman v. Rodgers, 47 Tex. Civ. App. 67 3799, 3800
v. Woodruff, 47 Tex. Civ. App. 229 1377
Suehr v. Chicago Sanitary Dist., 242 Ill. 496 3853, 3880
v. Sanitary Dist., 149 Ill. App. 328 3760, 3766
Suell v. Jones, 49 Wash. 582 1477
Suelzer v. Carpenter, — Ind. —, 107 N. E. 467 326
Suess v. Imperial L. Ins. Co., 64 Mo. App. 1 3084
Suffolk, The, 31 Fed. 835 3346, 3350
Suffolk Bank v. Worcester Bank, 5 Pick. 106 784, 785, 1230, 1231
Suffolk Co. v. Hayden, 3 Wall. 315 4439, 4442, 4446, 4448
Suffolk Ins. Co. v. Boyden, 9 Allen 123 3059
Sugar Beets P. Co. v. Lyons B. S. R. Co., 161 Fed. 215 624
Sugarman v. Brengel, 68 App. Div. (N. Y.) 377 1414
Sugg v. George B. Hendricks & Son, — Tex. Civ. App. —, 169 S. W. 394 2274
Sugo v. Green, 6 Phillip. Isl. 744 2691
Sullens v. Chicago, etc., R. Co., 74 Iowa 659 3881
Sullings v. Shakespeare, 46 Mich. 413 4582
Sullivan, In re, 218 Mass. 141 5207

[REFERENCES ARE TO PAGES]

Sullivan v. Anderson, 81 S. C. 478 313, 4169, 4186
v. Arcand, 165 Mass. 364 2749
v. Boswell, 122 Md. 539 2236
v. Browning, 67 N. J. Eq. 391 8
v. Cartier, 147 Fed. 222 1723, 1735
v. Dee, 8 Ill. App. 263 1281, 4165
v. Fosdick, 10 Hun 81 952
v. Frank, 13 Ohio N. P. (N. S.) 505 2242
v. Girson, 39 Mont. 274 1442, 1444
v. Hartford F. Ins. Co., 89 Tex. 665 3008
v. Jones, 3 C. & P. 579 3102
v. Lafayette Co., 61 Miss. 271 3964, 4131
v. Latimer, 38 S. C. 158 640
v. McMillan, 37 Fla. 134 1093, 1097, 2688, 2706
v. McMillan, 26 Fla. 543 2293, 2693
v. Marin, 175 Mass. 422 4676, 4789
v. Minneapolis, etc., R. Co., 121 Minn. 488 3312
v. Missouri, etc., R. Co., 29 Tex. Civ. App. 429 4136
v. Moffatt, 70 N. J. L. 4 2689, 2696
v. Nicolin, 113 Iowa 76 1030
v. Old Colony St. R. Co., 197 Mass. 512 96, 151, 4671
v. Old Colony St. R., 200 Mass. 303 311
v. Oregon R. & N. Co., 12 Ore. 392 1333, 1338, 1386, 3503, 3514
v. P. & R. R. Co., 30 Pa. 324 1347
v. Ramsey (Tex. Civ. App.), 155 S. W. 580 4423
v. Reardon, 5 Ark. 140 2602
v. Shreveport & P. R. Co., 39 La. Ann. 800 1519
v. Southern R., 74 S. C. 377 3505
v. Sullivan, 22 Ky. 707 1837
v. Sullivan, 20 S. C. 509 4335
v. Tioga R. Co., 112 N. Y. 643 327, 4682
v. Waterman, 20 R. I. 372 3839
v. Western U. Tel. Co., 11 Ohio C. C. (N. S.) 129, 30 Ohio C. C. 435 3547, 3563, 3564
Sullivan Mach. Co. v. Breeden, 40 Ind. App. 631 1353, 2386
Sullivan-S. L. Co. v. Watson, (Tex.) 155 S. W. 179 4853
Sullivan Sav. Inst. v. Copeland, 71 Iowa 67 979
Sully v. Duranty, 33 L. J. (Ex.) 319 211
v. Frean, 10 Ex. 535 1835
v. Schmitt, 147 N. Y. 248 3125, 3152, 3182
Sultan v. Western U. Tel. Co., 92 Miss. 785 3568
Sultan W. & P. Co. v. Weyerhaeuser T. Co., 31 Wash. 558 3969, 4003, 4124
Summer v. Beehe, 37 Vt. 562 1112
v. Williams, 8 Mass. 162 1861, 2986
Summerfield v. Western U. Tel. Co., 87 Wis. 1 3644
Summers v. Babb, 13 Ill. 483 3716, 3717
v. Barrett, 65 Iowa 292 2788
v. Farish, 10 Cal. 347 1762
v. Heard, 66 Ark. 550 4212, 4267
v. Hibbard, 153 Ill. 102 2289, 2294, 2295
v. Keller, 152 Mo. App. 626 434, 1267, 1305, 1310, 1318, 1324
v. Mills, 21 Tex. 77 1147, 1878
v. Tarney, 123 Ind. 560 314
Summit, City of, v. Morris County Traction Co., 85 N. J. L. 193 917
Sumner, The, 1 Brown Adm. 52, Fed. Cas. No. 13,608 2738
Sumner v. Dobbin, 16 Manitoba 151 2422
v. Gay, 4 Pick. 311 2769
v. Gray, 4 Ark. 467 2396, 2397
v. Kinney (Tex. Civ. App.), 136 S. W. 1192 152, 4681, 4783
v. People, 29 N. Y. 337 998
v. Tileston, 7 Pick. 198 3933
v. Utley, 7 Conn. 258 4503
v. Williams, 8 Mass. 162 2060, 2110, 2133, 2134, 2382, 3188
Sumpter v. Hedges, [1898] 1 Q. B. 673 2666
v. Welsh, 2 Bay 558 533
Sumrall v. Reid, 2 Dana 65 1773
Sumter v. Welsh, 2 Bay 558 2047
v. Welsh, 1 Brev. 539 2200
Sumwalt I. & C. Co. v. Knickerbocker I. Co., 144 Md. 403 228
Sun, The, 161 Fed. 385 2729
Sun v. Makainai, 14 Hawaii 495 1032
Sun Co. v. Wyatt, 48 Tex. Civ. App. 349 440
Sun F. Office v. Ayerst, 37 Neb. 184 3045
v. Ermentrout, 2 Pa. Dist. 77 2917
Sun L. Assur. Co. v. Bailey, 101 Va. 443 4525
Sun L. Ins. Co. v. United States F. & Co., 130 N. C. 129 2792
Sun Mfg. Co. v. Egbert, 37 Tex. Civ. App. 512 226, 323, 2634
Sun Mut. Ins. Co. v. Holland, 2 Tex. Civ. Cas. 391 3008
v. Saginaw B. Co., 114 Ill. 99 2914
Sun P. & P. Ass'n v. Moore, 183 U. S. 642 832, 834, 844, 861, 863, 865, 867, 883, 884, 885, 889, 894
v. Schenck, 98 Fed. 925 4568, 4577, 4586, 4587, 4597
Sunapee v. Eastman, 32 N. H. 470 418
Sunbury & E. R. Co. v. Hummell, 27 Pa. 99 3978
Sunday v. Gordon, Blatch. & H. 569 3452
v. Louisville & N. R. Co., 62 Fla. 395 4097
Sundberg v. Goar, 92 Minn. 143 423
Sundgren v. Stevens, 86 Kan. 154 1499
Sundine, In re, 218 Mass. 1 5175, 5198
Sundmaker v. Gaudet, 113 La. 887 4640
Sunley v. Metropolitan L. Ins. Co., 132 Iowa 123 156, 4503, 4508, 4509
Sunman v. Clark, 120 Ind. 142 2599
Sunny South L. Co. v. Neimeyer L. Co., 63 Ark. 268 4285
Sunnyside, The, 8 Prob. Div. 137 2728
Sunnyside C. & C. Co. v. Reitz, 14 Ind. App. 478 1430, 3791
Sunset Orchard L. Co. v. Sherman N. Co., 121 Minn. 5 760, 2283
Superior v. Industrial Comm., 176 Wis. 541 5182
Superior Mfg. Co. v. Russell, 127 Ga. 151 684
Supervisors v. Bates, 17 N. Y. 242 2905
v. Coffinbury, 1 Mich. 255 1559
v. Jones, 19 Wis. 51 1559
v. Kaime, 39 Wis. 468 1576, 1579, 1583
v. Kennicott, 103 U. S. 554 1770
v. Otis, 62 N. Y. 88 1592
Suppiger v. Gruaz, 137 Ill. 216 1679, 4339
Supply D. Co. v. Elliott, 10 Colo. 327 823
Supreme Council v. Apman, 39 Ind. 670 4417, 4419
Supreme Lodge v. Knight, 117 Ind. 489, 500 241

[REFERENCES ARE TO PAGES]

Supreme Lodge v. Neeley, — Tex. Civ. App. —, 135 S. W. 1046 3085, 3087, 4281
v. Rehg, 116 Ill. App. 59 1089
v. Selby, 153 N. C. 203 1229
Supreme Lodge K. P. v. Mims, — Tex. Civ. App. —, 167 S. W. 835 3083
Surlott v. Pratt, 3 A. K. Marsh. 174 1184, 1879
Surocco v. Geary, 3 Cal. 69 11
Surrey, The, 30 Fed. 223 3395
Survey v. Wells, etc., Co., 5 Cal. 124 4275
Susan, The, 1 Sprague 503 2721
Suse v. Pompe, 8 C. B. (N. S.) 537 1893
Susquehanna B. & B. Co. v. Evans, 4 Wash. C. C. 480 1867
Susquehanna F. Co. v. Malone, 73 Md. 268 3840
v. Spangler, 86 Md. 562 3840, 3846
Sussdorff v. Smidt, 55 N. Y. 319 2216
Sussex Ins. Co. v. Woodruff, 26 N. J. L. 541 3061
Susswein v. Pennsylvania S. Co., 184 Fed. 102 3162
Sutberry v. Meridian Fertilizer Factory, — Miss. —, 64 So. 723 4928
Suter v. Sacra, 21 Ky. L. Rep. 758 2693
Sutherland v. First Nat. Bank, 31 Mich. 230 634
v. Green, 49 Mont. 379 2392
v. Round, 57 Fed. 467 1371, 2427
v. Wyer, 67 Me. 64 287, 314, 318, 375, 410, 476, 2552, 2558, 2568
Sutherlin v. Bloomer, 50 Ore. 398 754
Sutliff v. Atwood, 15 Ohio St. 186 3131, 3133, 3140
v. Gilbert, 8 Ohio 405 1486, 1490
v. Montgomery, 115 Mo. App. 592 1721
Sutorius v. Dunstan, 59 N. Y. Super. Ct. 166 1568
Sutro v. Manhattan R. Co., 137 N. Y. 592 4081, 4124
Sutro T. Co. v. Segregated B. M. Co., 19 Nev. 121 1146
Sutter v. International H. Co., 81 Kan. 452 2367
Sutthoff v. Maruca, 57 Wash. 102 2025
Suttle v. Western U. Tel. Co., 148 N. C. 480 3627, 3654
Sutton v. Albatross, The, 2 Wall. C. C. 327 658
v. Baillie, 65 L. T. Rep. 528 2110
v. Baldwin, 146 Ind. 361 660, 664
v. Bancroft, 23 How. 320 1804
v. Buck, 2 Taunt. 307 4173
v. Cotham, 2 Tenn. Cas. 137 1124
v. Dana, 15 Colo. 98 4212
v. Goodman, 194 Mass. 389 3121, 3123
v. Great Northern R. Co., 99 Minn. 376 4210, 4302
v. Hawkins, 8 C. & P. 259 808, 811
v. Howard, 33 Ga. 536 875
v. Huffman, 32 N. J. L. 58 4957, 4962
v. Johnson, 1 T. R. 493 4634
v. Louisville, 5 Dana 28 3946
v. Lowry, 39 Mont. 462 1484
v. McConnell, 46 Wis. 269 4648
v. Page, 4 Tex. 142 1998
v. Snohomish, 11 Wash. 24 4815
v. Southern R. Co., 101 Ga. 776 39
v. Temple, 12 M. & W. 52 3138, 3139
v. Wanamaker (N. Y. Misc.), 95 Supp. 525 180, 2346
v. Wauwatosa, 29 Wis. 21 19
Sutton v. Western U. Tel. Co., 129 Ky. 166 140, 3573, 3574
Sutton's Est., 13 Pa. Super. Ct. 492 1029
Sutton's Heirs v. Louisville, 5 Dana 33 4121
Suttrel v. Dry, 1 Murphy 94 1483
Suver v. O'Riley, 80 Ill. 104 817
Suydam v. Jackson, 54 N. Y. 450 3141
v. Jenkins, 3 Sandf. 614, 620 47, 369, 4178, 4181, 4199, 4230, 4232, 4235, 4247, 4338, 4350, 4351
v. Jones, 10 Wend. 180 2124, 2130
v. Watts, 4 McLean 162 4389
v. Westfall, 2 Denio 205 1868
Sveiven v. Thompson, 110 Minn. 484 1443, 1453
Svendsen v. State Bank, 64 Minn. 40 277
Swafford v. Whipple, 3 G. Greene 261 2066, 2098
Swafford D. G. Co. v. Jacobs, 66 Mo. App. 362 4335
Swails v. Cissna, 61 Iowa 693 1245
Swain v. Cheney, 41 N. H. 232 2481
v. Pemigewasset P. Co., 76 N. H. 498 3951, 3956
v. Schieffelin, 134 N. Y. 471 267, 2415, 2423, 2437, 2448
v. Tennessee C. Co., 111 Tenn. 430 440, 3936, 3938
Swaine v. Perine, 5 Johns. Ch. 482 3728
Swales v. Grubbs, 6 Ind. App. 477 4618
Swall v. Clarke 51 Cal. 227 1869
Swallow, The, 27 Fed. 316 3305
Swan v. Boston E. R. Co., 188 Mass. 405 4085
v. Boston Store, 177 Ill. App. 349 4941, 4942
v. Bridgeport, 70 Conn. 143 495, 1618
v. Brown, 8 Kan. App. 505 3116
v. Craig, 73 Neb. 182 690
v. Drury, 22 Pick. 485 2231
v. Graves, 8 Cal. 549 1558
v. Liverpool L. & G. Ins. Co., 52 Miss. 704 3018, 3020
v. Mesmith, 7 Pick. 220 2958
v. Middlesex, 101 Mass. 173 2305, 4132, 4134, 4139
v. Picquet, 4 Pick. 465 1780
v. Tappan, 5 Cush. 104 15, 1366, 1571, 4565
v. Timmons, 81 Ind. 243 1721, 1728, 1759
v. Western U. Tel. Co., 129 Fed. 318 3566
Swanscot Mach. Co. v. Patridge, 25 N. H. 369 1221
Swanson v. Andrus, 83 Minn. 505, 510 1097, 1102, 1135, 2688, 2699, 2700, 2712
v. Cooke, 30 How. Pr. 385, 45 Barb. 574 615
v. Keokuk & W. R. Co., 116 Iowa 304 3806
v. Mississippi & R. R. B. Co., 42 Minn. 532 3933, 3934
v. Nelson, 127 Ill. App. 144 3767, 3768
v. Oakes, 93 Minn. 404 4936
v. Pacific S. Co., 60 Wash. 87 1511
v. Union S. Co., 89 Neb. 361 4905
Swantz v. Muller, 27 Ill. App. 320 400
Swanzey v. Moore, 22 Ill. 63 2471, 2544
Swartz v. Ballou, 47 Iowa 188 2137
v. Board of Com'rs, 158 Ind. 141 12
v. English, 4 Kan. App. 509 1679
v. Gottlieb, etc., B. Co., 109 Md. 393 4210, 4228
Swatman v. Ambler, 8 Ex. 72 3104

[REFERENCES ARE TO PAGES]

Swayne v. Lone Acre O. Co., 98 Tex. 597 3706
v. Lyon, 67 Pa. 433 1953, 2206
v. Swayne, 19 Pa. Super. 160 2003
Swazey v. Brooks, 34 Vt. 451 2094
Sweaney v. United States, 62 Wis. 396 1063
Sweany v. Hunter, 1 Murph. 181 2654
Swearingen v. Consolidated T. M. Co., 212 Mo. 524 4800
v. Tyler, 132 Ky. 458 2781
Sweatland v. Illinois, etc., Tel. Co., 27 Iowa 433 3549, 3550, 3568
Sweem v. Steele, 5 Iowa 352 284, 1562, 1987, 1989, 2008
Sweeney v. Baker, 13 W. Va. 158 4569
v. Jamieson, 2 Wash. Ty. 254 2275, 2355
v. Lewis C. Co., 66 Wash. 490 48, 171, 2602
v. Lomme, 22 Wall. 208 1662, 1670, 1679, 1682, 1683
v. Merrill, 38 Kan. 216 69
v. Montana Cent. R. Co., 19 Mont. 163 312, 3771, 3810
v. Montana Cent. R. Co., 25 Mont. 543 3766, 3769, 3811
v. Nassau Elec. R. Co., 84 Misc. (N. Y.) 557 762
v. Neely, 53 Mich. 421 1071, 1072
v. Owsley, 14 B. Mon. 413 2226
v. Port Burwell H. Co., 17 Up. Can. C. P. 574 73, 218
v. United States, 109 U. S. 618 2235
Sweeney Co. v. Fry, 151 Ind. 178 722
Sweeny v. Daugherty, 23 Iowa 291 376
v. New York, 173 N. Y. 414 1044, 1097, 2650
Sweet v. Bartlett, 4 Sandf. 661 591
v. Boyce, 134 Mass. 381 736
v. Harding, 19 Vt. 587 790
v. Howell, 96 App. Div. (N. Y.) 45 2062, 2113
v. Kimball, 166 Mass. 332 15, 4366, 4432
v. McDaniels, 39 Vt. 272 1407
v. Montpelier Sav. Bank & T. Co., 73 Kan. 47 2961
v. Mowry, 71 Hun 381 1733, 1734, 1735
v. Perkins, 196 N. Y. 482 146
v. Smith, 42 App. Div. (N. Y.) 502 4638
v. Southworth, 125 Mass. 417 698
v. Western U. Tel. Co., 139 Mich. 322 209, 3570
Sweetland v. Chicago & G. T. Ry. Co., 117 Mich. 329 5118
v. Tuthill, 54 Ill. 215 784, 823
Sweetman v. Prince, 26 N. Y. 232 2396
v. Prince, 62 Barb. 256 2396
Sweetzer v. Hay, 2 Gray 49 1559
Sweezy v. Collins N. I. Co., 171 Mich. 75 3164
Sweigart v. Berk, 8 S. & R. 308 422
Sweikhart v. Hanrahan, 184 Mich. 201 4979, 4984
Swengel v. La Salle County Carbon Coal Co., 182 Ill. App. 623 4922
Swensen v. Bender, 51 C. C. A. 627, 114 Fed. 1 4746
Sweny v. Smith, L. R. 7 Eq. 324 808
Swet v. Dodge, 4 Sm. & M. 667 1878
Swetland v. Creigh, 15 Ohio 118 1885
v. Swetland, 3 Mich. 482 1854
Swett v. Colgate, 20 Johns. 196 2387
v. Cutts, 50 N. H. 439 7
v. Dodge, 4 Sm. & M. 667 1147, 1182
v. Gray, 141 Cal. 63 1510
v. Hooper, 62 Me. 54 1031
Swett v. Horn, 1 N. H. 332 826
v. Patrick, 12 Me. 9 304, 2110, 2117, 2124, 2136, 2138, 2143
v. Troy, 12 Abb. Pr. (N. S.) 100 3948
Swezey v. Lott, 21 N. Y. 481 1621
Swift, In re, 114 Fed. 947 2922, 4239
Swift v. Applebone, 23 Mich. 252 1299, 1393, 1536
v. Barnes, 16 Pick. 194 1661, 1664, 1665, 1666, 1672, 4331, 4339, 4352, 4353
v. Barnum, 23 Conn. 523 363
v. Brownell, 1 Holmes 467 5015
v. Broyles, 115 Ga. 885 3882, 3905, 3906
v. Dickerman, 31 Conn. 285 469, 4514, 4530, 4535, 4587
v. Dolle, 39 Ind. App. 653 840, 932
v. Eastern W. Co., 86 Ala. 294 175
v. Gaylord, 229 Ill. 330 4937
v. Gifford, 2 Low. 100 4208
v. Gifford, 1 Low. 29 4309
v. Harriman, 30 Vt. 607 2576, 2679
v. Holoubek, 55 Neb. 228 4700
v. Johnson, 138 Fed. 867 1396, 4861, 4870, 4931, 4936
v. Louisville & N. R. Co., 180 Ill. App. 104 3338
v. Newport News, 105 Va. 108 3951, 3960, 3969, 4026, 4139
v. O'Neill, 88 Ill. App. 162 1468
v. Plessner, 39 Mich. 178 1705
v. Powell, 44 Ga. 123 835
v. Prouty, 64 N. Y. 545 585
v. Raleigh, 54 Ill. App. 44 412
v. Redhead, 147 Iowa 94 243, 2387, 2420, 2434
v. Whitney, 20 Ill. 144 1886, 1891
v. Winterbotham, L. R. 8 Q. B. 253 4387
v. Witchard, 103 Ga. 193 4605
Swift River Co. v. Fitchburg R. Co., 169 Mass. 326 3319, 3343, 3344, 3371
Swinburne v. Swinburne, 36 R. I. 255 767
v. Syme, Vict. L. R. (1909) 550 4546, 4549
Swindler v. Hilliard, 2 Rich. 286 3386
Swinfin v. Lowry, 37 Minn. 345 74
Swinley v. Force, 78 N. J. Eq. 52 702
Swinnerton v. Argonaut L. & D. Co., 112 Cal. 375 1095, 1099
v. Monterey County, 76 Cal. 113 2494
Swinney v. Cockrell, 86 Miss. 318 2156
Swire v. Leach, 18 C. B. (N. S.) 479 4173, 4202
v. Redman, 1 Q. B. Div. 536, 542 2806
Swisher v. McWhinney, 64 Ohio St. 343 1647
Switzer v. Connett, 11 Mo. 88 2947
Switzerland, The, 67 Fed. 617 5007, 5008, 5010, 5013
Swofford D. G. Co. v. Goss, 65 Mo. App. 55 746, 748
Swope v. Crawford, 16 Pa. Super. Ct. 474 4326
v. Leffingwell, 72 Mo. 348 636
v. Seattle, 36 Wash. 113 4020
Sword v. Keith, 31 Mich. 247 628, 631
Swords v. Edgar, 59 N. Y. 28 3843
Sycamore M. H. Mfg. v. Sturm, 13 Neb. 210 2436
Sydleman v. Beckwith, 43 Conn. 9 1424
Sydney v. Mugford Printing & Engraving Co., 214 Fed. 841 531
Sydney Harbour Trust Com'rs v. Warburton, 6 New South Wales St. Rep. 102 3104
Sydnor v. Arnold, 122 Ky. 557 57, 152
Syeds v. Hay, 4 T. R. 260 2922

[REFERENCES ARE TO PAGES]

Sykes v. Citizens' Nat. Bank, 69 Kan. 134 639, 683
v. Kruse, 49 Colo. 560 1835
v. Lawler, 49 Cal. 237 4771
v. Life Ins. Co., 148 N. C. 13 953, 1134, 4389
v. Northeastern R. Co., 44 L. J. (C. P.) 191, 32 L. T. 199, 23 Week. Rep. 483 4937
v. Thornton, 223 Pa. 589 1442
Sykora v. Case T. M. Co., 59 Minn. 130 1396
Syllivan v. Stradling, 2 Wils. 208 3097
Sylte v. Nelson, 26 Minn. 105 521
Sylva v. Cockett, 12 Hawaii 133 4645
Sylvester v. Ammons, 126 Iowa 140 1445
v. Craig, 18 Colo. 44 4212, 4232
v. Girard, 4 Rawle 185 4284
Symes v. Oliver, 13 Mich. 9 363, 4255, 4256
Symington v. McLin, 1 Dev. & Bat. 291 2927
Symonds v. Carter, 32 N. H. 458 4514, 4520, 4543
v. Cincinnati, 14 Ohio 148 3946, 3956, 4108
v. Page, 1 Cr. & J. 29 3695, 3696
Symons v. Metropolitan St. R. Co., 27 N. Y. Misc. 502 4720
Syndicat Lyonnais du Klondyke v. Barrett, 36 Can. Sup. Ct. 279 4407, 4410
Syndicate I. Co. v. Bradley, 7 Wyo. 228 1061
Syracuse, The, 97 Fed. 978 5012
Syracuse v. Roscoe, 66 N. Y. Misc. 317 1592, 2741
v. Stacey, 45 App. Div. (N. Y.) 249 4006
v. Stacey, 169 N. Y. 231 4046, 4055
Syracuse Bank v. Davis, 16 Barb. 188 1193
Syracuse S. S. Co. v. Rome, etc., R. Co., 42 App. Div. (N. Y.) 203, aff'd 168 N. Y. 650 3918, 3984
Syracuse, etc., R. Co. v. Collins, 3 Lans. 29 671, 2937
Syson T. Co. v. Dickens, 146 Ala. 471 311, 4175, 4197
Szymanski v. Chapman, 45 App. Div. (N. Y.) 369 765

T

T. E. Hill Co. v. United States Fidelity & Guaranty Co., 184 Ill. App. 528 1787
T. F. Oakes, The, 87 Fed. 229 2726, 2728
Taacks v. Schmidt, 18 Abb. Pr. 307 1719
Taan v. Le Gaux, 1 Yeates 204 1903
Tabak v. Fettner, 139 App. Div. (N. Y.) 248 2586
v. China Mut. Ins. Co., 131 Mass. 239 3014
v. Hutson, 5 Ind. 322 3474, 4662
v. Jenny, 1 Sprague 315 4208, 4264, 4308, 5015
Taber v. New York, etc., R. Co., 28 R. I. 269 3957, 4035, 4055, 4108, 4112, 4119
v. Seaboard A. L. R., 81 S. C. 317 3438, 3449, 3471
v. Seaboard A. L. R., 84 S. C. 291 3443, 3480
Taber L. Co. v. O'Neal, 160 Fed. 596 2613
Tabert v. Cooley, 46 Minn. 366 4638
Tackaberry v. Sioux City S. Co., 154 Iowa 358 440, 3937
Tackwell v. Lambert, 5 Cush. 23 4392
Tacoma v. Bonnell, 58 Wash. 593 4130
v. Nisqually P. Co., 57 Wash. 420 4040
v. Tacoma L. & W. Co., 17 Wash. 458 4380, 4393
v. Weatherby, 57 Wash. 295 4112, 4135
Tacoma B. P. Co. v. Sternberg, 26 Wash. 84 1045
Tacoma C. Co. v. Bradley, 2 Wash. 600 2371
Tacoma Eastern R. Co. v. Smithgall, 58 Wash. 445 3986
Tacoma M. Co. v. Gilcrest L. Co., 90 Neb. 104 2236, 2241
v. Perry, 32 Wash. 650 532
Taft v. Aylwin, 14 Pick. 336 457
v. Boyd, 13 Allen 86 661
v. Commonwealth, 158 Mass. 526 4001
v. Gifford, 13 Metc. (Mass.) 187 2816
v. Kessell, 16 Wis. 273 2209
v. Montague, 14 Mass. 282 2525
v. Myerscough, 197 Ill. 600 1828, 1847
v. Pike, 14 Vt. 405 1067, 2466, 2540
v. Rutherford, 66 Wash. 256 1610
v. Smith, 76 N. Y. Misc. 283 4235, 4238
v. Tiede, 55 Iowa 370 246
v. Travis, 136 Mass. 95 2216
Taggert v. Hunter, 5 Kan. App. 7 1504
Tahoe I. Co. v. Union I. Co., 109 Cal. 242 1365, 2238, 2260
Taillon v. Mears, 29 Mont. 161 3438, 3470
Tait v. Sherman, 10 Iowa 60 356
Talamon v. Home & Citizens' Mut. Ins. Cos., 16 La. Ann. 426 3048
Talbert v. Charleston & W. C. R. Co., 97 S. C. 465 3471
v. Mason, 136 Iowa 373 2113, 4391
Talbot v. Bedford, Cooke 447 2098
v. Herndon, 4 J. J. Marsh. 553 1528
v. Morton, 5 Litt. 326 1765, 1773
v. National Bank, 129 Mass. 67 1055, 1117
v. New York & H. R. Co., 151 N. Y. 155 12
v. Peebles, 6 J. J. Marsh. 200 1183
v. Sebree, 1 Dana 56 1027, 2046
v. Seeman, 1 Cranch 1 2721
v. Whipple, 7 Gray 122 3927
Talbott v. Donaldson, 71 Kan. 483 2209
v. West Virginia, etc., R. Co., 42 W. Va. 560 1281
Talcott v. Crippen, 52 Mich. 633 245, 4322
v. Des Moines, 134 Iowa 113 3949
v. Freedman, 149 Mich. 577 2274, 2286
v. Marston, 3 Minn. 339 870, 884, 958, 968
v. National E. Co., 144 App. Div. (N. Y.) 337 4840
Talliaferro v. King, 9 Dana 331 1206
v. Minor, 1 Call 456 607
Taliferro v. Western U. Tel. Co., 21 Ky. L. Rep. 1290 3630
Talkin v. Anderson (Texas Sup. Ct.), 19 S. W. 852 885
Tallmadge v. Wallis, 25 Wend. 107 556, 2193
Tallman v. Metropolitan E. R. Co., 121 N. Y. 119 3759, 3764, 3852, 3883, 3885
v. Murphy, 120 N. Y. 345 3125, 3141
v. Truesdell, 3 Wis. 443 871
Tally v. Ayres, 3 Sneed 677 50
v. Ganahl, 151 Cal. 418 2627, 2684

[REFERENCES ARE TO PAGES]

Tamaroa v. Southern Illinois University, 54 Ill. 334 305, 1722
Tamblyn v. Johnston, 126 Fed. 267 3192, 4605, 4628
Tamke v. Vangsnes, 72 Minn. 236 1315, 3673, 3676
Tampa W. Co. v. Cline, 37 Fla. 586 7
Tamvaco v. Simpson, H. & R. 374 480
v. Simpson, 19 C. B. (N. S.) 453 4305
Tancred v. Allgood, 4 H. & N. 438 1629
v. Leyland, 16 Q. B. 669 4605
Tandler v. Saunders, 56 Mich. 142 4352
Tandy v. Wabash R. Co., 68 Mo. App. 431 3318
v. Waesch, 154 Cal. 108 2147, 2185
Tanger v. Southwest Missouri E. R. Co., 85 Mo. App. 28 1340, 1343
Tangier, The, 32 Fed. 230 3301
Tangney v. Sullivan, 163 Mass. 166 4607, 4630
Tankersley v. Silburn, Minor 185 1540, 1541
Tankersly v. Graham, 8 Ala. 247 556, 2195
Tannehill v. Thomas, 1 Blackf. 144 1397
Tanner v. Dundee L. I. Co., 8 Sawyer 187, 12 Fed. 648 936
v. Hague, 7 T. R. 420 632
v. Kellogg, 49 Mo. 118 4093
v. Livingston, 12 Wend. 83 2077, 2089
v. Provo Bench C. & I. Co., 40 Utah 105 4048, 4067
v. Skinner, 11 Bush 120 1129
Tanning Co. v. Telegraph Co., 143 N. C. 376 3569
Tant v. Southern R. Co., 87 S. C. 184 3447
Tanton v. Boomgaarden, 89 Ill. App. 500 1069
v. Slyder, 93 Ill. App. 455 1681
Tanzer v. New York City R. Co., 46 N. Y. Misc. 86 4720
Tapley v. Goodsell, 122 Mass. 176, 182 1712
v. Lebaume, 1 Mo. 550 2060
Tappan v. Wilson, 7 Ohio 190 4506
Tarbox v. Hartenstein, 4 Baxter 78 2552
Tardeveau v. Smith, Hardin 175 833, 884
Tarkovsky v. Hess Co., 64 Ill. App. 513 3144
Tarleton v. McGawley, Peake 270 161
v. McGawley, Peake 205 169
Tarling v. Baxter, 6 B. & C. 360 2225
Tarpey v. Sharp, 12 Utah 383 1771
Tarpley v. Blabey, 2 Bing. N. C. 437 4594
v. Poage, 2 Tex 139 555, 2076, 2204
v. Wilson, 33 Miss. 467 1135, 4232
Tarr v. Oregon S. L. R., 14 Idaho 192 4718, 4794, 4833
v. Ravenscroft, 12 Gratt. 642 2869
v. Rosenstein, 53 Fed. 112 1765, 1783
Tarr Co. v. Kimbrough, 17 Ky. L. Rep. 1284 2548
Tart v. Tart, 154 N. C. 502 1088
Tarwater v. Hannibal, etc., R. Co., 42 Mo. 193 553
Tate v. Bates, 118 N. C. 287 4370, 4388
v. Doe, 24 Miss. 465 3696
v. Greensboro, 114 N. C. 392 5
v. Innerarity, 1 Stew. & Port. 33 1052
v. Missouri, etc., R. Co., 64 Mo. 149 1461
v. Parrish, 7 T. B. Mon. 325 3839
v. Smith, 70 N. C. 685 790, 802
v. Watts, 42 Ill. App. 103 4432
Tater v. Mullen, 23 Ind. 462 1495
Tatham v. Le Roy, 2 Blatch. 478 4450
Tathwell v. Cedar Rapids, 122 Iowa 50 1494
Tatnall v. Courtney, 6 Houst. 434 4775, 4782, 4783
Tatro v. Brower, 118 Mich. 615 2432
Tatterson v. Suffolk Mfg. Co., 106 Mass. 56 2522
Tatum v. Gibbs, 19 Ky. L. Rep. 665 967
v. McLellan, 56 Miss. 352 3705, 3706
v. Manning, 9 Ala. 144 4240
v. Mohr, 21 Ark. 349 1107, 2416
Tatun v. Kincannon, 54 Tex. Civ. App. 633 2116
Taul v. Everet, 4 J. J. Marsh. 10 876, 943, 1000
v. Moore, Hardin 90 1059
Taunton v. McInnish, 46 Ala. 619 611
Taussig v. Hart, 49 N. Y. 301 2964
v. Hart, 58 N. Y. 425 2923
v. St. Louis & K. R. Co., 166 Mo. 28 2467
v. Southern M. & L. Co., 124 Mo. App. 209 2289
Taxicab Co. v. Grant, 3 Ala. App. 393 332, 3483
Tayloe v. Merchants' Ins. Co., 9 How. 390, 13 L. ed. 187 3019, 3039
v. Parker, 137 N. C. 418 997
v. Sandiford, 7 Wheat. 13 704, 711, 860, 918
Taylor v. Aetna Ins. Co., 13 Gray 434 3019
v. Allen, 36 Barb. 294 670
v. Allen, 131 Ga. 416 2097, 2131, 2143
v. Atlantic C. L. R. Co., 78 S. C. 552 78, 3502
v. Bannerman, 120 Wis. 189 2575
v. Barnes, 69 N. Y. 430 1989, 1990
v. Bay City St. R. Co., 101 Mich. 140 3758, 3809
v. Beatty, 202 Pa. 120 702
v. Beck, 13 Ill. 376 2664
v. Bennett, 1 Ohio C. C. 95 4182
v. Blyth, 9 Colo. App. 81 1598
v. Booth, 1 C. & P. 286 1889
v. Bradley, 39 N. Y. 129 234, 250, 408, 409, 3192, 3198
v. Brodrick, 1 Dana 348 3717
v. Brooklyn, E. R. Co., 119 N. Y. 561 634, 821, 823, 1411
v. Brownfield, 41 Iowa 264 1719
v. Bullen, 5 Ex. 779 2388
v. Burnham & Co., [1910] S. C. 705, 47 Sc. L. R. 643, 3 B. W. C. C. 569 5174
v. Bush, 5 B. Mon. 84 1761
v. Butters & P.'s S. & L. Co., 103 Mich. 1 569
v. Buzard, 114 Mo. App. 622 997
v. Caldwell, 2 B. & S. 826 1561, 2307, 2607
v. Canton, 30 Pa. Super. Ct. 305 8, 3799, 3922
v. Carpenter, 11 Paige 292, 2 Sandf. Ch. 603 4485, 4486
v. Carpenter, 2 Woodb. & M. 1, Fed. Cas. No. 13,785 1309, 4485, 4495, 4496
v. Cato, The, 1 Pet. Adm. 48 2735
v. Church, 8 N. Y. 452, 460 1306, 4543
v. Cockrell, 80 Ala. 236 709
v. Cohn, 47 Ore. 538 342
v. Cole, 3 T. R. 292 1390
v. Coleman, 20 Tex. 772 714, 721
v. Collier, 26 Ga. 122 3389
v. Coolidge, 64 Vt. 506 1142, 4836
v. Cooper, 104 Mich. 72 3192, 3211
v. Deblois, 4 Mason 131 643
v. Drainage Dist., 167 Iowa 42 3948

[REFERENCES ARE TO PAGES]

Taylor v. Dustin, 43 N. H. 493 1368, 3488, 3941, 3942
v. Ellington, 46 La. Ann. 371 4502, 4519
v. Finley, 48 Vt. 78 786
v. Foster, 132 Mass. 30 720
v. French, 2 Lea 257 2781
v. Friendship, The, Bee 175 2733
v. Fulmore, 1 Rich. 52 1952, 2201
v. Galland, 3 Greene 17 27
v. Gilman, 24 Fed. 632 4480, 4481
v. Godbold, 76 Ark. 395 2505
v. Gould, 57 Pa. 152 421
v. Grand Ave. R. Co., 185 Mo. 239 1506
v. Gumpert, 96 Ark. 354 4502, 4508
v. Hall, 2 Str. 1189 4503
v. Hamberg, 183 Ill. App. 241 4390, 4391, 4394
v. Hart, 73 Miss. 22 3141
v. Hearst, 107 Cal. 262, 118 Cal. 366 4506, 4507, 4512, 4543, 4590
v. Henniker, 12 Ad. & E. 488 35
v. Hiestand, 46 Ohio St. 343 998
v. Higgins, 3 East 169 2844
v. Hines, 31 Mo. App. 622 4175
v. Holter, 1 Mont. 688 2098, 2137, 2143
v. Howard, 110 Ala. 468 165, 2323, 2327
v. Jackson, 83 Mo. App. 641 4139
v. James, 109 Ga. 327 3710
v. Jeter, 23 Mo. 244 2804
v. Johnson, 17 Ga. 521 1607
v. Johnston, 19 Tex. 351 1952
v. Jones, 1 Ind. 17 725
v. Jones, 42 N. H. 25 449, 1358, 1360
v. Ketchum, 35 How. Pr. 289, 5 Robert. 507 2946, 2964
v. Knox, 1 Dana 391 1020, 1117, 1135, 2910
v. Knox, 5 Dana 466 1061
v. Laird, 1 H. & N. 266 2542
v. Lapham, 13 Allen 26 2225
v. Lehman, 17 Ind. App. 585 3236
v. Leith, 26 Ohio St. 428 4383
v. Long Island R. Co., 25 Misc. (N. Y.) 11 2495
v. McClung, 2 Houst. 25 2753
v. McLean, 3 Call 381 1358
v. Maguire, 12 Mo. 313 233, 2627
v. Marcella, The, 1 Woods 302 925
v. Maris, 5 Rawle 51 574
v. Martin, 109 La. 137 2511
v. Mather, 3 T. R. 83 1825
v. Meek, 4 Blackf. 388 870, 954, 967, 975, 976
v. Merryweather, 15 Ala. 735 2667
v. Mertens, 82 Conn. 595 3768
v. Metropolitan E. R. Co., 50 N. Y. Super. 311 403, 4082, 4083
v. Metropolitan St. R. Co., 166 Mo. App. 131 4745
v. Mills, 2 Cow. 525 2831, 2835
v. Mills, 148 N. C. 415 4324, 4325
v. Monroe, 43 Conn. 36 1374, 4708
v. Morgan, 43 Okla. 142 1594, 1604
v. Morrison, 26 Ala. 728 2865
v. Morton, 61 Mass. 24 4321
v. Neri, 1 Esp. 386 115
v. Niagara B. Co., 52 N. Y. Misc. 356 2261
v. Nicholson & Son, Ltd., [1915] W. C. & Ins. Rep. 42 5202
v. North Pac. C. R. Co., 56 Cal. 317 2590
v. North Star, etc., Co., 79 Cal. 285 874
v. Nostrand, 134 N. Y. 108 2982, 2986
v. Parker, 43 Wis. 78 1601, 1604
Taylor v. Pennsylvania Co., 78 Ky. 348 4952, 4954
v. Peoria, B. & C. T. Co., 184 Ill. App. 188 335, 4653
v. Peterson, 9 La. Ann. 251 2525
v. Plumer, 3 M. & S. 562 361
v. Porter, 1 Dana 421 2024
v. Pullen, 152 Mo. 434 4525
v. Railway, 48 N. H. 320 1264, 1268
v. Read, 4 Paige 561 312, 2288
v. Robinson, 29 Me. 323 469
v. Roger Williams Ins. Co., 51 N. H. 50 3021
v. Rowland, 26 Tex. 293 1995, 2005
v. Saxe, 134 N. Y. 67 2272, 2273
v. Schofield, 191 Mass. 1 2500
v. Scott, 178 Ill. App. 487 807, 1032, 1201
v. Seabrook, 87 N. J. L. 407 5193, 5201, 5212
v. Shelkett, 66 Ind. 297 4964
v. Shum, 1 B. & P. 21 3133
v. Smith, 2 Hawks 465 978
v. Smith, 2 Whart. 432 2047
v. Southern Ry. Co., 178 Fed. 380 5049
v. Spencer, 75 Kan. 152 294, 2289
v. Spokane Falls & N. R. Co., 32 Wash. 450 1458
v. Spokane, etc., R. Co., 72 Wash. 378 3485
v. Sturgingger, 2 Mills' Const. 367 1529
v. Syme, 162 N. Y. 513 3118
v. Talbot, 2 J. J. Marsh. 49 742
v. Taylor, 232 U. S. 363, rev'g 204 N. Y. 135 5024, 5115
v. Taylor, 232 U. S. 363, rev'g 144 N. Y. App. Div. 634 5093
v. Times N. Co., 83 Minn. 523 841, 886, 889
v. Trustees of Poor, 1 Penne. 555 2235, 2237
v. Tucker, 1 Ga. 231 2219
v. Tully, Palmer 385 4556
v. Turley, 33 Md. 500 1890
v. Wabash R. Co., 130 Mo. App. 582 3542
v. Wahl, 72 N. J. L. 10 655
v. Wallace, 20 Colo. 211 2098, 2126, 2129
v. Wells, 2 Saund. 74n 1391
v. Welsh, 138 Ill. App. 190 4321, 4334, 4339
v. Western Pac. R. Co., 45 Cal. 323 4874, 4906
v. Western U. Tel. Co., 95 Iowa 740 19, 3573
v. Wetmore, 10 Ohio 490 2753, 2767
v. Wilcox, 188 Ill. App. 18 4982, 4983
v. Williams, 2 B. & Ad. 845 4641
v. Williams, 6 Wis. 363 2667
v. Williams, 14 Wis. 155 589
v. Wing, 84 N. Y. 471 952, 1047
v. Winsor, 30 R. I. 44 1492, 1511
v. Zamira, 6 Taunt. 524 503, 504
Taylor Mfg. Co. v. Hatcher Mfg. Co., 39 Fed. 440 235, 244, 259, 291
Taylor W. Co. v. Beolchi, 37 N. Y. Misc. 691 1717
Taylor, etc., R. Co. v. Warner, 84 Tex. 122 4862
v. Warner, 88 Tex. 642 1475
Taylor's Est., 3 Pa. Dist. 691 2480
Taymon v. Mitchell, 1 Md. Ch. 496 2391
Tays v. Ecker, 6 Tex. Civ. App. 188 3142, 3145
Tazewell v. Barrett, 4 Hen. & Munf. 159 1226
v. Saunders, 13 Gratt. 354 1570

[REFERENCES ARE TO PAGES]

Teaff v. Ross, 1 Ohio St. 469 2816
Teagarden v. Hetfield, 11 Ind. 522 51, 1368, 3941
Teague v. Irwin, 127 Mass. 217 4378
v. Whaley, 20 Ind. App. 26 2131, 2136, 2148, 2150
Teal v. Coal & C. R. Co., 66 W. Va. 315 3470
v. Russell, 3 Ill. 319 1522
Teasley v. Bradley, 120 Ga. 373 1514
Teass v. Boyd, 29 Mo. 131 825
Teaver v. Akin, 47 Ark. 528 3705
Tebbs v. Carpenter, 1 Madd. 201 1125
v. Cleveland, etc., R. Co., 20 Ind. App. 192 2919, 3329, 3346
Teberg v. Swenson, 32 Kan. 224 2834
Tebo v. Betancourt, 73 Miss. 868 1705
Tecker v. Seattle, etc., R. Co., 60 Wash. 570 4918, 4929
Tedder v. Riggin, 65 Fla. 153 2982, 2986, 4407
Tedford Auto Co. v. Horn, 113 Ark. 310 2299
Teel v. Miles, 51 Neb. 542 371
v. Rio Bravo O. Co., 47 Tex. Civ. App. 153 9, 428
Teese v. Huntingdon, 23 How. 2 306
Teeter v. Cole Mfg. Co., 151 N. C. 602 4217
v. Pierce, 11 B. Mon. 399 2865
Teetzel v. Davidson M. Co., 74 Neb. 529 2216
Tefft v. Wilcox, 6 Kan. 46 4657, 4693, 4714, 4748
v. Windsor, 17 Mich. 486 1299
Teis v. Smuggler M. Co., 158 Fed. 260 114
Telegraph, The, 14 Wall. 258 5015
Telegraph, The, v. Loetscher, 127 Iowa 383 2902
Telegraph Co. v. Frith, 105 Tenn. 167 1512, 1517, 3547, 3618, 3621, 3657
v. Griswold, 37 Ohio St. 301 3546, 3547, 3549, 3551, 3602
v. Mellon, 96 Tenn. 66 3555, 3608, 3612
v. Munford, 87 Tenn. 190 3549, 3558
Telephone Co. v. Brown, 104 Tenn. 56 3547, 3633
Telephone & T. Co. v. Forke, 2 Tex. App. Civil Cas. 318 1434
v. Shaw, 102 Tenn. 313 1268, 1279, 1286, 1316, 3827, 3829
Telfair County v. Clements, 1 Ga. App. 437 1522
v. Clements, 119 Ga. 916 4186
v. Webb, 119 Ga. 916 312, 4168, 4185
Telfener v. Russ, 145 U. S. 522 1944
Telfer v. Northern R. Co., 30 N. J. L. 188 4858, 4872, 4889, 4906
Telford v. Patton, 144 Ill. 611 1891
Tell v. Gibson, 66 Cal. 247 417
Teller v. Bay & R. D. Co., 151 Cal. 209 3744, 3798, 3801, 3892, 3895
Telluride P. Co. v. Bruneau, 41 Utah 4 3991, 4133
Telluride P. T. Co. v. Crane Co., 208 Ill. 218 2369
Temme v. Schwindt, 210 Pa. 507 60
Tempest v. Kilner, 2 C. B. 300 2317
v. Linley, Clayton 34 496
Templar v. McLachlan, 2 B. & P. N. R. 136 2484
Temple v. Duran (Tex. Civ. App.), 121 S. W. 253 1318, 4174
v. McComb City E. L. & P. Co., 89 Miss. 1 56, 151
v. Niagara F. Ins. Co., 109 Wis. 372 3067
v. Scott, 3 Minn. 419 580, 583
Temple E. Co. v. Halliburton (Tex. Civ. App.), 136 S. W. 584 147
Templeman v. Fountleroy, 3 Rand. 434 1225
Templemore v. Moore, 15 Irish C. L. (N. S.) 14 3774
Templer v. McLachlan, 2 N. R. 136 517
Templeton v. Biegert, 79 Kan. 638 2508
v. Graves, 59 Wis. 95 1268, 1291, 4543, 4545, 4549
v. Shakley, 107 Pa. 370 2805
Tenant v. Goldwin, 1 Salk. 360 3839
v. Marmaduke, 5 B. Mon. 76 589
Ten Broeck v. De Witt, 10 Wend. 617 591
Tenbrooke v. Jahke, 77 Pa. 392 4095
Ten Cate v. Fansler, 10 Okla. 7 1369, 1391, 4613, 4615
Ten Eick v. Simpson, 1 Sandf. Ch. 244 691
Ten Eyck v. Houghtaling, 12 How. Pr. 523 943, 1031, 1067, 3148
v. Rector, etc., 65 Hun 194 3120
v. Sayer, 76 Hun 37 1741
v. Vanderpool, 8 Johns. 120 1829
Ten Hopen v. Taylor, 103 Mich. 178 1558
v. Walker, 96 Mich. 236 4159, 4165, 4200
Tennants v. Gray, 5 Munf. 494 1570
Tennessee v. Ward, 9 Heisk. 100 174
Tennessee C., I. & R. Co. v. Herndon, 100 Ala. 451 418
v. McMillion, 161 Ala. 130 1433, 1444
v. State, 141 Ala. 103 1448, 1451
Tennessee Cent. R. Co. v. Binkley, 127 Tenn. 77 479
v. Brasher's Guardian, 29 Ky. L. Rep. 1277 1304
Tennessee, etc., R. Co. v. Danforth, 112 Ala. 80 2687, 2693, 2697
v. Lockhart, 79 Ala. 315 3474
Tennessee Mfg. Co. v. James, 91 Tenn. 154 862, 886, 899
Tennessee River, etc., Co. v. Leeds, 97 Tenn. 574 2389
Tenney v. Cincinnati, 5 Ohio C. C. (N. S.) 459 400
v. Evans, 13 N. H. 462 1483
v. Prince, 4 Pick. 385 2780, 2781
v. State Bank, 20 Wis. 152 4285
Tennien v. Chase, 201 Mass. 497 108
Tennis v. Gifford, 133 Iowa 372 2398, 2401, 2422
Tenny v. Foote, 95 Ill. 99 1849
v. Porter, 61 Ark. 329 978
v. Prince, 4 Pick. 385 2768
Tenzer v. Gilmore, 114 Mo. App. 210 2561
Te Poel v. Shutt, 57 Neb. 592 801, 802, 807
Terhune v. Aldis, 44 N. J. Eq. 146 1640
v. Cody C. Co., 72 App. Div. (N. Y.) 1 4920
v. Colton, 12 N. J. Eq. 233, 312 704
v. Oldis, 44 N. J. Eq. 146 1122
Terminal Bank v. Dubroff, 66 N. Y. Misc. 100 979
Terminal R. R. Ass'n v. Condon, 128 Ill. App. 335 4945
Ternes v. Dunn, 7 Utah 497 41
Terney v. Wilson, 45 N. J. L. 282 587
Terrace W. Co. v. San Antonio L. & P. Co., 1 Cal. App. 511 1362, 2274
Terre Haute v. Hudnut, 112 Ind. 542 213, 228, 265, 266, 3918
v. Turner, 36 Ind. 522 12

[REFERENCES ARE TO PAGES]

Terre Haute E. Co. v. Watson, 33 Ind. App. 124 4705
Terre Haute, etc., R. Co. v. Brunker, 128 Ind. 542 4666
v. Buck, 96 Ind. 346 54, 135, 136, 139, 158, 4679, 4682
v. Eggmann, 58 Ill. App. 21 4941
v. Mason, 148 Ind. 578 4646
v. Peoria, etc., R. Co., 182 Ill. 501 1759
v. Pierce, 95 Ind. 496 550, 559
v. Vanetta, 21 Ill. 188 1493, 1495, 3499
v. Walsh, 11 Ind. App. 13 1422, 3761, 3802, 3803
Terre Haute, etc., T. Co. v. Maberry, 52 Ind. App. 114 4929
Terrel v. Townsend, 6 Tex. 149 2814
Terrell v. Chesapeake & O. R. Co., 110 Va. 340 3840, 3841
v. Ingersoll, 10 Lea 77 1753
v. McLean, 130 Ga. 633 1606, 1608, 2754
v. Smith, 8 Conn. 426 632
v. Stevenson, 97 Ga. 570 2397
v. Walker, 65 N. C. 91 818, 820
Terrill v. Rankin, 2 Bush 453 26
Territory v. Board of Com'rs, 8 Mont. 396 1043
v. Choctaw, etc., R. Co., 20 Okla. 663 4086
v. Rindskopf, 5 N. M. 93 1705
Terry v. Allis, 20 Wis. 32 26, 4278
v. Beatrice S. Co., 43 Neb. 866 378
v. Birmingham Nat. Bank, 93 Ala. 599 4240
v. Bissell, 26 Conn. 23 2383
v. Davis, 114 N. C. 31 4608
v. Drabenstadt, 68 Pa. 400 2077, 2122, 2130, 2140, 2187
v. Hutchinson, L. R. 3 Q. B. 602 4958
v. Jewett, 17 Hun 395 489, 4885
v. Mayor, 8 Bosw. 504 3243, 3923
v. Robbins, 122 Fed. 725 1737
v. Roberts, 15 How. Pr. 65 581
v. Southern R., 81 S. C. 279 20, 3419
v. Wheeler, 25 N. Y. 520 2225
v. Williams, 148 Ala. 468 4158, 4174
Terwilliger v. Beals, 6 Lans. 403 2905
v. Knapp, 3 E. D. Smith 86 2220
v. Wands, 17 N. Y. 54 4552, 4553, 4558, 4562
Teryll v. St. Paul City R. Co., 121 Minn. 530 3527
Tessier v. Englehart, 18 Neb. 167 529
Teter v. Franklin Fire Ins. Co., 74 W. Va. 344 3011, 3014, 3016
v. Norfolk Fire Ins. Corp., 74 W. Va. 461 3053
Tetley v. McElmurry, 201 Mo. 382 1202, 1229
Tetzner v. Naughton, 12 Ill. App. 148 158, 444
Tevis v. Ryan, 13 Ariz. 120 207, 1458
Tew v. Winterton, 3 Brown 496 1561, 1563
Tewart v. Lawson, 3 Sm. & G. 307 1027
Tewes v. North German Lloyd S. S. Co., 89 App. Div. (N. Y.) 148 3417
v. North German Lloyd S. S. Co., 186 N. Y. 151 3417
Texada v. Camp, Walk. (Miss.) 150 2406
Texarkana, City of, v. Lawson, — Tex. Civ. App. —, 168 S. W. 867 3982
Texarkana G. & E. L. Co. v. Orr, 59 Ark. 215 1271, 1278
Texarkana Tel. Co. v. Pemberton, 86 Ark. 329 781
Texarkana W. Co. v. Kizer (Tex. Civ. App.), 63 S. W. 913 4233
Texarkana, etc., R. Co. v. Anderson, 67 Ark. 123 3480
v. Hartford Ins. Co., 17 Tex. Civ. App. 498 1020
v. Neches I. Works, 57 Tex. Civ. App. 249 3374, 4223
v. Toliver, 37 Tex. Civ. App. 437 4717, 4755
Texas Co. v. Giddings, — Tex. Civ. App. —, 148 S. W. 1142 3889
v. Lacour (Tex. Civ. App.), 122 S. W. 424 3800
v. Strange (Tex. Civ. App.), 154 S. W. 327 4778
Texas Bldg. Co. v. Reed, — Tex. Civ. App. —, 169 S. W. 211 1489, 1502
Texas Cent. Tel. Co. v. Owens (Tex. Civ. App.), 128 S. W. 926 3586
Texas I. Co. v. Moore (Tex. Civ. App.), 153 S. W. 166 2617
Texas L. Ins. Co. v. Roberts, 55 Tex. Civ. App. 217 2556
Texas L. & L. Co. v. Robertson, 38 Tex. Civ. App. 521 1918
Texas Moline Plow Co. v. Niagara Fire Ins. Co., 39 Tex. Civ. App. 168 3044
Texas P. R. Co. v. Hassell, 23 Tex. Civ. App. 681 3343
Texas Portland C. Co. v. Poe, 32 Tex. Civ. App. 469 323
Texas Power & Light Co. v. Bird, — Tex. Civ. App. —, 165 S. W. 8 4894, 4900, 4901, 4902
Texas T. Co. v. Hanson, — Tex. Civ. App. —, 124 S. W. 494 3471, 4653
v. Hanson (Tex. Civ. App.), 143 S. W. 214 4652, 4669
Texas Tel. & T. Co. v. Scott (Tex. Civ. App.), 127 S. W. 587 4719
v. Seiders, 9 Tex. Civ. App. 431 3607
v. Thompson (Tex. Civ. App.), 130 S. W. 705 4664
Texas Warehouse Co. v. Imperial Rice Co., — Tex. Civ. App. —, 164 S. W. 396 4210, 4238
Texas Western R. Co. v. Cave, 80 Tex. 137 4101
Texas & P. C. Co. v. Lawson, 10 Tex. Civ. App. 491 3261
Texas & W. Tel. & T. Co. v. Mackenzie, 36 Tex. Civ. App. 178 3564, 3568, 3597
Texas, etc., R. Co. v. Adams, 78 Tex. 373 3430
v. Armstrong, 93 Tex. 31 3482
v. Arnett, 40 Tex. Civ. App. 76 1367, 1436, 3513
v. Baruwell (Tex. Civ. App.), 133 S. W. 527 1392, 4705
v. Barwick, 50 Tex. Civ. App. 544 4814
v. Bayliss, 62 Tex. 570 383, 408
v. Becker & Cole, — Tex. Civ. App. —, 171 S. W. 1024 3431
v. Beezley, 46 Tex. Civ. App. 108 3513
v. Berchfield, 12 Tex. Civ. App. 145 3387
v. Bigham, 90 Tex. 223 111
v. Brouillette (Tex. Civ. App.), 130 S. W. 886 4801
v. Brown, 38 Tex. Civ. App. 610 3879
v. Cameron (Tex. Civ. App.), 149 S. W. 709 489
v. Carr, 91 Tex. 332 1141
v. Casey, 52 Tex. 112 3524
v. Coggin, 44 Tex. Civ. App. 474 3351

[REFERENCES ARE TO PAGES]

Texas, etc., R. Co. v. Cole, 66 Tex. 562 3459
v. Conway, 44 Tex. Civ. App. 68 4797
v. Cox, 145 U. S. 593 4952
v. Crowder, — Tex. Civ. App. —, 165 S. W. 116 4168
v. Cunningham, — Tex. Civ. App. —, 168 S. W. 428 4893, 4895, 4900
v. Currie, 33 Tex. Civ. App. 277 3351, 3430
v. Curry, 64 Tex. 85 1378
v. Dashiell, 198 U. S. 521 769
v. Davidson, 68 Tex. 370 4817
v. Dawson, 34 Tex. Civ. App. 240 3350
v. Dean, 98 Tex. 517 501, 4613, 4642
v. Dishman, 41 Tex. Civ. App. 250, 38 Tex. Civ. App. 277 3388
v. Donovan, 86 Tex. 378 1436
v. Douglas, 73 Tex. 325 4712
v. Douglass, 69 Tex. 694 348, 1477, 4689, 4752
v. Ellerd, 38 Tex. Civ. App. 596 1364, 3397
v. Ferguson (Tex.). White & W. 724 3535, 3537
v. Fisher, 18 Tex. Civ. App. 78 1445
v. Ford, 54 Tex. Civ. App. 312 3847, 3883
v. Geraldon, 54 Tex. Civ. App. 71 134, 135, 136, 3438, 3446, 3456
v. Gott, 20 Tex. Civ. App. 335 95, 3471, 3473, 3482
v. Graffeo, 53 Tex. Civ. App. 569 3780
v. Gullett (Tex. Civ. App.), 134 S. W. 262 4873, 4901
v. Hall, 58 Tex. Civ. App. 598 4793
v. Hannay-F. & Co., — Tex. Civ. App. —, 142 S. W. 1163 3400
v. Hardin, — Tex. Civ. App. —, 168 S. W. 1017 3981
v. Hargrove, — Tex. Civ. App. —, 169 S. W. 925 3396
v. Hartnett, 33 Tex. Civ. App. 103 4810
v. Higgins, 44 Tex. Civ. App. 523 4877
v. Hoffecker (Tex. Civ. App.), 123 S. W. 617 3388, 3391, 3400
v. Holloway, 48 Tex. Civ. App. 634 3434
v. Hubbard, — Tex. Civ. App. —, 169 S. W. 1058 766
v. Humble, 38 C. C. A. 502, 97 Fed. 837 4702, 4763, 4764
v. Humble, 181 U. S. 57 5089
v. Isenhower (Tex. Civ. App.), 131 S. W. 297 1445, 1452, 3388
v. James, 82 Tex. 306 3476
v. Johnson, 48 Tex. Civ. App. 135 4881, 4907, 4913
v. Johnson, 76 Tex. 421 4823
v. Jones (Tex. Civ. App.), 39 S. W. 124 3467, 3485
v. Jones, 34 Tex. Civ. App. 94 4216
v. Kenny, 46 Tex. Civ. App. 297 1511, 4919
v. King, — Tex. Civ. App. —, 174 S. W. 336 3394, 3431
v. Kirby, 44 Ark. 103 1434
v. Lawrence, 42 Tex. Civ. App. 318 3531
v. Lester, 75 Tex. 56 4918, 4919
v. Levi, 59 Tex. 674 313, 488, 4197
v. Looney, 33 Tex. Civ. App. 495 3942
Texas, etc., R. Co. v. Lynch (Tex. Civ. App.), 87 S. W. 80, 881 3466
v. McLeod (Tex. Civ. App.) 131 S. W. 311 4800
v. McNairy, 42 Tex. Civ. App. 222 3423
v. Marlor, 123 U. S. 687 624
v. Marshall, — Tex. Civ. App. —, 140 S. W. 508 3483
v. Matkin (Tex. Civ. App.), 142 S. W. 604 4805
v. Matthews, 60 Tex. 215 3755
v. Maughon (Tex. Civ. App.), 139 S. W. 611 3477
v. Mayes (Tex. App.), 15 S. W. 43 3457
v. Miller (Tex. Civ. App.), 128 S. W. 1165 4952
v. Mills (Tex. Civ. App.), 143 S. W. 690 4902, 4913
v. Morin, 66 Tex. 133 4700, 4701, 4768, 4770
v. Morrison Faust Co., 20 Tex. Civ. App. 14 3533
v. Mosley (Tex. Civ. App.), 124 S. W. 485 4682
v. Murray (Tex. Civ. App.), 156 S. W. 594 4681
v. Murtishaw, 34 Tex. Civ. App. 447 3392, 3400
v. Neill, — Tex. Civ. App. —, 159 S. W. 1180 766
v. Nelson, 38 Tex. Civ. App. 605 3348
v. Nicholson, 61 Tex. 491 3318, 3326
v. Norman (Tex. Civ. App.), 153 S. W. 1184 3887
v. O'Brien, 18 Tex. Civ. App. 690 4785, 4786
v. Payne, 15 Tex. Civ. App. 58 3386, 3389, 3390, 3400, 4169, 4178, 4179
v. Payne, 99 Tex. 46 3466, 3473
v. Perry, — Tex. Civ. App. —, 147 S. W. 305 3457
v. Postal Tel. C. Co. (Tex. Civ. App.), 52 S. W. 108 4066, 4068, 4069
v. Powell, 34 Tex. Civ. App. 575 3321
v. Prude, 39 Tex. Civ. App. 144 3803
v. Putnam (Tex. Civ. App.), 63 S. W. 910 23
v. Qualls (Tex. Civ. App.), 124 S. W. 140 1443, 2799, 3803
v. Randle, 18 Tex. Civ. App. 348 1451
v. Rea, 27 Tex. Civ. App. 549 3471
v. Richards, 68 Tex. 375 4956
v. Robertson, 82 Tex. 657 30
v. Rust, 19 Fed. 239 895, 930
v. Scruggs, 23 Tex. Civ. App. 712 4664
v. Smith, 34 Tex. Civ. App. 571 3321, 3430
v. Smith, 35 Tex. Civ. App. 351 27, 3741, 3780
v. Southwestern Tel. & T. Co. (Tex. Civ. App.), 57 S. W. 312 4066, 4068
v. Stewart, 38 Tex. Civ. App. 595 3375
v. Sullivan, 20 Tex. Civ. App. 50 766
v. Syfan, 91 Tex. 526 1515
v. Tankersley, 63 Tex. 57 1137, 3400
v. Tarkington, 27 Tex. Civ. App. 353 3483
v. Tracy, 38 Tex. Civ. App. 327 3348
v. Truesdell, 21 Tex. Civ. App. 125 3346, 3403
v. Volk, 151 U. S. 73 5133
v. Walker, 58 Tex. Civ. App. 615 4853, 4862, 4874, 4900

[REFERENCES ARE TO PAGES]

Texas, etc., R. Co. v. Watkins (Tex. Civ. App.), 26 S. W. 760 149
v. Watson, 54 Tex. Civ. App. 509 3388, 3430
v. Wharton (Tex. Civ. App.) 145 S. W. 282 3474, 3519
v. Wheeler, 52 Tex. Civ. App. 603 1471, 1502
v. White, — Tex. Civ. App. —, 177 S. W. 1185 5058
v. White, 25 Tex. Civ. App. 278 3747
v. White, 35 Tex. Civ. App. 521 3386, 3390
v. White, 42 C. C. A. 86, 101 Fed. 928 4786
v. Wiggins, — Tex. Civ. App. —, 156 S. W. 1131 3458
v. Wilder, 35 C. C. A. 105, 92 Fed. 953 4935
v. Wilson H. Line, 46 Tex. Civ. App. 38 3394, 3397
v. Woods, 15 Tex. Civ. App. 612 4762
v. Wynn, 44 Tex. Civ. App. 29 3446
v. Young, 60 Tex. 201 239, 439
Thacher v. New York, etc., R. Co., 153 App. Div. (N. Y.) 186 1094, 2481
Thacke v. Hensheim, — Misc. (N. Y.) —, 115 N. Y. Supp. 216 692, 2696
Thacker v. Bullock L. Co., 140 Ky. 463 715
Thalheimer v. Crow, 13 Colo. 397 524, 2828
Thalman v. Barbour, 5 Ind. 178 782
Thame v. Boast, 12 Q. B. 808 510
Thames I. Works, etc., Co., L. R. 3 Q. B. 181 2615
Tharsher v. Tyack, 15 Wis. 256 3719
Tharsis S. & C. Co. v. McElroy, 3 App. Cas. 1040 2654
Thatcher v. Dinsmore, 5 Mass. 299 659
v. Kaucher, 2 Colo. 698 1436, 2305
v. Massey, 20 S. C. 542 714, 743, 958
v. Taylor, 3 Munf. 249 1557
Thayer v. Brackett, 12 Mass. 450 802, 808, 809, 811
v. Brooks, 17 Ohio 489 391, 402, 3850
v. Clemence, 22 Pick. 490 2058, 2117, 2152, 2157
v. Davis, 75 Wis. 205 2226
v. Denton, 4 Mich. 192 703, 712
v. Erie Co. Sav. Bank, 160 App. Div. (N. Y.) 300 2754
v. Hamlin, 59 N. Y. Misc. 171 2696
v. Harbican, 70 Wash. 278 757, 2491
v. Hedges, 23 Ind. 141 601
v. Hoffman, 53 Kan. 723 2902
v. Hutchinson, 13 Vt. 507 4208, 4283
v. Lapham, 13 Allen 28 2226
v. Manley, 8 Hun 550 4302
v. Manley, 73 N. Y. 307 2331, 4244, 4277
v. Roberts, 44 Me. 247 1626
v. Sherlock, 4 Mich. 173 1388, 1390, 1536, 3779, 3825
v. Star M. Co., 105 Ill. 540 1202
v. Vermont Cent. R. Co., 24 Vt. 440 2657
v. Wadsworth, 19 Pick. 349 2544
Thayer-M. B. Co. v. Campbell, 164 Mo. App. 8 212, 267, 3200, 3258
Thebideau v. Cairns, 171 Fed. 233 3269
Thedford v. Herbert, 135 App. Div. (N. Y.) 174 2278
Theiss v. Weiss, 166 Pa. 9 2280
Theobald v. Burleigh, 66 N. H. 574 2539, 2663
v. Railway Passenger Assur. Co., 10 Ex. 45 3078, 3079
Thero v. Missouri Pac. R. Co., 144 Mo. App. 161 1504
Theta, The, 135 Fed. 129 2735
Thetford v. Hubbard, 22 Vt. 440 798
v. Tyler, 8 Q. B. 95 3102
Thew v. Miller, 73 Iowa 742 4211
Thibault v. Russell, 5 Harr. 293 3287
Thick v. Washer, 137 Mich. 155 4640
Thiedemann v. Goldschmidt, 1 De Gex. F. & J. 10 1818
Thiele v. Axell, 5 Tex. Civ. App. 548, 556 2117
Thielman v. Reinsch, 103 Ark. 307 2372
Thiesen v. Johns, 72 Mich. 285 1301
Thilemann v. New York, 82 App. Div. (N. Y.) 136 2655
Thill v. Pohlman, 76 Iowa 638 1310
Thillman v. Neal, 88 Md. 525 4774, 4775
Thimbleby v. Barron, 3 M. & W. 210 781
Third Nat. Bank v. Boyd, 44 Md. 47 4221, 4239
v. Ober, 178 Fed. 678 276, 277
v. Rice, 161 Fed. 822 4209
v. Spring, 28 N. Y. Misc. 9 1876
Thirkfield v. Mountain View Cemetery Ass'n, 12 Utah 76 1268, 1493, 3819, 3826, 3827
Thirteenth & F. St. P. R. Co. v. Boudrou, 92 Pa. 475 48
Thisler v. Hopkins, 85 Ill. App. 207 41, 2386
v. Miller, 53 Kan. 515 371, 382, 4348
Thistle C. Co. v. Rex C. & M. Co., 132 Iowa 592 2260, 2263, 2265
Thol v. Henderson, 8 Q. B. Div. 457 204
Tholen v. Duffy, 7 Kan. 405 868
Thomas v. Allen, 1 Hill 145 2191, 2192, 2874, 2894
v. Beaver Dam Mfg. Co., 157 Wis. 427 2526
v. Beckman, 1 B. Mon. 29 295, 1184, 2826
v. Bland, 91 Ky. 1 2093
v. Bola L. Co., 1 Cal. App. 335 416
v. Boston & M. R. R., 219 Fed. 180 5063
v. Bowen, 29 Ore. 258 4506
v. Brooklyn, 58 Iowa 438 4700
v. Caldwell, 136 Ala. 518 1943, 1946
v. Chicago G. W. R. Co., 112 Minn. 360 125
v. Chicago & N. W. R. Co., 202 Fed. 766 4853
v. Clarke, 2 Stark. 450 3278, 3279, 3299
v. Clarkson, 125 Ga. 72 941, 1162, 1879
v. Columbia P. Co., 144 Wis. 470 2521
v. Commonwealth, 3 J. J. Marsh. 121 1538
v. Croom, 102 Ark. 108 3189, 3211
v. Croswell, 7 Johns. 264 4516
v. Dansby, 74 Mich. 398 4741, 4765, 4778
v. Dickinson, 12 N. Y. 364 1480, 2331, 2332
v. Dickinson, 67 Hun 350 4398
v. Dike, 11 Vt. 273 2466, 2540
v. Dingley, 70 Me. 100 294
v. Doub, 8 Gill 1 978
v. Dunaway, 30 Ill. 373 473, 4569
v. Edwards, 3 Ans. 804 1052
v. Ellison, 102 Tex. 354 2152, 2156, 4390
v. Evans, 10 East 101 802, 804
v. First Nat. Bank, 32 Okla. 115 4351
v. Fischer, 71 Ill. 576 4569
v. Fleury, 26 N. Y. 26 2684
v. Francis, 12 Ind. 282 2370
v. Funkhouser, 91 Ga. 478 2914
v. Gammel, 6 Leigh 9 3718, 3719
v. Gates, 126 Cal. 1 1509, 4652
v. Great Western R. Co., 14 Up. Can. Q. B. 389 3532

[REFERENCES ARE TO PAGES]

Thomas v. Hammond, 47 Tex. 42 2189
v. Harbison-W. Ref. Co., 226 Pa. 136 3147
v. Hawpe, 35 Tex. Civ. App. 311 1121
v. Heathorn, 2 B. & C. 477 626, 749
v. Hubbell, 15 N. Y. 405 296
v. Hubbell, 35 N. Y. 120 2871
v. Irwin, 90 Ind. 557 1654, 1679
v. Isett, 1 G. Greene 470 1284, 4169, 4179
v. Jackson, 105 Ark. 353 2670
v. Jennings, 5 Sm. & M. 627 2780
v. Kanawha, etc., Co., 73 W. Va. 374 2598, 2669, 2682
v. Kelsey, 30 Barb. 268 741
v. Kerr, 137 Ill. App. 479 1261, 1312, 1321, 4621, 4647
v. Knowles, 128 Mass. 22 2307
v. Kyles, 1 Jones' Eq. 302 2005
v. Lancaster Mills, 71 Fed. 481 3336, 3340
v. Leach, 2 Mass. 152 1634
v. Linn, 40 W. Va. 122 1823
v. McCann, 4 B. Mon. 601 4383
v. McDaneld, 77 Iowa 302 1729
v. McManus, 23 Ky. L. Rep. 837 2465
v. Mallinckrodt, 43 Mo. 58 1419, 3722
v. Markmann, 43 Neb. 823 1600, 1601
v. Marks, 10 Vict. L. R. (law) 217 2370, 2372
v. Minot, 10 Gray 263 1222
v. Mirehouse, 19 Q. B. Div. 563 1630
v. Muehlmann, 92 Ill. App. 571 4640
v. Mueller, 106 Ill. 36 775
v. New York L. Ins. Co., 50 N. Y. Super. Ct. 225 4304
v. Newton, 2 C. & P. 606 1818
v. Peoria, etc., R., 36 Fed. 808 1015
v. Risley, 23 N. Y. Misc. 109 2787
v. Rumsey, 6 Johns. 26 436, 682
v. Russell, 9 Ex. 764 4643
v. St. Louis, I. M. & S. R. Co., 187 Mo. App. 420 4787
v. School, 9 Gill & J. 115 1121
v. Seattle B. & M. Co., 48 Wash. 560 785, 793, 826
v. Southern R. Co., 122 N. C. 1005 3447, 3448
v. Spofford, 46 Me. 408 1661
v. Sternheimer, 29 Md. 268 1135
v. Summey, 1 Jones 554 1614
v. Thomas, 7 Wis. 476 1814
v. Thomas, 16 B. Mon. 420 3710
v. Thompson, 2 Johns. 471 644, 779
v. Todd, 6 Hill 340 645, 647
v. Turner, 157 Ill. App. 16 1011
v. Union R. Co., 18 App. Div. (N. Y.) 185 4693
v. Warrenburg, 92 Kan. 576 2598, 2669
v. Waterman, 7 Met. 227 1929
v. Weed, 14 Johns. 255 1037
v. Wells, 140 Mass. 517 1101
v. Westchester County, 115 N. Y. 47 663
v. Western C. Co., 149 U. S. 95 1222
v. Western U. Tel. Co., 12 Pa. Dist. 682 3571, 3642
v. Western U. Tel. Co., 30 Okla. 63 3642
v. Western U. Tel. Co., 120 Ky. 194 3625
v. Wheeling Electrical Co., 54 W. Va. 395 1507, 4864, 4930
v. White, 12 Mass. 314 1559
v. Wiggers, 41 Ill. 470 3257
v. Williams, 139 Wis. 467 1317
v. Wilson, 3 McCord 105 1051
v. Winchester, 6 N. Y. 397 99, 169, 2448, 4413
Thomas v. Womack, 13 Tex. 580 3527
v. Zumbalen, 43 Mo. 471 3102
Thomas C. Co. v. Raymond, 135 Fed. 25 2390, 2415, 2422, 2455
Thomas F. Co. v. Start, 107 Cal. 206 2575
Thomas Hilyard, The, 55 Fed. 1015 2721
Thomas I. Co. v. Jackson I. Co., 131 Mich. 130 2284, 2347
Thomas M. Co. v. Voelker, 23 R. I. 441 4284, 4285
Thomas Mfg. Co. v. Huff, 62 Mo. App. 124 4212
v. Watson, 85 Me. 300 2229
Thomas Morgan, The, 123 Fed. 781 2716, 2734
Thomas P. B. Co. v. Herter, 60 Ill. App. 58 3791
Thomas P. Sheldon, The, 113 Fed. 779 477
Thomas P. Way, The, 28 Fed. 526 4998
Thomas, etc., Mfg. Co. v. Wabash, etc., R. Co., 62 Wis. 642 172, 174, 217, 3343, 3364, 3370, 3371, 3389, 3391, 3400
Thomas's Est., In re, 26 Colo. 110 1121, 1130
Thomason v. Hackney & Moale Co., 159 N. C. 299 4181, 4191
v. Seaboard A. L. R. Co., 142 N. C. 300 3841, 3883, 3907
Thomassen v. Townsend, 10 Bush 114 1925
Thomasson v. Southern R., 72 S. C. 1 1288
Thomeson v. Chicago, etc., R. Co., 137 Mo. App. 62 8
Thompkins v. Missouri, K. & T. R. Co., 128 C. C. A. 1, 211 Fed. 391 4643
Thompson, In re, 43 Hun 416 3948
In re, 85 Hun 438 3878
In re, 127 N. Y. 463 4134
Thompson v. Alger, 12 Metc. (Mass.) 428 2227, 2259
v. Anderson, 86 Iowa 703 4286
v. Beacon R. Co., 56 Conn. 493 4640
v. Bell, 37 Ala. 438 2029, 2048, 4396
v. Benson, 41 Wash. 70 1732
v. Bertrand, 23 Ark. 730 2416
v. Board of Trustees, 30 Ill. 99 1576
v. Bogle, 85 Pa. 477 2510
v. Boston & M. R. Co., 58 N. H. 524 1230
v. Bowers, 1 Doug. 321 4514, 4581
v. Boyle, 85 Pa. 477 1446, 2478
v. Brown, 1 Mood. & M. 406 738
v. Brown, 106 Iowa 367 2693, 2708
v. Button, 14 Johns. 84 1491
v. Carter, 6 Ga. App. 604 4207, 4219
v. Chaffee, 39 Tex. Civ. App. 567 2600
v. Charnock, 8 T. R. 139 3017
v. Chicago, etc., R. Co., 71 Minn. 89 4818
v. Chicago, etc., R. Co., 84 Neb. 482 2798, 3803, 3806
v. Chicago, etc., R. Co., 104 Fed. 845 4931
v. Christian, 28 Ala. 399 2196
v. Cincinnati, N. O. & T. P. R. Co., 165 Ky. 256 5063, 5128
v. Citizens' T. Co., 181 Pa. 131 3754, 3768, 3964
v. Clendenning, 1 Head 287 3686, 4970
v. Clubley, 1 M. & W. 212 1827, 1853, 1865
v. Cooper, 1 Call 861 644
v. Corbin, 41 Nova Scotia 386 233, 2416, 2432
v. Crocker, 9 Pick. 59 3848

[REFERENCES ARE TO PAGES]

Thompson v. Davenport, 1 Wash. (Va.) 125 737
v. Davenport, 9 B. & C. 78 2980
v. Dekum, 32 Ore. 506 1639, 1648, 1649, 2859, 2862, 2872
v. Dering C. Co., 158 Ill. App. 289 4733, 4735
v. DeWeese-Dye D. & R. Co., 25 Colo. 243 1480
v. Dickerson, 22 Iowa 360 1582, 1586, 1588
v. Dickhart, 66 Barb. 604 1431
v. Edwards, 85 Ind. 414 1159
v. Ellsworth, 39 Mich. 719 390, 4838
v. Evans, 49 Ill. App. 289 3739, 3827
v. Fargo, 58 Barb. 575 3408
v. Fausate, 1 Pet. C. C. 182 767
v. Field, — Tex. Civ. App. —, 164 S. W. 1115 313, 4170, 4177, 4197
v. French, 10 Yerg. 452 1358
v. Fullenwider, 5 Ill. App. 551 1219
v. Gaffey, 52 Neb. 317 2687, 2688
v. Gibson, 7 M. & W. 456 397, 414, 3845, 3858
v. Gibson, 8 M. & W. 281 402
v. Goding, 63 Me. 425 1594
v. Gorner, 104 Cal. 168 971, 998
v. Gould, 16 Abb. Pr. (N. S.) 424, 19 N. Y. 262 1353
v. Grand Int. Brotherhood of L. E., 41 Tex. Civ. App. 176 221
v. Great Northern R. Co., 79 Minn. 291 4804
v. Guthrie, 9 Leigh 100 1987, 1998
v. Gwyn, 46 Mich. 522 2922, 2946
v. Haislip, 14 Ark. 220 1404
v. Halbert, 40 Hun 536 4279
v. Hale, 6 Pick. 259 1825
v. Hibbs, 45 Ore. 141 959
v. Hoagland, 65 Ill. 310 946
v. Hudson, L. R. 4 Eng. & Ir. App. 1, rev'g L. R. 2 Eq. 612 874, 877, 879
v. Hudson, L. R. 6 Ch. 320 709, 732
v. Interstate Life & Accident Co., 128 Tenn. 526 3082
v. Jackson, 14 B. Mon. 114 252, 2695, 2715
v. Johnston, 86 Wis. 576 4920, 4935
v. Jones, 11 B. Mon. 365 1028, 2134
v. Kessel, 30 N. Y. 383 552
v. Ketcham, 4 Johns. 285 1147, 1179
v. Ketcham, 8 Johns. 189 1147, 1148, 1881
v. Kilcrease, 14 La. Ann. 340 2010
v. Lack, 3 C. B. 540 2823
v. Lindsay, 3 Brev. 403 2385, 2386
v. Liverpool & L. G. Ins. Co., 2 Haskell 363 3041
v. London County Council, [1897] 1 Q. B. 84 433
v. Louisville, etc., R. Co., 91 Ala. 496 4865
v. Lumley, 7 Daly 74 1356, 1380, 1403, 1411
v. Lyon, 40 W. Va. 87 804, 817, 818
v. McCready, 194 Pa. 32 4522, 4543
v. Mansfield, 43 Me. 490 556, 2198
v. Massey, 3 Me. 305 4620
v. Maxwell, 74 Iowa 415 767
v. Milwaukee, etc., R. Co., 27 Wis. 93 4028
v. Miser, 82 Ohio 289 2372
v. Moiles, 46 Mich. 42 1451, 3778, 3788
v. Monrow, 2 Cal. 99 1055, 1182
v. Montreal Ins. Co., 6 Up. Can. Q. B. 319 3041
v. Morgan, 6 Minn. 292 1194
Thompson v. Morris, C. & B. Co., 17 N. J. L. 480 402, 3854
v. Morrow, 5 S. & R. 289 3717
v. New Orleans, etc., R. Co., 50 Miss. 315 3452, 3503
v. New York L. Ins. Co., 21 Ore. 464 3084
v. Newell, 118 Mo. App. 405 4363
v. Northeastern Marine Engineering Co. [1914] W. C. & Ins. Rep. 13, 7 B. W. C. C. 49 5203
v. Northeastern R. Co., 2 B. & S. 106 161
v. O. A. Crenshaw Grain Co., 113 Ark. 169 2387
v. Page, 1 Metc. (Mass.) 566 416
v. Peck, 115 Ind. 512 659
v. Percival, 5 B. & Ad. 925 753
v. Perkins, 3 Mason 232 2957
v. Perkins, 26 Iowa 486 1480, 1481
v. Pettitt, 10 Q. B. 101 4161
v. Phelan, 22 N. H. 339 736, 737, 2539
v. Pickel, 20 Iowa 490 962
v. Powles, 2 Sim. 194 1881
v. Powning, 15 Nev. 195 170, 1314, 4190
v. Rake. 140 Iowa 232 4508, 4510, 4543
v. Richards, 14 Mich. 172 512, 1841, 2835
v. Richmond, 102 Me. 335 2058, 2150, 2152, 2153, 2165
v. Robertson, 4 Johns. 27 1904
v. Rose, 8 Cow. 266 1552
v. Rowcroft, 4 East 34 3033
v. St. Charles County, 227 Mo. 220 790, 888
v. St. Louis Ins. Co., 43 Wis. 459 3016
v. St. Louis & S. R. Co., 111 Mo. App. 465 1384
v. St. Nicholas Nat. Bank, 113 N. Y. 325 735
v. Sanders, 4 Dev. & Batt. 404 2856
v. Sanders, 5 T. B. Mon. 358 2123, 2124, 2129
v. San Francisco G. & E. Co., 20 Cal. App. 142 1393
v. Scheid, 39 Minn. 102 4316
v. Seaboard A. L. R., 81 S. C. 333 149, 1288
v. Seaboard Air Line R., 165 N. C. 377 58, 126
v. Seattle, etc., R. Co., 71 Wash. 436 4658
v. Seek, 84 Kan. 674 664, 2214
v. Shattuck, 2 Metc. (Mass.) 615 234, 315, 2130
v. Shelverton, 131 Ga. 714 460
v. Shepler, 72 Pa. 160 1988, 4410
v. Sloan, 23 Wend. 71 1885, 1889
v. State, 37 Miss. 518 1597, 1614
v. Stevens, 2 N. & McC. 494 1019
v. Stevens, 71 Pa. 161 1424, 2461
v. Stewart, 3 Conn. 171 1143
v. Thompson, 1 N. J. L. 159 1544
v. Thompson, 7 B. Mon. 421 1357
v. Thompson, 9 Ind. 323 1414
v. Tonopah Lumber Co., 37 Nev. 183 941, 1005, 1103
v. Treller, 82 Ark. 247 2796
v. Wabash R. Co., 184 Fed. 554 417
v. Wabash R. Co., 262 Mo. 468 5041
v. Walker, 6 Ga. App. 80 3162, 3164
v. Warren, 5 Cold. 644 1846
v. Watson, 10 Yerg. 362 2820
v. Western U. Tel. Co., 64 Wis. 531 3549, 3565, 3601

[REFERENCES ARE TO PAGES]

Thompson v. Western U. Tel. Co., 106 N. C. 549 3643
v. Western U. Tel. Co., 107 N. C. 449 352, 3621, 3624, 3631
v. Whitmarsh, 100 N. Y. 36 526
v. Wilson, 13 La. 138 2831
v. Winslow, 130 Fed. 1001 5009
v. Young, 2 Ohio 334 2756
Thompson L. Co. v. Thomas (Tex. Civ. App.), 147 S. W. 296 4822
Thompson Mfg. Co. v. Gunderson, 106 Wis. 449 2421
Thompson-S. Co. v. Warren, 38 App. Cas. (D. C.) 310 4688
Thompson & Son Co., George v. Holtzer-Cabot Elec. Co., 184 Ill. App. 475 2668
Thompson's Est., In re, 157 Mich. 669 1511, 2463
Thoms v. Dingley, 70 Me. 100 2415
Thomssen v. Ertz, 93 Minn. 280 531
v. Hall County, 63 Neb. 777 1574, 1578
Thomson v. American S. Co., 56 App. Div. (N. Y.) 113 1648
v. Columbia & P. S. R. Co., 205 Fed. 203 5049
v. Koch, 62 Wash. 438 979
v. Lee County, 3 Wall. 327 1210
v. Lockwood, 15 Johns. 256 2825
v. Pentecost, 206 Mass. 505 1442, 4380, 4391, 4393, 4396
v. Sanders, 118 N. Y. 252 552
v. Searcy, 6 Port. 393 1636
v. Taylor, 11 Hun 274 2849
v. Winchester, 19 Pick. 214 4371, 4486
Thomson-H. E. Co. v. Berg, 10 Tex. Civ. App. 200 2481
v. Durant L. I. Co., 4 N. Y. Misc. 207 3127
v. Durant L. I. Co., 144 N. Y. 34, 42 3124
v. Palmer, 52 Minn. 174 663, 698
Thoresen v. La Crosse City R. Co., 94 Wis. 129 4891
Thoreson v. St. Paul T. & L. Co., 73 Wash. 99 153, 432, 4715
Thorington v. Smith, 8 Wall. 1 611, 2330
Thorkildsen v. Carpenter, 120 Mich. 419 2053
Thorley v. Orchis S. Co., [1907] 1 K. B. 660 3340
v. Pabst B. Co., 179 Fed. 338 3185
Thorn v. Alvord, 32 N. Y. Misc. 456 1155
v. City Rice Mills, 40 Ch. Div. 357 621
v. Garner, 113 N. Y. 198 1082, 1084
v. Knapp, 42 N. Y. 474 3669, 3671, 3673, 4570
v. Mayor, L. R. 1 App. Cas. 120 2612
v. Morgan, 135 Mich. 51 284, 294, 2364, 2455
v. Smith, 71 Wis. 18 962
Thorn & H. L. & C. Co. v. Citizens' Bank, 158 Mo. 272 726, 885
Thornborow v. Whitacre, 2 Ld. Raym. 1164 867, 1560
Thornbro v. Kansas City, M. & O. R. Co., 91 Kan. 684 5066
Thorndike v. Locke, 98 Mass. 340 2227
v. United States, 2 Mason 1 936, 944, 1042, 1108, 1880
Thorne v. Deas, 4 Johns. 84 2914
v. McVeagh, 75 Ill. 81 2423, 2427, 3367
v. Mosher, 20 N. J. Eq. 257 803, 805, 818
Thornhill v. Evans, 2 Atk. 330 2488
Thornley, The, 98 Fed. 735 2719
Thornton v. Cordell, 8 Ga. App. 588 2625, 2629, 2635
v. Court, 3 De G., M. & G. 393 2124
v. Dean, 19 S. C. 583 1163
v. George, 108 Ga. 9 1514
v. Lawther, 169 Ill. 228 685
v. McKewan, 1 H. & N. 525 2807
v. Maynard, L. R. 10 C. P. 695 681, 1816
v. Place, 1 M. & R. 218 356, 494, 517, 2599, 2655
v. Schreiber, 124 U. S. 612 4481
v. Seaboard Air Line Ry., 98 S. C. 348, rev'd 238 U. S. 605 5090
v. Smith, 11 Minn. 15 3842
v. Thompson, 4 Gratt. 121 2406, 2409
v. Turner, 11 Minn. 336 26
v. United States Ins. Co., 12 Me. 150 3037
v. Wynn, 12 Wheat. 183 1827, 2390
Thornton-T. M. Co. v. Bretherton, 32 Mont. 80 4204, 4205, 4219, 4274
Thorogood v. Bryan, 8 C. B. 115 107
Thoroughgood v. Walker, 2 Jones 15 918
Thorp v. Bateman, 37 Mich. 68 2474
v. Bradley, 75 Iowa 50 274
v. Hough, 160 Iowa 694 4366, 4391
v. Ross, 4 Keyes 546 2693, 2696, 2698
v. Western U. Tel. Co., 118 Mo. App. 398 3565
Thorpe v. Burgess, 8 Dowl. P. C. 603 808
v. City of Spokane, 78 Wash. 488 4015
v. Cooper, 5 Bing. 129 372
v. Union Pac. Coal Co., 24 Utah 475 4952
v. White, 13 Johns. 53 2544
v. Wray, 68 Ga. 359 4841
Thorton v. National Exch. Bank, 71 Mo. 221 826
Thouron v. East Tennessee, etc., R. Co., 90 Tenn. 609 1118, 1579
v. Skirvin (Tex. Civ. App.), 122 S. W. 55 1322
v. Skirvin, 57 Tex. Civ. App. 105 2993
Thouvenin v. Lea, 26 Tex. 612 1995, 2005
Thrall v. Horton, 44 Vt. 386 1825, 1835
v. Knapp, 17 Iowa 468 460, 4783
v. Newell, 19 Vt. 202 2382, 2384
Thrasher v. Moran, 146 Cal. 683 1048, 1241
v. Pike County R. Co., 25 Ill. 393 2330
v. Pinckard, 23 Ala. 616 3717
Threatt v. Brewer M. Co., 49 S. C. 95 3878, 3887
Three States L. Co. v. Blanks, 66 C. C. A. 353, 133 Fed. 479 4350, 4352, 4357
Threlkeld v. Fitzhugh, 2 Leigh 451 2098, 2110, 2409
Thresher v. Waterworks Co., 2 B. & C. 608 3255
Throgmorton v. Davis, 4 Blackf. 174 4514
Throop v. Broaddus, 15 Ky. L. Rep. 812 (Ky. Super. Ct.) 3211
Thrush v. Gravbill, 128 Iowa 406 2133
Thuemler v. Brown, 18 Pa. Super. 117 2000, 3200
Thum v. Wolstenholme, 21 Utah 446 658
Thummel v. Dukes, 82 Mo. App. 53 2409
Thunder Bay River B. Co., v. Speechly, 31 Mich. 336 3919
Thurber v. Eastern B. & L. Ass'n, 116 N. C. 75 4646
v. Eastern B. & L. Ass'n, 118 N. C. 129 4639
v. Sprague, 17 R. I. 634 754, 1117

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Thurlow v. Gilmore, 40 Me. 378 737
Thurman v. Wells, 18 Barb. 500 3383
v. Western U. Tel. Co., 127 Ky. 137 3622
v. Wilson, 7 Ill. App. 312 2237, 2248
Thurmond v. Ash Grove W. L. Ass'n, 125 Mo. App. 73 3734, 3738, 3834
Thurnell v. Balbirnie, 2 M. & W. 786 2221
Thurston, Matter of, 57 Wis. 104 1121, 1124, 1130
Thurston v. Blaisdall, 8 N. H. 367 794
v. Hamblin, 199 Mass. 151 2521
v. Hancock, 12 Mass. 220 6, 3913
v. Haskell, 81 Me. 303 1720, 1728
v. James, 6 R. I. 103 453
v. Koch, 4 Dall. 348, 1 L. ed. 862 3009
v. Ludwig, 6 Ohio St. 1 764
v. Marsh, 5 Abb. Pr. 389 823
v. Marsh, 14 How. Pr. 572 785
v. Martin, 5 Mason 497 1496
v. Percival, 1 Pick. 415 2489
v. Portland, 63 Me. 149 4094
v. Prentiss, 1 Mich. 193 980, 2838, 2839
v. Prentiss, Walk. Ch. 529 985
v. Spratt, 52 Me. 202 309, 311, 2380, 2398
Thwing v. Washington Ins. Co., 10 Gray 443 3296
Thysell v. Holm, 124 Minn. 541 2795
Tibbal v. Cahoon, 10 Watts 232 1669, 1683
Tibbals O. Co. v. Meigs, 11 Cal. App. 298 2403
Tibbetts v. Haskins, 16 Me. 283 1419, 1446
v. Lesson, 148 Mass. 102 2158
Tibbles v. O'Connor, 28 Barb. 538 1664
Tiblier v. Alford, 12 Fed. 262 4625, 4628, 4634
Tice v. Fleming, 173 Mo. 49 3710
v. Munn, 94 N. Y. 621 4680
Tickler v. Andrae Mfg. Co., 95 Wis. 352 2560, 2576
Ticknor v. Branch Bank, 3 Ala. 135 1814
Ticonic Bank v. Johnson, 31 Me. 414 996
v. Smiley, 27 Me. 225 1870
Tidball v. Schmeltz, 77 Kan. 440 979
Tidd v. Rines, 26 Minn. 201 1541
Tiddy v. Harris, 101 N. C. 589 623
Tidewater O. Co. v. Scott, 105 Va. 160 558
Tidewater R. Co. v. Cowan, 106 Va. 817 4002, 4108
v. Shartzer, 107 Va. 562 3952
Tidman v. Ainslie, 10 Ex. 63 4600
Tidmarsh v. Chicago, etc., R. Co., 149 Wis. 590 4874
Tidwell v. Southern E. & B. Works, 87 Ark. 52 899
Tiefel v. Maxwell, — Tex. Civ. App. —, 154 S. W. 319 4348
Tiemann v. Citizens' Ins. Co., 76 App. Div. (N. Y.) 5 3044
Tiemer v. Zeidman, 159 Ill. App. 461 2423
Tiernan v. Commercial Bank, 7 How. (Miss.) 648 2995
v. Hinman, 16 Ill. 400 876
v. Minghini, 28 W. Va. 314 1053, 1060
Tierney v. Sampsell, 172 Ill. App. 119 1504, 4822
v. Whiting, 2 Colo. 620 2187
Tiffany v. Lord, 65 N. Y. 310 4300
v. St. John, 5 Lans. 153, 65 N. Y. 314 826, 828
Tiffany v. Willis, 30 Hun 266 2789
Tift v. Culver, 3 Hill 180 1268
v. Towns, 63 Ga. 237 4187
Tifton, etc., R. Co. v. Butler, 4 Ga. App. 191 1098, 1523
v. Chastain, 122 Ga. 250 1514
Tiggerman v. Butte, 44 Mont. 138 4786
Tighe v. Atchison, etc., R. Co. (Mo. App.), 107 S. W. 1034 3753
v. Wicks, 33 Up. Can. Q. B. 479 4534
Tignor v. Toney, 13 Tex. Civ. App. 518 4263, 4271
Tilburg v. Northern Cent. R. Co., 217 Pa. 618 3457
Tilden v. Blair, 21 Wall. 241 1166, 1167, 1882
v. Gordon, 34 Wash. 92 807, 816
v. Johnson, 52 Vt. 628 4259, 4261
Tiley v. Courtier, 2 Cr. & J. 16n 790
Tilford v. Roberts, 8 Ind. 254 655
Tilghman v. Proctor, 125 U. S. 136, 160 1070, 4439, 4445, 4450, 4453, 4454, 4456, 4476
v. Seaboard Air Line R. Co., 167 N. C. 163 478
Tiller v. St. Louis, etc., R. Co., 189 Fed. 994 78, 4686
Tilles v. Mutual L. Ins. Co., 1 Mart. Ch. Dec. 313 235
Tilley v. American B. & L. Ass'n, 52 Fed. 618 868
v. Bowman, [1910] 1 K. B. 745 532
v. Bridges, 105 Ill. 339 2382
v. Hudson River R. Co., 24 N. Y. 471 418, 4859, 4889, 4891
v. Hudson River R. Co., 29 N. Y. 252 4860, 4861, 4900, 4902, 4916
v. Montelius P. Co., 15 Colo. App. 204 2405
Tillinghast v. McLeod, 17 R. I. 208 4543, 4568
v. Merrill, 515 N. Y. 135 1578
Tillinghast-S. Co. v. Cotton Mills, 143 N. C. 268 317, 2274, 2340
Tillis v. Smith Sons Lumber Co., 188 Ala. 122 4391
Tillman v. Thatcher, 56 Ark. 534 987
Tillon v. Britton, 9 N. J. L. 120 1236
Tillotson v. Cheetham, 3 Johns. 56 1268, 4522, 4543
v. Grapes, 4 N. H. 444 556, 1826, 1843, 1844, 1846, 1862, 1865, 1956
v. Nye, 88 Hun 101 1203
v. Preston, 3 Johns. 229 1199
v. Pritchard, 60 Vt. 94 2099, 2110, 2123
v. Smith, 32 N. H. 90 38
Tillou v. Britton, 9 N. J. L. 120 786
Tillson v. Robbins, 68 Me. 298 4506
v. United States, 100 U. S. 43, 47 1039
Tilton v. Fuller, 35 N. H. 226 4216
v. Gates L. Co., 140 Wis. 197 1311, 2658, 4621
v. Hamilton F. Ins. Co., 14 How. Pr. 363 3048
v. McLaughlan, 83 N. J. L. 107 885, 2874
v. Maley, 186 Ill. App. 307 4581
Timan v. Leland, 5 Hill 237 772
Times Pub. Co. v. Carlisle, 94 Fed. 762 1290, 1340, 4401, 4507, 4543, 4548, 4549
v. Rood, — Tex. Civ. App. —, 163 S. W. 1037 1093
Timken v. Olin, 41 Fed. 169 4439
v. Tallmadge, 54 N. J. L. 117 2982
Timmerman v. Stanley, 123 Ga. 850 47
v. Whiting, 118 Minn. 398 4389, 4390

[REFERENCES ARE TO PAGES]

Timmonds v. United States, 84 Fed. 933 2461
Timmons v. Dunn, 4 Ohio St. 680 532, 564
Timms v. Shannon, 19 Md. 296 2212
Timson v. Manufacturers' C. C. Co., 220 Mo. 580 1478, 1490
Tindall v. Bell, 11 M. & W. 228 306, 3161
v. Meeker, 2 Ill. 137 1253
v. Northern Pac. R. Co., 58 Wash. 118 766
Tindle v. Birkett, 171 N. Y. 520 4387
Tingley v. Cutler, 7 Conn. 291 886, 889
v. Providence, etc., R. Co., 8 R. I. 493 4115, 4138
v. Times Mirror Co., 144 Cal. 205 1474, 4508, 4517, 4526, 4544, 4545, 4587, 4592
Tinicum F. Co. v. Carter, 61 Pa. 21 13
Tinkem C. Co. v. Smith, 123 Iowa 554 2376
Tinker v. Catlin, 205 Ill. 108, 102 Ill. App. 264 2781
v. Midland Valley M. Co., 25 Okla. 160 1853
Tinkham v. Boston & M. R. R., 77 N. H. 111 5129
v. Satori, 44 Mo. App. 659 848, 868
v. Smith, 56 Vt. 187 640
Tinkle v. St. Louis, etc., R. Co., 212 Mo. 445 4738
Tinney v. New Jersey S. Co., 5 Lans. 507 1495, 3528
v. New Jersey S. Co., 12 Abb. Pr. (N. S.) 1 4742
Tinsley v. Hoskins, 111 N. C. 340 1922
v. Jemison, 74 Fed. 177 285
v. Penniman, 12 Tex. Civ. App. 591 2513
v. Rowe, 17 Ill. App. 326 1363
v. Ryon, 9 Tex. 405 659
v. Tinsley, 15 B. Mon. 454 564, 3261
Tinsman v. Belvidere D. R. Co., 26 N. J. L. 148 113
Tippin v. Brockwell, 89 Ga. 467 2459
v. Perry, 122 Ga. 120 1121
v. Ward, 5 Ore. 450 375, 415
Tipton v. Feitner, 20 N. Y. 423 544
v. Tipton, 47 Tex. Civ. App. 619 1538
v. Triplett, 1 Metc. (Mass.) 570 2397
Tirrell v. Jones, 39 Cal. 655 1071
Tirry v. Hogan, — Mo. App. —, 163 S. W. 873 187
v. Hogan, 181 Mo. App. 48 2339, 2346, 2352
Tischler v. Hofheimer, 83 Va. 35 2746, 2750
Tisdale v. Kingman, 34 S. C. 326 4604
v. Major, 106 Iowa 1 215, 340, 1695
v. Norton, 8 Metc. (Mass.) 388 161
Tish v. Welker, 5 Ohio Dec. 725 1475
Tishimingo Sav. Inst. v. Buchanan, 60 Mich. 496 962, 1229
Tissot v. Great Southern Tel. & T. Co., 38 La. Ann. 996 3738, 3779
Titcomb v. McAllister, 81 Me. 399 2855
Title G. & S. Co. v. Commonwealth, 141 Ky. 570 1609
v. Drennon, 181 Mo. App. 198 2969
v. Slinker, 42 Okla. 811 2742
Titley v. Enterprise S. Co., 127 Ill. 457 2371
Tittle v. Kennedy, 71 S. C. 1 4271, 4318
Tittlebaum v. Boehmcke, 81 N. J. L. 697 4965
Titus, In re, 86 Misc. (N. Y.) 375 2970, 2977
Titus v. Corkins, 21 Kan. 722 170, 1269, 1314, 4190
v. Follett, 2 Hill 318 4531
Titus v. Larsen, 18 Wash. 145 1047
v. Neilson, 5 Johns. Ch. 452 3729
v. Northbridge, 97 Mass. 258 104
v. Poole, 145 N. Y. 426 2387
Titus St., In re, 139 App. Div. (N. Y.) 238 4105
Titus Street, In re, 84 Misc. (N. Y.) 620, aff'd 163 App. Div. 973 4152
Toale v. Western U. Tel. Co., 76 S. C. 248 3589, 3618, 3620, 3629
Toames Co-op. A. & D. Soc. v. Foley, [1910] 2 Irish 277 2754
Tobener v. Hassinbusch, 56 Mo. App. 591 4285
Tobey v. Barber, 5 Johns. 68 666
v. Ellis, 114 Mass. 120 2822
v. Price, 75 Ill. 645 2709
Tobias v. Harland, 4 Wend. 537 4556
v. Richardson, 5 Ohio C. C. (N. S.) 74 1088
Tobin v. Best, 120 App. Div. (N. Y.) 387 429
v. French, 93 Ill. App. 18 3741
v. Harford, 13 C. B. (N. S.) 791, 17 Fed. 528 3031
v. Harford, 17 C. B. (N. S.) 528, aff'g 13 C. B. (N. S.) 791 3012
v. Missouri Pac. R. Co. (Mo.), 18 S. W. 996 1805
v. O'Kelley, 117 La. 753 1970
v. Post, 3 Cal. 373 4194
v. Shaw, 45 Me. 331 328, 1474
v. South, 18 Ky. L. Rep. 350 1108
v. United States S. D. & S. Bank, 115 La. 366 1970
v. Western U. Tel. Co., 146 Pa. 375 3555
Tobler v. Austin, 22 Tex. Civ. App. 99 834, 887
v. Union S. Y. Co., 85 Neb. 413 1054
v. Willis, 59 Tex. 80 2749
Toby v. Price, 75 Ill. 645 2708
Tod v. Baylor, 4 Leigh Dec. 498 3717
v. Gallagher, 16 S. & R. 261 2206
Todd v. Bank, 3 Bush 626 1149
v. Boone County, 8 Mo. 431 1584
v. Botchford, 86 N. Y. 517 1051, 1053
v. Gamble, 148 N. Y. 382 2265, 2267, 2284
v. Guffin, 55 Ind. App. 605 698
v. Hawkins, 8 C. & P. 88 11
v. Jackson, 26 N. J. L. 525 3745
v. Kankakee, etc., R. Co., 78 Ill. 530 4119, 4124
v. Keene, 167 Mass. 157 237
v. Minneapolis, etc., R. Co., 39 Minn. 186 213, 267
v. Myers, 40 Cal. 357 2477
v. Parker, 1 N. J. L. 45 795
v. St. Louis, S. W. R. Co., — Tex. Civ. App. —, 173 S. W. 617 4015
v. Shelbourne, 8 Hun 510 1822
v. Summers, 2 Gratt. 167 2658
v. Warner, 48 How. Pr. 234 1436
v. Western U. Tel. Co., 77 S. C. 522 3629
Todd's Est., In re, 237 Pa. 466 1084
Tode v. Gross, 22 N. Y. St. Rep. 818 848
v. Gross, 127 N. Y. 480 885, 887
Toebbe v. Covington, 145 Ky. 763 3883, 3887
Tolbert v. Caledonian Ins. Co., 101 Ga. 741 4434
v. Harrison, 1 Bailey 599 580, 581, 584
Tolchester Beach I. Co. v. Scharnagl, 105 Md. 199 3468
Toledo, The, 136 Fed. 959 2726
Toledo v. Fuller, 7 Ohio C. C. (N. S.) 598 4791

[REFERENCES ARE TO PAGES]

Toledo v. Grasser, 12 Ohio C. C. 520 1137, 3878, 3889
v. Jacobson, 11 Ohio C. C. 220 4148
v. Lewis, 17 Ohio C. C. 588 3850
v. Libbie, 8 Ohio Dec. 589, 51 Ohio 652 2696
v. Libbie, 19 Ohio C. C. 704 2697
v. Radbone, 3 Ohio C. C. (N. S.) 382 4788
v. Sanwald, 13 Ohio C. C. 496 748
Toledo C. S. Co. v. Moneyweight S. Co., 178 Fed. 557 4451
v. Tyden, 141 Ill. App. 21 2214
Toledo El. St. R. Co. v. Tucker, 13 Ohio C. C. 411 4732, 4785
Toledo R. & L. Co. v. Mason, 81 Ohio 463 1494
v. Ward, 25 Ohio C. C. 399, 2 Ohio C. C. (N. S.) 256 4873, 4883
v. Wettstein, 14 Ohio C. C. (N. S.) 441, aff'd 79 Ohio St. 439 4929
v. Wettstein, 33 Ohio Cir. Ct. 15, aff'd 79 Ohio St. 439 4922
Toledo, St. L. & W. R. Co. v. Gordon, 143 Fed. 95 1339
Toledo St. R. Co. v. Mammet, 13 Ohio C. C. 591 4911
Toledo, etc., R. Co. v. Baddeley, 54 Ill. 19 334, 4670, 4742
v. Beals, 50 Ill. 150 1503
v. Bowler, 63 Ohio St. 274 3534, 3535
v. Detroit, etc., R. Co., 62 Mich. 564 4074
v. Dunlap, 47 Mich. 456 4053
v. Fostoria, 7 Ohio C. C. 293 4057
v. Fredericks, 71 Ill. 294 4817
v. Gordon (Ill.), 143 Fed. 95 3513, 3514
v. Hammond, 23 Ind. 379 3531
v. Hannon, 75 Ill. 298 1345
v. Harmon, 47 Ill. 298 1137, 1330
v. Johnston, 74 Ill. 83 1140, 4171
v. Kichler, 48 Ill. 438 3436
v. Kickler, 51 Ill. 157 1437, 2305
v. Kingman, 49 Ill. 43 3805
v. Kountz, 168 Fed. 832 5074
v. Lott, 10 Ohio C. C. 249 2459
v. Morrison, 71 Ill. 616 3948
v. Patterson, 63 Ill. 304 3503
v. Slavin, 236 U. S. 454, rev'g 88 Ohio St. 536 5125
v. Smart, 116 Ill. App. 523 47
v. Smith, 25 Ind. 288 1436
v. Wagner, 171 Ind. 185 3963, 4021
v. Wren, 78 Ohio 137 3314, 3318
Toledo, etc., T. Co. v. McFall, 28 Ohio C. C. 362 487, 4675
Toles v. Adee, 91 N. Y. 562 2787, 2788
v. Cole, 11 Ill. 562 1556
v. Hiller, 11 Paige 228 639, 1202
Toll Bridge, In re, 83 Misc. (N. Y.) 331 4045
Tolle v. Boeckeler, 12 Mo. App. 54 2865, 2867
Tolleson v. Posey, 32 Ga. 372 4521
v. Southern R. Co., 88 S. C. 7 3447
Tolman Co. v. Clements, 98 Mich. 6 2755
v. Griffin, 111 Mich. 301 2764
v. McClure, 10 Ind. App. 28 2762
Tom v. Goodrich, 2 Johns. 213 2832
v. Stetson, 43 Wash. 471 4616
Tomasi v. Donk C. & C. Co., 169 Ill. App. 47 1379
v. Donk C. & C. Co., 257 Ill. 70 1379
Tome v. Dubois, 6 Wall. 548 2225, 4214, 4260
Tome Institute v. Crothers, 87 Md. 569 3739
Tomkinson v. Balkis C. Co., [1891] 2 Q. B. 614 289
v. Willets Mfg. Co., 34 Fed. 536 4466
Tomlin v. Cedar Rapids, etc., R. & L. Co., 141 Iowa 599 12
Tomlinson v. Armour, 75 N. J. L. 748 99, 169
v. Day, 2 B. & B. 680 3103
v. Derby, 43 Conn. 562 412, 1363, 1374, 4693, 4707, 4714
v. Morris, 12 Ont. 311 2456
v. Nelson, 49 Wis. 679 524
v. Warner, 9 Ohio 103 4605
v. Wilmington, etc., R. Co., 101 N. C. 327 3502
Tomlinson C. Co. v. Kinsella, 31 Conn. 268 711
Tomlinson & Co. v. Morgan, 166 N. C. 557 2387
Tomlinson's App., 90 Pa. 224 1131, 1249
Tompkins v. Batie, 11 Neb. 147 807, 827
v. Clay St. R. Co., 66 Cal. 163 425, 773
v. Dallas C. Mill, 130 N. C. 347 2363
v. Dudley, 25 N. Y. 272 2607
v. Fonda G. L. Co., 188 N. Y. 261 4221
v. Hill, 28 Ill. 519 977
v. Hyatt, 28 N. Y. 347 1957
v. Kanawha Board, 21 W. Va. 227 3349, 3408
v. Lamb, 121 App. Div. (N. Y.) 366 2309
v. Monticello C. O. Co., 153 Fed. 817 234, 311 980, 2598, 2625, 2627, 2631, 2633
v. Perry (Tex. Civ. App.), 128 S. W. 1164 4407
v. Waddley, 3 Thomp. & C. 424 3686
v. West, 56 Conn. 478 4737
Tompkins Co. v. Galveston St. R. Co., 4 Tex. Civ. App. 1 1926, 2415, 2452
Toms v. Boyes, 59 Mich. 386 1027
v. Toronto R. Co., 22 Ont. L. R. 204 78, 88
v. Whitby, 35 Up. Can. Q. B. 195 107
v. Whitney, 35 Up. Can. Q. B. 195 4564
Tonawanda R. Co. v. Munger, 5 Denio 255 14
Tone v. Brace, 8 Paige 597 547, 3122, 3182
v. Wilson, 81 Ill. 529 556, 2055, 2075, 2076, 2089
Tong v. Matthews, 23 Mo. 437 2098
Tongue v. Nutwell, 31 Md. 302 3693, 3703, 3705, 3709, 3710
Tonica, etc., R. Co. v. Unsicker, 22 Ill. 221 4025
Tonini v. Cevasco, 114 Cal. 266 4504
Tonn v. Pier, 82 N. J. 422 698
Tonsellito v. New York Cent. & H. River R. Co., 87 N. J. L. 651 5061
Tonsor v. Fidelity & D. Co., 173 Ill. App. 383 2878
Toogood v. Spyring, 1 Cr., M. & R. 181 4522
Tooke v. Bonds, 29 Tex. 419 712, 1205
Tooker v. Alston, 86 C. C. A. 425, 159 Fed. 599 4382, 4391, 4407
Toomer v. Dickerson, 37 Ga. 428 2813, 2816
Toomey v. Delaware, etc., R. Co., 4 N. Y. Misc. 392 4604
v. Murphy, [1897] 2 Irish 601 860
Tootle v. Kent, 12 Okla. 674 4191
v. Clifton, 22 Ohio 247 32, 37
v. Elgutter, 14 Neb. 158 2746, 2749
v. Kent, 12 Okla. 674 4195, 4215

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Topeka v. Federal Union Surety Co., 213 Fed. 958 2758
v. Martineau, 42 Kan. 387 1433, 2620, 3768
Topeka Capital Co. v. Merriam, 60 Kan. 397 664
Toplitz v. Bauer, 161 N. Y. 325, 34 App. Div. 526 4233, 4280
v. Kings, 20 N. Y. Misc. 576 535
v. Ullman, 2 Misc. (N. Y.) 130 2565
Topolewski v. Plankinton P. Co., 143 Wis. 52 1276, 1309, 1311, 1332, 1338, 4641, 4644
Topping v. Healey, 3 F. & F. 325 2508
v. St. Lawrence, 86 Wis. 526 1394
Torbet v. McReynolds, 4 Humph. 215 1123, 1126
Torgeson v. Hanford, 79 Wash. 56 253, 4769, 4772
Tornado, The, 109 U. S. 110, 27 L. ed. 874 2718
Toronto v. Toronto R. Co., 7 Ont. L. R. 78 1031
Toronto R. Co. v. Grinsted, 24 Can. Sup. Ct. 570 134, 135, 186
v. Mulvaney, 38 Can. Sup. Ct. 327 4857
v. Toms, 44 Can. Sup. Ct. 268 78, 88
Torp v. Clemons, 37 Nev. 474 4209
v. Gulseth, 37 Minn. 135 2797, 4287
Torpy v. Johnson, 43 Neb. 882 2858
Torre v. Summers, 2 Nott & McC. 367 4974
Torres v. Starke, 132 La. 1045 3243
Torrey v. Baxter, 13 Vt. 452 645
v. Corliss, 33 Me. 336 2227
v. Forbes, 94 Ala. 135 426
v. Monor, Sm. & M. Ch. 489 3716
Torreyson v. United R. Co., 144 Mo. App. 626 4778
Torry v. Black, 58 N. Y. 185 482, 4296
v. Hadley, 28 Barb. 192 656
Torsch v. Dell, 88 Md. 459 4634, 4635, 4637, 4647
Toser v. New York Cent., etc., R. Co., 105 N. Y. 659 412
Totten v. Burhans, 91 Mich. 495 4383
v. Cooke, 2 Metc. (Ky.) 275 980
v. Henry, 46 W. Va. 232 1689
v. Read, 16 Daly 282 3679
v. Totten, 172 Mich. 565 4690, 4833
Tottle v. Kent, 12 Okla. 674 4169, 4180
Tottleben v. Blankenship, 58 Ill. App. 47 4502
Toulmin v. Sager, 42 Ala. 127 1235
Tourgee v. Rose, 19 R. I. 432 4972
Touro v. Cassin, 1 N. & McC. 173 1146
Tourtelott v. Junkin, 4 Blackf. 483 423
Tourtelotte v. Westchester E. R. Co., 120 App. Div. (N. Y.) 417 4, 1500
Toussaint v. Martinnant, 2 T. R. 105 2831
Towaliga Falls P. Co. v. Sims, 6 Ga. App. 749 3839, 3841, 3881, 3905, 3906, 3922
v. Washington, 136 Ga. 397 3734
Towbridge v. Holcomb, 4 Ohio St. 38 624
Towell v. Gatewood, 5 Ill. 22 2388
Towle v. Lawrence, 59 N. H. 501 482
v. Matheus, 130 Cal. 574 1606
v. Stevenson, 1 Johns. Cas. 110 2969
v. Swasey, 106 Mass. 100 1081
Towler v. Chatterton, 6 Bing. 258 1188
Towles v. Atlantic C. L. R. Co., 83 S. C. 501 3322
v. Carpenter, 62 W. Va. 151 820
v. Cincinnati T. W. Co., 146 Ky. 301 282
Town v. Trow, 24 Pick. 168 817
Town of Eunice v. Louisiana W. R. Co., 135 La. 882 4073
Towne v. Davis, 66 N. H. 396 2227
Townes v. Augusta, 52 S. C. 396 3842
v. Chency, 114 Md. 362 2524
Townley v. Oregon R. Co., 33 Ore. 323 3741
Towns v. Riddle, 2 Ala. 694 2821
Townsend v. Bonwill, 5 Harr. 474 1421
v. Champernown, 1 Y. & J. 449 2169
v. Everett, 4 Ala. 607 1582
v. Felthousen, 156 N. Y. 618 4364
v. Jennison, 44 Vt. 315 606
v. Libbey, 70 Me. 162 495, 1623
v. New York, etc., R. Co., 56 N. Y. 295 3463
v. Nickerson W. Co., 117 Mass. 501 3189, 3205, 3209
v. Norfolk R. & L. Co., 105 Va. 22 3841
v. Paoli, 41 Kan. 591 4742
v. Riley, 46 N. H. 300 1202, 1208
v. Rumball, 19 Ont. L. R. 433 863, 922
v. Swallow, 91 Neb. 564 1224, 2032
v. Texas, etc., R. Co., 40 Tex. Civ. App. 71 3495
v. Toronto, etc., R. Co., 28 Ont. 195 833, 838
v. Webb, 8 Mass. 146 2149
Townsend's App., 106 Pa. 268 1080
Townsends v. Bank, 7 Wis. 185 648, 649, 654
v. Stevenson, 4 Rich. 62 678
Townshend v. Goodfellow, 40 Minn. 314 2199
Townsley v. Yentsch, 98 Ark. 312 4535, 4538, 4590
Towslee v. Healy, 39 Vt. 522 816
Towson v. Havre de Grace Bank, 6 H. & J. 53 790
Trabing v. California N. & I. Co., 121 Cal. 137 371, 1338, 3468, 3488, 3512, 3513
Trabue v. Mays, 3 Dana 138 4513, 4599, 4600
v. Short, 5 Cold. 293 1151
v. Short, 18 La. Ann. 257 1151, 1905
Tracewell v. Wood County Court, 58 W. Va. 283 8, 3928
Tracey v. Good, 1 Clark (Pa.) 472 4302
Tracy v. Albany Exch. Co. 7 N. Y. 472 3189, 3191
v. Buchanan, 167 Mo. App. 432 39
v. Butters, 40 Mich. 406 3733
v. Fobes, 132 Iowa 250 2503
v. Goodwin, 5 Allen 409 1601
v. Gunn, 29 Kan. 508 1981, 1989, 2005
v. Hacket, 19 Ind. App. 133 1305, 4547, 4573
v. Mt. Pleasant, 165 Iowa 435 3961, 4034, 4038
v. Pomeroy, 120 Pa. 14 2800
v. Strong, 2 Conn. 659 785, 798, 1235
v. Wikoff, 1 Dall. 124, 133 1214, 1216
Trade-Mark Cases, 100 U. S. 82 4485, 4487
Trader v. Chidester, 41 Ark. 242 1924
Traders' Ins. Co. v. Mann, 118 Ga. 381 225, 3046
v. Pacaud, 150 Ill. 245 3049
Tradesman Co. v. Superior Mfg. Co., 147 Mich. 702 314, 2690, 2705
Tradesmen's Nat. Bank v. National S. Co., 169 N. Y. 563 2792
Tradewater C. Co. v. Lee, 24 Ky. L. Rep. 215 2275, 2284, 2289, 2344
Traffler v. Detroit & N. C. Co., 181 Fed. 256 432
Trafton v. Davis, 110 Me. 318 2378

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v. Gold, 5 Pick. 360, 380 297, 2399
v. Holland P. Ins. Co., 62 N. Y. 598 627
Trainer v. Wolff, 58 N. J. L. 381 3827
Tralich v. Chicago, M. & St. P. R. Co., 217 Fed. 675 5065
Traloff v. New York, etc., R. Co., 10 Blatch. 16 3432
Trammell v. Chambers County, 93 Ala. 388 35
v. Hudmon, 56 Ala. 235 1897
v. Ramage, 97 Ala. 666 1706
v. Southern R. Co., 182 Fed. 789 4917
v. Vaughan, 158 Mo. 214 3662, 3670, 3671, 3672, 3674, 3675, 3684
Transfer No. 4, The, 9 C. C. A. 520, 61 Fed. 336 4989
Transportation Co. v. Chicago, 99 U. S. 635, 640 5, 3841, 3949
v. Downer, 11 Wall. 129 3386
Transportation Line v. Hope, 95 U. S. 297 1422
Trapp v. McClellan, 68 App. Div. 362 144
v. Rockford Elec. Co., 186 Ill. App. 379 4922, 4939
v. Southern R., 72 S. C. 343 3402
v. Western U. Tel. Co., 92 S. C. 214 3592, 3618
Trask v. Hamburger, 70 N. H. 453 2275
v. Hartford, etc., R. Co., 2 Allen 331 383
v. State F. & M. Ins. Co., 29 Pa. 198 3021
v. Vinson, 20 Pick. 105 556, 1956
Trauerman v. Lippincott, 39 Mo. App. 478 1276, 3827, 3828
Traffler v. Detroit & C. N. Co., 181 Fed. 256 4848
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v. Henderson C. Mills, 120 Ky. 218 1238, 2741, 2876
v. Melick, 5 Fed. 178 3000
v. Murray, 16 Colo. 296 3000
v. Parker, 92 Md. 22 2522
Travelers' Protective Ass'n v. Smith (Ind.), 101 N. E. 817 4378
Travell v. Bannerman, 71 App. Div. (N. Y.) 439 71
Traver v. Halsted, 23 Wend. 66 1953
Travers v. Hartman, — Del. Super. Ct. —, 92 Atl. 855 334, 4743, 4767
v. Kansas Pac. R. Co., 63 Mo. 421 1344
Travick v. Martin-B. Co., 79 Tex. 640 340
Travis v. Barger, 24 Barb. 614 4972
v. Duffau, 20 Tex. 49 183, 196
v. Louisville & N. R. Co., 183 Ala. 415 509, 4728
v. Pierson, 43 Ill. App. 579 313
Trawick v. Martin-Brown Co., 79 Tex. 460 1322, 1695, 4191, 4606
v. Peoria, etc., St. R. Co., 68 Ill. App. 156 2547, 2564
Traynor v. Palmer, 86 Ill. 477 2056
Traywick v. Southern R., 71 S. C. 82 3322
Treadwell v. Davis, 34 Cal. 601 4176, 4284
v. Moore, 34 Me. 112 711, 723
v. Tillis, 108 Ala. 262 35
v. Whittier, 80 Cal. 574 1384
Treanor v. New York B's Co., 51 N. Y. Misc. 607 275
Treasurers v. Buckner, 2 McMull. 323 1602, 1608
v. Clowney, 2 McMull. 510 1607
Treasurers v. Hilliard, 8 Rich. 412 1608
v. Ross, 4 McCord 273 1598, 1600
v. Taylor, 2 Bailey 524 1614
Treat v. Barber, 7 Conn. 279 164, 361, 4164, 4776
v. Browning, 4 Conn. 408 469, 470, 4574, 4581, 4600
v. Farmers' L. & T. Co., 185 Fed. 760 1039, 1133
v. Hiles, 81 Wis. 280 237, 243, 248, 254, 255, 257, 284, 410
v. Price, 47 Neb. 875 814
v. Smith, 139 Ill. App. 262 2025
v. Stanton, 14 Conn. 445 418, 419
v. Staples, 1 Holmes 1 4313
Trebilcock v. Wilson, 12 Wall. 687 606, 800
Tredegar v. Seaboard A. L. R., 183 Fed. 289 1222
Tredegar I. & C. Co. v. Gielgud, Cab. & Ell. 27 2265
Tredway v. Kaufman, 21 Pa. Super. 256 1115
Trees v. Milliken, 43 Ind. App. 256 2511
Trego v. Rubovits, 178 Ill. App. 127 295, 1093, 2891, 3161, 3233
Tregre & S. v. Carter P. Co., 132 La. 293 4185, 4191
Trelawney v. Thomas, 1 H. Black. 304 1019, 1034
Treman v. Morris, 9 Ill. App. 237 1661, 1664, 1666, 4352
Tremeere v. Morison, 1 Bing. N. C. 89 3155
Tremolo Patent, 23 Wall. 518 4465, 4472
Trenchard v. Kell, 127 Fed. 596 4408
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Trent v. Rhomberg, 66 Tex. 249 1764
Trentman v. Wahrenburg, 30 Ind. App. 304 935
v. Wiley, 85 Ind. 33 1687, 1691, 1692, 1702
Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. 576 3072
v. Perrine, 23 N. J. L. 402 1363, 4556, 4557, 4558
Trenton P. Co. v. Title G. & T. Co., 176 N. Y. 65 3094
Treptow v. Ward, 153 Ill. App. 422 4628, 4635
Tres Palacios R. & I. Co. v. Eidman, 41 Tex. Civ. App. 542 239, 2589
Trescott v. Waterloo, 26 Fed. 592 4844
Trester v. Pike, 60 Neb. 510 1728, 1733
Tretter v. Chicago, etc., R. Co., 154 Iowa 280 3799, 3803
v. Chicago G. W. R. Co., 147 Iowa 375 3893
Trevor v. Wall, 1 T. R. 151 1527
Treweek v. Howard, 105 Cal. 434 1639, 1641
Triangle Lumber Co. v. Acree, 112 Ark. 534 1509
Trible v. Nichols, 53 Ark. 271 987
Tribune Ass'n v. Eisner & M. Co., 70 App. Div. (N. Y.) 172 2666
v. Follwell, 107 Fed. 646 4543, 4547, 4577
Tribune Co. v. Bradshaw, 20 Ill. App. 17 240, 2588
Trice v. Chesapeake & O. R. Co., 40 W. Va. 271 1493, 3500, 3522, 3527
v. Turrentine, 13 Ired. 212 1556, 1598
Trickey v. Larne, 6 M. & W. 278 557, 1835
Trieber v. New York, etc., R. Co., 149 App. Div. (N. Y.) 804 4860
Trigg v. Bucyrus, 104 Va. 79 1039

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v. Faris, 5 Humph. 343 2380
v. Northcut, Litt. Sel. Cas. 414 411
v. St. Louis, etc., R. Co., 74 Mo. 147 343, 3452, 3481, 3524
v. Western U. Tel. Co., 4 Ga. App. 416 3570
Triggs v. Jones, 46 Minn. 277 2907, 2923, 2968
v. McIntyre, 215 Ill. 369 145
Trim Joint Dist. School v. Kelly, [1914] W. C. & Ins. Rep. 359, 136 L. T. J. 605 5199
Trimble v. Kansas City, etc., R. Co., 180 Mo. 574 1114
v. Kansas City, etc., R. Co., 201 Mo. 372 2484, 2486
v. Keer M. Co., 56 Mo. App. 683 4322
v. New York, etc., R. Co., 162 N. Y. 84 3535
v. Spiller, 7 T. B. Mon. (Ky.) 394 348, 4772
v. Texarkana, etc., R. Co., 199 Mo. 44 695
v. Thorne, 16 Johns. 151 2819
Trimby v. Vignier, 1 Bing. N. C. 151 1145, 1151
Trimm v. Marsh, 54 N. Y. 599 826
Trimmer v. Pennsylvania, etc., R. Co., 55 N. J. L. 46 4105
Trimmier v. Atlanta & C. R. Co., 81 S. C. 203 4937
Trindle v. Register Printing & Publishing Co., 58 Colo. 81 1684, 2821
Trinidad A. Co. v. Ambard, [1809] App. Cas. 594 3914
v. Buckstaff Mfg. Co., 86 Neb. 623 2236
v. Trinidad A. Ref. Co., 119 Fed. 134 2282
Trinidad Nat. Bank v. Denver Nat. Bank, 4 Dill. 290 287
Trinity Church v. Higgins, 48 N. Y. 537 2892, 2893, 3119
Trinity College v. Hartford, 32 Conn. 452 3958, 4108, 4110, 4112, 4114
Trinity Parish v. Aetna Ind. Co., 37 Wash. 515 2893
Trinity, etc., R. Co. v. Doke (Tex. Civ. App.), 152 S. W. 1174 1138, 1243
v. Gregory (Tex. Civ. App.), 142 S. W. 656 3761
v. Lane, 79 Tex. 643 4803
v. O'Brien, 18 Tex. Civ. App. 690 4665, 4720
v. Orenbaum, — Tex. Civ. App. —, 173 S. W. 531 4141
v. Schofield, 72 Tex. 496 3878, 3888, 3893, 3894, 3897
Triplett v. Allen, 26 Gratt. 724 2048
v. Gill, 7 J. J. Marsh. 438 2056
v. Jackson, 130 Iowa 408 2502
Tripp v. Bishop, 56 Pa. 424 1936
v. Forsaith Mach. Co., 69 N. H. 233 2237, 2245
v. Grouner, 60 Ill. 474 1282, 4304
v. Thomas, 3 B. & C. 427 4535
v. Wynne, 76 Ga. 200 958
Trischet v. Hamilton Mut. Ins. Co., 14 Gray 456 1503
Triscony v. Brandenstein, 66 Cal. 514 3736
Trist v. Child, 21 Wall. 441 1850
Tri-State M. Co. v. Breisch, 145 Mich. 232 1437, 1452
Tri-State Tel. & T. Co. v. Cosgriff, 19 N. D. 771 3956, 3960, 3995, 4002, 4097
Triumph, The, 1 Sprague 428 2723
Troendle v. Steger, 159 Ky. 182 2299
Troll v. Laclede Gas Light Co., 182 Mo. App. 600 4863, 4951
v. Prudential Ins. Co., 172 Mo. App. 12 2478
v. St. Louis P. C. Co., 160 Mo. App. 501 143
Trombley v. Humphrey, 23 Mich. 474 3945
Trombly v. Klersy, 141 Mich. 73 642
Trompen v. Hammond, 61 Neb. 446 1057
Troop, The, 128 Fed. 856 4993
Trosper v. Commissioners, 27 Kan. 391 4114
Trosper C. Co. v. Crawford, 152 Ky. 241 4725
Troth v. Millville Bottling Works, — N. J. L. —, 93 Atl. 435 5153
Trott v. Chicago, etc., R. Co., 115 Iowa 80 4697
Trotta v. Johnson, 121 Ky. 827 4856
Trotter v. Grant, 2 Wend. 413 704, 717, 1008, 1108
v. Hughes, 12 N. Y. 74 2895
v. Stayton, 45 Ore. 301 3699, 3701
v. Strong, 63 Ill. 272 2822
v. Tousey, 131 Mich. 624 2275
v. Trotter, 40 Miss. 704 1127
Trotter's Est., 15 Pa. Dist. 352 1131
Troubar v. Hunter, 5 Rawle 257 1112
Trouer v. Sharp, 4 J. J. Marsh. 79 1038
Troup v. Wood, 4 Johns. Ch. 228 633
Troup's Case, 29 Beav. 353 1073
Trouser Co. v. Seaboard A. L. R. Co., 139 N. C. 382 3532
Trousil v. Bayer, 85 Neb. 431 1363
Trout v. Kennedy, 47 Pa. 387 1438, 2298, 2305
v. Watkins L. & U. Co., 148 Mo. App. 621 134, 170, 189, 356, 1258, 3439, 3441
Trout Auto L. Co. v. People's G. L. & C. Co., 168 Ill. App. 56 4195
Troutwine v. Hoff, 126 App. Div. (N. Y.) 556 35
Trow v. Thomas, 70 Vt. 580 4771
v. White Bear, 78 Minn. 432 1503, 1517
Trowbridge v. Brookline, 144 Mass. 139 3993
v. Forepaugh, 14 Minn. 133 433
v. Holcomb, 4 Ohio St. 38 2337
v. Mayor, 7 Hill 429 569
v. Seaman, 21 Ill. 101 1891
Trower v. Elder, 77 Ill. 452 918
v. Hamilton, 179 Mo. 205 1905
Troxell v. Delaware, L. & W. R. Co., 227 U. S. 434, rev'g 200 Fed. 44 5122, 5126, 5131
v. Haynes, 5 Daly 390 1760
v. Haynes, 16 Abb. Pr. (N. S.) 1 1731
v. Haynes, 49 How. Pr. 517 1719
Troxwell v. Fugate, Hardin 2 1059
Troy v. Cheshire R. Co., 23 N. H. 83, 102 389, 400, 3759, 3853, 3860, 3865, 3866, 4063
v. Rogers, 113 Ala. 131 1685, 1687
Troy City Bank v. Grant, Hill & Denio 119 634
Troy F. Co. v. Logan, 96 Ala. 619 2558, 2562
Troy I. & N. Factory v. Corning, 6 Blatch. 328 2219
Troy L. Co. v. Henry, 23 Ore. 232 2389
Troy, etc., R. Co. v. Northern T. Co., 16 Barb. 100 1425
Truax v. Heartt, 135 Mich. 150 569
Truby v. American N. G. Co., 38 Pa. Super. Ct. 166 3761
True v. International Tel. Co., 60 Me. 9 193, 207, 284, 476, 3549, 3553, 3566, 3580, 3600

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True Blue, The, 2 W. Rob. 176 2719
Truel v. Missouri, etc., R. Co., 143 Mo. App. 380 135, 3473, 3480
Truesdell v. Chesapeake & Ohio Ry. Co., 159 Ky. 718 5065
Truitt v. Blaird, 12 Kan. 420 1449
v. Osler, 4 Boyce (Del.) 555 207, 3777
v. Revill, 4 Harr. 71 4329
Trull v. Granger, 8 N. Y. 115 1989, 2008, 3183, 3187, 3189
Truman v. Case T. M. Co., 169 Mich. 153 4265
Trumbo v. Curtright, 1 A. K. Marsh. 582 2067
v. Lockridge, 4 Bush 417 2211
Trumbull v. School Dist., 22 Wash. 631 32, 33
v. Trumbull, 71 Neb. 186 4980
Trunk v. Clark, 163 Iowa 620 2583, 2598, 2668
Trunkey v. Hedstrom, 131 Ill. 204 1365, 2216, 2275
Truschel v. Dean, 77 Ark. 546 2376
Truscott v. King, 6 N. Y. 147 703, 730, 737
Truslow v. Parkersburg B. & T. R. Co., 61 W. Va. 628 2512
Trust Co. v. Floyd, 47 Ohio St. 525 2980, 2986
Trustees v. Harshman, 262 Ill. 72 3961, 3965
v. Kendrick, 12 Me. 381 659, 661
v. Lawrence, 11 Paige 80 1134
v. McCaughy, 2 Ohio St. 155 1193, 1194
v. Siers, 68 W. Va. 125 2382
v. Walrath, 27 Mich. 232 918
v. Youmans, 50 Barb. 316 7
Trustees Church Home v. Morris, 99 Ky. 317 1082
Trustees Internal Imp. Fund v. Lewis, 34 Fla. 424 1210
Trustees of Little Cedar Congregation, etc., v. Chicago, etc., R. Co., 119 Minn. 181 1523
Tryon v. Carter, 2 Str. 994 938
v. Robinson, 10 Rich. 160 1754
v. Whitmarsh, 1 Metc. (Mass.) 1 4363, 4385
Trzetiatowski v. Evening American Pub. Co., 185 Ill. App. 451 335, 4653
Tsmura v. Great Northern R. Co., 58 Wash. 316 5069
Tubberville v. Simpson, 94 Miss. 154 1918
Tubbs v. Roberts, 40 Colo. 498 3800
v. Van Kleek, 12 Ill. 446 3663
Tubular R. & S. Co. v. Exeter B. & S. Co., 159 Fed. 824 2, 478
Tuck v. Hartford F. Ins. Co., 56 N. H. 326 3049
v. Moses, 58 Me. 461 1661, 1666, 1667, 1675
Tucker v. Baldwin, 13 Conn. 136 667, 767
v. Brackett, 25 Tex. Supp. 199 732
v. Buffalo C. Mills, 76 S. C. 539 1502, 4737
v. Chaplin, 2 C. & K. 730 4853
v. Clark, 2 Sandf. Ch. 96 2087, 2088
v. Cocke, 2 Rand. 51 2048
v. Deering S. R. Co., 133 Mo. App. 122 293
v. Draper, 62 Neb. 66 109, 1394
v. Grover, 60 Wis. 240 1101
v. Hart, 23 Miss. 548 1559
v. Horn, 31 Ky. L. Rep. 805 2565
v. Ives, 6 Cow. 193 1107
v. Lawson, 2 Times L. Rep. 593 4597
Tucker v. Massachusetts Cent. R., 118 Mass. 546 1434, 3964, 3980
v. New Brunswick T. Co., 44 Ch. Div. 249 1760
v. Newman, 11 Ad. & E. 40 3835
v. Page, 69 Ill. 179 1238
v. Parks, 7 Colo. 62 1356, 1363
v. Philadelphia & R. C. & I. Co., 53 Hun 139 2522
v. Richards, 58 S. C. 22 1120, 1132
v. Smith, 4 Me. 415 1825
v. State, 163 Ind. 403 1132
v. White, 5 Allen 322 2755, 2767
v. Winders, 130 N. C. 147 1311, 1316, 4841, 4842
v. Wright, 3 Bing. 601 4301, 4302
Tucker, Lynch & Coldwell v. Hawley, 23 Cal. App. 460 2501
Tucker & D. Mfg. Co. v. Staley, 40 Ind. App. 63 111, 125
Tuckerman v. Newhall, 17 Mass. 581 421, 637, 756, 762, 773, 781, 782
Tuckwell v. Lambert, 5 Cush. 23 2405, 4371
Tudor v. Lewis, 3 Met. (Ky.) 378 1624
v. Macomber, 14 Pick. 34 3035, 3036
Tuebbecke v. Rothschild, 152 Ill. App. 321 4640
Tuebner v. California St. R. Co., 66 Cal. 171 3886, 3921
Tuel v. Weston, 47 Vt. 634 1330
Tuers v. Tuers, 100 N. Y. 196 2910, 2911
Tuffli v. Ohio L. Ins. & T. Co., 2 Disney 121 953
Tuffree v. Binford, 130 Iowa 532 2506
Tufts v. Adams, 8 Pick. 547 2094, 2115, 2152, 2157
v. Atlantic Tel. Co., 151 Mass. 269 836
v. Bennett, 163 Mass. 398 2237
v. Charlestown, 4 Gray 537 4030, 4134
v. Grewer, 83 Me. 407 2242, 2264
v. Lawrence, 77 Tex. 526 2225, 2260
v. Mabie, 7 Kan. App. 129 2404
v. McClintock, 28 Me. 424 361
v. Plymouth G. M. Co., 14 Allen 407 605, 2560
v. Weinfeld, 88 Wis. 647 2260, 2697, 2702
Tuggle v. Hamilton, 100 Ga. 202 2159
Tuite v. Wakelee, 19 Cal. 692 2923
Tukey v. Foster, 158 Iowa 311 2157
Tulane Educational Fund's Adm'rs v. Baccich, 129 La. 469 193, 203, 204, 2009, 2987
Tuley v. McClung, 67 Ind. 10 1918
Tulley v. Dunn, 42 Ala. 262 3102
Tullidge v. Wade, 3 Wils. 18 1269, 3827, 4969
Tullis v. McClary, 128 Iowa 493 4625, 4627
Tullock v. Mulvane, 61 Kan. 650 1715, 1721, 1726
v. Mulvane, 184 U. S. 497 1715, 1723
Tully v. Fitchburg R. Co., 134 Mass. 499 5108
v. Harloe, 35 Cal. 302 4325
v. New York & T. S. Co., 10 App. Div. (N. Y.) 463 4805
Tuly v. State, 1 Ind. 500 1582
Tunbridge-Wells Dippers, 2 Wils. 414 120
Tunis v. Grandy, 22 Gratt. 109 3122, 3124
Tunis L. Co. v. Dennis L. Co., 97 Va. 682 3255
Tunnel M. & L. Co. v. Cooper, 50 Colo. 390 1505, 1506, 4797

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v. West Leigh C. Co., [1906] 2 Ch. 22 394, 3914
Tunno v. Fludd, 1 McCord 121 533
Tuohy v. Columbia S. Co., 61 Ore. 527 1498, 4735
Tupper v. Powell, 1 Johns. Ch. 439 978
Turbyfill v. Atlanta & C. R. Co., 86 S. C. 279 4937
Turk v. Norfolk & W. R. Co., — W. Va. —, 84 S. E. 569 3502, 3525, 4661, 4774
Turley v. Atlanta, etc., R. Co., 127 Ga. 594 1392
Turman v. Looper, 42 Ark. 500 2838
Turnbow v. Wimberly, 106 La. 259 1261, 1519
Turnbull v. Banks, 22 App. Div. (N. Y.) 508 2458
v. Bowyer, 40 N. Y. 456 1869
v. Gadsden, 2 Strobh. Eq. 14 4366
v. Garden, 38 L. J. (Ch.) 331 2903
v. Richardson, 69 Mich. 400 1446
Turnbull Joice L. Co. v. Chicago L. & C. Co., 152 Ill. App. 347 530
Turner v. Ambler, 10 Q. B. 260 4635
v. American S. & T. Co., 213 U. S. 257 1423
v. Bank, 3 Keyes 425 656
v. Brooks, 2 Tex. Civ. App. 451 1980
v. Burns, 24 Ont. 28 2323
v. Burrows, 8 Wend. 144 2781
v. Calvert, 12 S. & R. 46 986
v. Carter, 1 Head 520 1403, 1404
v. Cedar (Misc.), 91 N. Y. Supp. 758 4222
v. Child, 1 Dev. 331 644
v. Collier, 4 Heisk. 89 612
v. Crawford, 14 Kan. 499 586, 590
v. DeWitt, 4 Ohio C. C. (N. S.) 434 2120
v. Dinnegar, 20 Hun 465 4648
v. Fell, 142 Ill. App. 458 1049
v. Fremont, 159 Fed. 221 867
v. Fremont, 170 Fed. 259 887
v. Gibbs, 50 Mo. 556 537
v. Gonzales, 3 Ind. Ty. 649 3710
v. Grand Rapids, 20 Mich. 390 2650
v. Great Northern R. Co., 15 Wash. 213 3443, 3445, 3446, 3485
v. Hadden, 62 Barb. 480 416
v. Hale, 8 Kan. 38 2820
v. Hamilton, 88 Fed. 467 977
v. Hawkeye Tel. Co., 41 Iowa 458 3565, 3598
v. Hayden, 4 B. & C. 1 687
v. Hearst, 115 Cal. 394 4523, 4536, 4590
v. Hitchcock, 20 Iowa 310 425, 435, 755
v. Kuehnle, 70 N. J. Eq. 61 3716, 3718
v. Lamb, 14 M. & W. 412 2587, 3155
v. Lawson, 144 Ala. 432 2056, 2091
v. Lee G. & M. Co., 98 Tenn. 604 825
v. Lord, 92 Mo. 113 2008
v. Lowry, 2 Aik. 72 1620
v. McAdory, 58 Miss. 27 2198
v. McCarthy, 4 E. D. Smith 250 1534
v. Mason, 14 M. & W. 112 2526
v. Miller, 42 Tex. 418 2135
v. Missouri Pac. R. Co., 130 Mo. App. 535 4095
v. Moon, [1901] 2 Ch. 825 2057, 2058, 2059
v. Morris, 27 Miss. 733 3719
Turner v. Nassau El. R. Co., 41 App. Div. (N. Y.) 213 131, 4676
v. National C. O. Co., 50 Tex. Civ. App. 468 2754
v. New South Wales Mont de Piete D. & I. Co., 10 New South Wales St. Rep. 900 4316
v. Newburgh, 109 N. Y. 301 412, 1428
v. Norfolk & W. R. Co., 40 W. Va. 675 1271, 4865
v. North Beach, etc., R. Co., 34 Cal. 594 1338, 3513
v. Osborn, — Miss. —, 64 So. 721 722
v. Page, 186 Mass. 600 143
v. Phillips, Peak's N. P. Cas. 166 2488
v. Pierce, 31 Wis. 342 733, 735
v. Retter, 58 Ill. 264 4273
v. Richardson, 7 East 335 3134
v. Robinson, 6 C. & P. 15 2525
v. Robinson, 10 Irish Ch. (N. S.) 121, 501 4478
v. Satterlee, 7 Cow. 480 585
v. Sisson, 137 Mass. 191 1605
v. Southern R., 75 S. C. 58 3536, 3537
v. State, 66 Ind. 210 1619
v. State, 67 App. Div. (N. Y.) 393 4087
v. Stephens (Tex. Civ. App.), 155 S. W. 1009 1318
v. Stevens, 8 Utah 75 1493, 4511, 4549, 4558
v. Telgate, 1 Lev. 95 4841
v. Thomas, L. R. 6 C. P. 610 453
v. Townsend, 42 Neb. 376 3232
v. Turner, 36 Tex. 41 2944
v. Wabash R. Co., 114 Mo. App. 539 1361
v. Webster, 24 Kan. 38 2462
v. Younker, 76 Iowa 285 4314
Turner Imp. Co. v. Des Moines, 155 Iowa 592 1044
Turney v. Smith, 14 Ill. 242 3724, 3725
v. Southern Pac. Co., 44 Ore. 280 1391
v. Williams, 7 Yerg. 172 1124
Turnley v. Micheal (Tex. Civ. App.), 15 S. W. 912 2510
Turnor v. Turner, 2 Brod. & B. 107 1657, 1658
Turnpike Co. v. County, 15 Pa. Dist. 703 1440, 1500
v. Davidson County, 91 Tenn. 291 4020
v. Fry, 88 Tenn. 296 429
v. Yates, 108 Tenn. 428 108
Turnpike Road v. Brosi, 22 Pa. 29 4118
Turon v. Chicago City R. Co., 152 Ill. App. 351 1470
Turpie v. Lowe, 114 Ind. 37, 54 283
Turpin v. Remy, 3 Blackf. 210, 216 4601
v. Reynolds, 14 La. 473 457
v. Sledd's Ex'r, 23 Gratt. 238 605
Turrell v. Archer, 1 Mart. Ch. 103 876, 1957
Turrentine v. Perkins, 46 Ala. 631 1085, 1086
Turrill v. Illinois Cent. R. Co., 20 Fed. 912 4463
Turton v. New York Recorder Co., 144 N. Y. 144 4518, 4544, 4590, 4591
Turwin v. Gibson, 3 Atk. 720 591
Tuscaloosa Belt R. Co. v. Maxwell, 171 Ala. 318 1386, 4158
Tuscaloosa County v. Foster, 132 Ala. 392 4378, 4393
Tuskegee L. & S. Co. v. Birmingham R. Co., 5 Ala. App. 499 2153, 3988
v. Birmingham Realty Co., 161 Ala. 542 32, 1391, 2149, 2150, 2152

[REFERENCES ARE TO PAGES]

Tuteur v. Chicago, etc., R. Co., 77 Wis. 505 4895, 4935
Tuthill v. Morris, 81 N. Y. 94 827
v. Scott, 43 Vt. 525 38
Tûton v. Thayer, 47 How. Pr. 180 2768, 2772, 2789
Tutt v. Land, 50 Ga. 350 1071
Tuttle v. Bell, 92 Kan. 725 1464, 3804, 3830, 4159, 4177
v. Bisbee, 144 Iowa 53 458
v. Brown, 4 Gray 457 2405, 2410, 4410
v. Buck, 107 Minn. 145 13
v. Chicago, R. I. & P. R. Co., 42 Iowa 518 4757
v. Claflin, 76 Fed. 227 4466, 4467
v. Cooper, 10 Pick. 281 424
v. Farmington, 58 N. H. 13 4787
v. Gilbert Mfg. Co., 145 Mass. 169 3250, 3251
v. Tuttle, 12 Metc. (Mass.) 551 625, 758
v. Tuttle, 101 Me. 287 1837
Tuttle-C. Co. v. Coaldale F. Co., 136 Iowa 382 2274, 2278, 2302
Tutton v. Majestic, [1909] 2 K. B. 54 326
Tutty v. Ryan, 13 Wyo. 134 1714
Tutwiler v. Burns, 160 Ala. 386 2692, 2700
Tutwiler C. C. & I. Co. v. Enslen, 129 Ala. 336 4946, 4947, 4950
v. Nail, 141 Ala. 374 1270
v. Nichols, 145 Ala. 666 3856
v. Nichols, 146 Ala. 364 3880, 3886, 3900, 3904
v. Tuvin, 158 Ala. 657 1380, 4623
Tuxbury v. Miller, 19 Johns. 311 1852
Twambly v. Henley, 4 Mass. 441 2054
Tweed v. Western U. Tel. Co., — Tex. —, 166 S. W. 696 1379
Tweedie T. Co. v. Pitch Pine L. Co., 156 Fed. 88 3302, 3308
v. Sangstad, 180 Fed. 691 3316
v. Strong, 115 C. C. A. 617, 195 Fed. 929 3304
Tweeten v. Tacoma Railway & Power Co., 210 Fed. 828 780
Twelfth Ave. South, In re, 74 Wash. 132 1955, 3946
Twell's Est., 11 Pa. Dist. 713 1079, 1085
Twigger v. Ossing Printing and Publishing Co., 161 App. Div. (N. Y.) 718 1366, 4539
Twin City C. Co. v. Godfrey, 176 Mich. 109 2393
Twin Lakes H. G. Min. Synd. v. Colorado M. R. Co., 16 Colo. 1 4037, 4101
Twinam v. Swart, 4 Lans. 263 4314
Twitty v. McGuire, 3 Murphy 501 542
Two Friends, The, 1 W. Rob. 286 2723
Two Hundred Tons of Coal, 7 Bene. 343 2718
Twohig v. Brown, 85 Tex. 51 2204
Twohy v. McMurran, 57 Minn. 242 2749
Twohy M. Co. v. Melbye, 83 Minn. 394 1117
Twomley v. Central, etc., R. Co., 69 N. Y. 158 148
Twopenny v. Young, 3 B. & C. 211 783
Twycross v. Grant, 2 C. P. Div. 469, 544 4407
Twyman v. Knowles, 13 C. B. 222 3744
v. Pickard, 2 B. & Ald. 105 2124
Tye v. Gwynne, 2 Camp. 346 1835
Tyers v. Rosedale, etc., Co., L. R. 8 Ex. 305 2233
Tyfe v. Turtle Creek, 22 Pa. Super. 292 6
Tygart v. Albritton, 5 Ga. App. 412 189, 255
Tying v. Commercial W. Co., 58 N. Y. 308 4211, 4243
Tyler v. Aetna Ins. Co., 16 Wend. 385 3059
v. Anderson, 106 Ind. 185 4397
v. Bland, 9 M. & W. 338 1234
v. Bowen, 124 Iowa 452 1267, 4628
v. Burrington, 39 Wis. 376 2472, 2474
v. Davis, 63 Miss. 345 1679, 1681
v. Hudson, 147 Mass. 609 3987, 4056
v. Hyde, 80 Ill. App. 123 665
v. Ives, MS. Sup. Court 1839, 2894
v. Mahoney, 166 N. C. 509 4628, 4643
v. Moody, 23 Ky. L. Rep. 584 2448
v. Nelson, 14 Gratt. 214 1614
v. Odd Fellows' Mut. Relief Ass'n, 145 Mass. 134 749
v. Safford, 31 Kan. 608 1705
v. Salley, 82 Me. 128 3664, 3666
v. Sowders, — Tex. Civ. App. —, 173 S. W. 640 4631
v. Waddingham, 58 Conn. 375, 398 2815
v. Walker, 101 Tenn. 306 1921
v. Western U. Tel. Co., 54 Fed. 634 3644
v. Western U. Tel. Co., 60 Ill. 421 3547, 3551, 3553, 3580
v. Wilkinson, 4 Mason 397 35, 38
v. Young, 3 Ill. 444 1841, 1845
Tyler C. & L. Co. v. Wettermark, 12 Tex. Civ. App. 399 2357
Tyler M. Co. v. Last Chance M. Co., 90 Fed. 15 1745, 1761
Tyler S. E. R. Co. v. Hitchins, 26 Tex. Civ. App. 400 3774
v. Raspberry, 13 Tex. Civ. App. 185 4885, 4895
Tyly v. Morrice, Carthew 485 3411
Tynberg v. Cohen, 76 Tex. 409 4604
Tynburg v. Cohen, 67 Tex. 220 1700, 1701
Tyne & B. S. Co. v. Leech, [1900] 2 Q. B. 12 3307
Tyner v. Cotter, 67 Wis. 482 4380, 4382, 4419
v. Hamilton, 51 Ind. 259 2822
v. Hays, 37 Ark. 599 1357, 1360
Tyng v. American S. Co., 48 App. Div. (N. Y.) 240 1708
v. American S. Co., 69 App. Div. (N. Y.) 137 1708
v. Commercial W. Co., 58 N. Y. 308 2311, 2954, 4273
Tyree v. Donnally, 9 Gratt. 64 1599
v. Parham, 66 Ala. 424 2835
v. Wilson, 9 Gratt. 59 1613
Tyrer v. King, 2 Car. & K. 149 1997
Tyrrell v. Lockhart, 3 Blackf. 136 1532
Tyrus v. Kansas City, etc., R. Co., 114 Tenn. 579 8, 3863, 3877
Tyson v. Booth, 100 Mass. 258 465, 1375, 4682, 4783
v. Chestnut, 118 Ala. 387, 405 3183, 3189
v. Com'rs, 28 Md. 510 14
v. Ewing, 3 J. J. Marsh. 186 1261
v. Hardesty, 29 Md. 305 2048
v. Jackson, 41 Tex. Civ. App. 128 559
v. Milwaukee, 50 Wis. 78 1064, 1101
v. Passmore, 2 Pa. 122 4378
v. Pryor, 1 Gall. 133 2726
v. Sanderson, 45 Ala. 364 1569
v. State Bank, 6 Blackf. 225 2929
v. Williamson, 96 Va. 636 4395
v. Woodruff, 108 Ga. 368 752

U

Ubeda y Salazar v. San Juan L. & T. Co., 4 Porto Rico Fed. 533 4652, 4732

[REFERENCES ARE TO PAGES]

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Uhe v. Chicago, etc., R. Co., 3 S. D. 563 1142
Uhl v. Small, 54 Kan. 651 3694
Uhland v. Uhland, 17 S. & R. 265 1107
Uhle v. Philadelphia, 30 Pa. Super. Ct. 480 4098
Uhler v. Cowen, 192 Pa. 443, 199 Pa. 316 3146
v. Semple, 20 N. J. Eq. 288 1072
v. Semple, 5 C. E. Gr. 288 3729
Uhlig v. Barnum, 43 Neb. 584 194, 313, 476
Uhrich v. Livergood, 25 Ill. App. 640 1014
Ukam v. Daily Record Co., 189 Mo. 378 4505, 4508
Ulbricht v. Eufaula W. Co., 86 Ala. 587 36
Uldrich v. Gilmore, 35 Neb. 288 4789
Ulen v. Kittridge, 7 Mass. 233 2768, 2779
Uline v. New York, etc., R. Co., 101 N. Y. 98 401, 414, 415, 3759, 3841, 3852, 3853, 3866, 3876
Ulit v. Biggs, 53 Tex. Civ. App. 529 4186
Ullman v. Barnard, 7 Gray 554 4173
v. Chicago, etc., R. Co., 112 Wis. 150 3414, 3418
v. Devereux, 46 Tex. Civ. App. 459 4285
v. Kent, 60 Ill. 271 230, 2242, 2243
Ulmer v. Cunningham, 2 Me. 117 431
Ulrich v. Hower, 156 Pa. 414 2525, 2526
v. Pateros W. D. Co., 67 Wash. 328 208, 234
v. Ulrich, 60 N. Y. Super. 237 2472
Ulrick v. Dakota L. & T. Co., 2 S. D. 285 6, 1482, 3763, 3913, 3917
Ulsch v. Muller, 143 Mass. 379 620, 696
Ulster County Sav. Ins. v. Ostrander, 163 N. Y. 430 1584, 2751
v. Young, 161 N. Y. 23 1584, 2745, 2751
Ulster S. S. Co. v. Cape Fear T. & T. Co., 94 Fed. 214 2717, 2727
Ultima Thule, etc., R. Co. v. Benton, 86 Ark. 289 52
Umbreit v. American B. Co., 144 Wis. 611 1715
Umbria, The, 166 U. S. 404 4996, 5003
Umbria, The, 59 Fed. 475 5013, 5014, 5015
Umbria, The, 46 Fed. 927 5016
Uncle Sam O. Co. v. Forrester, 79 Kan. 610 1399, 4223
Undaunted, The, 1 Lush. 90 2727
Underhill v. Agawam Mut. Ins. Co., 6 Cush. 440 3041
v. Collins, 132 N. Y. 269 3111
v. Gaff, 48 Ill. 198 368, 1103, 2309
v. Palmer, 10 Daly 478 2810
v. Spencer, 25 Kan. 71 1721, 1727
v. Taylor, 2 Barb. 348 468, 4594, 4596
v. Welton, 32 Vt. 40 157, 4555
v. Wynkoop, 15 Pa. Super. Ct. 230 703
Underwood v. Birchard, 47 Vt. 305 3183
v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500 3021
v. Gulf Ref. Co., 128 La. 968 348, 1425, 4946
v. Hossack, 38 Ill. 208 2779
v. Jordan, — Tex. Civ. App. —, 166 S. W. 88 2979
v. Nichols, 17 C. B. 239 2944
v. Old Colony St. R. Co., 33 R. I. 319 4875
Underwood v. Parker, 2 Strange 1200 469, 4580
v. Simonds, 12 Metc. (Mass.) 275 1857
v. Smith, 93 Tenn. 687 4516
v. Waldron, 33 Mich. 232 1422
v. Whiteside County B. & L. Ass'n, 115 Ill. App. 387 1117
v. Wolf, 131 Ill. 425 535
Underwood T. Co. v. Century R. Co., 165 Mo. App. 131 354, 1102, 3203
v. Veal, 12 Ga. App. 11 4347, 4351
Underwriters' W. Co. v. Board of Underwriters, 35 La. Ann. 803 622
Unexcelled F. Co. v. Polites, 130 Pa. 536 2237
Unfried v. Baltimore & O. R. Co., 34 W. Va. 260 1515
v. Libert, 20 Idaho 708 1281, 4210
v. Libert, 23 Idaho 603 1359, 1361, 4210
Ungar v. Feuer, 172 Ill. App. 204 1399
Unger v. Howell, [1911] W. C. & Ins. Rep. 58, 7 B. W. C. C. 36 5202
v. Leiter, 32 Ohio St. 210 3731
Uniack v. Chicago, etc., R. Co., 67 Wis. 108 1063
Union v. Durkes, 38 N. J. L. 21 1518
Union Bank v. Baldenwick, 45 Ill. 375 647
v. Beech, 3 H. & C. 672 2823
v. Blanchard, 65 N. H. 21 2415
v. Costen, 3 N. Y. 203 2767
v. Lobdell, 10 La. Ann. 130 739
v. Morgan, 12 New Zeal. 672 1114
v. Mott, 27 N. Y. 633 423
v. Pinner, 25 N. J. Eq. 495 2212
v. Rideau L. Co., 3 Ont. L. R. 269 3791
v. Ridgely, 1 H. & G. 324 2756
v. Solle, 2 Strobh. 390 1117
v. Thompson, 8 Rob. (La.) 227 1607
v. Williams, 3 Cold. 579 1207
Union C. Co. v. Western U. Tel. Co., 163 Cal. 298 3554, 3564
Union C. M. Co. v. McAdam, 38 Iowa 663 2046
Union Central L. Ins. Co. v. Bernard, 33 Ohio St. 459 3084
v. McHugh, 7 Neb. 66 3090
v. Prigge, 90 Minn. 370 2796
Union Cent. Life Ins. Co. of Cincinnati, Ohio, v. Drake, 214 Fed. 536 374
Union College, Trustees of, v. City of New York, 65 App. Div. (N. Y.) 553 1964
v. City of New York, 173 N. Y. 38 3715
v. Wheeler, 61 N. Y. 88 690
Union D. & R. Co. v. Londoner, 50 Colo. 22 4712
v. Smith, 16 Colo. 361 4842
Union E. Co. v. Kansas City S. B. R. Co., 135 Mo. 353 1433, 4125, 4132, 4139
Union E. R. Co., In re, 55 Hun 163 4083
Union Esperanza Min. Co. v. Shandon Min. Co., 18 N. M. 153 809
Union Estates Co. v. Adlon Const. Co., 84 Misc. (N. Y.) 599 869
Union Exp. Co. v. Graham, 26 Ohio St. 595 3385, 3386
Union F. Works v. Columbia I. & S. Co., 112 Ill. App. 183 172, 2340
Union Fibre Co. v. Aaron Poultry Co., 176 Mo. App. 26 1430, 2669
Union G. & T. Co. v. Robinson, 79 Fed. 420 2885, 2898

[REFERENCES ARE TO PAGES]

Union Hall Ass'n v. Morrison, 39 Md. 281, 296 3709, 3710
Union I. Co. v. Markle, 191 Pa. 329 947
Union Ice Co. v. Crowell, 5 C. C. A. 49, 55 Fed. 87 4999
Union Ins. Co. v. Central T. Co., 157 N. Y. 633 211, 1812
Union Inst. v. Boston, 129 Mass. 82 962
v. Phoenix Ins. Co., 196 Mass. 230 785, 3017
Union L. Co. v. Tronson, 36 Wis. 126 4359
Union M., B. & T. Co. v. Hagood, 97 Fed. 360 999
v. Hagood, 98 Fed. 779 988
Union Mill Co. v. Chandler, 90 Iowa 650 1687, 1691, 1706
v. Prenzler, 100 Iowa 540 1267, 1272, 1286, 1304, 1311, 1320, 1700, 1704, 1705
Union Mut. L. Ins. Co. v. Slee, 110 Ill. 35 966
v. Thomas, 83 Fed. 803 4510
v. Union Mills P. Co., 37 Fed. 286 621
Union Nat. Bank v. Chapman, 169 N. Y. 538 1147
v. Cross, 100 Wis. 174 1693, 1694, 4191, 4196
v. Moline, etc., Co., 7 N. D. 201 574, 4358
v. Post, 64 Ill. App. 404, 93 Ill. App. 339, 192 Ill. 385 4272, 4273, 4288
v. Roberts, 45 Wis. 373, 379 1817
v. Wheeler, 60 N. Y. 612 2826
Union Naval S. Co. v. United States, 202 Fed. 491 361, 4222, 4257
Union Oil Co.'s App., 3 Penny. 504 1960
Union Pac. R. Co. v. Artist, 60 Fed. 365 769
v. Botsford, 141 U. S. 250 1465, 1467, 1468, 1471
v. Connolly, 77 Neb. 254 1485, 4793, 4807
v. Dunden, 37 Kan. 1 1484
v. Hand, 7 Kan. 380 1495
v. Hause, 1 Wyo. 27 1495, 3528
v. Holmes, 68 Kan. 810 1137
v. Jones, 21 Colo. 340 3515, 4758, 4761, 4770
v. Jones, 1 C. C. A. 282, 49 Fed. 343 4749
v. Lapsley, 51 Fed. 174 108
v. Libby, 27 Colo. App. 111 3334
v. McMican, 194 Fed. 393 1472, 4779
v. Milliken, 8 Kan. 647 1499
v. Mitchell, 56 Kan. 324 1512
v. Mitchell-C. T. Co., 190 Fed. 544 868
v. Moyer, 40 Kan. 184 3339
v. Murphy, 76 Neb. 545 3777
v. Pillsbury, 29 Kan. 652 1356
v. Rainey, 19 Colo. 225 3311, 3335
v. Ray, 46 Neb. 750 1138
v. Reese, 5 C. C. A. 510, 56 Fed. 288 4789
v. Shovell, 39 Colo. 436 4705, 4710
v. Stanwood, 71 Neb. 150, 158 1449
v. Travelers' Ins. Co., 83 Fed. 676 3214
v. Wyler, 158 U. S. 285 5126
v. Young, 19 Kan. 488 4698, 4816
Union R. Co. v. Carter, 129 Tenn. 459 1343, 4869
v. Hunton, 114 Tenn. 609 4130, 4135, 4143
v. Raine, 114 Tenn. 569 3965, 3987, 4033
Union R. T. Co. v. McClure Co., 146 Fed. 623 4505
Union R. & T. Co. v. Traube, 59 Mo. 355 3389
Union Ref. Co. v. Barton, 77 Ala. 148 258
Union S. Co. v. Arkansas S. R. Co., 123 La. 555 1723
v. Jones, 128 Fed. 672 2406
Union S. Y. Co. v. Chicago, etc., R. Co., 196 U. S. 217 2859
v. Hovencamp (Tex. Civ. App.) 144 S. W. 704 2946
Union S. & M. Works v. Breidenstein, 50 Kan. 53 1676
Union Sav. B. & T. Co. v. Gelbach, 8 Wash. 497 1185
Union Steamboat Co. v. Chaffin's Adm'rs, 204 Fed. 412 5013
Union Stone Co. v. Wilmington Transfer Co., — Del. —, 90 Atl. 407 4168, 4169
Union T. Co. v. Citizens' T. Co., 185 Pa. 217 2776
v. Pfeil, 39 Ind. App. 51 3968, 3986, 3994, 4107, 4120, 4125
v. Preston Nat. Bank, 144 Mich. 106 1031, 1121
v. Sullivan, 38 Ind. App. 513 1374
Union T. R. Co. v. Jenkins, 1 Caines 381 1527
v. Peet Bros. Mfg. Co., 58 Kan. 197 4033, 4043, 4127
Union Village & J. R. Co., In re, 53 Barb. 457 3949, 3977
Union W. P. Co. v. Lewiston, 101 Me. 564 1135
v. Pingree, 91 Me. 440 3143, 3185, 3258, 3263
United B. Co. v. Stoltenberg, 211 Ill. 531 4937
United E. & C. Co. v. Broadnax, 136 Fed. 351 2259
United Flour Mills Co. v. Kryda, 185 Ill. App. 610 2235
United Horse S. & N. Co. v. Stewart, 13 App. Cas. 401 4474
United Importers' Co., In re, 7 New Zeal. 229 1114
United Iron Works v. Outer Harbor Dock & Wharf Co., 168 Cal. 81 1502
United Merchants' R. & I. Co. v. American B. Co., 71 Misc. (N. Y.) 457 2588
v. American B. Co., 128 N. Y. Supp. 666 2588
United Merthyr C. Company, In re, L. R. 15 Eq. 46 3786
United N. Co. v. Worthington, 13 Fed. 392 4450
United P. Co. v. Matheny, 81 Ohio 204 335, 1313
United Press v. Abell Co., 179 App. Div. (N. Y.) 550 378
United R. E. Co. v. McDonald, 140 Mo. 605 2776
United R. & E. Co. v. Biedler, 98 Md. 564 109
v. Cloman, 107 Md. 681 1461
v. Dean, 117 Md. 686 4745, 4786
v. Deane, 93 Md. 619 3467
v. Riley, 109 Md. 327 4723
v. Wehr, 103 Md. 323 2277
United S. Co. v. Summers, 110 Md. 95 888, 2654
United S. S. Co. v. Haskins, 181 Fed. 962 3387, 3436
United Service Co., In re, L. R. 6 Ch. 212 306

[REFERENCES ARE TO PAGES]

United Shoe Mach. Co. v. Abbott, 158 Fed. 762 869, 874
v. Dean, 51 Pa. Super. Ct. 88 4353
v. Holt, 185 Mass. 97 4226
United Society v. Brooks, 145 Mass. 410 2227
United States, 39 Ct. of Cls. 508 2379
United States v. Adams, 7 Wall. 463 816
v. Addison, 6 Wall. 291 1772, 2557
v. Alcorn, 145 Fed. 995 832
v. American Exch. Nat. Bank, 70 Fed. 232 1873
v. American S. Co., 163 Fed. 228 1598, 1607
v. American S. Co., 200 U. S. 197 2744
v. Arnold, 1 Gall. 348 1038, 1567, 1570, 1571, 1575
v. Ballantine, 138 Fed. 312 1608
v. Baltimore & O. S. W. R. Co., 226 U. S. 14 5038
v. Bank, 15 Pet. 393 1818
v. Barber, 74 Fed. 483 1039
v. Barker, 1 Paine 156 1903
v. Bayard, 127 U. S. 251 1039
v. Beaty, 198 Fed. 284 4134
v. Behan, 110 U. S. 338 235, 291, 2687, 2688, 2695, 2701, 2709
v. Bernard, 121 C. C. A. 190, 202 Fed. 728 1272, 3740
v. Bernard, 202 Fed. 728 3746
v. Bethlehem S. Co., 205 U. S. 105, rev'g 41 Ct. of Cls. 19 845, 862
v. Bostwick, 94 U. S. 53 3150
v. Boyd, 15 Pet. 187 1582, 1586, 1588
v. Bradley, 10 Pet. 343 1851
v. Brindle, 110 U. S. 688 2460, 2499
v. Broadhead, 127 U. S. 212 1039
v. Brown, Gilpin 155 1558
v. Butler, 114 Fed. 582 1133
v. Campbell, 170 Fed. 318 1591
v. Chandler Dunbar Water Power Co., 229 U. S. 53 3051
v. Chicago, M. & P. S. Ry. Co., 197 Fed. 624 5053
v. Chicago, M. & St. P. Ry. Co., 149 Fed. 486 5041
v. Child, 12 Wall. 232 757
v. Cheeseman, 3 Sawyer 424 1583, 1590, 2755
v. Clyde, 13 Wall. 35 757
v. Colorado & N. W. Ry. Co., 157 Fed. 321 5043, 5050, 5053
v. Curtis, 100 U. S. 119 1038, 1117, 1575
v. Dashiel, 4 Wall. 182 1577, 1578
v. Denvir, 106 U. S. 536 1117, 1133
v. Dudley, 21 D. C. 337 1585
v. Dumplin Island, 1 Barb. 24 3959
v. Eccles, 111 Fed. 490 3792
v. Eckford, 1 How. 250 706, 1582, 1586, 1588
v. Eckford, 7 How. 688 1589
v. Eggleston, 4 Sawyer 199 1122
v. Ennis, 132 Fed. 133 2796
v. Flint L. Co., 87 Ark. 80 4257
v. Freel, 186 U. S. 309 2792
v. Freis, 3 Dall 515 1483
v. Gentry, 119 Fed. 70, 55 C. C. A. 658 3790
v. Gibert, 2 Sumn. 19 1307
v. Giles, 9 Cranch 212 1614
v. Gillies, 144 Fed. 991 559
v. Gordon, 1 Brock. 190, 7 Cranch 287 1558
v. Grizzard, 219 U. S. 180 3968, 3982, 3993
v. Gurney, 4 Cranch 333 806, 874
v. Haskell, 4 Wash. C. C. 402 1307
v. Heaton, 128 Fed. 414 2849
United States v. Hoar, 2 Mason 314 1043
v. Hodson, 10 Wall. 395 1558
v. Homestake M. Co., 117 Fed. 481 3788, 3789, 3791
v. Honolulu P. Co., 122 Fed. 581 4002, 4049
v. Howell, 4 Wash. C. C. 620 764
v. January, 7 Cranch 572 707, 1582, 1588
v. Justice, 14 Wall. 535 757
v. Keehler, 9 Wall. 83 1577, 1578
v. Kirkpatrick, 9 Wheat. 720 714, 736, 1591, 1596
v. Knabe, 147 Fed. 802 782
v. La Jeune Eugenie, 2 Mason 409 1145
v. Land in Monterey County, 47 Cal. 515 4053, 4106
v. Lewis P. Co., 160 Fed. 989 1737
v. Linn, 1 How. 104 1582
v. Linn, 2 McLean 501 707
v. Lissner, 12 Fed. 840 596
v. Lyman, 1 Mason 482 662
v. McKee, 91 U. S. 442 1039
v. Magoon, 3 McLean 171 1391, 4260
v. Martin, 94 U. S. 400 2462, 2484
v. Mexican I. R. Co., 154 Fed. 519 1067
v. Meyers, 190 Fed. 688 4092
v. Mills, 9 Fed. 684 4257
v. Mock, 149 U. S. 273 3737
v. Molloy, 144 Fed. 321 2230
v. Montell, Taney 47 864
v. Moore, 2 Brock. 317 1607
v. Mora, 97 U. S. 413 1558
v. Morgan, 3 Wash. C. C. 10 1558
v. Morgan, 99 Fed. 570 2717
v. Moses, 126 Fed. 58 2461
v. Nahant, 153 Fed. 520 3968, 4065, 4125, 4151
v. Narragansett, 180 Fed. 260 4100
v. New York & P. R. S. S. Co., 197 Fed. 995 3315
v. Nicholl, 12 Wheat. 505 1591
v. North Carolina, 136 U. S. 211 1040, 1163
v. O'Neill, 198 Fed. 677 3946
v. Pine River L. & I. Co., 78 Fed. 319 4307
v. Pine River L. & I. Co., 89 Fed. 907 4211, 4269
v. Prescott, 3 How. 578 1576, 1577, 1578
v. Quinn, 122 Fed. 65 1093
v. Rogers, 28 Fed. 607 1559
v. Rundle, 100 Fed. 400 2744
v. Rundle, 107 Fed. 227 2754
v. St. Anthony R. Co., 192 U. S. 524 3789
v. Sanborn, 135 U. S. 271 1005, 1117
v. Sargent, 89 C. C. A. 81, 162 Fed. 81 4150
v. Seufert Bros. Co., 78 Fed. 520 4051
v. Sherman, 98 U. S. 565 1039, 1040
v. Simpson, 3 P. & W. 437 2814
v. Smith, 94 U. S. 214 47, 252, 476
v. Smith, 110 Fed. 338 4055
v. Speed, 8 Wall. 77 252, 2696, 2704, 2709, 2715
v. Spencer, 2 McLean 405 1582, 1614
v. Stone, 106 U. S. 525 1587
v. Taffe, 78 Fed. 524 4051
v. Taffe, 86 Fed. 830 4019
v. Taylor, 35 Fed. 484 1276, 3779, 3828
v. Thomas, 15 Wall. 337 1578
v. Throckmorton, 98 U. S. 61 17
v. Tillotson, 1 Paine 305 2762
v. Tingey, 5 Pet. 129 1558, 1559

[REFERENCES ARE TO PAGES]

United States v. United States F. & G. Co., 151 Fed. 534 832, 859
v. Ute C. & C. Co., 158 Fed. 20 3824, 4257, 4259
v. Van Zandt, 11 Wheat. 184 1591
v. Verdier, 164 U. S. 213 1039, 1040
v. Vermont M. Co., 13 App. Cas. (D. C.) 506 2748, 2760
v. Walker, 128 Fed. 1012 1039
v. Wann, 3 McLean 179 1616
v. Watts, 1 New Mex. 553 1578
v. Welch, 217 U. S. 333 3972, 3994
v. West, 8 D. C. App. Cas. 59 2757
v. Williams, 18 Fed. 475 3809
v. Withers, 130 Fed. 696 40, 317
United States B. Co. v. Stoltenberg, 113 Ill. App. 435 4935
United States B. & P. Co. v. Browne, 25 Ohio C. C. 347 2520
United States B. & S. Co. v. Thissell, 137 Fed. 1 760
United States Bank v. Bank, 10 Wheat. 333 647
v. Chapin, 9 Wend. 471 951, 953
United States Ben. Soc. v. Watson, 41 Ind. App. 452 1806
United States C. Co. v. Canon City C. Co., 24 Colo. 116 3791
United States Cast Iron Pipe & Foundry Co. v. City of Chicago, 185 Ill. App. 558 1417
United States E. L. Co. v. Sullivan, 22 App. Cas. (D. C.) 115 4917, 4927, 4934
United States Exp. Co. v. Backman, 2 Cin. Super. Ct. 251, 28 Ohio St. 144 20, 3386, 3412
v. Haines, 67 Ill. 137 3344
v. Joyce, 36 Ind. App. 1 3417
v. Keefer, 59 Ind. 263 3425
v. Koerner, 65 Minn. 540 41, 3284
v. Taylor (Tex. Civ. App.), 156 S. W. 617 112, 4187
v. Wahl, 94 C. C. A. 260, 168 Fed. 848 4673
United States F. & G. Co. v. American B. Co., 41 Ind. App. 620 2741
v. Board of Education, 118 Ky. 355 1584, 1597
v. Carnegie Trust Co., 161 App. Div. (N. Y.) 429 2804
v. Citizens' Nat. Bank, 147 Ky. 810 1777
v. Cochrane, 81 Wash. 192 2758
v. Des Moines Nat. Bank, 74 C. C. A. 553 113
v. Downey, 38 Colo. 414 2792
v. Ettenheimer, 70 Neb. 144 1560
v. Faulkner, 144 Ky. 629 1584
v. French Mut. Gen. Soc. of Mut. Ins. against Theft, 212 Fed. 620 2754
v. Fultz, 76 Ark. 410 2747
v. Haggart, 163 Fed. 801 2872
v. Hittle, 121 Iowa 352 2885
v. Howell, 74 Wash. 596 2898
v. Jones, 133 Ky. 621 1714, 1735
v. Millstead (Ky.), 109 S. W. 875 1595
v. Rainey, 120 Tenn. 357 1559, 1574
v. Rice, 148 Fed. 206 2792
v. United States, 150 Fed. 550 1595
v. United States, 191 U. S. 416 2758
United States Frumentum Co. v. Lauhoff, 216 Fed. 610 4452
United States Home Co. v. O'Connor, 48 Colo. 354 1134, 4389
United States Insurance Co. v. Lenox, 1 Johns. Cas. 377 3297
United States L. Ins. Co. v. Salmon, 91 Hun 535, aff'd 157 N. Y. 682 2796
United States M. Co. v. Sperry, 26 Fed. 727 962, 1211
United States Morris v. Summerl, 2 Wash. C. C. 203 2933
United States Mut. Acc. Ass'n v. Barry, 131 U. S. 100 3080
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United States Nat. Bank v. Waddingham, 7 Cal. App. 172 959, 1876
United States Rubber Co. v. Peterman, 119 Ill. App. 610 1120
United States S. Co. v. Parry, 92 C. C. A. 519, 166 Fed. 407 4686
v. Sisam, 191 Fed. 293 3893, 3894, 3905, 3938
United States Savings & L. Co. v. Beckley, 137 Ala. 119 1163
United States Tel. Co. v. Gildersleeve, 29 Md. 232 3549, 3550, 3554, 3604, 3606
v. Wenger, 55 Pa. 262 3566
United States Trust Co. v. O'Brien, 143 N. Y. 284 194, 244, 251, 2573, 3174
United Surety Co. v. Summers, 110 Md. 95 842, 885, 2627
United W. W. Co. v. Farmers' L. & T. Co., 11 Colo. App. 225 623
Universal L. Ins. Co. v. Binford, 76 Va. 103 3085
Unsell v. Hartford L. & A. Ins. Co., 32 Fed. 443 1089
Unterberger v. Scharff, 51 Mo. App. 102 1497, 1515, 4549
Untermeyer v. Freund, 50 Fed. 77 4458
v. Freund, 58 Fed. 205 4437, 4457
Unz v. Price, 22 Ky. L. Rep. 791 3256
Upcher v. Oberlender, 50 Kan. 315 1431
Upchurch v. Robertson, 127 N. C. 127 4502
Updegraff v. Lesem, 15 Colo. App. 297 3256, 3257
v. Spring, 11 S. & R. 188 1224
Updegrove v. Pennsylvania, etc., R. Co., 132 Pa. 540 769
v. Zimmerman, 13 Pa. 619 469, 4568
Updike v. Ten Broeck, 32 N. J. L. 105 2462, 2470, 2517
Upham v. Barbour, 65 Minn. 364 4230
v. Dickinson, 50 Ill. 97 1510
v. Lefavour, 11 Metc. (Mass.) 174 728, 736, 737, 738, 2973
v. Prince, 12 Mass. 14 2768
v. Smith, 7 Mass. 265 836, 899
Upjohn v. Ewing, 2 Ohio St. 13 422, 771
Uppinghouse v. Mundel, 103 Ind. 238 15
Upson C. & M. Co. v. Williams, 7 Ohio C. C. (N. S.) 293, 28 Ohio C. C. 388 432, 441, 3877, 3880, 3889, 3937
Upton v. Hume, 24 Ore. 420 4516, 4519, 4520, 4571, 4576
v. Julian, 7 Ohio St. 95 542
v. Levy, 39 Neb. 331 4379
v. O'Donahue, 32 Neb. 565 870
v. South Reading Branch R. Co., 8 Cush. 600 3957
v. Swedish A. Hospital, 157 Ill. App. 126 1794
v. Times Democrat P. Co., 104 La. 141 4586, 4590
v. Townsend, 17 C. B. 30 3122, 3124, 3125
v. Upton, 51 Hun 184 4546
v. Vail, 6 Johns. 181 4363, 4372, 4374

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Urbahn v. Martin, 19 Tex. Civ. App. 93 2798, 2865, 2866, 2868
Urban v. Tyszka, 16 Pa. Dist. 625 4615
Urko Mendi, The, 216 Fed. 427 2716, 2721, 2726
Urnbach v. Pye, 55 N. Y. Misc. 465 2195
Urquhart v. Dunham, etc., R. Co., 156 N. C. 581 1489
v. McIver, 4 Johns. 103 278, 2955
Ursula Bright S. S. Co. v. Amsinck, 115 Fed. 242 3007
Urton v. Price, 57 Cal. 270 773
Usborne v. Limerick Market Trustees, [1900] 1 Ch. 85 961
Usher v. Dansey, 4 M. & S. 94 1360
v. Hiatt, 18 Kan. 195 176
v. Noble, 12 East 639 3026
v. Scranton R. Co., 132 Fed. 405 1499
v. Severance, 20 Me. 9 4595
v. West Jersey R. Co., 126 Pa. 206 4952
v. Western U. Tel. Co., 122 Mo. App. 98 1330, 3570
Usrey Lumber Co. v. Huie-Hodge Lumber Co., 135 La. 511 2301, 2361
Ussery v. Augusta-A. R. Co., 79 S. C. 209 3502
Utah O. Co. v. Keith, 18 Utah 464 3142, 3190
Ute Indians v. United States, 45 Ct. of Cls. 440 1040, 1201
Utica Bank v. Finch, 3 Barb. Ch. 293 1778
Utica, etc., R. Co., In re, 56 Barb. 464 3972
Utica, etc., R. Co. v. Gates, 8 App. Div. (N. Y.) 181, aff'g 21 N. Y. Misc. 205 2162
Utter v. Chapman, 38 Cal. 659 2556, 3266
v. Chapman, 43 Cal. 279 3266, 3272, 3278
v. Jaffray, 114 Ill. 470 1360
v. Stuart, 30 Barb. 20, 2 Hill 288 2018
Utterbach v. Binns, 1 McLean 242 3710
Utterson v. Elmore, 154 Mo. App. 646 2793
Uvalde E. L. Co. v. Parsons (Tex. Civ. App.), 138 S. W. 163 3841, 3853

V

Vail v. Anderson, 61 Minn. 552 691
v. Jersey Little Falls Mfg. Co., 32 Barb. 564 2522
v. McMillan, 17 Ohio St. 617 817
v. Nickerson, 6 Mass. 261 1244, 1246
v. Reynolds, 118 N. Y. 297 1458, 4392, 4416
Vaise v. Delaval, 1 T. R. 11 1482, 1484
Vale v. Trader, 5 Kan. App. 307 3138, 3140
Valente v. Sierra R. Co., 151 Cal. 534 1476
v. Sierra R. Co., 158 Cal. 412 4860, 4877, 4890, 4895
v. Weinberg, 80 Conn. 134 2687, 2688
Valentine v. Donohoe K. B. Co., 133 Cal. 191 2770
v. Ruste, 93 Ill. 585 1079
v. Wheeler, 116 Mass. 478 2885
Valette v. Mason, Smith (Ind.) 89 1822
Valk v. Erie R. Co., 130 App. Div. (N. Y.) 446 3419
Vallancourt v. O'Rorke, 1 Vict. (Ct. of Mines) 43 3825
Vallancy v. Hunt, 26 N. D. 611 1683
Vallandingham v. Ray, 128 Ky. 506 1655
Valle v. Fleming, 29 Mo. 152 3709
Vallejo, etc., R. Co. v. Reed, etc., Co., 169 Cal. 545 3961
Vallentyne v. Immigration L. Co., 95 Minn. 195 1981
Vallet v. Parker, 6 Wend. 615 1828
Valley v. Boston & M. R. Co., 103 Me. 106 747
Valley Nat. Bank of Des Moines v. Cownie, 164 Iowa 421 2769
Valley Sav. Bank v. Mercer, 97 Md. 458 778
Valley Stream, In re, 152 App. Div. (N. Y.) 422 4132
Vallier v. Ditson, 74 Me. 553 662
v. Walsh, 6 Up. Can. C. P. 459 1989
Vallo v. United States Exp. Co., 147 Pa. 404 149, 4785
Valparaiso v. Moffitt, 12 Ind. App. 250 3850, 3939
Valparaiso City W. Co. v. Dickover, 17 Ind. App. 233 3847, 3850, 3882
Valparaiso L. Co. v. Tyler, 177 Ind. 278 1484, 4921
Valpy v. Oakeley, 16 Q. B. 941 2276, 2299
Valton v. National L. Assur. Co., 22 Barb. 9, 20 N. Y. 32 3071
Vamplew v. Parkgate Iron & Steel Co., [1903] 1 K. B. 851, 72 L. J. K. B. 575, 88 L. T. 756, 51 W. R. 691, 67 J. P. 417, 19 T. L. R. 421 5173
Van Pub. Co. v. Westinghouse, etc., Co., 72 App. Div. (N. Y.) 121 4385
Vanada v. Hopkins, 1 J. J. Marsh. 293 1953
Van Aken v. Gleason, 34 Mich. 477 732
Van Alen v. Rogers, 1 Johns. Cas. 283 3692
v. Rogers, 3 Johns. Cas. 457 3693
Van Ankin v. Westfall, 14 Johns. 232 4581
Van Arman v. Byington, 38 Ill. 433 2459
Van Arsdale v. Boardman, 3 How. Pr. 60 1898
v. Edwards, 24 Okla. 41 1815
v. Howard, 5 Ala. 596 4383
v. Rundel, 82 Ill. 63 193, 284
Van Arsdale-O. B. Co. v. Martin, 81 Kan. 499 1915
Van Atta v. McKinney, 16 N. J. L. 235 2490
Van Baalen v. Dean, 27 Mich. 104 1680
Vanbebber v. Plunkett, 26 Ore. 562 746
Van Benschooten v. Lawson, 6 Johns. Ch. 313 1202, 1214
Van Benschoten v. Yaple, 13 How. Pr. 97 4568, 4574, 4585
Van Benthuysen v. De Witt, 4 Johns. 213 1553, 1556
Van Beuren v. Van Gaasbeck, 4 Cow. 497 952, 962
v. Wotherspoon, 74 App. Div. (N. Y.) 123 3098
Van Blarcom v. Broadway Bank, 37 N. Y. 540 675
Van Boskerek v. Torbert, 184 Fed. 419 1502
Van Bracklin v. Fonda, 12 Johns. 468 2377
Van Brimmer v. Texas & P. Ry. Co., 190 Fed. 394 5067
Van Brocklen v. Smeallie, 140 N. Y. 70 2228, 2235, 2237, 2241, 2242, 2244
Van Brocklin v. Brantford, 20 Up. Can. Q. B. 347 3185
Van Bruen v. Fishkill W. Co., 50 Hun 448 3882
Van Brunt v. Cincinnati, etc., R. Co., 78 Mich. 530 4939
v. Schenck, 11 Johns. 377 4204

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Van Buren County Sav. Bank v. Sterling W. M. Co., 125 Iowa 645 709
Van Buskirk v. Board of Education, 78 N. J. L. 650 888
v. Murden, 22 Ill. 446 2667
Vanbuskirk v. Quincy, etc., R. Co., 131 Mo. App. 357 1357, 1363, 1367, 3436
Van Camp v. Keokuk, 130 Iowa 716 107, 1362
Vance v. Bloomer, 20 Wend. 196 2329
v. English, 78 Ind. 80 2790
v. Erie R. Co., 32 N. J. L. 334 1332
v. Evans, 11 W. Va. 342 3147
v. House, 5 B. Mon. 537 2211, 2212
v. Inhabitants, etc., 7 Blackf. 241 3696
v. Lancaster, 3 Hayw. 130 2851
v. McBurnett, 94 Ga. 251 1870, 2331, 2411
v. Vance, 5 T. B. Mon. 521 1117
v. Vandercook, 170 U. S. 468 4318
Vancleave v. Beach, 110 Ind. 269 4211
v. Clark, 118 Ind. 61 2596
Van Cleef v. Therasson, 3 Pick. 12 656, 662
Van Cleve v. St. Louis, etc., R. Co., 124 Mo. App. 224 1376
Van Clief v. Van Vechten, 130 N. Y. 571 2599, 2664
Vandalia Coal Co. v. Bland, — Ind. App. —, 108 N. E. 176 4922
v. Yemm, 175 Ind. 524 4689, 4778
Vandalia R. Co. v. Holland, — Ind. —, 108 N. E. 580 5066
Vandenberg v. Slagh, 150 Mich. 225 2578
v. Truax, 4 Denio 464 143, 153, 3818
Vanderbeck v. Vanderbeck, 30 N. J. Eq. 265 643, 779
Vanderberg v. Connolly, 18 Utah 112 1733, 2888, 4836
Vanderbilt v. Bishop, 188 Fed. 971 4389
v. Eagle I. Works, 25 Wend. 665 542
v. Ocean S. S. Co., 215 Fed. 886 3390, 4210
v. Richmond T. Co., 2 N. Y. 479 1335
Vandergrift v. Abbott, 75 Ala. 487 547, 3244, 3258
v. Cowles E. Co., 161 N. Y. 435 378, 2607
Vanderkemp v. Shelton, 11 Paige 28, 1 Clark Ch. 321 2791
Van Derlyn v. Mack, 137 Mich. 146 5101
Vanderpool v. Richardson, 52 Mich. 336 3667, 3670
v. Smith, 2 Daly 135 3233
Vanderslice v. Newton, 4 N. Y. 130 1356, 1363
v. Philadelphia, 103 Pa. 102 3901
Vanderveer v. Moran, 79 Neb. 431 4770
v. Sutphin, 5 Ohio St. 293 470, 4513, 4517, 4576
Vander Velde v. Leroy, 140 Mich. 359 4680
Vanderwalker v. Osmer, 65 Barb. 556 2388
Vander Wegen v. Great Northern R. Co., 114 Minn. 118 1395
Vanderwerkin v. New York, etc., R. Co., 6 Abb. Pr. 239 4954
Van Deusen v. Blum, 18 Pick. 229 543
v. Newcomer, 40 Mich. 90 4842
v. Young, 29 N. Y. 9 1431, 3775, 3778, 3834, 3837
Vandevoort v. Gould, 36 N. Y. 639 1067, 3104
Van de Wiele v. Garbade, 60 Ore. 585 4392
Vandine v. Burpee, 13 Metc. (Mass.) 288 1419, 1422, 1432, 1442
Vandiver v. O'Gorman, 57 Minn. 64 4284
v. Pollak, 107 Ala. 547 424, 438, 2859, 2864, 2891
v. Robertson, 125 Mo. App. 307 2
v. Waller, 143 Ala. 411 1685, 1694, 1695, 1699, 1704, 1706
Van Doren v. Pennsylvania R. Co., 35 C. C. A. 282, 93 Fed. 260 4952, 4954
v. Tjader, 1 Nev. 380 2779
v. Van Doren, 45 N. J. Eq. 580 1121
Van Dusan v. Grand Trunk R. Co., 97 Mich. 439 3464
Vandyke v. Brown, 8 N. J. Eq. 657 2970
Vane v. Lord Barnard, Gilb. Eq. 7 2170
Vaneables v. West, 3 New South Wales St. Rep. 54 4268,
Van Epps v. Harrison, 5 Hill 63 515, 532, 556, 564, 2455, 2828, 4369, 4381, 4402
v. Harrison, 40 Am. Dec. 323 515
Van Etten v. Kosters, 48 Neb. 152 1802
v. Newton, 134 N. Y. 143 3303, 3304
Van Gilder v. Bullen, 159 N. C. 291 2157, 4390
Van Gordon v. Ormsby, 60 Iowa 510 1253
Van Hemert v. Porter, 11 Metc. (Mass.) 210 1146
Van Hoeffen v. Columbia Taxicab Co., 179 Mo. App. 591 3468, 3470
Van Hoover v. Van Hoover, 18 Mo. App. 19 1759
Van Hoozier v. Hannibal, etc., R. Co., 70 Mo. 145 401, 3852
Van Horn, In re, 167 Fed. 1021 886
Van Horn v. Crane, 1 Paige 455 3132
v. Rucker, 33 Mo. 391 2242
Van Horne v. Brown, 85 N. J. L. 544 38
Van Houston v. Morse, 162 Mass. 414 3685
Van Husan v. Kanouse, 13 Mich. 303 826, 1102, 1103
Van Ingen v. Star Co., 1 App. Div. (N. Y.) 429, aff'd 157 N. Y. 695 4508, 4537, 4544
Van Kannel v. Higley, 172 Ill. App. 88 841, 858, 860
Van Keuren v. Miller, 78 Hun 173 413
Van Leuven v. Lyke, 1 N. Y. 515 1390
Van Lew v. Parr, 2 Rich. Eq. 321 2200, 2202, 2212
Van Lien v. Byrnes, 1 Hilt. 133 2500
Vanloon v. Vanloon, 159 Mo. App. 255 371, 4508, 4537, 4573, 4574
Van Meter v. Bass, 40 Colo. 78 4644
v. Crews (Ky.), 148 S. W. 40 372
v. Crews, 149 Ky. 335 4835
Vanmeter v. True, 61 Ky. L. Rep. 320 4784
Van Middlesworth v. Van Middlesworth, 32 Mich. 183 659
Van Name v. Barber, 115 App. Div. (N. Y.) 593 700
v. Van Name, 23 How. Pr. 247 3716
Van Natta v. Mutual S. Ins. Co., 2 Sandf. 490 3047
Vannatta v. Vannatta, 21 Ky. L. Rep. 1464 1692, 1707
Van Ness v. Fisher, 5 Lans. 236 257
v. Pacard, 2 Pet. 137 3256
Vann v. Lunsford, 91 Ala. 576 2309
Van Norman v. Fitchette, 100 Minn. 145 2506
Van Olinda v. Hall, 88 Hun 452 4978, 4980

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Van Ostrand v. Reed, 1 Wend. 424 2843, 2847
Van Patten v. Taber, 71 Misc. (N. Y.) 610 2506
Van Pelt v. Corwine, 6 Ind. 363 2540
v. Davenport, 42 Iowa 308 3867, 3923
v. Little, 14 Cal. 194 1601
v. McGraw, 4 N. Y. 110 3838
Van Raalte v. Epstein, 202 Mo. 173 2511, 2902
Van Raugh v. Van Arsdaln, 3 Cai. 154 1151
Van Rensselaer v. Bradley, 3 Denio 135 3132, 3137, 3138
v. Chadwick, 22 N. Y. 32 3132
v. Chadwick, 24 Barb. 333 775, 3137
v. Gallup, 5 Denio 454 3137
v. Gifford, 24 Barb. 349 3137
v. Jewett, 2 N. Y. 135 943, 1031, 1069, 1097, 3147, 3148, 3401, 3402
v. Jones, 2 Barb. 643 1069, 1096, 3137, 3147, 3148
v. Mould, 48 Hun 396 3797
v. Platner, 1 Johns. 276 1068, 1096
v. Platner, 2 Johns. Cas. 17 1354, 1358, 1528
v. Radcliff, 10 Wend. 639 3734
v. Roberts, 5 Denio 470 704, 714, 724, 725
Van Riper v. Morton, 61 Mo. App. 440 1241
v. Van Riper, 2 N. J. Eq. 1 640
v. Williams, 2 N. J. Eq. 407 2211, 2212
Van Rumsdyk v. Kane, 1 Gall. 371 1146
Vansandan v. Browne, 9 Bing. 402 2541
Vansant v. Kowalewski, — Del. —, 90 Atl. 421 1261, 4661, 4690, 4731, 4743, 4774
Van Sceiver v. King, 176 Mich. 605 698, 713, 714, 728, 737
Van Schaack v. Northern T. Co., 3 Biss. 394 3386
Van Schaick v. Edwards, 2 Johns. Cas. 355 1146, 1147, 1878
v. Lese, 31 N. Y. Misc. 610 2052
v. Ramsey, 90 Hun 550 4287
v. Trotter, 6 Cow. 599 1530
Van Schoick v. Delaware Canal, 20 N. J. L. 249 399
v. Delaware & R. C. Co., 20 N. J. L. 249 4014
Van Sickle v. Brown, 68 Mo. 627 4636
v. Drain. Dist. No. 1, 186 Mo. App. 563 4145
Van Siclen v. New York, 64 App. Div. (N. Y.) 437 3933
v. New York, 32 N. Y. Misc. 403 3878
Van Slambrook v. Little's Est., 127 Mich. 61 2464
Van Siochem v. Villard, 207 N. Y. 587 4375, 4378, 4383
Van Slyck v. Kimball, 8 Johns. 198 2874
Van Steinburgh v. Tobias, 17 Wend. 562 443, 3938
Vanstone v. Hopkins, 49 Mo. App. 386 2295
Van Storch v. Winslow, 13 R. I. 23 4165
Vanstory C. Co. v. Stadiem, 149 N. C. 6 2241, 2244, 2245
Van Tassel v. Capron, 1 Denio 250 4532
Van Tassell v. Wakefield, 214 Ill. 205 3710
Vant Hul v. Great Northern R. Co., 90 Minn. 329 4812
Van Tine v. Crane, 1 Wend. 524 423
Van Trees v. Territory, 8 Okla. 353 1578
Vantries v. Richey, 8 W. & S. 87 2906
Van Tuyl v. Young, 3 Ohio C. C. (N. S.) 183 886
Van Vacter v. Brewster, 1 Sm. & M. 490 612
v. McKillip, 7 Blackf. 598 4976
Vanvalkenbergh v. Fuller, 6 Paige 10 1252
Van Valkenburgh v. Evertson, 13 Wend. 76 2405
Van Veghten v. Hudson River P. T. Co., 103 App. Div. (N. Y.) 130 3851, 3881
Van Velsor v. Seeberger, 59 Ill. App. 322 4380, 4392
Van Vleet v. Adair, 1 Blackf. 346 1397, 1399, 2318, 2329
v. McLean, 23 Hun 207 4382
v. Sledge, 45 Fed. 750 948
Van Vliet v. Kanter, 65 N. Y. Misc. 48 1037, 1110
Van Vrankin v. Kansas City E. R. Co., 84 Kan. 287 4793
Van Vronker v. Eastman, 7 Metc. (Mass.) 157 3728, 3730
Van Waggoner v. McEwen, 1 Green's Ch. 422 2209
v. McEwen, 2 N. J. Eq. 412 2211
Van Wagner v. Van Nostrand, 19 Iowa 427 2059, 2181, 2186
Van Wagoner v. New York C. Co., 36 Hun 552 1434
Van Wart v. Smith, 1 Wend. 219 2931
v. Woolley, 3 B. & C. 439 495, 2931
v. Woolley, 5 Dowl. & R. 374 2969
Van Werden v. Equitable L. Assur. Soc., 99 Iowa 621 624, 3083
Van Wie v. Southern Wisconsin P. Co., 148 Wis. 410 3919
Van Wiginton v. Pulitzer Pub. Co., 218 Fed. 795 4539, 4587
Van Winkle v. Johnson, 11 Ore. 469 2854, 2862
v. Satterfield, 58 Ark. 617 2550, 2558, 2561, 2565
v. United States M. S. Co., 37 Barb. 122 3389, 3433
v. Wilkins, 81 Ga. 93 191, 521, 1247, 2343, 2366
Van Winter v. Henry County, 61 Iowa 684 1512, 4810
Van Wormer v. Crane, 51 Mich. 363 3153
Van Wyck v. Allen, 69 N. Y. 61 238, 284, 408, 2374, 2423, 2441, 3800
v. Montrose, 12 Johns. 350 1556, 1557
Van Wycklen v. Brooklyn, 118 N. Y. 424 1422
Van Zandt v. Hanover Nat. Bank, 149 Fed. 127 530
Varco v. Chicago, etc., R. Co., 30 Minn. 18 1135, 1137, 1138, 1141
Vargas v. American R. Co., 1 Porto Rico Fed. 292 4918, 4937
Varick v. Crane, 4 N. J. Eq. 128 1158
Variety Mfg. Co. v. Landaker, 227 Ill. 22 327, 4787
Varner v. Nobleborough, 2 Me. 121 659
Varney v. Conery, 77 Me. 527 753
Varnham v. Council Bluffs, 52 Iowa 698 4739
Varzin, The, 180 Fed. 892 2726, 2728
Vasby v. United States G. Co., 46 Mont. 411 4822
Vashon v. Barrett, 105 Va. 490 1116
Vassau v. Madison E. R. Co., 106 Wis. 301 1268, 1281, 1338, 3482, 3503, 3513
Vassel v. Cole, 10 Mo. 634 4960

[REFERENCES ARE TO PAGES]

Vatable v. New York, etc., R. Co., 96 N. Y. 49 874
Vatel v. Herner, 1 Hilt. 149 548, 3129, 3260
Vaugh v. Bunker Hill & S. M. & S. Co., 126 Fed. 895 417
v. Wabash R. Co., 62 Mo. App. 461 3335
v. Walsh, 122 Wis. 486 523
Vaughan, The, 14 Wall. 258 5015
Vaughan v. Bibb, 46 Ala. 153 1124
v. Blanchard, 1 Yeates 175 3122
v. Campbell, 1 Brev. 478 2385
v. Goode, Minor 417 1108, 1880
v. Howe, 20 Wis. 497 1069, 1097, 1100, 1135
v. Kennan, 38 Ark. 114 961, 1202, 1206, 1219
v. Menlove, 3 Bing. (N. C.) 468 117
v. Reddick, 32 Ky. L. Rep. 531 2918
v. St. Louis & S. F. R. Co., 177 Mo. App. 155 5132
v. Wood, 1 Myl. & K. 403 2316, 4252
Vaughan and Telegraph, The, 14 Wall. 258 603, 606, 615
Vaughan's S. Store v. Stringfellow, 56 Fla. 708 2439, 2440, 2444
Vaughn v. Farmers' & Merchants' Nat. Bank (Tex. Civ. App.), 126 S. W. 690 1986, 1997
v. Huff, 99 Miss. 110 4311
v. Smith, 177 Ind. 111 3679
v. Wabash R. Co., 62 Mo. App. 461 3346
Vaulx v. Buntin, 127 Tenn. 118 834, 862
v. Herman, 8 Lea 683 1499
Vaupell v. Woodward, 2 Sandf. Ch. 143 803
Vauter v. Elders, 2 Mill, Const. 184 4334
Vautier v. Atlantic Ref. Co., 231 Pa. 8 3840, 3893
Vavasseur v. Krupp, 15 Ch. Div. 474 529
Vawter v. Missouri Pac. R. Co., 84 Mo. 679 4952, 4954
Veasey v. Doton, 3 Allen 380 4375
Veazie v. Bangor, 51 Me. 509 356, 2666, 2667, 2682
v. Parker, 72 Me. 443 2502
v. Somerby, 5 Allen 280 4359
v. Williams, 8 How. 134 4365
v. Willis, 6 Gray 90 2769, 2783
Vedder v. Delaney, 122 Iowa 583 4733, 4735, 4736, 4737, 4740
v. Hildreth, 2 Wis. 427 131
v. Vedder, 1 Denio, 257 396, 3850
Vcendam, The, 46 Fed. 489 2724
Veghte v. Hoagland, 29 N. J. L. 125 390, 399
Veitch v. Russell, 3 Q. B. 928 2489
v. Western U. Tel. Co., 6 Ala. App. 328 3562, 3566
Veiths v. Hagge, 8 Iowa 163 1008
Velte v. United States, 76 Wis. 278 1063
Venard v. Cross, 8 Kan. 248 16, 3833
Vencil v. Quincy, etc., R. Co., 132 Mo. App. 722 3403
Venezuela, 173 Fed. 834 2415, 2421, 2429, 2433, 2455
Vennen v. New Dells Lumber Co., 161 Wis. 370 5191
Vennum v. Mertens, 119 Mo. App. 461 1905
Vent v. Duluth T. Co., 77 Minn. 523 1802
v. Osgood, 19 Pick. 572 2540
Venus, The, 17 Fed. 926 4997, 4998
Venus S. Co. v. Wilson, 152 Fed. 170 3269
Veon v. Creaton, 138 Pa. 48 4741
Verholf v. Van Houwenlengen, 21 Iowa 429 4974
Vermilya v. Chicago, etc., R. Co., 66 Iowa 606 3804
Vermilye v. Postal Tel. C. Co., 205 Mass. 598 3554
Vermont L. & T. Co. v. Dygert, 89 Fed. 123 959, 1164
Vermont State Baptist Convention v. Ladd, 58 Vt. 95 745, 1082
Vernam v. Smith, 15 N. Y. 328 547, 3125, 3129, 3182
v. Wilson, 31 Pa. Super. 257 1990, 2008
Verne v. Williams, 3 Dema. 349 1079
Verner's Est., 6 Watts 250 1121
Verney v. Iddings, 2 Chitty 234 1242
Vernier v. Knauth, 7 App. Div. (N. Y.) 57 2967
Vernon v. Brown, 40 App. Div. (N. Y.) 204 3162
v. Keys, 12 East 632 118, 4374
v. Wedgeworth, 148 Ala. 490 3839, 3840, 3879, 3905
Vernon S. R. Co. v. Mayor, 95 Ga. 387 4086
Verrill v. Minot, 31 Me. 299 3472, 4657
Verry v. Watkins, 7 C. & P. 308 4784, 4971
Versailles, The, 1 Curt. 353 2720
Vertrees v. Head, 138 Ky. 83 2986
Verwers v. Carpenter, 166 Iowa 273 1266, 4959, 4968
Very v. Levy, 13 How. 345 747
Vest v. Speakman, 153 Ala. 393 1364, 4518
Vette v. Sanitary Dist. of Chicago, 260 Ill. 432 399
Veysey v. Thompson, 49 Wash. 571 532
Vial v. Larson, 132 Iowa 208 4509
Viany v. Ferran, 5 Abb. Pr. (N. S.) 110 3112, 3113
Vibbard v. Johnson, 19 Johns. 77 2193, 2380
Vicars v. Wilcocks, 8 East 1 115, 4562
Vicary v. Farthing, Cro. Eliz. 411 1482
v. Foley, 17 Vict. L. R. 407 4255
Vichman v. Boelter, 105 Minn. 60 3235
Vick v. Percy, 7 Sm. & M. 256 2197, 2211
v. Whitfield, Mart. & Hayw. 396 4573
v. Whitfield, 2 Hayw. 222 4579
Vickers v. Chicago, etc., R. Co., 71 Fed. 139 25
v. Vickers, L. R. 4 Eq. 529 2221
v. Wilcocks, 8 East 1 1746
Vickery v. Evans, 16 Ind. 331 2217
v. McCormick, 117 Ind. 594 2280, 2343
v. New London N. R. Co., 87 Conn. 634 5125
v. Ritchie, 202 Mass. 247 2463, 2465
Vicksburg v. Herman, 72 Miss. 211 3951
v. McLain, 67 Miss. 4 4939
Vicksburg R. P. & Mfg. Co. v. Marlett, 78 Miss. 872 3503
v. White, 82 Miss. 468 1479
Vicksburg W. Co. v. Dutton, 98 Miss. 209 1507
v. Mayor, etc., 99 Misc. 132 1716, 1726
Vicksburg W. S. Co. v. Gorman, 70 Miss. 360 2691, 2702
Vicksburg, etc., R. Co. v. Calderwood, 15 La. Ann. 481 4119
v. Jackson (Tex. Civ. App.), 133 S. W. 925 56, 111, 4662
v. Louisiana & A. R. Co., 136 La. 691 4072
v. Patton, 31 Miss. 155 1269, 1344, 3506
v. Phillips, 64 Miss. 693 4851, 5118

[REFERENCES ARE TO PAGES]

Vicksburg, etc., R. Co. v. Putnam, 118 U. S. 545 1477, 4691, 4742, 4752, 5088, 5133, 5134, 5135
v. Ragsdale, 46 Miss. 458 3317, 3328, 3367, 3371, 3379
Victor S. M. Co. v. Heller, 44 Wis. 265 656
Victoria S. S. Co. v. Western Assur. Co. of Toronto, 167 Cal. 348 3006
Victorian Ry. Com'rs v. Coultas, L. R. 13 App. Cas. 222 77, 3480, 3647, 4686
Victory, The, 15 C. C. A. 490, 68 Fed. 395 4987, 4990
Vider v. Chicago, 164 Ill. 354 1015, 1043
Viebahn v. Board of Com'rs, 96 Minn. 276 3839
Viele v. Goss, 49 Barb. 96 4373, 4419
v. Hoag, 24 Vt. 46 2795
v. Judson, 82 N. Y. 32 691
Vienna v. Barclay, 3 Cow. 231 2913
Vierling v. Binder, 113 Iowa 337 3676, 3679, 3683, 3684, 3690
v. Iroquois F. Co., 68 Ill. App. 643 1097
Vietti v. Nesbitt, 22 Nev. 390 941, 1005
Vigers v. Aldrich, 4 Burr. 2482 632
Vilas v. Bundy, 106 Wis. 168 2491
v. Downer, 21 Vt. 419 1446, 2486, 2491, 2510
Viles v. Barre & M. T. & P. Co., 79 Vt. 311 2679
Vilett v. Moler, 82 Minn. 12 4379
Vilhac v. Biven, 28 Cal. 410 605
Viliski v. Minneapolis, 40 Minn. 304 3788, 4260, 4263
Villars v. Palmer, 67 Ill. 204 2814
Villings v. Albright, 66 App. Div. (N. Y.) 239 4976
Villipique v. Shuler, 3 Strohb. 462 4960
Vilter Mfg. Co. v. Tygart's Valley B. Co., 168 Fed. 1002 931
Vinal v. Core, 18 W. Va. 1 1515, 4602, 4628, 4634, 4635, 4636, 4639, 4641, 4644, 4645
v. Richardson, 13 Allen 521 1111
Vincent v. Central City L. & I. Co., 45 Tex. Civ. App. 36 3235
v. Corbett, 94 Miss. 46 4383
v. Dedfield, 98 Mich. 84 3183
v. Leland, 100 Mass. 432 535, 2392
v. McNamara, 70 Conn. 332 406, 425, 437
v. Morrison, 1 Ill. 227 1828
v. New York, etc., R. Co., 77 Conn. 431 312, 3754
v. Stiles, 77 Ill. App. 200 2683
v. Woodland O. Co., 165 Pa. 402 2508
Vine v. Casmey, 86 Minn. 74 1386
Vines v. Tift, 79 Ga. 301 966
Vining v. Leeman, 45 Ill. 248 547
v. Rexford (Pa.), 201 Fed. 904 4869, 4904
Vinnette v. Northern Pac. R. Co., 47 Wash. 320 110
Vinson v. Flynn, 64 Ark. 453 4601
v. Knight, 137 N. C. 408 4208
v. Southern Bell Telephone & Telegraph Co., 188 Ala. 292 3639
Vinton v. Baldwin, 88 Ind. 104 2501
v. Lyons, 131 La. 673 1241, 2113, 2116
v. Mansfield, 48 Conn. 474 1675, 1679, 1681
v. Middlesex R. Co., 11 Allen 304 1347
v. Peck, 14 Mich. 287 1822
Vinyard v. Barnes, 124 Ill. 346 1654, 1679
Viola, The, 52 Fed. 172 2721, 2724, 4989
Violet v. Patton, 5 Cranch 151 2781
v. Rose, 39 Neb. 661 284, 1981, 1983, 2009
Violet Blossom, The, 216 Fed. 379 2716, 2726, 2728
Violett v. Patton, 5 Cranch 142 1853
v. Stettinius, 5 Cranch C. C. 559 3290
Violetta, The, 141 Fed. 690 4987
Viou v. Brooks-S. L. Co., 99 Minn. 97 4787
Vipond v. Townsend, 88 Wis. 285 1918, 1920
Virginia B. & T. Ass'n v. Southern R. Co., 152 N. C. 345 3418
Virginia Beach D. Co. v. Commonwealth, 115 Va. 280 1719, 1741, 1745
Virginia C. P. Co. v. Atlantic C. L. R., 155 N. C. 148 3375
Virginia-Carolina R. Co. v. Booker, 99 Va. 633 4096
Virginia Ehrman and The Agnese, 97 U. S. 316 4990
Virginia F. & M. Ins. Co. v. Cannon, 18 Tex. Civ. App. 588 3052
Virginia M. Co. v. Wilkinson, 92 Va. 98 2198
Virginia R. & P. Co. v. Ferebee, 115 Va. 289 3875, 3886
Virginia, etc., R. Co. v. Bailey, 103 Va. 205 1477
v. Henry, 8 Nev. 165 4010
v. Lovejoy, 8 Nev. 100 4097
v. Lynch, 13 Nev. 92 4115
v. McLean, 158 N. C. 498 3962
v. Nickels, 116 Va. 792 4054
Virginian R. Co. v. Hurt, 112 Va. 622 2776, 3794
v. Jeffries, 110 Va. 471 3853
v. London, 114 Va. 334 3906, 3928
Virtue v. Creamery P. Mfg. Co., 123 Minn. 17 267, 434, 1417, 4601, 4609, 4610, 4647
Vischer v. Talbotton Branch R. Co., 34 Ga. 536 2712
Viskoeil v. Doktor, 27 Ill. App. 232 686
Vitebro v. Friedlander, 120 U. S. 707 3232
Vito v. Birkel, 209 Pa. 206 889
Vivian v. Allen, 9 Colo. App. 147 4392
v. Campion, 2 Ld. Raym. 1125, 1 Salk. 141 3155, 3162
v. Challenger, 45 Pa. Super. 1 1280, 4176
v. Otis, 24 Wis. 518 1582, 2755
Vlasservitch v. Augusta & A. R. Co., 85 S. C. 291 1326, 3447
Vlierboom v. Chapman, 13 M. & W. 539 3294
Vliet v. Camp, 13 Wis. 198 1879
Voegler v. Western U. Tel. Co., 10 Tex. Civ. App. 229 97
Voelckel v. Banner B. Co., 9 Ohio C. Ct. 318 2526
Voelker v. Hill-O. C. Co., 153 Mo. App. 1 4861, 4873, 4882
Vogan v. Caminetti, 65 Cal. 438 1817
Vogel v. McAuliffe, 18 R. I. 791 146, 1268, 3203, 3207, 3230, 4159, 4162, 4185, 4200
v. Shurtliff, 28 Ill. App. 516 572
v. West Plains, 73 Mo. App. 588 103
Vogelgesang v. St. Louis, 139 Mo. 127 103
Vogle v. Brown, 120 Ill. 338, 12 Ill. 252 571
Vogler v. Chicago & Carterville Coal Co., 180 Ill. App. 51 3860, 3883
Vogt v. Grinnell, 123 Iowa 332 3853, 3881, 3884

[REFERENCES ARE TO PAGES]

Vogt v. Hecker, 118 Wis. 306 2666
v. Milwaukee, 99 Wis. 258 2462
v. Schienebeck, 122 Wis. 491 2297
Vohs v. Shorthill, 130 Iowa 538 4743, 4793
Voight v. Baltimore, etc., R. Co., 79 Fed. 561 21
Voigt v. Beller, 56 Mich. 140 1205
v. Milwaukee County, 158 Wis. 666 3962, 4005
Voisin v. Providence W. Ins. Co., 51 App. Div. (N. Y.) 553 3007
Volans v. Owen, 74 N. Y. 528 59, 60
Volkmar v. Third Ave. R. Co., 28 N. Y. Misc. 141 4186
Vollmer v. Stregge, 27 N. D. 579 4974
Vollum v. Simpson, 2 Bos. & P. 368 4362
Volquardsen v. Iowa Tel. Co., 148 Iowa 77 3575
Voltz v. Blackmar, 64 N. Y. 440 1268, 1276 4993
Volund, The, 181 Fed. 643
Von Au v. Magenheimer, 115 App. Div. (N. Y.) 84 1459, 4403
v. Magenheimer, 126 App. Div. (N. Y.) 257 4364, 4365
Von Berg v. Goodman, 85 Ark. 605 3246
Vonderhite v. Walton, 7 Ky. L. Rep. 766 2152, 2182, 2188
Vonder Horst v. Vonder Horst, 88 Md. 127 1084
Von Dorn v. Mengedoht, 41 Neb. 525 2663
Von Fragstein v. Windler, 2 Mo. App. 598 405, 1269
Von Hemert v. Porter, 11 Metc. (Mass.) 210 1009, 1012, 1180, 1878
Von Heyne v. Tompkins, 89 Minn. 77 2525
Von Reeden v. Evans, 52 Ill. App. 209 4668
Von Richthofen v. Bijou I. Dist., 52 Colo. 527 3946
Von Schoening v. Buchanan, 14 Abb. Pr. 185 40, 1538
Von Schoick v. Von Schoick, 76 N. J. L. 242 2
Von Storch v. Griffin, 77 Pa. 504 3681, 3686
Voorhees v. De Meyer, 2 Barb. 37 2048
v. Earl, 2 Hill 288 2390, 2405, 2426
v. Reed, 17 Ill. App. 21 835
v. Smith-Schoonmaker, 86 N. J. L. 500 5191
v. Stoothoff, 11 N. J. L. 145 1121
v. Toney, 32 Okla. 570 4596
v. Voorhees, 18 N. J. Eq. 227 639
Voorhis v. Childs, 17 N. Y. 354 423
Vooth v. McEachen, 181 N. Y. 28 2913
Vorges v. Giboney, 38 Mo. 458 800
Vorhis v. Elias, 54 App. Div. (N. Y.) 412 814
Vos v. Child, 171 Mich. 595 2319
Vosburg v. Mallory, 70 App. Div. 247 265
v. Putney, 78 Wis. 84 4779
v. Putney, 86 Wis. 278 4676
Vose v. Florida R. Co., 50 N. Y. 369 2805, 2810, 2819, 2822
Voss v. Bolzenius, 147 Mo. App. 375 167, 339
v. Chamberlain, 139 Iowa 569 1822, 1826, 2782
v. Chicago Sandoval C. Co., 165 Ill. App. 565 9
v. Lewis, 126 Ind. 155 2864
v. McGuire, 26 Mo. App. 452 821
v. Sylvester, 203 Mass. 233 3232
v. Wagner P. C. Co., 16 Ind. App. 271 3539
Votaw v. McKeever, 76 Kan. 870 2504
Voudrie v. Southern R. Co., 155 Ill. App. 279 140
Vought v. Williams, 120 N. Y. 253 1953
Vowell v. Issaquah C. Co., 31 Wash. 103 4715, 4913
Vredenbergh v. Hallett, 1 Johns. Cas. 27 1243, 1246
Vredenburg v. Behan, 33 La. Ann. 627 774
v. Snyder, 6 Iowa 39 2814
Vreeland v. Michigan Cent. R. Co., 189 Fed. 495 4872
v. VanBlarcom, 35 N. J. Eq. 530 2902
Vroman v. American, etc., Exp. Co., 2 Hun 512 3433
Vroom v. Sage, 100 App. Div. (N. Y.) 285 4207, 4224
v. Smith, 14 N. J. L. 479 1558
Vughan v. McCarthy, 59 Minn. 199 2502
Vulcan D. Co. v. American C. Co. (N. J. L.), 85 Atl. 318 4499
v. American C. Co., 75 N. J. Eq. 542 4463
Vulcan I. Works Co. v. Roquemore, 175 Fed. 11 2273, 2302, 2305, 2421
Vyse v. Wakefield, 6 M. & W. 442 1112

W

W. A. Leyhe Piano Co. v. American Multigraph Sales Co., — Tex. Civ. App. —, 171 S. W. 494 1805
W. H. Coyle Consol. Companies v. Swift & Co., 42 Okla. 613 2274
W. H. Norris Lumber Co. v. Harris, — Tex. Civ. App. —, 177 S. W. 515 231
W. W. Kimball Co. v. Massey, 126 Minn. 461 531
Waaler v. Great Northern R. Co., 22 S. D. 256 1332
Wabash P. Co. v. Bracey, 160 Ill. App. 18 1242
Wabash P. & P. Co. v. Crumrine, 123 Ind. 89 1304, 4507
Wabash R. Co. v. Billings, 212 Ill. 37 1505
v. Campbell, 117 Ill. App. 630 477
v. Campbell, 219 Ill. 312 3387, 3434
v. Fox, 64 Ohio St. 133 4954
v. Gretzinger, 182 Ind. 155 4877, 4880, 4883, 4900, 4901
v. Hayes, 180 Ill. App. 511 5025, 5139, 5141
v. Hayes, 234 U. S. 86 5025, 5139, 5141
v. Kelly, 153 Ind. 119 180
v. McCabe, 118 Mo. 640 1721
v. McDanials, — Ind. —, 107 N. E. 291 4941
v. Pearce, 192 U. S. 179 3341
v. Sanders, 47 Ill. App. 436 3842
v. Williamson, 3 Ind. App. 190 1140
Wabash S. D. Co. v. Black (Tenn.), 61 C. C. A. 639, 126 Fed. 721 4849
Wabash Western R. Co. v. Friedman, 146 Ill. 583 4708
Wabash, etc., R. Co. v. Locke, 112 Ind. 404 110
v. Lynch, 12 Ill. App. 365 3370, 3389, 3398, 3403, 3433
v. McDougall, 118 Ill. 269, 126 Ill. 111 4018, 4022, 4095, 4125, 4146
v. Rector, 104 Ill. 296 1311
v. Shacklet, 105 Ill. 364 108
Wacek v. Frink, 51 Minn. 282 1609

[REFERENCES ARE TO PAGES]

Wachs v. New York Rys. Co., 84 Misc. (N. Y.) 632 3475, 4661, 4690, 4730
Wachter v. Quenzer, 29 N. Y. 547 4585
Wack v. Sorber, 2 Whart. 387 2044
Wacksmuth v. Atlantic C. L. R. Co., 157 N. C. 34 25, 503, 755
Waco Artesian W. Co. v. Cauble, 19 Tex. Civ. App. 417, 194, 320
Waco Cement Stone Works v. Smith, — Tex. Civ. App. —, 162 S. W. 1158 2598, 2648
Wadasco v. Peoples, 13 Pa. Dist. 333 129
Waddell v. Chicago, etc., R. Co., 20 Iowa 9 1807
v. Darling, 51 N. Y. 327 525
v. Wallace, 32 Okla. 140 3666, 3675
Wade v. Amalgamated S. Co., 65 Ore. 488 2166
v. Barlow, 99 Miss. 33 2121
v. Belmont, I. C. & W. P. Co., 87 Neb. 732 233, 242, 2617, 2714
v. Boone, 184 Mo. App. 88 2945
v. Carolina Tel. & T. Co., 147 N. C. 219 3755, 4138
v. Chicago, etc., R. Co., 149 U. S. 327 1822
v. Comstock, 11 Ohio St. 71 2095, 2096, 2098, 2111
v. Creighton, 25 Ore. 455 2779, 2780
v. Curtis, 96 Me. 309 661
v. First Nat. Bank, 11 Bush 697 1793, 1808
v. Gould, 8 Okla. 690 4353
v. Graham, 4 Ohio 126 1653
v. Green, 3 Humph. 547 2838
v. Halligan, 16 Ill. 507 548, 3122, 3257, 3263, 4361
v. Herndl, 127 Wis. 544 3183, 3185, 3199, 3202
v. Leroy, 20 How. 34 1375, 3490, 4693, 5088, 5092
v. Merwin, 11 Pick. 280 2068, 2105
v. Mt. Vernon, 123 App. Div. (N. Y.) 796 4787
v. National Bank, 114 Fed. 377 4610
v. Roberts, 6 Humph. 124 2970
v. Scott, 7 Mo. 509 1848
v. Thayer, 40 Cal. 578 1268, 3513
v. Wade, 1 Wash, C. C. 477 1117, 1222
Wade's Case, 5 Coke 114a 645, 787, 799
Wadhams v. Balfour, 32 Ore. 313 2226
v. Swan, 109 Ill. 46 510, 570, 2055, 2093, 2141, 2150, 2153
Wadleigh v. Buckingham, 80 Wis. 230 371, 4312, 4323, 4339
v. Phelps, 149 Cal. 627 813, 1051, 1229
Wadley v. Davis, 63 Barb. 500 549
Wadlinger v. Washington German B. & L. Ass'n, 153 Pa. 622 708
Wadsworth v. Adams, 138 U. S. 380 2511
v. Allen, 8 Gratt. 174 2767
v. Loranger, Harr. Ch. 113 1854
v. Lyon, 93 N. Y. 201 2799
v. O'Donnell, 7 Ky. L. Rep. 837 1742
v. Pacific Ins. Co., 4 Wend. 33 3022
v. Tillotson, 15 Conn. 366 38
v. Treat, 43 Me. 163 339, 405, 4662, 4668
v. Western U. Tel. Co., 86 Tenn. 695 328, 330, 332, 352, 355, 3611, 3621, 3624, 3645
Wadsworth L. Co. v. Piedmont T. Co., 162 N. C. 503 4043, 4134
Waechter v. St. Louis, etc., R. Co., 113 Mo. App. 270 4793
v. Walters, 41 Ind. App. 408 2474
Waffle v. Porter, 61 Barb. 130 13
Wagenblast v. McKean, 2 Grant's Cas. 393 807, 809
Wagenseller v. Prettyman, 7 Ill. App. 192 2854
Wager v. Schuyler, 1 Wend. 553 1029, 2122
Wagers v. Irvine, 103 Ky. 544 1048
Waggoner v. Cox, 40 Ohio St. 539 869, 878, 885
v. Jermaine, 3 Denio 306 3842
v. Moore, 45 Tex. Civ. App. 308 3194, 3259
v. Paterson G. L. Co., 23 N. J. L. 283 2830
v. Porterfield, 55 Tex. Civ. App. 169 4809
v. Sneed (Tex. Civ. App.), 138 S. W. 219 4791
v. Snody, 36 Tex. Civ. App. 514 422, 4158, 4173, 4176
v. Snody, 98 Tex. 512, 36 Tex. Civ. App. 514 4174
v. Wyatt, 43 Tex. Civ. App. 75 3832
Waggoner Banking Co. v. Gray Co. State Bank, — Tex. Civ. App. —, 165 S. W. 922 2752
Wagner v. Allen, 174 Mass. 563 2596
v. Bristol B. L. R. Co., 108 Va. 594 3952
v. Chicago & A. R. Co., 265 Ill. 245, aff'd 239 U. S. 452 5037, 5044, 5132
v. Clausen B. Co., 146 App. Div. (N. Y.) 70 4907
v. Corkhill, 40 Barb. 175 2626, 2629
v. Edison E. I. Co., 141 Mo. App. 51 2466
v. Finnegan, 54 Minn. 251 2094, 2096
v. Gage Co., 3 Neb. 237 4119
v. Gibbs, 80 Miss. 53 1261, 1272, 1306, 1316
v. Holbrunner, 7 Gill 296 470
v. Jacoby, 26 Mo. 532 372, 376
v. Peterson, 83 Pa. 238 2954, 2964, 4249
v. Van Schaick Realty Co., 163 App. Div. (N. Y.) 632 2127, 3186
v. White, 4 Har. & J. 564 3138
Wagner Co. v. Cawker, 112 Wis. 532 891
Wagner's App., 103 Pa. 185 736
Wagoman v. Byers, 17 Md. 183 4506
Wagoner v. Watts, 44 N. J. L. 126 2825
Wagstaff v. Ashton, 1 Harr. 503 469
v. Short Horn D. Co., 1 Cab. & E. 324 (1884) 238, 2443
Wahl v. Barnum, 116 N. Y. 87 757
v. Tracy, 139 Wis. 668 1119, 2912
Waialua A. Co. v. Oahu R. & L. Co., 19 Hawaii 446 1067
Wailes v. Cooper, 24 Miss. 208 2196
Wainscott v. Occidental B. & L. Ass'n, 98 Cal. 253 4363, 4372
v. Silvers, 13 Ind. 500 3151
Wainwright v. Satterfield, 52 Neb. 403 1503, 1517
v. Webster, 11 Vt. 576 595, 748
v. Weske, 82 Cal. 193 1353
Waistell v. Atkinson, 3 Bing. 289 825, 1229
Wait v. Borne, 123 N. Y. 592 2408
v. Brewster, 31 Vt. 516 660
v. O'Neill, 76 Fed. 408 3142, 3152
v. Robertson M. Co., 37 Wash. 282 1494, 4606, 4624
v. Stanton, 104 Ark. 9 894
Waite v. Bartlett, 53 Mo. App. 378 989
v. Corbin, 109 Ala. 154 4292
v. Gilbert, 10 Cush. 177 3363
v. Jones, 1 Bing. N. C. 656 1850

[REFERENCES ARE TO PAGES]

Waithman v. Weaver, 11 Price 257n 4579
Wakefield v. Beckley, 3 McCord 480 971
v. Stedman, 12 Pick. 562 4224
Wakeford v. Commissioner of Railways, 2 New South Wales L. R. 258 2711
Wakely v. Hart, 6 Bin. 316 1531, 1532
v. Johnson, 115 Mich. 285 4603
Wakeman v. Everett, 41 Hun 278 526
v. Wheeler & W. Mfg. Co., 101 N. Y. 205 244, 259, 1431, 1441, 1448, 2343, 2438, 2551, 2573
Walaas v. Johnson, 204 Fed. 440 4991
Walbridge v. Barrett, 118 Mich. 433 2494
v. Walbridge, 80 Kan. 567 56, 163
Walbum v. Insurance Co., 4 La. 289 3065
Walcott v. Canfield, 3 Conn. 194 424
v. Coleman, 2 Conn. 324 1529
v. Golding, 8 T. R. 126 1553
v. Harris, 1 R. I. 404 1556
Wald v. Pittsburg, etc., R. Co., 162 Ill. 545 140
Walden v. Sherburne, 15 Johns. 409 1103
v. Western U. Tel. Co., 105 Ga. 275 3593, 3594
Waldhier v. Hannibal, etc., R. Co., 87 Mo. 37 4807
Waldie v. Brooklyn Heights R. Co., 78 App. Div. (N. Y.) 557 4694
Waldo v. Forbes, 1 Mass. 10 1555, 1570
v. Long, 7 Johns. 173 2136, 2157
Waldon v. Murdock, 23 Cal. 540 2226
Waldrip v. Black, 74 Cal. 409 2835, 2836
v. Hill, 70 Wash. 187 2706
Waldron v. Alexander, 136 Ill. 550 2481
v. Chase, 37 Me. 414 2226
v. Coal Co., 61 W. Va. 280 1205
v. Hendrickson, 40 App. Div. (N. Y.) 7 379
v. McCarty, 3 Johns. 471 3125
v. Murphy, 40 Mich. 668 789, 791, 796, 827
v. Sperry, 53 W. Va. 116 4601
v. Willard, 17 N. Y. 466 27
v. Zacharie, 54 Tex. 503 675
Waldrons v. Wells, 84 N. J. L. 245 3766, 3768
Waldsmith v. Waldsmith, 2 Ohio 333 422
Waldteufel v. Pacific V. Co., 6 Cal. App. 624 2446, 2619
Wales v. Bogue, 32 Ill. 464 1557
v. Miner, 89 Ind. 118 1268, 4974
v. Pacific Elec. M. Co., 130 Cal. 521 4930
v. Waterbury Mfg. Co., 101 Fed. 126 4470
Walfboro L. & B. Co. v. Rollins, 195 Mass. 323 1815
Walford, In re, [1912] 1 Ch. 219 1079
Walford v. Walford, [1912] App. Cas. 658 1079
Walkeman v. Wheeler & W. Co., 101 N. Y. 205 228
Walker v. Bank, 13 Barb. 636, 9 N. Y. 582 26, 1868, 2930, 2939
v. Barnes, 5 Taunt. 540 1153
v. Bement, 50 Ind. App. 645 883
v. Best, 107 App. Div. (N. Y.) 304 4543
v. Borland, 21 Mo. 289 4169
v. Boston & M. R., 71 N. H. 271 4665
v. Bradley, 3 Pick. 261 1116
v. British G. Ass'n, 18 Q. B. 277, 83 Eng. C. L. 276 2757
v. Broadhurst, 3 Ex. 889 2767
v. Brown, 12 La. Ann. 266 802
v. Brown, 104 Ga. 357 2472
v. Chanslor, 153 Cal. 118 1318, 1320
v. Clements, 15 Q. B. 1046 530
v. Constable, 1 B. & B. 306 1034
Walker v. Cronin, 107 Mass. 555 4553
v. Crosby, 38 Minn. 34 684
v. Deaver, 5 Mo. App. 139 2164
v. Deaver, 79 Mo. 664 2156, 2174, 2181
v. Eastern Counties R., 6 Hare 594 4147
v. Ellis, 1 Sneed 515 233, 2599, 2635
v. Engler, 30 Mo. 130 884
v. Erie R. Co., 63 Barb. 260 334, 412, 3472, 3488, 3495, 4669, 4748
v. Farmers' & M.'s Bank (Tex. Civ. App.), 146 S. W. 312 1386, 4271
v. France, 112 Pa. 203 532, 1943
v. Fuller, 29 Ark. 448 1282, 4194, 4196, 4299
v. Goe, 3 H. & N. 395, 4 H. & N. 350 118, 210
v. Great Northern R. Co., 28 L. R. Ire. 69 30
v. Gunnels, 188 Ala. 206 3099
v. Hadduck, 14 Ill. 399 1067, 3147
v. Hagerty, 30 Neb. 120 1825
v. Hamilton, 1 De G., F. & J. 602 1899, 1900
v. Hatton, 10 M. & W. 249 302, 2863, 3152, 3159
v. Hosington, 43 Vt. 608 534
v. Jackson, 10 M. & W. 168 3283
v. Johnson, 13 Ark. 522 2198
v. Johnson, 6 Ind. App. 600 3690
v. Johnson, 28 Minn. 147 553, 570, 4217
v. Kimball, 22 Ill. 537 939
v. Lake Shore, etc., R. Co., 104 Mich. 606 4859, 4902
v. Lake Shore, etc., R. Co., 111 Mich. 518 4903
v. Lancashire Ins. Co., 188 Mass. 560 1221, 1503
v. Lovitt, 250 Ill. 543 1148, 1879
v. Lundstrom, 132 Mo. App. 367 2696
v. McCulloch, 4 Me. 421 456, 778, 781
v. McNeill, 17 Wash. 582 4860, 4862
v. Martin, 52 Ill. 347 1499
v. Maxwell, 1 Mass. 113 422
v. Mayo, 143 Mass. 42 662
v. Meek, 12 Sm. & M. 495 2329
v. Millard, 29 N. Y. 375 520, 537, 2661
v. Montgomery, 249 Ill. 378 1117
v. Moore, 10 B. & C. 416 183, 210, 355, 1997, 2000, 2002
v. Mueller, 160 App. Div. (N. Y.) 704 4066
v. Newton, 53 Wis. 336 693
v. Norton, 29 Vt. 230 2532
v. Ogden, 1 Biss. 287, 29 Fed. Cas. 41 874
v. Old Colony & N. R. Co., 103 Mass. 10 3984, 3993
v. Orange, 16 Gray 193 356, 2666, 2667, 2676, 2684
v. Osgood, 53 Me. 422 4341, 4352, 4357
v. Palmer, 24 Ala. 358 2903
v. Philadelphia, 195 Pa. 168 4739
v. Pittman, 108 Ind. 341 4620
v. Pritchard, 135 Ill. 103 1716, 1728
v. Reeves, 2 Dough. 461 3134
v. Rogers, 24 Md. 237 2475
v. Schuyler, 10 Wend. 481 3718
v. Seaborne, 1 Taunt. 526 762
v. Sedalia, 74 Mo. App. 70 4017
v. Shoemaker, 4 Hun 579 548, 3260
v. Smith, 4 Dall. 389 2922, 2956
v. Smith, 1 Wash. C. C. 152 47, 1492, 1495

[REFERENCES ARE TO PAGES]

Walker v. South Chester R. Co., 174 Pa. 288 4044, 4098
v. Southern R. Co., 76 S. C. 308 3400
v. Taylor, 28 Colo. 233 2473
v. Thomas, 8 Ky. L. Rep. 700 (Ky. Super. Ct.) 1118
v. Tomlinson, 44 Tex. Civ. App. 446 1918
v. Tribune Co., 29 Fed. 827 4553
v. Tucker, 70 Ill. 527 2607
v. United States Ins. Co., 11 S. & R. 61 3036
v. Venters, 148 N. C. 388 624
v. Vicksburg, etc., R. Co., 110 La. 718 417
v. Vicksburg, etc., R. Co., 52 La. Ann. 2036 3911
v. Walbridge, 136 Fed. 19 4391, 4408
v. Walker, 5 Heisk. 425 2945
v. Wellington & M. R. Co., 5 New Zeal. L. R. (Sup. Ct.) 193 4150
v. Western U. Tel. Co., 75 S. C. 512 3551, 3557
v. Wickens, 49 Kan. 42 4502, 4544, 4568
v. Wills, 5 Ark. 166 1110
v. Wilmarth, 37 Vt. 289 1624
v. Wilson, 13 Wis. 522 555, 2058, 2209
v. Wonderlick, 33 Neb. 504 2889
Walker Mfg. Co. v. Knox, 136 Fed. 334 2476, 2478
Walker's Est., 125 Cal. 242 1641
Wall v. Atlantic C. L. R., 71 S. C. 337 3538
v. City of London R. P. Co., L. R. 9 Q. B. 249 1990
v. Gordon, 12 Abb. Pr. (N. S.) 349 4478
v. Harwood Mfg. Co., 127 La. 959 1419, 4625, 4626, 4628
v. Hill, 7 Dana 175 3717
v. Hinds, 4 Gray 256 3133
v. Holloman, 156 N. C. 275 3788, 4261
v. Hoskins, 5 Ired. 177 4953
v. Humphreys, 4 Dana 209 1660, 1673
v. Livezay, 6 Colo. 465 4656, 4730
v. Mount, 121 Ga. 831 1559
v. Northern Pac. R. Co., 50 Mont. 122 3420
v. Pittsburgh H. Co., 152 Pa. 427 3770
v. Platt, 169 Mass. 398 3042, 3045, 3398, 3751, 3752
v. St. Joseph A. I. & C. S. Co., 112 Mo. App. 659 189, 2364
v. St. Louis & S. F. R. Co., 184 Mo. App. 127 1260, 3382, 3504, 4163
v. Thomas, 41 Fed. 620 434
v. Trumbull, 16 Mich. 288 1594
Wallace v. Ah Sam, 71 Cal. 197 183
v. Antrim S. Co., 44 N. H. 521 1843
v. Bentley, 77 Cal. 19 2987, 2992
v. Berdell, 101 N. Y. 13 1964, 3704
v. Chesapeake & O. R. Co., 73 W. Va. 347 3972
v. Clark, 7 Blackf. 298 1673, 1674, 1676
v. Clark, 2 Overt. 93 4971
v. Cox, 92 Neb. 354 1660, 1661, 1669, 1672
v. Drew, 59 Barb. 413 438, 3938
v. Finberg, 46 Tex. 47 1700, 4194
v. Floyd, 29 Pa. 184 2522
v. Fouche, 27 Miss. 266 985
Wallace v. Gilchrist, 24 Up. Can. C. P. 40 297, 2885
v. Glaser, 82 Mich. 190 1205, 1214
v. Goodall, 18 N. H. 439 474, 3774, 3785, 3795
v. Goodlett, 104 Tenn. 670 1193, 1194, 1196
v. Grand Trunk W. R. Co., 179 Mich. 277 4931
v. Hollowell, 56 Minn. 501 4407, 4408
v. Jefferson G. Co., 147 Pa. 205 4019, 4038
v. Jones, 110 Md. 143 2797
v. Kansas City & S. R. Co., 47 Mo. App. 491 3862, 3878, 3886
v. Kelsall, 7 M. & W. 264 756, 770
v. Knoxville W. Mills, 117 Ky. 450 286, 2346, 2370, 2455
v. Lent, 1 Daly 481 3260
v. Long, 105 Ind. 522 2516, 2548
v. McConnell, 13 Pet. 136 806
v. McPherson, 139 N. C. 297 1350
v. Matthews, 39 Ga. 617 3279
v. Mayor, 9 Abb. Pr. 40 1282
v. New York City R. Co. (N. Y. Misc.), 92 Supp. 766 1373
v. Pennsylvania R. Co., 222 Pa. 556 4681, 4745, 4747
v. Pennsylvania Co., 219 Pa. 327 4712, 4793
v. Pennsylvania R. Co., 195 Pa. 127 4694, 4714, 4723
v. Prudential Ins. Co., 174 Mo. App. 110 1806
v. Straus, 113 N. Y. 238 2826
v. Swift, 31 Up. Can. Q. B. 523 2910, 2920, 3425
v. Talbot, 1 McCord 466 2098
v. Tanner, 118 Ill. App. 639 2404, 2421
v. Tellfair, 2 T. R. 188 2933
v. Terry (Tex. App.), 15 S. W. 35 1710
v. Thames & M. Ins. Co., 22 Fed. 66 3023
v. Tumlin, 42 Ga. 462 252
v. Wallace, 8 Ill. App. 69 1108
v. Western North Carolina R. Co., 104 N. C. 442 4656, 4662, 4690, 4748
v. Wilmington & N. R. Co., 8 Houst. 529 4748
v. Wren, 32 Ill. 146 2411
v. York, 45 Iowa 81 306, 1729
Wallace's Est., 13 Pa. Dist. 155 1032
Wallace's Est., 24 N. Y. St. 405 1083
Waller v. Campbell, 25 Ala. 544 2871
v. Kingston C. Co., 191 Pa. 193 3148
v. Lacy, 1 M. & G. 54 704
v. Long, 6 Munf. 71 870
v. Midland Great Western R. Co., 12 Ir. L. T. Rep. 145 4680
v. Midland, etc., R. Co., 4 L. R. Ir. 376, rev'g 2 L. R. Ir. 376 3325
v. Staples, 107 Iowa 738 1871
Wallerstein v. Columbian Ins. Co., 44 N. Y. 204 3011, 3013
Walley v. Deseret Nat. Bank, 14 Utah 305 4245, 4273, 4279
v. Wiley, 56 Ind. App. 171 476
Wallin v. Eastern R. Co., 83 Minn. 149 55, 162
Walling v. Commercial Advertiser Ass'n, 165 App. Div. (N. Y.) 26 4512
Walling's Case, 35 N. J. Eq. 105 1645
Wallingford v. Columbia & G. R. Co., 26 S. C. 258 20, 3386, 3387
v. Kaiser, 191 N. Y. 392 4227, 4790

[REFERENCES ARE TO PAGES]

Wallingford v. Western U. Tel. Co., 53 S. C. 410 3565, 3566
Wallis v. Carpenter, 13 Allen 19 861, 877
v. Cook, 10 Mass. 510 3389
v. Dilley, 7 Md. 237 1225, 1723, 1741
v. Hodson, 2 Atk. 114 29
v. Loubat, 2 Denio 607 2489
v. Mease, 3 Bin. 546 4515
v. Smith, 21 Ch. Div. 243 835, 836, 913, 919
v. Wenham, 204 Mass. 83 930, 932
v. Westport, 82 Mo. App. 522 4701
Wallner v. Chicago Con. T. Co., 245 Ill. 148 424, 758
Walls v. Bailey, 49 N. Y. 464 2911
v. Johnson, 16 Ind. 374 1664, 4352
Walmesley v. Cooper, 11 A. & E. 216 453
Walnut v. Wade, 103 U. S. 183 1209
Walnut Ridge M. Co. v. Cohn, 79 Ark. 338 2282
Walrath v. Campbell, 28 Mich. 111 4359
v. Redfield, 11 Barb. 368, 18 N. Y. 457 213, 218, 1136, 3809, 3881, 3919, 3921
v. Thompson, 2 N. Y. 185, 6 Hill 540, 4 Hill 200 2757
v. Whittekind, 26 Kan. 482 2637
Walser v. Thies, 56 Mo. 89 4606
v. Western U. Tel. Co., 114 N. C. 440 270
Walsh, Ex parte, 26 Md. 495 1117
Walsh v. Bailie, 10 Johns. 180 2767
v. Barthel, 85 Conn. 552 1066
v. Chicago, etc., R. Co., 42 Wis. 23 183, 184, 342, 3457
v. City of Chicago, 185 Ill. App. 521 549, 2648
v. Colvin, 53 Wash. 309 820, 2025
v. Curtis, 73 Minn. 254 876
v. Fisher, 102 Wis. 172 899, 2525, 2529, 2575
v. Frey, 116 App. Div. (N. Y.) 527 3233
v. Hale, 25 Gratt. 314 2047, 2048
v. Hall, 66 N. C. 233 534, 553
v. Harang, 48 La. Ann. 984 2133, 2143
v. Hayes, 72 Conn. 397 1406
v. Hyde & B. A. Co., 113 App. Div. (N. Y.) 42 1338, 1508
v. Jenvey, 85 Md. 240 2647
v. Lake Shore & M. S. Ry. Co., 185 Mich. 177 5066
v. Lennon, 98 Ill. 27 663
v. Locke & Co., [1914] W. C. & Ins. Rep. 95 5210
v. Meyer, 40 Wash. 650 342, 2404, 4425
v. Miller, 51 Ohio St. 462 2750, 2824
v. Myers, 92 Wis. 397 2218, 2255, 2260, 2697
v. New York Cent., etc., R. Co., 140 App. Div. (N. Y.) 1 775
v. New York, N. H. & H. R. Co., 173 Fed. 494, aff'd 223 U. S. 1 5101, 5107, 5110
v. New York & K. Co., 88 App. Div. (N. Y.) 477 2545
v. New York, etc., R. Co., 204 N. Y. 58 781, 4694
v. Richmond L. R. Co., 124 App. Div. (N. Y.) 533 1383
v. Sayre, 58 How. Pr. 334 1465
v. Sisson, 49 Mich. 423 4420
v. United States T. & A. Co., 153 Ill. App. 229 430
v. Walley, L. R. 9 Q. B. 367, 43 L. J. (Q. B.) 102 2525
v. Washington M. Ins. Co., 32 N. Y. 427 3018
Walsh v. Waterford Harbor Com'rs, [1914] W. C. & Ins. Rep. 16 5173
Walsh Mfg. Co. v. Plymouth L. Co., 159 N. C. 507 2392
Walshe v. Endom, 129 La. 148 2008, 2011
Walson v. Hamilton, 6 Rich. 75 41
Walston v. Denny, 84 Ill. App. 417 813
Walstrom v. Oliver W. C. Co., 161 Ala. 608 2662, 2668, 2671
Walter v. Calhoun, 88 Kan. 801 997, 1069
v. Hangen, 71 App. Div. (N. Y.) 40 2597, 2668
v. Huggins, 164 Mo. App. 69 2598
v. James, L. R. 6 Ex. 124 679, 680, 682
v. Jenkins, 16 S. & R. 414 1485
v. Maresch, 3 Wash. 624 1807
v. Pennsylvania C. S. Co., 9 Del. Ch. 374 1223
v. Post, 6 Duer, 363 3822
v. Richardson, 11 Rich. 466 376, 385
v. Schultz, 1 N. Y. Misc. 196 3669
v. Selfe, 4 De G. & Sm. 315 3839
v. United R. Co., 165 Mo. App. 628 1505
v. Vanderhoof, 2 N. J. L. 73 1541
v. Warfield, 2 Gill 216 1674, 1676, 1677, 1681
v. Wicomico County, 35 Md. 385 3843
Walter B. Co. v. Blackburn (Tex. Civ. App.), 67 S. W. 220 227
v. Blackburn, — Tex. Civ. App. —, 157 S. W. 220 3201, 3210
Walters v. Armstrong, 5 Minn. 448 1830, 1866
v. Chicago, etc., R. Co., 36 Iowa 458 4935
v. Chicago, etc., R. Co., 47 Mont. 501 4793
v. Chicago, etc., R. Co., 74 Neb. 531 21
v. Cox, 67 Mo. App. 299 3664, 3667
v. McGirt, 8 Rich. 287 1020
v. Meredith, 3 Y. & Coll. 264 1563
v. Missouri Pac. R. Co., 82 Kan. 739 4676
v. Smith, 23 Ill. 342 1860
v. Transue, 6 Northampton County Rep. 406 3205
v. United R. Co., 165 Mo. App. 628 1361
Walterscheid v. Crupper, 79 Kan. 627 1267, 3206
Waltham Mfg. Co. v. New York & T. Steamship Co., 204 Mass. 253 3340
v. Freeman, 159 Iowa 567 1419, 1506
Walther v. Calhoun, 88 Kan. 801 3106
v. Post, 4 Abb. Pr. 382 3743
v. Wetmore, 1 E. D. Smith 7 704, 4256, 4263, 4293
Walton v. Campbell, 51 Neb. 788 2093, 2123, 2131, 2136, 2141
v. Clark, 54 Minn. 341 2471
v. Cody, 1 Wis. 420 2376, 2428
v. Crowley, 3 Blatch. 440 4484
v. Fothergill, 7 C. & P. 392 3325
v. Hargrover, 42 Miss. 18 3727
v. Henderson, Smith (N. H.), 168 687
v. Jordan, 23 Ga. 420 4382
v. McKitrick, 141 Ky. 415 885, 886
v. Meeks, 120 N. Y. 79 1997, 2000
v. Miller, 109 Va. 210 432
v. Ruggles, 180 Mass. 24 372, 390
v. Stafford, 14 App. Div. (N. Y.) 310 3100
v. United States, 61 Fed. 486 1039, 1199
v. Walton, 32 Barb. 203 1355

[REFERENCES ARE TO PAGES]

Walton v. Walton, 70 Ill. 142 2044
v. Waterhouse, 3 Saund. 422a 3150
Walton Ave., In re, 131 App. Div. (N. Y.) 696 3969, 4105
Walworth v. Finnegan, 33 Ark. 751 2682
v. Pool, 9 Ark. 394 2548, 2556, 2558
Walwyn v. St. Quintin, 1 B. & P. 658 1817
Wambaugh v. Bimer, 25 Ind. 368 834
Wampach v. St. Paul, etc., R. Co., 21 Minn. 364 1363, 1368, 3942
Wampler v. Weinmann, 56 Minn. 1 3141
Wampole v. Simard, 39 Can. Sup. Ct. 160 2614, 4389, 4412, 4429
Wamsganz v. Wolff, 86 Mo. App. 205 1281, 3206
Wamsley v. Atlas S. Co., 50 App. Div. (N. Y.) 199, rev'd 168 N. Y. 533 4235, 4238
v. Wamsley, 48 App. Div. (N. Y.) 330 2310
Wanack v. Michels, 215 Ill. 87 2858
Wanamaker v. Bowes, 36 Md. 42 485, 1702, 4202, 4204, 4302
v. Powers, 102 App. Div. (N. Y.) 485 726, 2810
v. Quinn, 27 Pa. Super. 288 558
Wandell v. Edwards, 25 Hun 498 4972
Wanek v. Winona, 78 Minn. 98 1462
Wankford v. Wankford, 1 Salk. 299 643
Wanless v. West Chicago St. R. Co., 77 Ill. App. 120 1713
Wann v. Western U. Tel. Co., 37 Mo. 472 3546, 3551
Wanner v. Manufacturers' & Merchants' Mut. Fire Ins. Co., 245 Pa. 80 3043
Wanser v. Messler, 29 N. J. L. 256 2396
Wanzer v. Bright, 52 Ill. 35 4628
v. Wyckoff, 9 Hun 178 4608, 4634
Wapello County v. Bigham, 10 Iowa 39 1583, 1596, 1614
Waples v. Overaker, 77 Tex. 7 2243, 2249
v. Waples, 1 Harr. 394 1086
Waples-P. Co. v. Bank, 6 Ind. Terr. 326 2783
Wappello State Sav. Bank v. Colton, 133 Iowa 147 2752
Wappoo Mills v. Commercial G. Co., 91 Ga. 396 2341
Warburg v. Wilcox, 7 Abb. Pr. 336 753
Warburton v. Doble, 38 Cal. 619 3263
Ward v. Adams, 8 Ky. L. Rep. 769 (Ky. Super. Ct.) 3143
v. Aetna L. Ins. Co., 82 Neb. 499 146
v. Aetna L. Ins. Co., 85 Neb. 471 3000
v. American H. F. Co., 119 Wis. 12 2540, 2542
v. Ashbrook, 78 Mo. 515 2156, 2181
v. Bailey, 23 Me. 316 1485
v. Bell, 18 Ind. 104 1799
v. Blackwood, 41 Ark. 295 1287, 1291
v. Blackwood, 48 Ark. 396 552, 4794
v. Center, 3 Johns. 271 4372
v. Chicago, etc., R. Co., 61 Minn. 449 3802
v. Cobb, 148 Mass. 518 2503
v. Conatser, 4 Baxter 64 57
v. Cook, 158 Mich. 283 4426
v. Cornett, 91 Va. 676 998
v. Dampskibsselskabet Kjoebenhavn, 144 Fed. 524 4860, 4872, 4873, 4877, 4905
v. Dick, 47 Conn. 300 4513, 4514
v. Ely-W. D. G. Bldg. Co., 248 Mo. 348 126, 4786
v. Fellers, 3 Mich. 281 558, 559, 2578
Ward v. Georgia Terminal Co., 143 Ga. 80 3982
v. Haren, 183 Mo. App. 569 854, 858, 905, 2585
v. Haws, 5 Minn. 440 4732
v. Henley, 1 Y. & J. 285 1656
v. Henry, 5 Conn. 595 2831
v. Henry, 15 Wis. 239 4176, 4285, 4286
v. Hobbs, L. R. 4 App. Cas. 13 17
v. Hood, 124 Ala. 570 1661, 1662, 1668
v. Hudson River B. Co., 125 N. Y. 230 885, 888, 894
v. Hudson River R. Co., 24 N. Y. St. Rep. 347 848
v. Jewett, 4 Robert. 714 839
v. Johnson, 13 Mass. 148 773
v. Johnson, 51 Minn. 480 1827
v. Johnson, 6 Munf. 6 781, 782
v. Jones, 11 Ky. L. Rep. 273 (Ky. Super. Ct.) 2490
v. Kelsey, 38 N. Y. 80 3237, 3240
v. Kohn, 58 Fed. 462 2478, 2485, 2491, 2494
v. Latimer, 12 Tex. 438 1890, 1927
v. Morr T. & S. Co., 119 Mo. App. 83 4222
v. Motter, 2 Rob. (Va.) 536 424
v. New York Cent. R. Co., 47 N. Y. 29 217, 2366, 2367, 3328, 3347, 3359, 3919
v. North Haven, 43 Conn. 148 105
v. Odem (Tex. Civ. App.), 153 S. W. 634 4219
v. Pullman Co., 138 Ky. 554 100
v. Reasor, 98 Va. 399 4603
v. Reynolds, 32 Ala. 384 557, 2456
v. Schlosser, 111 Md. 528 2741
v. Shaw, 7 Wend. 404 2225
v. Smith, 11 Price 19 330, 1369, 2450, 3218
v. Smith, 7 Wall. 450 622, 687, 792, 795, 801, 806, 1228
v. State, 28 Ala. 53 467
v. Sugg, 113 N. C. 489 988
v. Sutor, 70 Tex. 343 4601
v. Syme, 8 N. Y. Leg. Obs. 95 1561
v. Thompson, 141 Wis. 376 4975, 4976, 4977
v. Thorndyke, 65 Wash. 11 1229
v. Vanderbilt, 4 Abb. App. Dec. 521 222, 334
v. Vanderbilt, 34 How. Pr. 144 3445, 3472
v. Walton, 4 Ind. 75 764
v. Ward, 41 Iowa 687 1306
v. Warner, 8 Mich. 508 3747
v. Weeks, 7 Bing. 211 115, 156, 157, 4562
v. Wilcox, 1 Denio 37 3103
v. Willson, 3 Mich. 1 524, 538, 2577
v. Wilson, 100 Ind. 52 2767, 2770
v. Wordsworth, 1 E. D. Smith 598 591, 592
Ward & Co. v. Womack, — Tex. Civ. App. —, 168 S. W. 433 2793
Ward's Central & P. L. Co. v. Elkins, 34 Mich. 439 328, 3315, 3389
Warde v. Eyre, 2 Bulst. 323 360
Wardell v. Eden, 2 Johns. Cas. 258 979
v. Fosdick, 13 Johns. 325 532, 4373
v. McConnell, 25 Neb. 558 425, 756, 774
v. McConnell, 23 Neb. 152 4766
Warden v. Bayfield County, 87 Wis. 181 693
v. Green, 6 Watts 424 3389
v. Marshall, 99 Mass. 305 2226

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v. Baldwin, 51 Wis. 450 4301
v. Fisher, 48 Wis. 334 535
v. Myers, 2 Neb. (Unof.) 507 2623
Wardle v. New Orleans, etc., R. Co., 35 La. Ann. 202 4748, 4824
v. Whitney, 23 Wis. 55 2391
Ware v. Bankers' L. & I. Co., 95 Va. 680 1160, 1164
v. Brown, 2 Bond 268, Fed. Cas. No. 17,170 4388
v. Cartledge, 24 Ala. 622 4525
v. Cortland C. & C. Co., 192 N. Y. 439 2648, 2690
v. Cortland C. & C. Co., 148 App. Div. (N. Y.) 546 2705, 2706
v. Heiss, 133 Iowa 285 2970
v. Houghton, 41 Miss. 382 2198
v. Lippincott, 45 N. J. Eq. 320 1028
v. McMurray, 74 N. J. L. 37 2514
v. Otis, 8 Me. 387 712
v. Owens, 42 Ala. 212 3722, 3723
v. Spinney, 76 Kan. 289 2904
v. Street, 2 Head 609 595, 648, 650
v. Weathnall, 2 McCord 413 2395
Ware River R. v. Vibbard, 114 Mass. 458 1676, 4349
Warfield v. Booth, 33 Md. 63 537, 554, 564. 2325
v. Hepburn, 62 Fla. 418 1363
Waring v. Cunliffe, 1 Ves. 99 1013
v. Gaskill, 95 Ga. 731 539
v. Henry, 30 Ala. 721 1101
v. Mason, 18 Wend. 425 2271
Warmouth v. Cramer, 3 Wend. 395 4581
Warne v. Calvert, 7 Ad. & E. 143 2763
v. Rose, 5 N. J. L. 809 431
Warner v. Abbey, 112 Mass. 355 3823
v. Bacon, 8 Gray 397 384, 388, 1363
v. Baltimore & O. R. Co., 11 Ohio N. P. (N. S.) 487 1393
v. Benjamin, 89 Wis. 290 4377, 4378, 4393, 4403
v. Caulk, 3 Whart. 193 4361
v. Chamberlain, 7 Houst 18 4665
v. Couchman, [1911] 1 K. B. 350, 80 L. J. K. B. 526 5195
v. Crouch, 14 Allen 163 1826, 1828
v. DeArmond, 49 Ore. 199 432, 4779
v. Durham, Hill & Denio 206 765
v. Ford L. & Mfg. Co., 123 Ky. 103 4006
v. Griswold, 8 Wend. 666 419
v. Hale, 67 Ill. 595 3098
v. Hitchins, 5 Barb. 666 3151
v. Ingersoll, 157 Fed. 311 4505, 4532
v. Juif, 38 Mich. 662 962, 963
v. Lessler, 33 N. Y. 296 1804
v. Lockerby, 31 Minn. 421 471, 4530, 4574, 4581, 4592
v. Martin, 11 How. 209 4294
v. Matthews, 18 Ill. 83 1673
v. Morrison, 3 Allen 566 2852, 2855, 2859
v. Narragansett Mut. Fire Ins. Co., 111 Me. 590 3039
v. New York Cent. R. Co., 52 N. Y. 437 1485, 1490
v. Press P. Co., 132 N. Y. 181 4537, 4544
v. Robinson, 1 Port. 194 1482
v. Roehr, Fed. Cas. No. 17,189a 4494
v. Southern Pac. Co., 113 Cal. 105 1338, 3473, 3513, 3522, 3528
v. State, 132 App. Div. 611 12
Warner v. Talbot, 112 La. 817 339, 461, 467, 1519, 4668
v. Thurlo, 15 Mass. 154 1038, 1571, 1574
v. Trustees Norwegian C. Ass'n, 19 Iowa 115 3716
v. Vallily, 13 R. I. 483 4285
v. Warner, 235 Ill. 448 3719
Warner I. Co. v. Ingersoll, 157 Fed. 311 1364
Warner's Est., 18 Pa. Dist. 262 1080
Warnibold v. Schlichting, 16 Iowa 243 800
Warnock v. Itawis, 38 Wash. 144 685, 1206, 1922
v. Moore, 91 Kan. 262 4982
Warrall v. Munn, 38 N. Y. 151 1143
Warre v. Calvert, 7 Ad. & El. 143 45
Warren, Matter of, 56 App. Div. (N. Y.) 414 1198
Warren v. A. B. Mayer Mfg. Co., 161 Mo. 112 2301
v. Banning, 140 N. Y. 227 1030
v. Boston, etc., R. Co., 163 Mass. 484 3484, 4667
v. Boynton, 5 Barb. 13 573
v. Buckminster, 24 N. H. 336 2225
v. Chandler, 98 Iowa 237 1933, 1941, 1959, 1981, 1988, 1996
v. Chapman, 105 Mass. 87 1852
v. Coharie L. Co., 154 N. C. 34 1280
v. Cole, 15 Mich. 265 223, 1299, 1300, 1314, 4160, 4382, 4392, 4417
v. Coombs, 20 Me. 139 1903
v. Copelin, 4 Metc. (Mass.) 597 1905
v. Deslippes, 33 Up. Can. Q. B. 59 37
v. Doolittle, 5 Cow. 678 1536
v. Englehart, 13 Neb. 283 417
v. First Division, etc., R. Co., 21 Minn. 424 4150, 4152, 4153
v. Fitchburg R. Co., 8 Allen 227 137
v. Flood, 72 Mo. App. 199 4644, 4645
v. Franklin Ins. Co., 104 Mass. 518 3026
v. Hewett, 45 Ga. 501 2970
v. Ins. Co., 104 Mass. 518 3027
v. Kearney, 63 Wash. 369 4549
v. Keep, 155 U. S. 255 4465
v. Kelley, 80 Me. 512 4173, 4174, 4175
v. Lyons, 152 Mass. 310 2793
v. McCarty, 25 Ill. 95 1055
v. Mains, 7 Johns. 476 790, 803, 804
v. Marberry, 85 Tex. 193 1789
v. Mayer Mfg. Co., 161 Mo. 112 2275, 2305, 2347, 2355
v. Peabody, 8 C. B. 800 3301
v. Philadelphia C. Co., 83 Pa. 437 2387
v. Postal Life Ins. Co., 163 App. Div. (N. Y.) 638 3091
v. Powers, 5 Conn. 373 1561, 1635, 1636
v. Putnam, 68 Wis. 481 3789, 3790
v. Ray, 155 Mich. 91 4534
v. St. Paul, etc., R. Co., 18 Minn. 384 4101
v. St. Paul, etc., R. Co., 21 Minn. 424 4101
v. Shealy, 83 S. C. 113 2708
v. Skinner, 20 Conn. 559 748
v. State, 11 Mo. 583 1614
v. Stoddart, 105 U. S. 224 312, 476, 2298
v. Tyler, 81 Ill. 15 1009, 1011
v. Van Pelt, 4 E. D. Smith 202 2387
v. Wagner, 75 Ala. 188 3124, 3125, 3127, 3138, 3143, 3151

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v. Wheeler, 21 Me. 484 1981, 1984, 2008, 2231, 2309
Warren Academy v. Starrett, 15 Me. 443 1853, 1867
Warren County v. Rand, 88 Miss. 395 3956, 3969, 4025, 4107
v. Ward, 21 Iowa 85 1588
Warren, etc., R. Co. v. Waldrop, 93 Ark. 127 4698, 4876, 4908
Warrender v. Warrender, 9 Bligh 110 1145
Warrick v. Reinhard, 136 Iowa 27 1445, 1458, 3802, 3806
v. Rounds, 17 Neb. 411 4766
Warrington v. Furbor, 8 East 242 2834, 2937
v. Pollard, 24 Iowa 281 816, 820
Warrior C. & C. Co. v. Mabel M. Co., 112 Ala. 624 3775, 3788
Warrum v. Derry, 14 Ind. App. 442 2754
Warsaw v. Fisher, 24 Ind. App. 46 1375
Warth v. Jackson County Court, 71 W. Va. 184 4674, 4700, 4737
v. Liebovitz, 179 N. Y. 200 2695
Warthen v. Melton, 132 Ga. 113 424
Wartman v. Swindell, 54 N. J. L. 589 40, 4161
Warwick v. Ely, 59 N. J. Eq. 44 1080
v. Foulkes, 12 M. & W. 507 459, 4570, 4841
v. Nairn, 10 Ex. 762 557, 1835
v. Richardson, 10 M. & W. 284 295, 2192, 2875, 2892
v. State, 5 Ind. 350 1653
Warwicke v. Noakes, Peake, 67 622
Wasatch M. Co. v. Crescent M. Co., 7 Utah 8 1032
v. Morgan C. Co., 32 Utah 229 2386, 2392
Waschow v. Kelly C. Co., 245 Ill. 516 52, 58
Waseca County v. Sheehan, 42 Minn. 57 1592
Wash v. Lackland, 8 Mo. App. 122 1725
Washband v. Washband, 24 Conn. 500 1875
Washburn v. Carthage Nat. Bank, 86 Hun 396, aff'd 155 N. Y. 690 4215
v. Dewey, 17 Vt. 92 815
v. Empire B. & S. Co., 152 App. Div. (N. Y.) 563 3303
v. Franklin, 36 Barb. 599 1194
v. Gilman, 64 Me. 163 208
v. Hubbard, 6 Lans. 11 258, 2551, 2572
v. Milwaukee, etc., R. Co., 59 Wis. 364 1434, 3964, 4115, 4135
v. National W. P. Co., 81 Fed. 17 4224
v. Picot, 3 Dev. 390 515, 1826, 1835
v. Roberts, 72 Ind. 213 4315
Washburn & M. Mfg. Co. v. Reliance M. Ins. Co., 179 U. S. 1 3015
v. Worcester, 153 Mass. 494 3993, 4000
Washington v. First Nat. Bank, 64 Tex. 4 1058
v. Ogden, 1 Black 450 1841
v. Pacific E. Co., 14 Cal. App. 685 4719
v. Park (1835), 6 Leigh 581 1741
v. Planters' Bank, 1 How. (Miss.) 230 1238
v. Timberlake, 74 Ala. 259 531, 1368
Washington Bank v. Prescott, 20 Pick. 339 717, 719
v. Shurtleff, 4 Metc. (Mass.) 30 1112, 2749
Washington County Court v. McKee, 12 Ky. L. Rep. 102 1042
Washington County Ins. Co. v. Colton, 26 Conn. 42 1570
Washington County W. Co. v. Garver, 91 Md. 398 231
Washington F. & M. Ins. Co. v. Chesebro, 35 Fed. 477 2914
Washington G. L. Co. v. District of Columbia, 161 U. S. 316 327, 328, 2430
v. Lansden, 9 App. Cas. (D. C.) 508 1535, 4508, 4537
Washington H. P. B. Co. v. Sinnott (N. Y. Misc.), 92 N. Y. Supp. 504 2348
Washington Herald Co. v. Berry, 41 App. Cas. (D. C.) 322 4542
Washington I. Co. v. Chicago, 147 Ill. 327 4108, 4112
v. Shortall, 101 Ill. 46 3796
v. Webster, 147 Ill. 327 4117
v. Webster, 62 Me. 341 1661, 1664, 1666, 1669, 1672, 4194, 4314, 4350, 4351, 4354
v. Webster, 68 Me. 449 1436, 1437, 1457, 2295, 2303
v. Webster, 125 U. S. 426 1662, 1665, 1666, 1672, 1674
Washington L. P. Co. v. Goodrich, 110 Va. 692 1481, 1482
Washington Mills Emery Mfg. Co. v. Commercial Ins. Co., 13 Fed. 646 3042, 3043
v. Weymouth & B. Ins. Co., 135 Mass. 503 3038, 3043, 3059, 3063, 3064
Washington N. G. Co. v. Johnson, 123 Pa. 576 704, 710
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Washington-Virginia R. Co. v. Boukknight, 113 Va. 411 4826
Washington, etc., R. Co., In re, 140 U. S. 96 1054
Washington, etc., R. Co. v. American C. Co., 5 App. Cas. (D. C.) 524 2625, 2626
v. Dashiell, 7 App. Cas. (D. C.) 507 344, 4688
v. Harmon, 147 U. S. 571 1051, 4653, 4748, 5088
v. Hickey, 5 App. Cas. (D. C.) 436 149
v. Hickey, 12 App. Cas. (D. C.) 269 4757, 4759
v. Patterson, 9 App. Cas. (D. C.) 423 4657, 4691, 4730, 4748
Washington, etc., S. P. Co. v. Sickles, 19 Wall. 611 4441
Washington, etc., Tel. Co. v. Hobson, 15 Gratt. 122 3546, 3582
Wasioto, etc., R. Co. v. Blanton, 160 Ky. 134 400
v. Hensley, 148 Ky. 366 1430
Wassall v. James Russell & Sons, Ltd., [1915] W. C. & Ins. Rep. 88 5202
Wasser v. Western L. & S. Co., 97 Minn. 460 1929, 2512
Wasserberg v. Cunard S. Co., 8 N. Y. Misc. 78 3534
Wasson v. Hodshire, 108 Ind. 26 2814
v. Palmer, 17 Neb. 330 1941, 1947, 1983
Watcross A.-L. R. Co. v. Offerman & W. R. Co., 114 Ga. 727 1783
Water Co. v. Chambers, 13 N. J. Eq. 199 399

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Water Com'rs v. Robbins, 82 Conn. 623 4380, 4383
Water Front, In re, 118 App. Div. (N. Y.) 865 4118
Water Lot Co. v. Leonard, 30 Ga. 561 2713, 4194
Waterbury v. Graham, 4 Sandf. 215 390, 391
v. Platt, 76 Conn. 435 3956
v. Street, 50 Fed. 835 3313
v. Westervelt, 9 N. Y. 598 436
Waterbury Co. v. Maryland C. Co., — Misc. (N. Y.) —, 134 N. Y. Supp. 564 759
Waterford School Trustees v. Clarkson, 23 Ont. App. 213 2751
Waterhouse v. Citizens' Bank, 25 La. Ann. 77 612
v. Kendall, 11 Cush. 128 1841
Waterloo, The, Blatchf. & H. 114 2733
Waterman v. Buck, 63 Vt. 544 392
v. Buck, 58 Vt. 529 3108
v. Chicago & A. R. Co., 82 Wis. 613 4752, 4807, 4830
v. Clark, 76 Ill. 428 524, 560, 1838, 2827
v. Connecticut R. Co., 30 Vt. 610 399
v. Dutton, 6 Wis. 265 3021
v. Frank, 21 Mo. 108 1711
v. Le Sage, 142 Wis. 97 3099
v. Minneapolis, St. P. & S. S. M. R. Co., 26 N. D. 540 1505
v. Younger, 49 Mo. 413 703, 722
Waterman Lumber & Supply Co. v. Holmes, — Tex. Civ. App. —, 161 S. W. 70 476, 2687, 2707
Waterman Lumber Co. v. Shaw, — Tex. Civ. App. —, 165 S. W. 127 1372
Waterous E. Works Co. v. Clinton, 110 Minn. 267 1559
Waters, In re, 5 New Zeal. L. R. 431 4252
Waters v. Atlantic R. Co., 9 Pa. Dist. 473 4714
v. Bristol, 26 Conn. 398 1493, 1495
v. Brown, 3 A. K. Marsh. 557 461, 462, 465
v. Brown, 44 Mo. 302 315, 316
v. Cline, 121 Ky. 611 2469
v. Gooch, 6 J. J. Marsh 589 3718
v. Greenleaf-J. L. Co., 115 N. C. 648 1281, 3827, 3955
v. Jones, 3 Port. 442 4529
v. Kear, 168 N. C. 246 319
v. Langdon, 16 Vt. 570 4178, 4229
v. Pearson, 163 Iowa 391 1936, 1938
v. Riley, 2 H. & G. 305 2854
v. State, 1 Gill 302 1590
v. Tompkins, 2 Cr., M. & R. 273 710
v. Towers, 20 Eng. L. & Eq. 410 2451
v. Towers, 8 Ex. 401 2615, 2631
v. Travis, 9 Johns. 450 692
v. West Chicago St. R. Co., 101 Ill. App. 265 4607, 4613, 4619, 4644
Waters-P. O. Co. v. Deselms, 18 Okla. 107 146
v. Deselms, 212 U. S. 159 169, 2448, 4925
v. Snell, 47 Tex. Civ. App. 413 1373, 4652, 4818
Waterson v. Allegheny Valley R. Co., 74 Pa. 208 237
v. Seat, 10 Fla. 326 1439
Watertown Ecclesiastical Society's App., 46 Conn. 230 1487
Watertown F. Ins. Co. v. Simmons, 131 Mass. 85 2796
Watertown Sav. Bank v. Mattoon, 78 Conn. 388 2796
Watkins v. American Nat. Bank, 134 Fed. 36 371, 560, 561, 1990
v. Angotti, 65 W. Va. 193 2372
v. Baird, 6 Mass. 506 4605
v. Bigelow, 96 Minn. 53 2485
v. Citizens' Nat. Bank, 53 Tex. Civ. App. 437 4289
v. Gregory, 69 Miss. 469 2094
v. Hill, 8 Pick. 522 660, 661
v. Hopkins, 13 Gratt. 743 515
v. Junker, 4 Tex. Civ. App. 629 1366, 2613
v. Junker, 90 Tex. 584 1097, 1099, 1100, 1137, 1185
v. Kaolin Mfg. Co., 131 N. C. 536 86, 90, 97, 4688
v. Lang, 17 S. C. 13 1206
v. Morgan, 6 C. & P. 661 869, 870, 1033
v. Paine, 57 Ga. 50 2272
v. Parsons, 13 Kan. 426 630
v. Rist, 67 Vt. 284 3808
v. Robb, 2 Esp. 710 799
v. Wabash R. Co., 137 Iowa 441 3963, 4134
v. West Wytheville L. & I. Co., 92 Va. 1 4375
Watkins' L. M. Co. v. Campbell, 98 Tex. 372 1443
Watkinson v. Inglesby, 5 Johns. 386 761, 762, 763
v. Laughton, 8 Johns. 213 1107, 3401
Watmough v. Francis, 7 Pa. 206 2889
Watney v. Wells, L. R. 2 Ch. 250 1072
Watriss v. First Nat. Bank, 130 Mass. 343 3155, 3162, 3166
v. First Nat. Bank, 124 Mass. 571 3255
v. Pierce, 32 N. H. 560 2795
Watrous v. Bates, 5 Up. Can. C. P. 366 2275
v. Hilliard, 38 Colo. 255 1943, 1945
Watson, The, 128 Fed. 201 4980
Watson v. Adams, 187 Ala. 490 488
v. Aiken, 55 Tex. 536 983
v. Alcock, 1 Sm. & Giff. 319, aff'd 4 De Gex. Mac. & G. 242 2816
v. Ambergate R. Co., 15 Jur. 448 268
v. Appleton, 183 Ala. 514 735
v. Augusta B. Co., 124 Ga. 121 2435, 4664
v. Bates, 5 Up. Can. C. P. 366 2343
v. Bauer, 4 Abb. Pr. (N. S.) 273 1457
v. Bigelow, 47 Mo. 413 2969
v. Blaine, 12 S. & R. 131 2068
v. Boswell, 25 Tex. Civ. App. 379 4166, 4190
v. Brewster, 1 Pa. 381 615
v. Chicago, etc., R. Co., 46 Minn. 321 3694
v. Christie, 2 Bos. & P. 224 493, 505, 4573
v. Coburn, 35 Neb. 492 4228, 4286, 4299, 4302, 4306
v. Colusa-P. M. & S. Co., 31 Mont. 513 440, 441, 1432, 3851, 3858, 3877, 3893, 3938
v. Columbia, 77 Mo. App. 267 4017
v. Columbia M. Co., 118 Ga. 603 374, 2497
v. Cowdrey, 23 Hun 169 4238
v. Cresap, 1 B. Mon. 195 644, 645

[REFERENCES ARE TO PAGES]

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v. Dilts, 116 Iowa 249 165, 3735, 3820
v. Duykinck, 3 Johns. 335 3302
v. Flanagan, 14 Tex. 354 1818
v. Gray, 16 T. L. Rep. 308 2287, 2341
v. Gray's Harbor B. Co., 3 Wash. 283 2697, 2701, 2706, 2707
v. Harmon, 85 Mo. 443 1135, 1495
v. Hastings, 1 Penne. 47 1267
v. Hetherington, 1 C. & K. 36 794
v. Hooton, 4 Ill. App. 294 3241, 3250
v. Kemp, 41 Ga. 586 2199
v. Kentucky & I. & R. Co., 137 Ky. 619 130, 152
v. Kirby, 112 Ala. 436 234, 2359, 2363
v. Le Row, 6 Barb. 481 579
v. Lisbon Bridge, Proprietors of, 14 Me. 201 225, 314, 4188
v. Loring, 3 Mass. 557 2930
v. Loughran, 112 Ga. 837 368, 369, 1435
v. McManus, 223 Pa. 583 1049, 1221
v. Marine Ins. Co., 7 Johns. 57 3025
v. Mayor, etc., 84 N. J. L. 422 4155
v. Mercer, 8 Pet. 88 1194
v. Milwaukee & M. R. Co., 57 Wis. 332 4033, 4049, 4135, 4154
v. Mims, 56 Tex. 451 992
v. Moore, 2 Cush. 133 4516, 4577, 4579, 4580
v. Needham, 161 Mass. 404 285
v. New Milford, 72 Conn. 561 1501, 3839, 3889
v. New Milford W. Co., 71 Conn. 442 2, 37
v. Orr, 3 Dev. 161 1145
v. Owens, 1 Rich. 111 658
v. Parker, 50 Tex. Civ. App. 616 735
v. Phoenix Bank, 8 Metc. (Mass.) 217 876
v. Pittsburgh, etc., R. Co., 37 Pa. 469 3975, 3980
v. Read, 4 Baxter 49, 1 Tenn. Ch. 196 2805
v. Rinderknecht, 82 Minn. 235 4677, 4679
v. Roode, 30 Neb. 264 2389
v. Russell, 149 N. Y. 388 2546
v. San Francisco, etc., R. Co., 50 Cal. 523 1526
v. Seaboard A. L. R. Co., 133 N. C. 188 4878, 4905, 4913
v. Smith, 63 Iowa 228 590
v. Sutherland, 1 Tenn. Ch. 208 2790
v. Texas & P. R. Co., 8 Tex. Civ. App. 144 405
v. Trask, 6 Ohio 531 4506
v. Van Meter, 43 Iowa 76 40
v. Watson, 1 Houst. 209 2517
v. Watson, 37 Ind. App. 548 834
v. Watson, 20 L. J. (C. P.) 25 3719
v. Watson, 49 Mich. 540 4960
v. Watson, 53 Mich. 168 1301, 4967, 4969, 4973
Watt v. Corey, 76 Me. 87 4644, 4645
v. Hoch, 25 Pa. 411 1008, 1009, 1240
v. Hunter, 20 Tex. Civ. App. 76 1971
v. Nevada Cent. R. Co., 23 Nev. 154 4169, 4171, 4178, 4179
v. Potter, 2 Mason 77 4169, 4211, 4226
v. Riddle, 8 Watts 545 1897, 1898, 1915
v. South Bound R. Co., 60 S. C. 67 1268
v. Watt [1905] App. Cas. 115 1519
Watt's Est., 3 Pa. Dist. 343 1079, 1085
Watters v. P. E. Kroehler Mfg. Co., 87 Ill. App. 548 5204
Watters v. Retail Clerks' Union, 120 Ga. 424 1364
v. Smith, 2 B. & Ad. 889 759
v. Waterloo, 126 Iowa 199 103
Watterson v. Alleghany Valley R. Co., 74 Pa. 208 1961, 1962, 2605, 2619
v. Owens River Canal Co., 25 Cal. App. 247 2793
Wattles v. Laird, 9 Johns. 326 1925
v. South Omaha I. & C. Co., 50 Neb. 251 3139, 3150
Watts v. Board of Education, 9 App. Div. (N. Y.) 143 2599
v. Camors, 10 Fed. 145, aff'd 115 U. S. 353 848, 918, 3269, 3270
v. Coffin, 11 Johns. 495 3122
v. Fraser, 7 Ad. & E. 223 4594
v. Garcia, 40 Barb. 656 1197
v. Hewlett Bay Co., 152 App. Div. (N. Y.) 493 3800, 3806
v. Norfolk, etc., R. Co., 39 W. Va. 196 3738, 3955
v. Ohio Val. Elec. Ry. Co., — W. Va. —, 88 S. E. 659 5153
v. Parker, 27 Ill. 224 2055
v. Rice, 75 Ala. 289 1688, 1698
v. Sheppard, 2 Ala. 425 825, 918, 925
v. Shuttleworth, 5 H. & N. 235 2816
v. South Bound R. Co., 60 S. C. 67 1278
v. Todd, 1 McMull. 26 2549
v. United States, 129 Fed. 222 5013
v. Watts, 11 Mo. 547 870
v. Watts, 104 Va. 269 1129
v. Willing, 2 Dall. 100 1904
Watzlavzick v. Oppenheimer, 38 Tex. Civ. App. 306 1804
Waugh v. Gulf, etc., R. Co., — Tex. Civ. App. —, 131 S. W. 843 3321, 3424
v. Montgomery, 8 Vict. L. R. (law) 290 122
Waughop v. Bartlett, 165 Ill. 124 682
Wave, The, v. Hyer, The, 2 Paine 131 2722
Waverly W. Works Co., Matter of, 85 N. Y. 478 4148
Wavle v. Michigan United R. Co., 170 Mich. 81 4885
Way v. Langley, 15 Ohio St. 392 756
Waycross A. L. R. Co. v. Offerman & W. R. Co., 119 Ga. 983 1751
v. Offerman & W. R. Co., 114 Ga. 727 1796
Waydell v. Luer, 5 Hill 448, 3 Denio 410 753
Wayland v. St. Louis, etc., R. Co., 75 Mo. 548 3843, 3936
v. Tucker, 4 Gratt. 267 2851, 2852
Wayman v. Hoag, 14 Barb. 232 2755
v. Southard, 10 Wheat. 1, 48 1145
Wayne v. Kirby, 2 Bailey 551 2795
v. Lapp, 180 Pa. 278 3236
v. Pennsylvania R. Co., 231 Pa. 512 4152, 4155
v. St. Louis & N. R. Co., 165 Ill. App. 353 4719
v. Sands, 1 Freeman 351 2825
v. Styles, 94 Ill. App. 615 3229, 3241
Wayne County Sav. Bank v. Low, 81 N. Y. 566 1163, 1167
Waynesboro Mut. F. Ins. Co. v. Creaton, 98 Pa. 451 3041
Waynesville W. Mfg. Co. v. Berlin M. Works, 144 N. C. 689 183, 2340, 2435
Wead v. Larkin, 49 Ill. 99 2134
Weakland v. Hoffman, 50 Pa. 513 555

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Weant v. Southern T. & D. Co., 112 Md. 463 1880
Weare v. Chase, 93 Me. 264 3903
Weart v. Hoagland, 22 N. J. L. 517 2673
v. Winnick, 3 N. H. 473 1189
Weast v. Derrick, 100 Pa. 509 1945
Weatherbee v. Green, 22 Mich. 311 3784
v. Lillybeck, 86 Miss. 156 530, 556
Weatherby v. Shackleford, 37 Miss. 559 1738
Weatherford M. & F. Co. v. Tate, 49 Tex. Civ. App. 392 2343
Weatherford, etc., R. Co. v. Crutcher, (Tex. Civ. App.) 141 S. W. 137 87
Weatherholt v. Howard, 143 Ga. 41 4513
Weathers v. Ray, 4 Dana 474 416
Weaver v. Bachert, 2 Pa. 80 3664, 4959
v. Berwind W. C. Co., 216 Pa. 195 3762, 3766, 3768
v. Cone, 12 Pa. Super. Ct. 143 4415
v. Darby, 42 Barb. 441 1680
v. Hendrick, 30 Mo. 502 4518, 4598
v. Lloyd, 1 C. & P. 295 4582
v. Maxwell Motor Co., (Mich.) 1 Nat. Comp. Jour. (No. 11, 1914) 6, rev'd 186 Mich. 588 5206
v. Mississippi & R. R. B. Co., 28 Minn. 534 1355, 1451, 3747
v. Neal, 61 W. Va. 57 128
v. Page, 6 Cal. 681 4605, 4620, 4624
v. Penny, 17 Ill. App. 628 172, 558, 2447
v. Phillips, 231 Pa. 325 4552
v. Roberson, 134 Ga. 149 548, 3257
v. Shriver, 79 Md. 530 4364
v. Tapscott, 9 Lehigh 424 2832
v. Toogood, 1 Barb. 238 579
Weaver's Estate, In re, 140 Iowa 615 5098
Webb v. Anspach, 3 Ohio St. 522 1606
v. Atlantic C. L. R. Co., 76 S. C. 193 1262, 3505
v. Baltimore & O. R. Co., 114 Md. 216 3989
v. Bishop, 101 N. C. 99 992
v. Boyle, 63 N. C. 271 3716
v. Browning, 14 Mo. 354 2484, 2489
v. Bumpass, 9 Port. 201 633
v. Daggett, 39 Tex. Civ. App. 390 1432, 3155
v. Denver, etc., R. Co., 7 Utah 17 4861, 4862
v. Depew, 152 Mich. 698 2551
v. Dickinson, 11 Wend. 62 704, 736
v. Duckingfield, 13 Johns. 390 2525
v. Gilman, 80 Me. 177 1268, 1311, 1316, 4664, 4669, 4775
v. Goldsmith, 2 Duer 413 753
v. Gray, 181 Ala. 408 4502, 4569, 4573, 4587
v. Holt, 113 Mich. 338 2097, 2125, 2136
v. Laird, 62 Vt. 448 1738, 1741, 1745
v. Lines, 77 Conn. 51 1086
v. Metropolitan St. R. Co., 89 Mo. App. 604 312, 323
v. Milford S. Co., 128 Ky. 308 2455
v. National Bank, 67 Kan. 62 664
v. Novelty H. Co., 231 Pa. 297 2236
v. Pond, 19 Wend. 423 295, 2189, 2875, 2885, 2893
v. Portland Mfg. Co., 3 Sumner 189 38
v. Railway Co., 88 Tenn. 119 762
v. Rome & O. R. Co., 49 N. Y. 420 68
Webb v. Rothschild, 49 La. Ann. 244 4774
v. Russell, 3 T. R. 394 3135
v. Taylor, 80 N. C. 305 4311
v. Trescony, 76 Cal. 621 2497
v. Webb, 16 Vt. 636 1555
v. Webb, 92 Md. 101 1083
v. Wheeler, 80 Neb. 438 1981, 2055, 2064, 2112, 2122
v. Yonkers R. Co., 51 App. Div. (N. Y.) 194 4664
Webbe v. Western U. Tel. Co., 169 Ill. 610 3555, 3556, 3610, 3611
Webber v. Barry, 66 Mich. 127 152
v. Davis, 44 Me. 147 2225
v. Eastern R. Co., 2 Metc. (Mass.) 147 3978
v. Jonesville, 94 S. C. 189 1318
v. Nicholas, 4 Bing. 16 306
v. Nicholas, Ry. & Moo. 419 1999
v. Tivill, 2 Saund. 121 2216
v. Webber, 146 Mich. 31 1874
v. Wilcox, 45 Cal. 301 1749
Weber v. Berlin, 8 Ont. L. R. 302 3878, 3886, 3889, 3891, 3896, 3904
v. Board of Com'rs, 93 Minn. 320 759
v. Butler, 81 Hun 244 4544
v. Couch, 134 Mass. 26 765
v. Henry, 16 Mich. 399 4359
v. Hertz, 87 Ill. App. 251 1676
v. Morris, etc., R. Co., 36 N. J. L. 213 489
v. Moy, 183 Ill. App. 200 841, 861, 912, 921, 3258
v. Squier, 51 Mo. App. 601 2276, 2299
v. Third Ave. R. Co., 12 App. Div. (N. Y.) 512 4848, 4852, 4853
v. Weber, 47 Mich. 569 4382
Weber Co. v. Chicago, etc., R. Co., 113 Iowa 188 3535
Weber Implement Co. v. Dunard, 181 Mo. App. 658 4359
Weber W. Co. v. Kehl, 139 Ill. 644 4690
Weblett v. McGraw, 41 Tex. Civ. App. 239 2664
Webster v. Beau, 77 Wash. 444 254
v. Beebe, 2 Boyce (Del.) 161 2669, 2671
v. Bosanquet, [1912] App. Cas. 394 886
v. British Empire Mut. L. Assur. Co., 15 Ch. Div. 169 1091, 1109
v. Buss, 61 N. H. 40 420
v. Casein Co., 206 N. Y. 506 374
v. De Tastet, 7 T. R. 157 287, 2914, 2916, 2933
v. Douglas County, 102 Wis. 181 1134
v. Enfield, 10 Ill. 298 2662
v. Hoban, 7 Cranch. 399 1941, 1943
v. Kansas City & S. R. Co., 116 Mo. 114 4033, 4101, 4155
v. Loeb, 112 Mo. App. 139 2482
v. Moe, 35 Wis. 75 3788
v. New Brunswick C. Co., 2 Ban. & Ard. 67 4457
v. Pierce, 35 Ill. 158 597, 817, 820, 822, 2924, 2945
v. Seattle, etc., R. Co., 42 Wash. 364 4736, 4747
v. Sherman, 33 Mont. 448 4312
v. Snider, 45 Can. Sup. Ct. 296 1934
v. Stadden, 14 Wis. 277 662, 664
v. Whitworth, 49 Ala. 201 2944
v. Wilcox, 45 Cal. 302 1762
v. Woolford, 81 Md. 329 178, 2355
v. Wyser, 1 Stew. 184 747, 754
Webster County v. Nelson, 154 Iowa 660 2743

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Weddigen v. Boston, etc., Co., 100 Mass. 422 662
Weddington v. White, 148 Ky. 671 4647
Wedemeyer v. Hindelang, 161 Mich. 600 1077
Weeber v. Hawes, 80 Minn. 476 3141
Weed v. Adams, 37 Conn. 378 2950
v. Black, 2 MacArthur, 268 2494
v. Clark, 4 Sandf. 31 2761
v. Dills, 34 Mo. 483 1710, 1711
v. Draper, 104 Mass. 28 2598
v. Larkin, 49 Ill. 99 2114
v. Miller, 1 McLean 423 617
v. Panama R. Co., 17 N. Y. 362 1336, 3511, 3512
v. Weed, 25 Conn. 494 1244
Weed S. M. Co. v. Maxwell, 13 Mo. 486 2825
v. Winchel, 107 Ind. 260 2758
Weedsport Bank v. Park Bank, 2 Keyes 561 630
Weekes v. William Stead, Ltd., [1914] W. C. & Ins. Rep. 434 5199
Weekler v. Chicago, 61 Ill. 142 3946
Weeks v. Boston E. R. Co., 190 Mass. 563 1471
v. Grace, 194 Mass. 296 2148
v. Hackett, 104 Me. 264 4209
v. Hasty, 13 Mass. 218 1019
v. Holmes, 12 Cush. 215 2469
v. Leighton, 5 N. H. 343 2540
v. Little, 47 N. Y. Super. Ct. 1 888, 928
v. O'Brien, 141 N. Y. 199 2221, 2683, 2686
v. Prescott, 53 Vt. 57 215, 1693, 4194
v. Profert, L. R. 8 C. P. 427 2981
v. Rector, etc., 56 App. Div. (N. Y.) 195 2709
v. Silver Islet, etc., Co., 55 N. Y. Sup. Ct. 1 874
v. State, 48 App. Div. (N. Y.) 357 3903
v. Stevens (Tex. Civ. App.), 155 S. W. 667 2618, 4407
v. Webb, 140 App. Div. (N. Y.) 450 2880
Weeks-T. P. Co. v. Glenside W. Mills, 64 N. Y. Misc. 205 3854
Weems v. Ventress, 14 La. Ann. 267 1108
Wegener v. Smith, 15 C. B. 285 3303
Wegner v. Herkimer, 167 Mich. 587 4391
v. Risch, 114 Wis. 270 4840
v. Second Ward Sav. Bank, 76 Wis. 242 1136, 4313
Wehle v. Butler, 43 How. Pr. 5 1135
v. Butler, 12 Abb. Pr. (N. S.) 139 439, 4305
v. Butler, 61 N. Y. 245 485, 486, 4180, 4202, 4227, 4300
v. Haviland, 69 N. Y. 448 2954, 4180, 4227, 4267
v. Spelman, 25 Hun 99 4306
Wehman v. Southern R., 74 S. C. 286 3322
Wehmeyer v. Mulvihill, 150 Mo. App. 197 4839, 4843, 4844
Wehnyk v. Second Ave. R. Co., 14 App. Div. (N. Y.) 515 4819
Wehring v. Modern Woodmen, 107 Minn. 25 1090
Wehrman v. Priest, 12 Mo. App. 577 3233
v. Reakirt, 1 Cin. Super. Ct. 230 1077
Wehrum v. Kuhn, 61 N. Y. 623 757
Weicherding v. Krueger, 109 Minn. 461 4510
Weick v. Dougherty, 28 Ky. L. Rep. 930 1509
v. Dougherty, 139 Ky. 528 253, 4183
v. Lander, 75 Ill. 93 64
Weide v. City of St. Paul, 126 Minn. 491 4818
v. St. Paul, 62 Minn. 67 739, 4150, 4156
Weideman v. Keller, 171 Ill. 93 2377, 2378
Weidenhammer v. McAdams, 52 Ind. App. 98 730
Weidman S.-D. Co. v. Newark, 83 N. J. L. 50 3892, 3941
Weidner v. Olivit, 108 App. Div. (N. Y.) 122 1442, 1452, 2947
Weigel v. Brown, 115 C. C. A. 442, 194 Fed. 652 4837
Weigley v. Moses, 78 Ill. App. 471 1790
v. Muller, 51 Pa. Super. Ct. 125 3183
Weightman v. Union T. Co., 208 Pa. 449 2873
Weikel v. Sterns, 142 Ky. 513 4386
Weil v. Defenbaugh, 65 Ill. App. 489 3098
v. Enterprise G. & Mfg. Co., 42 La. Ann. 492 636
v. Fineran, 78 Ark. 87 2490, 2496
v. Hagan, 161 Ky. 292 4663, 4690
v. Israel, 42 La. Ann. 955 4506, 4633
v. Silverstone, 6 Bush 698 361
v. Stone, 33 Ind. App. 112 1482
Weiler v. Henarie, 15 Ore. 28 2834
Weill v. Hecht, 14 N. Y. Misc. 230 2749
Weimer v. Clement, 37 Pa. 147 2388
Weinberg v. Chicago, 172 Ill. App. 77 4653
v. Compagnie Générale Transatlantique (Misc.), 150 N. Y. Supp. 1020 3530
v. Greenberger, 47 N. Y. Misc. 117 862, 3103
v. Naher, 51 Wash. 591 819
Weingrad v. Kletzky, 52 Misc. (N. Y.) 129 2506
Weinman v. De Palma, 232 U. S. 571, aff'g 16 N. M. 302 3216, 3822
Weinschenk v. Western Allegheny R. Co., 233 Pa. 442 4000, 4033, 4139
Weinstock-Nickols Co. v. Courtney, 26 Cal. App. 445 1806
Weintz v. Kramer, 44 La. Ann. 35 1610
Weir v. Allegheny County, 95 Pa. 413 1038
v. Dicker, 11 Ky. L. Rep. 523 (Ky. Super. Ct.) 2821
v. Girvin, [1899] 1 Q. B. 193, 1 Q. B. 45 3289
v. Hudnut, 115 Ind. 525 624
v. Plymouth, 148 Pa. 566 3887
v. Rountree, 173 Fed. 776 22
v. St. Paul, etc., R. Co., 18 Minn. 155 3946, 4108, 4110
v. Union R. Co., 188 N. Y. 416 4694
Weirhauser v. Cole, 132 Iowa 14 1723
Weis v. Devlin, 67 Tex. 507 2608
Weisenberg v. Appleton, 26 Wis. 56 4794
Weiser v. Holzman, 33 Wash. 87 112
Weiser Valley L. & W. Co. v. Ryan, 190 Fed. 417 3962, 4037
Weisfield v. Beale, 44 Pa. Super. Ct. 386 3734
Weisman v. Wolinsky (Misc.), 147 N. Y. Supp. 869 1501
Weiss v. Commissioners, 152 Ky. 552 4038, 4039, 4049
v. Great Northern R. Co., 119 Minn. 355 1512
v. Marks, 206 Pa. 513 752

[REFERENCES ARE TO PAGES]

Weiss v. Whittemore, 28 Mich. 353 4534, 4540, 4557
Weitershausen v. Crotian P. & P. Co., 157 Fed. 947 430, 4505
Weiting v. Millston, 77 Wis. 523 4676
Weitzel v. Marr, 46 Pa. 463 4173
Welborn v. Dixon, 70 S. C. 108 1259, 1272
v. Metropolitan St. R. Co., 170 Mo. App. 351 4745
Welby v. Drake, 1 C. & P. 557 753
Welch v. Adams, 152 Mass. 74 793, 1084, 1085, 1086
v. Anderson, 8 T. L. Rep. 119 3331
v. Boston & P. R. Co., 14 R. I. 609 4640
v. Boston, etc., R. Co., 41 Conn. 333 3335
v. Browning, 115 Iowa 690 2061
v. Buckins, 9 Ohio St. 331 3727
v. Cheek, 125 N. C. 353 4602
v. Cleveland, etc., R. Co., 161 Ill. App. 185 3760
v. Durand, 36 Conn. 182 1269, 1313
v. Evans Bros. Const. Co., — Ala. —, 66 So. 517 32
v. Greene, 24 R. I. 515 1498
v. Hicks, 6 Cow. 504 3291, 3293, 3294
v. Hoyt, 24 Ill. 117 1838
v. Hubschmitt B. & W. Co., 61 N. J. L. 57 2792
v. Ireland, 6 East 613 1553
v. Lawson, 32 Miss. 170 2003, 2006, 2466
v. Livingston, 33 N. Y. Misc. 116 2547
v. McAllister, 15 Mo. App. 492 4795
v. McDonald, 85 Va. 500 833
v. Maine Cent. R. Co., 86 Me. 552 4940
v. Milwaukee, etc., R. Co., 27 Wis. 108 4142, 4143
v. Nichols, 41 Mont. 435 2240
v. Piercy, 7 Ired. 365 111, 1391, 3815
v. Seymour, 18 Conn. 387 1584, 1596, 1614
v. Sumner, 28 Conn. 390 1582
v. Tippery, 66 Neb. 604 3946
v. Wadsworth, 30 Conn. 149 1174, 1193
v. Ware, 32 Mich. 77 165, 334, 412, 1298, 4519, 4551, 4657, 4668
v. Welch, 20 Ky. L. Rep. 1990 1795, 1796
v. Welch, 22 Ky. L. Rep. 1259 1796
v. Wesson, 6 Gray 505 18, 19
Weld v. Bartlett, 10 Mass. 470 496, 497, 1618, 2934
v. Goldenberg, 65 Fed. 466 2612
v. Nichols, 17 Pick. 538 764
v. Postal Tel.-C. Co., 199 N. Y. 88 18, 3549, 3554, 3614
v. Postal Tel.-C. Co., 73 Ark. 205 3567
v. Postal Tel.-Cable Co., 210 N. Y. 59 3550
v. Western, 199 N. Y. 88 3566
Weld & Co. v. Victory Mfg. Co., 205 Fed. 770 2241, 2244, 2250, 2341
Weldon v. Buck, 4 Johns. 144 1814
Weleetka Light & Water Co. v. Burleson, 42 Okla. 748 2901
v. Castleberry, 42 Okla. 745 4332
Welge v. Batty, 11 Ill. App. 461 631
Welker v. Butler, 15 Ill. App. 209 4535, 4586
v. Hazen, 247 Pa. 122 4983
Weller v. Eames, 15 Minn. 461 2873, 2875
Weller v. Heimbruck, 145 Wis. 217 3765, 3900
v. Missouri Lumber & Mining Co., 176 Mo. App. 243 476, 1357, 1365, 1372
v. Stevens, 12 Cal. App. 779 758
Welles v. Boston Ins. Co., 6 Pick. 182 3041, 3054
v. Castles, 3 Gray 323 3127, 3138
v. Colorado Nat. L. Ins. Co., 49 Colo. 508 697
v. Northern Cent. R. Co., 150 Pa. 620 4145
v. Shroeder, 67 Conn. 257 1522
Welling v. La Bau, 34 Fed. 40 4451, 4470
Wellington, The, 52 Fed. 605 2726
Wellington v. Boston & M. R., 164 Mass. 380 4128
v. Boston & M. R., 158 Mass. 185 4140
v. City of Cambridge, 220 Mass. 312 3956, 4024, 4035, 4045
v. Downer K. O. Co., 104 Mass. 64 99, 4678
v. Kelly, 84 N. C. 543 680
v. Moore, 37 Neb. 560 1430
v. Sedgwick, 12 Cal. 469 361
v. Small, 3 Cush. 145 119, 4429
v. Spencer, 37 Okla. 461 227, 4195
Wellington Nat. Bank v. Robbins, 71 Kan. 748 225, 295, 1870
Welliver v. Irondale E. L., etc., Co., 38 Pa. Super. Ct. 26 3890
v. Pennsylvania C. Co., 23 Pa. Super. Ct. 79 3768, 3810
Wellman v. Dickey, 78 Me. 29 4159
v. Miner, 19 N. Y. Misc. 644 4186
v. Miner, 179 Ill. 326 721
v. O'Connor-Martin Co., 178 Mich. 682 2290
v. Sun P. & P. Ass'n, 66 Hun 331 4537
Wellmeyer v. St. Louis T. Co., 198 Mo. 527 4713
Wells v. Abernethy, 5 Conn. 222 1105, 1933, 1947, 1981, 1996, 2218, 2309, 2318
v. Babcock, 56 Mich. 276 1071, 1072, 1074
v. Baldwin, 18 Johns. 45 1853
v. Boston & M. R., 82 Vt. 108 1338, 3497, 3514
v. Brown, 3 N. J. L. 411 1105
v. Calnan, 107 Mass. 514 2608
v. Clarkson, 5 Mont. 336 586
v. Cochran, 84 Neb. 278 2902
v. Commonwealth, 8 B. Mon. 459 1357, 1598
v. Cook, 16 Ohio St. 67 4388
v. Cox, 1 Daly 515 1526
v. Denver, etc., R. Co., 7 Utah 482 4862
v. Elsam, 40 Mich. 218 592
v. Enright, 127 Cal. 669 1077
v. Girling, 1 Brod. & Bing. 447 871, 998
v. Great Northern R. Co., 59 Ore. 165 3334, 3532
v. Hopkins, 5 M. & W. 7 1829, 1841
v. Jackson, 3 Munf. 458 459, 460
v. Johnston, 52 La. Ann. 713 4839, 4842
v. Matthews, 70 Ill. App. 504 1359
v. Miller, 66 N. Y. 255 2852, 2855
v. Minneapolis B. & A. Ass'n, 122 Minn. 327 4739
v. Missouri-Edison E. Co., 108 Mo. App. 607 821
v. Morrison, 91 Ind. 51 626

[REFERENCES ARE TO PAGES]

Wells v. National L. Ass'n, 95 Fed. 222 259, 260, 264, 287, 371
v. New Haven & N. Co., 151 Mass. 46 3849, 3853, 3869, 3870
v. New York, etc., R. Co., 24 N. Y. 181 21
v. New York Cent., etc., R. Co., 25 App. Div. (N. Y.) 365 137, 3468, 3470
v. Padgett, 8 Barb. 323 328, 3662, 3689
v. Parker, 76 Ark. 41 4639
v. Perkins, 43 Wis. 160 2473
v. Porter, 5 B. Mon. 416 985
v. Sanger, 21 Mo. 354 1495
v. Selwood, 61 Barb. 238 2405, 2662
v. Smith, 2 Edw. 78 836
v. Spears, 1 McCord 421 2386
v. Tedrick, 69 Ill. App. 203 1398
v. Toogood, 165 Mich. 677 4573
v. Waterhouse, 22 Me. 131 4374
v. Western U. Tel Co., 144 Iowa 605 50, 419, 3564, 3581, 3597, 3607, 3610, 4365, 4400
Wells' Adm'r v. Robb, 9 Bush 26 810
Wells, Fargo & Co. v. Battle, 5 Tex. Civ. App. 532 3370
v. Benjamin, — Tex. Civ. App. —, 165 S. W. 120 4712
v. Davis, 105 N. Y. 670 1047, 1055
v. Hanson, 41 Tex. Civ. App. 174 3537
v. Neiman-M. Co., — Tex. Civ. App. —, 125 S. W. 614 3413
v. Zimmer, 186 Fed. 130 152
Wells Fargo Exp. Co. v. Boyle, 39 Tex. Civ. App. 365 1381
v. Fuller, 4 Tex. Civ. App. 213 3328, 3375
v. Fuller, 13 Tex. Civ. App. 610 3381, 3382
v. Samuels, 11 Tex. Civ. App. 15 3354
v. Thompson, 53 Tex. Civ. App. 515 3323
v. Williams (Tex. Civ. App.), 71 S. W. 314 3387, 3398
Wellston C. Co. v. Franklin P. Co., 57 Ohio St. 182 2690
Welsh v. Brown, 8 Ind. App. 421 2962
v. Brown, 43 N. J. L. 37 1078, 1080
v. Cochran, 63 N. Y. 181 4617
v. Ebersole, 75 Va. 651 2781
v. First Division St. Paul & P. R. Co., 25 Minn. 314 1209
v. Haleen, 157 Iowa 647 1310, 1327, 4620
v. Kibler, 5 S. C. 405 2123, 3196
v. London Assur. Co., 151 Pa. 607 3047, 3064
v. Pittsburg, etc., R. Co., 10 Ohio St. 65 3335
v. Railroad Co., 10 Ohio St. 65 3353
v. Stewart, 31 Mo. App. 376 1386
v. Tri-City R. Co., 148 Iowa 200 1502
v. Wilson, 34 Minn 92 3812, 4201
Welsh Flannel & T. Co., L. R. 20 Eq. 360 1078
Welsher v. Libby, 107 Wis. 47 582, 590
Welter v. Jacobson, 7 N. D. 32 1600
Weltners v. Riggs, 3 W. Va 445 2238
Welton v. Martin, 7 Mo. 307 3933
Wemhak v. Morgan, 20 Q. B. Div. 635 4556
Wemple v. Stewart, 22 Barb. 154 1437, 2296, 2305
Wendelken v. Stone (N. J. L.), 86 Atl. 377 1288, 1348
v. Stone (N. J. L.), 86 Atl. 376 4841
Wendell v. Highstone, 52 Mich. 552 2798, 2805
Wendell v. Walker (N. Y. Misc.), 87 N. Y. Supp. 142 2359
v. Washington & W. Bank, 5 Cow. 161 1907
Wender Blue Gem C. Co. v. Louisville P. Co., 137 Ky. 339 3121, 3123
Wendham v. Williams, 27 Miss. 313 1527
Wendle v. Palmer, 77 Conn. 12 2501
Wendling v. Jennisch, 85 Iowa 392 1073
Wendt v. Industrial Ins. Comm. of Wash., 80 Wash. 111 5185, 5188
v. Ross, 3 Cal. 650 704, 733, 736
v. Vogel, 87 Wis. 462 2683, 2685
Wenger v. Calder, 78 Ill. 275 4677
v. Phillips, 195 Pa. 214 4637
Wengert v. Beashore, 2 N. J. L. 232 4605
Wenham v. Mallin, 103 Ill. App. 609 978
v. Schmitt, 219 Ill. 195 1759
v. Wilson, 129 Ill. App. 553 4210, 4232
Wenman v. Mohawk Ins. Co., 13 Wend. 267 943, 1031, 1032
Wenona Z. Co. v. Dunham, 56 Ill. App. 351 3875
Wensel v. Property Mut. Ins. Ass'n, 129 Iowa 295 3009, 3046, 3049
Wentworth v. Goodwin, 21 Me. 154 2198
v. Manhattan Market Co., 218 Mass. 91 1093, 3164
v. Portsmouth, 68 N. H. 392 4153
Wentz v. Bernhardt, 37 La. Ann. 636 4836, 4839
v. Dehaven, 1 S. & R. 312 642
v. Meyersohn, 59 App. Div. (N. Y.) 130 746
Werbolovsky v. New York & B. D. Exp. Co., 63 N. Y. Misc. 329 4771, 4772
Werkheiser-P. Mill Co. v. Langford, 51 Tex. Civ. App. 224 4271, 4272
Werner v. Brooklyn E. R. Co., 11 App. Div. (N. Y.) 86 4941
v. Cincinnati, 3 Ohio C. C. (N. S.) 276 383
v. Edmiston, 24 Kan. 147 448
v. Evans, 94 Ill. App. 328 3529, 3532
v. Finley, 144 Mo. App. 554 862, 886, 922
v. Graley, 54 Kan. 383 4312, 4314, 4328
v. Padula, 49 App. Div. (N. Y.) 135, aff'd 167 N. Y. 611 3145
v. Popp, 94 Minn. 118 8
v. Tuch, 52 Hun 269 813, 826
v. Wheeler, 142 App. Div. (N. Y.) 358 2056, 2074, 2075, 2084, 2087, 2094
Werner S. Co. v. Pickering, 55 Tex. Civ. App. 632 4210, 4216, 4228
Wernwag v. Mothershead, 3 Blackf. 401 870, 974, 975, 976, 1876
Werra, The, 12 Prob. Div. 52 2727, 2730
Wert v. Potts, 76 Iowa 612 439
Werten v. Koosa, 169 Ala. 258 1407, 1442, 3229
Wertham v. Mason City, etc., R. Co., 128 Iowa 135 4091
Wertheim v. Chicoutini P. Co., [1911] App. Cas. 301 48, 502, 1437, 2368
Wertheimer v. Rosenbaum (Misc.), 146 N. Y. Supp. 177 3186
v. Saunders, 95 Wis. 573 3241
Wertheimer S. Co. v. Missouri Pac. R. Co., 147 Mo. App. 489 139
Wertheimer-S. S. Co. v. McDonald, 138 Mo. App. 328 2387
Werthman v. Mason City, etc., R. Co., 128 Iowa 135 4088

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Wescoat v. Decker, 85 N. J. L. 716 4896
Wescoe's App., 52 Pa. 195 639
Wesley v. Chicago, etc., R. Co., 84 Iowa 441 405
Wesley Church v. Moore, 10 Pa. 273 2831
Wesner & W. Mfg. Co. v. Atlantic C. L. R., 71 S. C. 211 3322
Wesseler v. Great Northern Ry. Co., — Wash. —, 155 Pac. 1063 5039
Wesser Valley L. & W. Co. v. Ryan, 190 Fed. 417 4034
West v. Averill G. Co., 109 Iowa 488 803
v. Bayfield M. Co., 144 Wis. 106 4874, 4878
v. Bayfield M. Co., 149 Wis. 145 1504
v. Bristol T. Co., [1908] 2 K. B. 14 113, 3893
v. Brockport, 16 N. Y. 168 1594
v. Cabell, 153 U. S. 78 1601
v. Caldwell, 23 N. J. L. 736 1667, 4352
v. Carter, 54 Wash. 236 4383, 4395
v. Cutting, 19 Vt. 536 2390
v. Diprose, [1900] 1 Ch. 337 1198
v. Druff, 55 Iowa 335 4969, 4971
v. Forest, 22 Mo. 344 163, 334, 3651, 4662
v. Grocery Co., 138 N. C. 166 436
v. Hart, 7 J. J. Marsh 258 3152
v. Hughes, 1 Har. & J. 574 3693
v. Lanier, 9 Humph. 762 3743
v. Leiphart, 169 Mich. 354 127, 417
v. Martin, 51 Wash. 85 266, 3770, 4189
v. Milwaukee, etc., R. Co., 56 Wis. 318 1063, 1538, 4100, 4152, 4155
v. Patrick, 1 J. J. Marsh. 95 1059
v. Platt, 127 Mass. 367 1528, 4630
v. Prichard, 19 Conn. 212 2276
v. Pusey, 113 Md. 569 3735
v. Rice, 9 Metc. (Mass.) 564 495, 1624
v. St. Louis S. R. Co., 187 Mo. 351 147, 4662, 4675, 4743
v. St. Paul Nat. Bank, 54 Minn. 466 2930, 2938, 2939
v. Stewart, 7 Pa. 122 2059
v. Waddill, 33 Ark. 575 2043
v. Walker, 2 Swan 32 4569, 4596
v. Ward, 77 Iowa 323 111
v. Wentworth, 3 Cow. 82 2311, 2329, 2337, 4246
v. Western U. Tel. Co., 39 Kan. 93 345, 352, 3618, 3642
v. Weyer, 46 Ohio St. 66 1110
v. White, 165 Mass. 258 4286
v. Wright, 98 Ind. 335 4382, 4383
West Allis L. Co. v. Wiesenthal, 141 Wis. 460 523
West Boylston Mfg. Co. v. Searle, 15 Pick. 225 767
West Branch Bank v. Chester, 11 Pa. 282 936
v. Morehead, 5 W. & S. 542 705
West Bristol T. Co., [1908] 2 K. B. 14 3840
West Chester & P. R. v. Broomall (Pa.), 3 Atl. 444 1962
West Chester & W. P. R. Co. v. Chester County, 182 Pa. 40 4044, 4071, 4077, 4078
West Chicago A. Works v. Sheer, 8 Ill. App. 367 1067
v. Sheer, 104 Ill. 586 1014, 1103
West Chicago M. Ass'n v. Chicago, 215 Ill. 278 4025
West Chicago Park Com'rs v. Boal, 232 Ill. 248 3957, 4087, 4090, 4092
West Chicago St. R. Co. v. Carr, 170 Ill. 478 1471, 1473, 4702, 4738
v. Chicago, 172 Ill. 198 3962, 4033
v. Dooley, 76 Ill. App. 424 4935
v. Dougherty, 209 Ill. 241 4721, 4724
v. Foster, 175 Ill. 396 4657, 4663
v. Johnson, 69 Ill. App. 146 1505
v. Krueger, 68 Ill. App. 450 1505
v. Levy, 182 Ill. 525 1381
v. Lieb'g, 79 Ill. App. 567 4686
v. Lups, 74 Ill. App. 420 4663, 4832
v. Morrison, 160 Ill. 288 3826
v. Musa, 80 Ill. App. 223 4830
v. Scanlan, 68 Ill. App. 626 4939
West Coast M.'s Agency v. Oregon C. M. Co., 54 Wash. 247 833
West Coast Mfg. & I. Co. v. West Coast I. Co., 31 Wash. 610 1986, 2097, 2101, 2113
v. West Coast I. Co., 25 Wash. 627 2095, 2150
West Coast Timber Co. v. Hughitt, 185 Ill. App. 500 569
West Counties M. Co. v. Lower C. M. Co., L. R. 9 Ex. 218 4566
West End Mfg. Co. v. Warren Co., 198 Mass. 320 2374
West Florida L. Co. v. Studebaker, 37 Fla. 28 4398
West Homestead v. Erbeck, 239 Pa. 192 4423
West Huntsville C. M. Co. v. Alter, 164 Ala. 305 2820
West Jersey Trust Co. v. Philadelphia & R. Ry. Co., — N. J. L. —, 95 Atl. 753 5030
West Kentucky Coal Co., v. Dyer, 161 Ky. 407 3961, 3963, 3980, 4135
West Leigh C. Co. v. Tunnicliffe, [1908] App. Cas. 27 393, 3888
West Mahanoy v. Watson, 116 Pa. 344 111
West Muncie S. Co. v. Slack, 164 Ind. 21 3892, 3939
West Newbury v. Chase, 5 Gray 421 4134
West Pratt C. Co. v. Andrews, 150 Ala. 368 4721
West Pub. Co. v. Edward Thompson Co., 184 Fed. 749 4479
West Republic M. Co. v. Jones, 108 Pa. 55 943, 2275, 2294, 2379, 2411
West Salem v. Industrial Comm., 162 Wis. 57 5210
West Skok'e D. Dist. v. Dawson, 243 Ill. 175 4038, 4124, 4137
West Virg'nia T. Co. v. Sweetzer, 25 W. Va. 434 3281
West Virginia, etc., R. Co. v. Gibson, 94 Ky. 234 3965, 3969, 4038, 4122
Westbay v. Terry, 83 Ark. 144 862, 868
Westberg v. Kansas, 64 Mo. 493 694
Westbourne, The, 14 Prob. Div. 132 2720
Westbrook v. Davis, 48 Ga. 471 612
v. McMillan, 1 Bailey 259 2201
v. Mize, 35 Kan. 299 435
Westchester Ave., In re, 126 App. Div. (N. Y.) 839 4042
Westchester F. Ins. Co. v. Earle, 33 Mich. 143 3049
Westcott v. Campbell, 11 R. I. 378 3717
v. Fargo, 61 N. Y. 542 3336
v. Fargo, 63 Barb. 349 3385
v. Fidelity & D Co., 87 App. Div. (N. Y.) 497 1563, 2873
v. Nims, 4 Cush. 215 533, 534
Westcott C. Co. v. Oneida Nat. C. Co., 199 N. Y. 247 4498

[REFERENCES ARE TO PAGES]

Westercamp v. Brooks, 115 Iowa 159 4748
Westerfield v. New York L. Ins. Co., 157 Cal. 339 4410
v. Scripps, 119 Cal. 607 4520, 4543
Westerman v. Means, 12 Pa. 97 832
Western v. Barton, 4 Taunt. 673 2753
v. Grand Trunk R. Co., 54 Me. 376 217
v. Russell, 3 V. & B. 187 2052
v. Sharp, 14 B. Mon. 177 2667, 2689
v. Short, 12 B. Mon. 153 2122
Western Assur. Co. v. Chesapeake L. & T. Co., 105 Md. 232 1449
v. Phelps, 77 Miss. 625 3009
v. Southwestern T. Co., 68 Fed. 923 3007
v. Studebaker Mfg. Co., 124 Ind. 176 3044
Western B. & S. Co. v. Jevne, 179 Ill. 71, 78 Ill. App. 668 3733
Western Bank v. Sherwood, 29 Barb. 383 1557
Western Bank & T. Co. v. Ogden, 42 Tex. Civ. App. 465 740
Western Brass Mfg. Co. v. Maverick, 4 Tex. Civ. App. 535 656
Western Cherokee Indians v. United States, 27 Ct. of Cls. 1 1040
Western Cottage P. & O. Co. v. Anderson, 45 Tex. Civ. App. 513 4380, 4383, 4432
v. Anderson, 97 Tex. 432 1270
Western E. I. Co. v. Empire E. I. Co., 155 Fed. 301 4451
Western G. C. Co. v. Dowagiac G. & F. Co., 146 Mich. 119 862, 888
v. Schoeninger, 42 Colo. 357 1466
Western G. Const. Co. v. Danner, 38 C. C. A. 528, 97 Fed. 882 4731
Western G. Mfg. Co. v. Schoeninger, 42 Colo. 357 1461
Western G. Road v. Cox, 39 Ind. 260 2629
Western Implement Co. v. Blodgett, 24 Cal. App. 19 2438
Western Indemnity Co. v. Pillsbury, 170 Cal. 686 5146, 5150, 5157, 5158, 5162, 5167
Western M. & L. Co. v. Blanchard, 1 Wash. 230 1525
Western Mfg. Co. v. The Guiding Star, 37 Fed. 641 3385, 3387, 3395, 3400
Western Maryland R. Co. v. Martin, 110 Md. 554 4, 7, 3877, 3883
v. Stocksdale, 83 Md. 245 2500, 3464
Western Nat. Bank v. White (Tex. Civ. App.), 131 S. W. 828 279
Western News Co. v. Wilmarth, 33 Kan. 510 4620
Western Newspaper Union v. Des Moines, 157 Iowa 685 4089, 4117
Western Pacific L. Co. v. Wilson, 19 Cal. App. 338 672
Western Pennsylvania R. Co. v. Hill, 56 Pa. 460 3976, 4005
Western R. Co. v. Bayne, 75 N. Y. 1 2969
v. Wallace, 170 Ala. 584 4722
Western R. E. Trustees v. Hughes, 172 Fed. 206 315, 1329
Western Star, The, 157 Fed. 489 2728, 2731, 2732
Western States, The, 151 Fed. 929 3468, 3473, 3526
Western Steel C. & F. Co. v. Bean, 163 Ala. 255 1472
Western Tel. Co. v. McMorris, 158 Ala. 563 3635
Western Transportation Co. v. Hoyt, 69 N. Y. 236 3293
v. Newhall, 24 Ill. 466 3385
Western Transportation & C. Co. v. Kilderhouse, 87 N. Y. 430 1168
Western Turne Co. v. Wright, 11 S. D. 521 2405, 2406
Western Union C. S. Co. v. Ermeling, 73 Ill. App. 394 368
v. Winona P. Co., 197 Ill. 457 2906, 2957
Western Union R. Co. v. Smith, 75 Ill. 496 2650, 2708
Western Union Tel. Co. v. Adair, 115 Ala. 441 3609, 3621
v. Adams, 28 Ind. App. 420 3642
v. Adams, 75 Tex. 531 352, 353, 3564, 3611, 3623, 3635, 3646, 3654, 3655
v. Adams, 154 Ala. 657 3609
v. Adams Mach. Co., 92 Miss. 849 254, 3570
v. Albertville C. Co., 6 Ala. App. 344 3582
v. Alford, 110 Ark. 379 3549
v. Allen, 66 Miss. 549 3564, 3607
v. Anderson, 34 Tex. Civ. App. 41 3557
v. Anniston C. Co., 6 Ala. App. 351 3549, 3568, 3609, 3617, 3638
v. Arant, 88 Ark. 499 3622
v. Arend (Tex. Civ. App.), 131 S. W. 1190 3559
v. Arnold, 96 Tex. 493 3632, 3636, 3650
v. Askew, 92 Ark. 133 3566
v. Aubrey, 61 Ark. 613 3584
v. Auslet, 53 Tex. Civ. App. 264 143, 237, 3594
v. Ayers, 41 Tex. Civ. App. 627 3570, 3654
v. Ayers, 131 Ala. 391 3636
v. Barkley (Tex. Civ. App.), 131 S. W. 849 3559
v. Barlow, 51 Fla. 351 3570
v. Barrett, 55 Tex. Civ. App. 323 3626
v. Bates, 93 Ga. 352 3591
v. Beals, 56 Neb. 415 3550, 3551, 3585
v. Belew, 32 Tex. Civ. App. 338 3622
v. Bell, 48 Tex. Civ. App. 151 3656
v. Bennett, 3 Ala. App. 275 3547
v. Bennett (Tex. Civ. App.), 124 S. W. 151 3549
v. Bennett, 3 Ala. App. 275 3637, 3655
v. Bennett, 58 Tex. Civ. App. 60 3657
v. Benson, 159 Ala. 254 1258, 3619, 3622, 3633, 3635, 3654
v. Berdine, 2 Tex. Civ. App. 517 3617, 3622, 3624, 3656, 3657
v. Beringer, 84 Tex. 38 3621, 3623, 3657
v. Betvram, White & W. 1152 3562
v. Bickerstaff, 100 Ark. 1 3546, 3570, 3660
v. Biggerstaff, 177 Ind. 168 3593, 3604
v. Birchfield, 14 Tex. Civ. App. 664 3620
v. Birge-F. Co., 20 Tex. Civ. App. 526 3552, 3563, 3604
v. Blackmer, 82 Ark. 526 3654, 3657
v. Blackwell, 24 Okla. 535 3565, 3600
v. Blair, 51 Tex. Civ. App. 427 3634
v. Blake, 29 Tex. Civ. App. 224 3557, 3612, 3659
v. Blanchard, 68 Ga. 299 18, 3551, 3569, 3601

[REFERENCES ARE TO PAGES]

Western Union Tel. Co. v. Bodkin, 79 Kan. 792 1326, 1511, 3618
v. Bowdoin, — Tex. Civ. App. —, 168 S. W. 1 4660
v. Bowen, 84 Tex. 476 3594, 3604, 3606
v. Bowen, 97 Tex. 621 1379
v. Bowman, 141 Ala. 175 3592, 3617
v. Bradford, 52 Tex. Civ. App. 392 3570
v. Briscoe, 18 Ind. App. 22 3549, 3621
v. Broesche, 72 Tex. 654 352, 2888, 3553, 3598, 3621, 3646, 3656
v. Brown, 6 Ala. App. 339 3609, 3638
v. Brown, 58 Tex. 170 3618
v. Brown, 71 Tex. 723 353, 3636, 3654
v. Brown, 84 Tex. 54 3565, 3566
v. Bryant, 17 Ind. App. 70 3595, 3621, 3654
v. Buchanan, 35 Ind. 429 3549
v. Buchanan, 35 Tex. Civ. App. 437 3557
v. Buchanan, — Tex. Civ. App. —, 129 S. W. 850 3627, 3628
v. Burch, 36 Tex. Civ. App. 237 3570
v. Burns, 164 Ala. 252 3622, 3638
v. Burris, 179 Fed. 92 3607, 3611, 3612, 3644, 3650
v. Burrow, 10 Tex. Civ. App. 122 3553, 3658
v. Butler, 45 Tex. Civ. App. 28 3655
v. Caldwell, 126 Ky. 42 3571, 3657
v. Call Pub. Co., 181 U. S. 92 5034
v. Campbell, 36 Tex. Civ. App. 276 3570
v. Carew, 15 Mich. 525 3546, 3547, 3549, 3550
v. Carter, 2 Tex. Civ. App. 624 3609, 3632
v. Carter, 85 Tex. 580 3591, 3609, 3654, 3655
v. Carver, 15 Tex. Civ. App. 547 1142, 3566
v. Cashman, 132 Fed. 805 1314, 4525, 4545
v. Cashman, 149 Fed. 367 4595
v. Castler, 90 Ark. 208 3628
v. Catlett, 177 Fed. 71 4869
v. Cavin, 30 Tex. Civ. App. 152 3626
v. Chamberlain, — Tex. Civ. App. —, 169 S. W. 370 3620
v. Chamblee, 122 Ala. 428 3546, 3547, 3551, 3616
v. Chilson, — Tex. Civ. App. —, 168 S. W. 878 3622
v. Chilton, 100 Ark. 296 3612
v. Chouteau, 28 Okla. 664 3642, 3645
v. Church, 3 Neb. (Unof.) 22 3586
v. Church (Neb.), 90 N. W. 878 3598, 3632
v. Clark, 14 Tex. Civ. App. 563 3574, 3609
v. Cleveland, 169 Ala. 131 3622, 3635, 3656
v. Clifton, 68 Miss. 307 3558
v. Cline, 8 Ind. App. 364 3621
v. Coffin, 88 Tex. 94 3636
v. Coggin, 68 Fed. 137 3560, 3561
v. Collins, 45 Kan. 88 3577
v. Compton, 114 Ark. 193 3549
v. Cook, 54 Neb. 109 3593
v. Cook, 61 Fed. 624 3551
v. Cooper, 29 Tex. Civ. App. 591 3556, 3612
v. Cooper, 71 Tex. 507 339, 352, 353, 3586, 3632, 3640, 3646
v. Cornwell, 2 Colo. App. 491, 496 3560, 3564
v. Crall, 38 Kan. 679 3547, 3549, 3551
Western Union Tel. Co. v. Crall, 39 Kan. 580 269
v. Crawford, 29 Okla. 143 171, 332, 3587
v. Crawford, 110 Ala. 460 3551, 3568, 3616
v. Crenshaw, 93 Ark. 415 3557, 3612
v. Crocker, 135 Ala. 492 3637, 3658
v. Cross, 116 Ky. 5 1258, 3619
v. Crow (Tex. Civ. App.), 152 S. W. 1015 3591
v. Crow, 106 Ark. 117 3620, 3659
v. Crowley, 158 Ala. 583 3618, 3633
v. Culledge, 84 Ark. 501 3633
v. Cunningham, 99 Ala. 314 3618, 3626
v. DeJarles, 8 Tex. Civ. App. 109 3622, 3632
v. Dickens, 148 Ala. 480 3826
v. Dobyns, 41 Okla. 403 3549, 3550
v. Dodson, 98 Miss. 745 3660
v. Dubois, 128 Ill. 248 3564, 3610, 3611
v. Dunlap, 183 Ala. 454 3659
v. Edmondson, 91 Tex. 206 3650
v. Edsall, 63 Tex. 668 3546, 3547
v. Edsall, 74 Tex. 329 3602, 3604
v. Elliott, 7 Tex. Civ. App. 482 3550
v. Engler, 21 C. C. A. 246, 75 Fed. 102 4804
v. Eubanks, 100 Ky. 591 3546, 3551, 3555, 3562
v. Evans, 1 Tex. Civ. App. 297 3621, 3634, 3659
v. Evans, 5 Tex. Civ. App. 55 3609, 3657
v. Evans, 108 Ark. 39 3659
v. Eyser, 2 Colo. 141 3506
v. Eyser, 91 U. S. 495 3503
v. Fatman, 73 Ga. 285 3562, 3593, 3601
v. Federolf (Tex. Civ. App.), 145 S. W. 314 3574, 3600
v. Feegles, 75 Tex. 537 352, 353, 3646, 3655
v. Fellner, 58 Ark. 29 3569
v. Fenton, 52 Ind. 1 3549, 3553, 3592, 3596
v. Ferguson, 26 Ind. App. 213 3642
v. Ferguson, 157 Ind. 64 352, 3621, 3642, 3644
v. Fischer, 133 Ky. 768 3568
v. Fisher, 107 Ky. 513 3622
v. Flannagan, 113 Ark. 9 3620, 3629, 3659
v. Flint River L. Co., 114 Ga. 576 3568, 3615
v. Fontaine, 58 Ga. 433 3549, 3551
v. Ford, 8 Ga. App. 514 171, 3588, 4661, 4686
v. Ford, 77 Ark. 531 16, 3609, 3612
v. Foster, 64 Tex. 220 3591
v. Foy, 32 Okla. 801 3589, 3642
v. Fuel, 165 Ala. 391 3622, 3656, 3657
v. Garlington, 101 Ark. 487 3633, 3638, 3660
v. Garrett, 46 Tex. Civ. App. 430 3607
v. Gibson (Tex. Civ. App.), 39 S. W. 198 3636
v. Gilstrap, 77 Kan. 191 3618
v. Glenn, 8 Ga. App. 168 33
v. Glover, 138 Ky. 500 3654
v. Goldwire (Tex. Civ. App.), 152 S. W. 503 188, 3603, 3604
v. Gossett, 15 Tex. Civ. App. 52 3602, 3658
v. Graham, 1 Colo. 230 196, 3549, 3550, 3553, 3583
v. Griffin, 27 Tex. Civ. App. 306 3630
v. Griffin, 92 Ark. 219 3638
v. Griffin, 93 Tex. 530 3625
v. Griffith, 161 Ala. 241 3624
v. Gulick, 48 Tex. Civ. App. 78 143

[REFERENCES ARE TO PAGES]

Western Union Tel. Co. v. Gulledte, 84 Ark. 501 3655
v. Hale, 11 Tex. Civ. App. 79 3609
v. Haley, 143 Ala. 586 3479, 3636
v. Hall, 124 U. S. 44 172, 3569
v. Haltom, 71 Ill. App. 63 3642
v. Hamilton, 36 Tex. Civ. App. 300 3547, 3655, 3657
v. Hanley, 85 Ark. 263 3557, 3588, 3633, 3655
v. Harper, 15 Tex. Civ. App. 37 3569
v. Harris, 6 Ga. App. 260 4917
v. Harris, 19 Ill. App. 347 3551, 3578, 3601
v. Hart, 62 Ill. App. 120 3568, 3602, 3613, 3616
v. Hearn, 110 Ark. 176 3549
v. Hearne, 7 Tex. Civ. App. 67 281, 320, 3614
v. Hearne, 77 Tex. 83 3550
v. Heathcoat, 149 Ala. 623 3622
v. Henderson, 89 Ala. 510 352, 1472, 3621, 3624
v. Henley, 23 Ind. App. 14 3575, 3597
v. Herring (Tex. Civ. App.), 146 S. W. 699 3655
v. Hill, — Tex. Civ. App. —, 162 S. W. 382 3657
v. Hill, 163 Ala. 18 3557, 3610, 3658
v. Hiller, 93 Miss. 658 1343, 1514, 3618
v. Hines, 22 Tex. Civ. App. 315 3547, 3591, 3632
v. Hines, 96 Ga. 688 3592
v. Hoffman, 80 Tex. 420 3564, 3613
v. Hogue, 79 Ark. 33 3654
v. Hollingsworth, 83 Ark. 39 3626, 3627, 3628
v. Hopkins, 49 Ind. 223 1361
v. Houghton, 82 Tex. 561 3659
v. Howell, 38 Kan. 685 3551
v. Howle, 156 Ala. 331 3589, 3638
v. Hoyt, 89 Ark. 118 3594
v. Hughey, 55 Tex. Civ. App. 403 3639
v. Hyer, 22 Fla. 637 3560, 3562, 3566
v. Ivy, 102 Ark. 246 323, 3613
v. Ivy, 177 Fed. 63 207, 3546, 3547, 3613, 3639
v. Jackson, 163 Ala. 9 3591, 3623
v. Jackson Lumber Co., 187 Ala. 629 2374, 2392, 3564
v. James, 90 Ga. 254 3556, 3565
v. Jeanes, 88 Tex. 230 3613
v. Jenkins (Tex. Civ. App.), 152 S. W. 198 3655
v. Johnsey, 49 Tex. Civ. App. 487 3613
v. Johnson, 9 Tex. Civ. App. 48 3622, 3637
v. Jones, 95 Ind. 228 3555
v. Jump, 8 Ky. L. Rep. 531 (Ky. Super. Ct.) 3591
v. Kanause, — Tex. Civ. App. —, 143 S. W. 189 3635
v. Kemp, 44 Neb. 194 3553, 3592
v. Kendzora (Tex. Civ. App.), 26 S. W. 245 3626
v. Kerr, 4 Tex. Civ. App. 280 3620
v. Kibble, 53 Tex. Civ. App. 222 3654
v. Kinsley, 8 Tex. Civ. App. 527 3622
v. Kirkpatrick, 76 Tex. 217 353, 3606, 3654
v. Krichbaum, 132 Ala. 535 3638
v. Kuykendall, 99 Tex. 323 3654
v. Lacer, 122 Ky. 839 3557
v. Landis (Pa.), 12 Atl. 467 3577
Western Union Tel. Co. v. Landry (Tex. Civ. App.), 108 S. W. 461 3655
v. Landry (Tex. Civ. App.), 134 S. W. 848 3654
v. Lawson, 66 Kan. 660 3546, 3618
v. Lawson, 182 Fed. 369 56, 3564, 3577, 3593
v. Lehman, 105 Md. 442 3564, 3593
v. Lehman, 106 Md. 318 4, 226, 3566, 3569
v. Leland, 156 Ala. 334 3626
v. Lewis, 203 Fed. 832 3595
v. Lindley, 89 Ga. 484 3565
v. Linn, 87 Tex. 7 3551, 3630
v. Long, 148 Ala. 202 3658
v. Longwill, 5 N. M. 308 3555, 3592, 3611
v. Louisell, 161 Ala. 231 3549
v. Love Banks Co., 73 Ark. 205 3565, 3566, 3567
v. Lovett, 24 Tex. Civ. App. 84 3632
v. Luck, 91 Tex. 178 3632, 3636
v. Lycan, 60 Ill. App. 124 3590
v. Lydon, 82 Tex. 364 3634
v. Lyman, 3 Tex. Civ. App. 460 3547, 3548
v. Lyon, 93 Miss. 590 3568
v. McCaul, 115 Tenn. 99 3591, 3629, 3650
v. McDavid (Tex. Civ. App.), 121 S. W. 893 3657
v. McFadden, 32 Tex. Civ. App. 582 3620
v. McFarlane, — Tex. Civ. App. —, 161 S. W. 57 3624
v. McGown, 42 Tex. Civ. App. 565 3606
v. McIlvoy, 21 Ky. L. Rep. 1393 3658
v. McKenzie, 96 Ark. 218 3628
v. McKibben, 114 Ind. 511 3555, 3592, 3611
v. McKinney, 2 Tex. Civ. Cas. 644 3562, 3597, 3604
v. McLaurin, 70 Miss. 26 3593, 3610
v. McMillan (Tex. Civ. App.), 30 S. W. 298 3636
v. McMorris, 158 Ala. 563 34, 1364, 3622
v. McMullin, 98 Ark. 347 3627
v. McNairy, 34 Tex. Civ. App. 389 3570
v. Manker, 145 Ala. 418 3608, 3635, 3638
v. Martin, 9 Ill. App. 587 3560
v. Matthews, 113 Ky. 188 3617
v. Meek, 49 Ind. 53 3549
v. Mellor, 33 Tex. Civ. App. 264 3559
v. Miller, 97 Miss. 225 1280
v. Mills, 50 Fla. 474 316
v. Milton, 53 Fla. 484 2830, 3568, 3570
v. Moore, 76 Tex. 66 353, 3606, 3646, 3655
v. Moore (Tex. Civ. App.), 139 S. W. 1020 3612
v. Morris, 10 Kan. App. 61 4739
v. Morris, 83 Fed. 992 3586
v. Mullins, 44 Neb. 732 3591
v. Murray, 29 Tex. Civ. App. 207 3591, 3596, 3628
v. Nagle, 11 Tex. Civ. App. 539 3553, 3563
v. Nations, 82 Tex. 539 3659
v. Neill, 57 Tex. 283 3546, 3549, 3550
v. Newhouse, 6 Ind. App. 442 3656
v. North, 177 Ala. 319 3622, 3659

[REFERENCES ARE TO PAGES]

Western Union Tel. Co. v. North Packing & P. Co., 188 Ill. 366, 89 Ill. App. 301 3565, 3617
v. Northcutt, 158 Ala. 539 3562, 3608, 3622, 3629, 3633, 3635, 3636
v. Nye, 70 Neb. 251 487, 3565, 3567
v. Oastler, 90 Ark. 268 3620, 3628, 3654
v. O'Callaghan, 32 Tex. Civ. App. 336 3626
v. Odom, 21 Tex. Civ. App. 537 3632
v. Olivarri, 104 Tex. 203 3654
v. Olivarri (Tex. Civ. App.), 110 S. W. 930 3560
v. Pallotta, 81 Miss. 216 3592
v. Partlow, 30 Tex. Civ. App. 599 3592, 3594
v. Patty D.-G. Co., 96 Miss. 781 3569
v. Peagler, 163 Ala. 38 3635, 3654
v. Pearce, 82 Miss. 487 3571
v. Pennsylvania R. Co., 59 C. C. A. 113, 123 Fed. 33 4056
v. Piner, 1 Tex. Civ. App. 301 3659
v. Piner, 9 Tex. Civ. App. 152 3658
v. Potts, 120 Tenn. 37 3609, 3610, 3618, 3622, 3654
v. Powell, 54 Tex. Civ. App. 466 135, 3588
v. Pratt, 18 Okla. 274 3559
v. Prevatt, 149 Ala. 617 3555, 3637
v. Price, 137 Ky. 758 3658
v. Pritchett, 108 Ga. 411 4532
v. Procter, 6 Tex. Civ. App. 300 3584, 3620, 3632
v. Rabon (Tex. Civ. App.), 127 S. W. 580 3657
v. Rains, 63 Tex. 27 3555
v. Raines, 78 Ark. 545 3620, 3654
v. Reed, 3 Ala. App. 253 3559, 3591
v. Reed, 37 Tex. Civ. App. 445 3633
v. Reeves, 8 Tex. Civ. App. 37 3550
v. Reeves, 34 Okla. 468 1258, 3546, 3566, 3618
v. Reid, 83 Ga. 401 3565
v. Reid, 120 Ky. 231 3624, 3627
v. Reynolds, 77 Va. 173 3562
v. Rhine, 90 Ark. 57 3659
v. Rich, 59 Tex. Civ. App. 395 3629
v. Richards (Tex. Civ. App.), 158 S. W. 1187 3633, 3656
v. Richman (Pa.), 8 Atl. 171 3555, 3577
v. Ring, 102 Md. 677 1430, 3774
v. Robbins, 3 Ala. App. 234 3618
v. Robertson (Tex. Civ. App.), 5 N. C. C. A. 685, 126 S. W. 629 3549, 3594, 3597
v. Robinson, 97 Tenn. 638 3552, 3632, 3636, 3656, 3658
v. Rogers, 68 Miss. 748 3642, 3645, 3648
v. Rosentreter, 80 Tex. 406 3655, 3657
v. Rowell, 153 Ala. 295 1258, 1471, 3574, 3623, 3642
v. Rowell, 166 Ala. 651 3656
v. Russell, 4 Ala. App. 485 3597, 3654
v. Russell, 12 Tex. Civ. App. 82 3657
v. Saunders, 164 Ala. 234 3637
v. Schriver, 129 Fed. 344, 64 C. C. A 96 3613
v. Seed, 115 Ala. 670 3618, 3621
v. Semmes, 73 Md. 9 2477
v. Shaw, 40 Tex. Civ. App. 277 3617
v. Sheffield, 71 Tex. 570 3585, 3602, 3616
v. Shenep, 83 Ark. 476 3620, 3628, 3629
v. Shofner, 87 Ark. 303 3654
Western Union Tel. Co. v. Short, 53 Ark. 434 3547, 3551, 3590, 3601
v. Shotter, 71 Ala. 760 3551, 3578, 3615
v. Shumate, 2 Tex. Civ. App. 429 3558, 3573, 3591
v. Sights, 34 Okla. 461 3570
v. Simpson, 64 Kan. 309 3570
v. Simpson, 73 Tex. 422 329, 353, 3621, 3624, 3646, 3657
v. Sklar, 126 Fed. 295 78, 3644
v. Sledge, 153 Ala. 291, 163 Ala. 4 367, 3629
v. Sloss, 45 Tex. Civ. App. 153 3612, 3658
v. Smith, 15 Ky. L. Rep. 334 (Ky. Super. Ct.) 3657
v. Smith, 64 Ohio St. 106 3833
v. Smith, 76 Tex. 253 3558
v. Snell, 3 Ala. App. 263 3625
v. Snodgrass, 94 Tex. 284 3548
v. Spivey, 98 Tex. 308 3568
v. State, 64 N. H. 265 1066
v. Steenbergen, 107 Ky. 469 3636
v. Steiberger (Tex.), 54 S. W. 829 3632
v. Stephens, 2 Tex. Civ. App. 129 3624, 3626, 3657
v. Stevens (Tex. Sup. Ct.), 16 S. W. 1095 3616
v. Stevenson, 128 Pa. 442 3553
v. Stiles, 89 Tex. 312 3634
v. Stokes, 171 Ala. 168 3618
v. Stratemeier, 6 Ind. App. 125 3546, 3555, 3558, 3621, 3631
v. Stratemeier, 11 Ind. App. 601 3656
v. Sullivan, 82 Ohio 14, 30 Ohio C. C. 435 3559
v. Swearingin, 97 Tex. 293 3655
v. T. C. Caumissar & Sons, 160 Ky. 569 3595
v. Taylor (Ky.), 112 S. W. 844 3617
v. Taylor, — Tex. Civ. App. —, 162 S. W. 999 3620
v. Taylor, — Tex. Civ. App. —, 167 S. W. 289 3549
v. Taylor, 57 Ind. App. 93 3555
v. Teague, 134 Ky. 601 3622
v. Thomas, 7 Tex. Civ. App. 105 3599
v. Thompson, 18 Tex. Civ. App. 609 3622
v. Thompson M. Co., 41 Tex. Civ. App. 223 3594
v. Toms, 99 Ark. 117 3654
v. Totten, 141 Fed. 533 1416, 4364
v. True, 101 Tex. 236 3559
v. Truitt, 5 Ga. App. 809 311, 3568, 3591
v. Turner, 94 Tex. 304 3548, 3598
v. Twaddell, 47 Tex. Civ. App. 51 3559
v. Tweed (Tex. Civ. App.), 138 S. W. 1155 4664
v. Ulmer (Tex. Civ. App.), 152 S. W. 528 3591
v. Valentine, 18 Ill. App. 57 3592
v. Vance (Tex. Civ. App.), 151 S. W. 904 3656
v. Van Cleave, 107 Ky. 464 3621
v. Vickery (Tex. Civ. App.), 158 S. W. 792 3633
v. Virginia P. Co., 87 Va. 418 3568
v. Walck, — Tex. Civ. App. —, 161 S. W. 902 766
v. Waller, 96 Tex. 589 3556, 3612, 3634
v. Waters, 139 Ala. 652 3638
v. Watson, 82 Miss. 101 3618
v. Waxelbaum, 113 Ga. 1017 3552, 3556, 3569

[REFERENCES ARE TO PAGES]

Western Union Tel. Co. v. Way, 83 Ala. 542 3549, 3555, 3558, 3562, 3565, 3569, 3613
v. Webb, 98 Ark. 87 3656
v. Weiting (Tex.), White & W. 801 3562
v. Wells, 50 Fla. 474 147, 353, 3590, 3652
v. Weniski, 84 Ark. 457 3654, 3659
v. West, 165 Ala. 399 3635
v. Westmoreland, 151 Ala. 319 172, 274, 1258, 1280, 3619, 3629, 3654
v. Westmoreland, 150 Ala. 654 3639
v. Wilhelm, 48 Neb. 910 3566
v. Williams, 57 Tex. Civ. App. 267 3202, 3598, 3613
v. Williams, 129 Ky. 515 3634
v. Williams (Tex. Civ. App.), 137 S. W. 148 3566, 3567, 3594, 3617
v. Williford, 2 Tex. Civ. App. 544 3604
v. Wilson, 32 Fla. 527 3560, 3562
v. Wilson, 37 Am. St. 125 3566
v. Wilson, 69 Tex. 739 352
v. Wilson, 93 Ala. 32 3621
v. Wilson, 97 Tex. 22 3654, 3655
v. Wofford, 32 Tex. Civ. App. 427 3586, 3604
v. Womack, 9 Tex. Civ. App. 607 3552, 3626, 3632
v. Wood, 57 Fed. 471 3609, 3644
v. Woodard, 84 Ark. 323 3557, 3607
v. Woods, 56 Kan. 737 3577
v. Woods, 88 Ill. App. 375 4700
v. Woods (Tex. Civ. App.), 133 S. W. 440 3566, 3567
v. Yopst, 118 Ind. 248 3555
v. Young (Tex. Civ. App.), 130 S. W. 257 3626
v. Young (Tex. Civ. App.), 133 S. W. 512 3612, 3623, 3638, 3657
Western W. & P. Co. v. West, [1892] 1 Ch. 271 273
Western & A. Pipe Lines v. Home Ins. Co., 145 Pa. 346 1090, 3059
Western & A. R. Co. v. Bailey, 105 Ga. 100 133, 146
v. Bishop, 50 Ga. 465 22
v. Brown, 58 Ga. 534 1480
v. Brown, 102 Ga. 13 1138
v. Bryant, 123 Ga. 77 149
v. Calhoun, 104 Ga 384 1142
v. Clark, 117 Ga. 548 1476
v. Davis, 139 Ga 493 4725
v. Henderson, 6 Ga. App. 385 432
v. Johnston, 59 Pa. 290 3947
v. McCauley, 68 Ga 818 1140
v. Meigs, 74 Ga. 857 489, 4885
v. Moore, 94 Ga. 457 4879
v. Roberson, 61 Fed. 592 4914
v. Sellers, 15 Ga. App. 369 4712, 4728
v. Strong, 52 Ga. 461 4954
v. Summerour, 139 Ga. 545 3346
v. Tate, 129 Ga. 526 428, 1440, 3773, 3775
v. Turner, 72 Ga. 292 3513
v. Western U. Tel. Co., 138 Ga. 420 4068
v. Young, 81 Ga. 397 1140, 1141, 4669, 4670, 4689, 4772, 4773
v. Young, 83 Ga. 512 4671, 4810
Western & S. L. Ins. Co. v. Quinn, 130 Ky. 397 759
Westervelt v. Demarest, 46 N. J. L. 37 4388
v. Gregg, 12 N. Y. 211 26
v. Mohrenstecher, 76 Fed. 118 2748, 2750, 2751
Westervelt v. National Mfg. Co., 33 Ind. App. 18 1750
v. Smith, 2 Duer 449 295
Westfal v. Albert, 212 Ill. 68 883
Westfall v. Braley, 10 Ohio St. 188 595, 648, 649
v. Dungan, 14 Ohio St. 276 523
v. Peacock, 63 Barb. 207 2228, 2244
Westfield v. Mayo, 122 Mass. 100 298, 300, 306, 2164
v. Westfield, 19 S. C. 85 1214
Westfield G. & M. Co. v. Abernathy, 8 Ind. App. 73 1531
Westinghouse v. New York A. B. Co., 131 Fed. 607 4452
v. New York A. B. Co., 133 Fed. 936 4476
v. New York A. B. Co., 140 Fed. 545 4466
Westinghouse E. & Mfg. Co. v. Condit E. Mfg. Co., 159 Fed. 154 4437
Westlake v. De Graw, 25 Wend. 669 537, 547, 3103, 3138, 3139, 3236, 3257, 3263
v. St. Lawrence Ins. Co., 14 Barb. 206 1445
Westlecraft v. Barry, 83 N. J. L. 53 2626, 2689
Westminister Metal & Foundry Co. v. Coffman, 123 Md. 619 559
Westmore v. San Francisco, 44 Cal. 294 509
Weston v. Barnicoat, 175 Mass. 454 4556
v. Boston & M. R. Co., 190 Mass. 298 3367
v. Davis, 24 Me. 374 2462
v. Gilmore, 63 Me. 493 1488
v. Grand Trunk R. Co., 54 Me. 376 2367, 3349
v. Gravlin, 49 Vt. 507 3743, 3832
v. Weston, 102 Mass. 514 3099
Weston P. Co. v. Pope, 155 Ind. 394 3840, 3907
Westown R. Co. v. Keller, 143 App. Div. (N. Y.) 458 2031, 2931
Westphal v. City of New York, 75 App. Div. (N. Y.) 252 3772
Westropp v. Solomon, 8 C. B. 345 2385
Westwater v. Grace Church, 140 Cal. 339 175, 2549, 2571
Westwood v. Cowne, 1 Stark. 172 4557
v. Secretary of State for India, 11 Week. Rep. 261, 7 L. T. 736 931
Wetherbee v. Bennett, 2 Allen 428 1419, 1427, 2148, 2180, 2183, 2186
v. Green, 22 Mich. 311 362, 363, 4260, 4262, 4345
v. Marsh, 20 N. H. 561 471, 4576
Wetherell v. Chicago City R. Co., 104 Ill. App. 357 4849
v. Joy, 40 Me. 325 703, 704, 710
Wetmore v. Bruce, 118 N. Y. 319, 54 N. Y. Super. 149 1997, 2148, 2159
v. Crouch, 150 Mo. 671 748
v. Green, 11 Pick. 462 2120, 2157, 2189
v. Hegeman, 88 N. Y. 72 1815
v. Mellinger, 64 Iowa 741 4609
v. Pattison, 45 Mich. 439 183
v. Woodhouse, 10 Tex. 33 1010
Wetsel v. Tillman, 3 Tex. Civ. App. 559 4606
Wetter v. Kleinert, 139 App. Div. (N. Y.) 220 2584, 2694, 2695
Wettlauffer v. Ames, 133 Mich. 201 1020
Wetzel v. Satterwhite (Tex. Civ. App.), 125 S. W. 93 3736, 3750
Wetzell v. Dinsmore, 54 N. Y. 496 3416

[REFERENCES ARE TO PAGES]

Wetzell v. Richcreek, 53 Ohio St. 62 3187
v. Waters, 18 Mo. 396 1400
Weyand v. Park Terrace Co., 202 N. Y. 231 622
v. Randall, 131 App. Div. (N. Y.) 167 621
Weybrick v. Harris, 31 Kan. 92 2405
Weyer v. Chicago, etc., R. Co., 68 Wis. 180 3970, 3978
v. Wegner, 58 Tex. 539 3827
Weymer v. Belle Plaine B. Co., 151 Iowa 541 2466, 2575, 2581
Weymouth v. Babcock, 42 Me. 44 749
v. Chicago & N. R. Co., 17 Wis. 550 364, 3792, 4261, 4346
Weyrich v. Hobleman, 14 Neb. 432 998
Whalen v. Keith, 35 Mo. 87 3839
v. Layman, 2 Blackf. 194 3663
v. St. Louis, etc., R. Co., 60 Mo. 323 222, 334, 3472, 3495
v. Union B. & P. Co., 145 App. Div. (N. Y.) 1 3937
Whaley v. Vidal, 27 S. D. 627 4900, 4907
v. Wilson, 112 Ala. 627 3839
Whaling v. Wells, 50 La. Ann. 562 4639
Whalon v. Aldrich, 8 Minn. 346 2591
Wharf v. Roberts, 88 Ill. 426 4383
Wharton v. Bradford, 209 Pa. 319 3908
v. Duncan, 83 Pa. 40 2804
v. King, 69 Ala. 365 620
v. Lewis, 1 C. & P. 529 3680
v. Morris, 1 Dall. 124 790, 802, 1887
v. Walker, 4 B. & C. 163 630
v. Winch, 140 N. Y. 287 381, 2693
v. Woodburn, 4 Dev. & Bat. 507 2833
Wheadon v. Olds, 20 Wend. 174 2224
Wheat v. Dotson, 12 Ark. 699 515, 533, 556
Wheatcraft v. Myers, 57 Ind. App. 371 4433
Wheatland v. Taylor, 29 Hun 70 923, 925
Wheatley v. Abbott, 32 Miss. 343 642
v. Glover, 125 Ga. 710 1077
v. Thorn, 23 Miss. 62 1306, 4776
Wheatly v. Miscal, 5 Ind. 142 2540
Wheaton v. Hibbard, 20 Johns. 290 712
v. Lund, 61 Minn. 94 2597
v. Peters, 8 Pet. 656 4478
v. Pike, 9 R. I. 132 953, 1206, 1211
Wheaton B. & L. Co. v. Boston, 204 Mass. 218 842
Wheeden v. Fiske, 50 N. H. 125 2650, 2655, 2664
Wheedon v. American B. & T. Co., 128 N. C. 69 864, 894
Wheelan v. Chicago, etc., R. Co., 85 Iowa 178 4905, 4950
Wheeland v. Fredonia Gas Co., 92 Kan. 50 2646
Wheelden v. Lowell, 50 Me. 499 4383
Wheeler v. Aberdeen, 45 Wash. 63 11, 343, 3753
v. Anglim, 193 Mass. 600 2478
v. Baker, 132 Mich. 507 755
v. Ball, 26 Mo. App. 443 2053
v. Bell, 88 Hun 100 2902
v. Chicago & W. I. R. Co., 182 Ill. App 194 1428, 1464
v. Cleveland, 170 Ala. 426 2238
v. Commercial I. Co., 22 Wash. 546 1807
v. Dake, 129 Mo. App. 547 2788
v. Equitable T. Co., 206 Pa. 428 2875
v. Guild, 20 Pick. 545 686
v. Hanson, 161 Mass. 371 4614, 4618, 4619
v. Harrison, 28 Mich. 265 638
v. Haskins, 41 Me. 432 1102
Wheeler v. Hathaway, 54 Mich. 550 1083
v. House, 27 Vt. 735 719
v. Knaggs, 8 Ohio 172 790, 801, 2506
v. McDonald, 77 Mo. App. 213 4232
v. Meyer, 95 Mich. 36 2777
v. Millar, 90 N. Y. 353 1077
v. Nesbitt, 24 How. 544 4634, 4636
v. Newberry County, 18 S. C. 132 1043
v. Ocker & F. Mfg. Co., 162 Mich. 204 2514
v. Pereles, 43 Wis. 332 4281, 4287
v. Pettes, 21 Vt. 398 1617
v. Pope, 5 Tex. 262 1184, 1879, 1881
v. Randall, 48 Ill. 182 1308, 2447
v. Ruthven, 74 N. Y. 428 1080
v. Shed, 1 D. Chip. 208 3106
v. Sioux Paving B. Co., 162 Iowa 414 4799
v. Sohier, 3 Cush. 219 2129
v. Styles, 28 Tex. 240 1987
v. Sweet, 137 N. Y. 435 2899
v. Townshend, 42 Vt. 15 4186
v. Train, 4 Pick. 168 1676, 4361
v. Wayne County, 132 Ill. 599 2053
v. Woodward, 66 Pa. 158 825, 1229
v. Worcester, 10 Allen 591 432, 435
Wheeler & W. Mfg. Co. v. Bovce, 36 Kan. 350 1332, 1343, 4836
v. Brown, 65 Wis. 99 2755
Wheeling M. & F. Co. v. Wheeling S. & I. Co., 58 W. Va. 62 888
Wheeling, etc., R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28 4907
Wheelock v. Berkeley, 138 Ill. 153 2392, 2404, 2406, 2456
v. Pacific, P. G. Co., 51 Cal. 223 542, 2456
v. Postal Tel.-C. Co., 197 Mass. 119 3554, 3559, 3560
v. Tanner, 39 N. Y. 481 807, 813, 815
v. Wheelright, 5 Mass. 104 480, 2922, 4296
Whelan v. Lynch, 60 N. Y. 469, 65 Barb. 326 1418, 1436, 1452, 2304, 2305, 2311, 2946, 2950, 2951, 2954
v. Miller, 49 Pa. Super. Ct. 91 4631
Whelchel v. Duckett, 91 Ga. 132 1710
Whelen's App, 70 Pa. 410 4378
Wheless v. Rhodes, 70 Ala. 419 1279
v. Serano, 121 Mo. App. 17 378
v. Williams, 62 Miss. 369 1108
Whereatt v. Ellis, 68 Wis. 61 1242
v. Ellis, 103 Wis. 348 1569, 1575
Wherley v. Rowe, 106 Minn. 494 699, 748, 757, 763, 1079
Whetmore v. Murdock, 3 Woodb. & M. 390 703, 714, 717
Whetstone v. Colley, 36 Ill. 328 602, 1541
Whidden v. Seelye, 40 Me. 247 1184, 1879
Whinery v. Brown, 36 Ind. App. 276 2489
Whipple v. Cumberland Mfg. Co., 2 Story 661 38, 1495, 1496
v. Dutton, 175 Mass. 365 4291
v. Fuller, 11 Conn. 582 4609
v. Gorsuch, 82 Ark. 252 4643
v. Mississippi & Y. P. Co., 34 Fed. 54 2749
v. Walpole, 10 N. H. 130 1442, 2306, 2670
v. Wanskuck Co, 12 R. I. 321 3815
Whisler v. Hicks, 5 Blackf. 100 555, 1845, 2153
Whissenhunt v. Jones, 78 N. C. 361 3695
Whiston v. Stodder, 8 Mart. 95 1145, 1148, 1155
Whitacre v. Culver, 9 Minn. 295 1830

[REFERENCES ARE TO PAGES]

Whitaker, The, 1 Sprague 282 2720
Whitaker v. Hartford, etc., R. Co., 8 R. I. 47 1210
v. Hawley, 25 Kan. 674 3138, 3180
v. Hawley, 26 Kan. 277 3140
v. Phoenixville, 141 Pa. 327 4098
v. Poston, 120 Tenn. 207 3707
v. Salisbury, 15 Pick. 534 452
v. Sandifer, 1 Duv. 261 2556, 2561
Whitall v. Cressman, 18 Neb. 508 1253
Whitbeck v. Estate of Ramsay, 74 Ill. App. 524 2743
v. New York Cent. R. Co., 36 Barb. 644 1419, 1436, 3751, 3779, 3785
v. Ramsey, 74 Ill. App. 524 2803
v. Skinner, 7 Hill 53 537, 547
v. Van Ness, 11 Johns. 409 655, 656
v. Waine, 16 N. Y. 535 2053
Whitcher v. Benton, 50 N. H. 25 4114, 4115
v. Dexter, 61 N. H. 91 663
Whitcomb v. Collier, 133 Iowa 303 1134
v. Harris, 90 Me. 206 1205
v. Houston (Tex. Civ. App.), 130 S. W. 215 866
v. Waterville, 99 Me. 75 371
v. Williams, 4 Pick. 288 659
White v. Allen, 133 Mass. 423 4291
v. Apsley R. Co., 194 Mass. 97 4606, 4608
v. Arleth, 1 Bond 319 860, 899
v. Australasian S. N. Co., 13 New South Wales L. R. (law) 177 4893
v. Bailey, 10 Mich. 155 1423
v. Ballou, 8 Allen 408 54
v. Banks, 21 Ala. 705 2851, 2865
v. Barnes, 112 N. C. 323 1267, 4774
v. Beard, 5 Port. 94 1949
v. Beem, 80 Ind. 239 722
v. Binstead, 13 C. B. 303, 76 Eng. C. L. 303 4203, 4303
v. Bonney, 110 Va. 864 4208
v. Boone, 71 Tex. 712 663
v. Braddock Borough School Dist., 159 Pa. 201 2665
v. Brockway, 40 Mich. 209 2597
v. Brooke, 11 Wash. 99 1744, 1745, 1759
v. Brown, 2 Jones 403 376
v. Campbell, 13 Gratt. 573 4967
v. Cannada, 25 Ark. 41 1357
v. Carlton, 52 Ind. 371 2869
v. Carr, 71 Me. 555 4644, 4645
v. Chapin, 102 Mass. 138 3921
v. Charlotte, etc., R. Co., 6 Rich. 47 3957, 4033
v. Chicago, etc., R. Co., 145 Iowa 408 4787
v. Chicago, etc., R. Co., 1 S. D. 326 3751, 3776
v. Chicago, etc., R. Co., 122 Ind. 317 399, 4145
v. Chicago, etc., R. Co., 49 Mont. 419 4795, 4809
v. Cincinnati, etc., R. Co., 34 Ind. App. 287 3968, 3996, 4030
v. Clack, 2 Swan 230 2143, 3698
v. Clay, 7 Leigh 68 1716
v. Concord R. Co., 30 N. H. 188 1439, 2670
v. Conly, 14 Lea 51 159
v. Connecticut Ins. Co., 120 Mass. 330 627
v. Connecticut Mut. L. Ins. Co., 4 Dill. 177 3008
v. County Com'rs, 2 Cush. 361 3957
v. Curd, 86 Ky. 191 958, 960
v. Cuyler, 6 T. R. 176 2846
White v. Dingley, 4 Mass. 433 836
v. Ditson, 140 Mass. 351 1128
v. Dobson, 17 Gratt. 262 815
v. Dougherty, 1 Boyce (Del.) 355 2462
v. Dougherty, Mart. & Yerg. 309 576
v. Dresser, 135 Mass. 150 343, 3918
v. Fifth Ave. & High St. B. Co., 189 Pa. 500 4124
v. Foxborough, 151 Mass. 28 4025, 4030
v. French, 15 Gray 339 2885
v. Green, 3 T. B. Mon. 155 625, 2330
v. Gresham, 52 Ill. App. 399 2376, 2386, 2387
v. Griffin, 4 Jones 139 37
v. Hermann, 51 Ill. 243 1419, 1444, 1450, 2305
v. Howard, 1 Sandf. 81 677
v. Howland, 9 Mass. 314 2569, 2779
v. Iltis, 24 Minn. 43 976
v. International Text Book Co., 144 Iowa 92 4634, 4637, 4647
v. International Textbook Co., 150 Iowa 27 1331
v. International T. B. Co., 156 Iowa 210 4603, 4608, 4639
v. International Text Book Co., 164 Iowa 693 1310, 1311, 1322, 4629
v. Jordan, 27 Me. 370 748
v. Jouett, 147 Ky. 197 1458
v. Kiggins, 130 Ill. App. 404 1451, 1981
v. Kincaid, 149 N. C. 415 6
v. Leatherberry, 82 Miss. 103 231, 2342
v. Life Ass'n of America, 63 Ala. 419 828, 2808
v. Lloyd, 3 Blackf. 390 4347
v. Lyons, 42 Cal. 279 1185, 1186
v. McLaren, 151 Mass. 553 2597, 2600, 2646
v. McNeily, 1 Bay 11 1534
v. McNett, 33 N. Y. 371 66, 111
v. Madison, 26 N. Y. 117 306, 1989, 2982, 2984, 2987
v. Mann, 26 Me. 361 1561
v. Manning, 46 Tex. Civ. App. 298 1039
v. Matador L. & C. Co., 75 Tex. 465 2237, 2249, 2295
v. Medford, 163 Mass. 164 4018
v. Merritt, 7 N. Y. 352 4566
v. Metropolitan St. R. Co., 132 Mo. App. 339 1318, 3450, 3481, 3501
v. Metropolitan, etc., E. R. Co., 154 Ill. 620 4126
v. Miller, 47 Ind. 385 2834, 2844
v. Miller, 71 N. Y. 118, 133 238, 239, 408, 2375, 2380, 2387, 2440
v. Miller, 78 N. Y. 393 1094, 1102, 2414, 2423
v. Milwaukee City R. Co., 61 Wis. 536 1462, 4742
v. Minneapolis, etc., R. Co., 111 Minn. 167 3427, 3497
v. Missouri, etc., R. Co., 230 Mo. 287 15
v. Molyneux, 2 Ga. 124 3138
v. Moseley, 8 Pick. 356 213, 265, 3815, 3918
v. Moses, 21 Cal. 34 3710
v. Murtland, 71 Ill. 250 491, 1316, 1317, 1318, 4958, 4960, 4964, 4967, 4968, 4969, 4971, 4973
v. Naerup, 57 Ill. App. 44 1281
v. Nassau T. Co., 168 N. Y. 149 6
v. Nellis, 31 N. Y. 405 4965

[REFERENCES ARE TO PAGES]

White v. Nellis, 31 Barb. 279 4966
v. Newcomb, 25 App. Div. (N. Y.) 397 4549
v. Nicholls, 3 How. 266 11
v. Norfolk & S. R. Co., 115 N. C. 631 3468
v. Northwest S. Co., 5 Ore. 99 1356
v. Oliver, 36 Me. 92 543
v. Parker, 6 Barb. 48 767
v. Pease, 15 Utah 170 1453
v. Pennsylvania R. Co., 229 Pa. 480 3975
v. Reed, 15 Conn. 457 2745, 2748
v. Reitz, 129 Mo. App. 307 4383
v. Remick, 198 Mass. 41 407, 3174
v. Republic F. Ins. Co., 57 Me. 91 3040, 3048
v. Richmond & D. R. Co., 110 N. C. 456 780
v. Ross, 5 Stew. & P. 123 4336
v. Sage, 19 Ont. App. 135 4384
v. Salisbury, 33 Mo. 150 2318, 4239
v. Sander, 168 Mass. 296 94, 344, 4688
v. Savage, 48 Ore. 604 2797, 2820
v. Sealey, 1 Doug. 49 1568, 1572
v. Sheffield, etc., R. Co., 90 Ala. 253 4316, 4317, 4343
v. Sherman, 168 Ill. 589, 62 Ill. App. 271 1120, 1121
v. Sisters of Charity, 79 Ill. App. 646 2599
v. Smith, 6 Lans. 5 2946
v. Smith, 54 N. Y. 522 287, 2965, 4392, 4402
v. Solomon, 164 Mass. 516 2259
v. Spangler, 68 Iowa 222 1288
v. Sprague, 9 N. Y. St. Rep. 320 3250
v. Springfield, City of, 189 Mo. App. 228 4015
v. Sterzing, 11 Tex. Civ. App. 553 4284
v. Stoner, 18 Mo. App. 540 1431, 3774, 3836
v. Street, 67 Tex. 177 2105
v. Stretch, 22 N. J. Eq. 79 2211
v. Sun Pub. Co., 164 Ind. 426 40, 1304, 4547, 4550, 4590
v. Sutherland, 64 Ill. 181 533
v. Teal, 12 Ad. & E. 114 4284
v. Thomas, 12 Ohio St. 312 3671
v. Toles, 7 Ala. 569 709
v. Tompkins, 52 Pa. 363 624
v. Trumbull, 15 N. J. L. 314 720, 728
v. Tucker, 16 Ohio St. 468 4647
v. United States, 202 Fed. 501 1138, 4257
v. Van Houten, 51 Mo. 577 4348, 4353
v. Vicksburg, etc., R. Co., 42 La. Ann. 990 416
v. Walker, 31 Ill. 422 936
v. Weaver, 41 Ill. 409 2779
v. Webb, 15 Conn. 302 423, 430, 1680, 4173
v. Western U. Tel. Co., 153 App. Div. (N. Y.) 684 3569
v. White, 3 Dana 376 1121
v. White, 5 Rawle 61 1480
v. White, 76 Kan. 82 1316, 4981, 4982, 4984
v. White, 101 Minn. 451 4982
v. White, 140 Wis. 538 1267, 1328, 4980, 4981
v. Whitney, 3 Metc. (Mass.) 81 2110, 2115, 3188
v. Wilkins, 24 Me. 299 1598
v. Williams, 13 Tex. 258 2137
v. Woodruff, 25 Neb. 797 33
v. Wyley, 17 Ala. 167 4631, 4642
White v. Yawkey, 108 Ala. 270 3772, 4260, 4263
White A. Co. v. Dorsey, 119 Md. 251 2302, 2388, 2404
White Blakeslee Mfg. Co. v. Rhodes, 152 N. C. 636 1658
White Deer Creek I. Co. v. Sassaman, 67 Pa. 415 1432, 1434
White Pine. L. Co. v. Aetna Ind. Co., 42 Wash. 569 1729
White Plains, In re, 124 App. Div. (N. Y.) 1 4053
White River School Tp. v. Dorrell, 26 Ind. App. 538 1045
White River, etc., R. Co. v. Star R. & L. Co., 77 Ark. 128 224, 3196
White S. M. Co. v. Dakin, 86 Mich. 581 1569
v. Hines, 61 Mich. 423 2754
v. Miller, 66 Minn. 119 2747
v. Shaddock, 79 Ark. 220 261
White Star, The, 1 Adm. & Ecc. 68 2720
White Valley, etc., R. Co. v. McClure, 29 Ind. 536 4025
White Walnut C. Co. v. Crescent C. & M. Co., 254 Ill. 368 2242, 2249
White's Adm'x v. Central Vermont R. Co., 87 Vt. 330, aff'd 238 U. S. 507 4902, 5125
Whitecotton v. St. Louis & H. R. Co., 104 Mo. App. 65 3756, 4095
Whitehall T. Co. v. New Jersey S. Co., 51 N. Y. 369 1143
Whitehead v. Boorom, 7 Bush 399 1793, 1808
v. Callahan, 44 Colo. 396 3692, 3694
v. Cape Henry Syndicate, 111 Va. 193 233, 1735, 1752
v. Darling, 9 Ky. L. Rep. 340 2976
v. Jessup, 2 Colo. App. 76 4633, 4645
v. Kennedy, 69 N. Y. 462 1512, 3529
v. Manor, 23 Pa. Super. Ct. 314 3975
v. Mathaway, 85 Ind. 85 4790
v. Pittsburg R. Co., 230 Pa. 79 4835
v. Wisconsin Cent. R. Co., 103 Minn. 13 4652, 4806
Whitehead & A. M. Co. v. Ryder, 139 Mass. 366 2421, 2435
Whitehill v. Wilson, 3 P. & W. 405 642
Whitehouse v. Androscoggin R. Co., 52 Me. 208 3738
v. Atkinson, 3 C. & P. 344 4215, 4234
v. Fellowes, 10 C. B. (N. S.) 765 393, 402, 414
v. Galstead, 90 Ill. 95 3306
v. Staten Island W. S. Co., 101 App. Div. (N. Y.) 112 288
Whiteley v. China, 61 Me. 199 2305
v. Mississippi, etc., B. Co., 38 Minn. 523 4108
Whitellegge v. De Witt, 12 Daly 319 537
Whiteman v. Childress, 6 Humph. 303 1888, 1889
v. Harriman, 85 Ind. 49 2865
v. Hawkins, 4 C. P. Div. 13 2928
v. Merion T. & T. Co., 25 Pa. Super. Ct. 320 3094
v. Perkins, 56 Neb. 181 2013
Whitemarsh v. Hall, 3 Denio 375 2540
Whitenack v. Philadelphia & R. R. Co., 57 Fed. 901 3842
Whitesell v. Hill, 101 Iowa 629 538
v. Study, 37 Ind. App. 429 11, 4633
Whitesett v. Forehand, 79 N. C. 230 368
Whiteside v. Adams Exp. Co., 89 Neb. 430 3397
v. Connolly, 21 N. Y. Misc. 19 1415
v. Jennings, 19 Ala. 784 1947, 2048

[REFERENCES ARE TO PAGES]

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v. Noyac C. Ass'n, 84 Hun 555 1728, 1733
Whitfield v. Boyd, 158 N. C. 451 3696, 3710
v. Levy, 35 N. J. L. 149 834, 859, 860, 861, 918, 926
v. Rowland, 152 N. C. 211 1432, 3776
v. South Eastern R. Co., 96 Eng. C. L. 115 1332
v. Westbrook, 40 Miss. 311 1316
v. Whitfield, 40 Miss. 352 1457, 4209, 4272
v. Whitfield, 44 Miss. 254 1679
v. Zellnar, 24 Miss. 663 2687, 2693
Whitford v. Panama R. Co., 23 N. Y. 465 4852, 4854, 4954, 5118
Whitham v. Kershaw, 16 Q. B. Div. 613 3837
Whiting v. Adams, 66 Vt. 679 4256
v. Burke, L. R. 6 Ch. 342, aff'g L. R. 10 Eq. Cas. 539 2859
v. Commonwealth, 196 Mass. 468 4024
v. Dewey, 15 Pick. 428 2088, 2135
v. Independent Mut. Ins. Co., 15 Md. 397 3009
v. Johnson, 6 Gray 246 4601
v. New Baltimore, 127 Mich. 66 866, 869, 886
v. Plumas County, 64 Cal. 65 635
Whitley v. Moseley, 46 Ala. 480 611
v. Murray, 34 Ala. 155 2524
v. Willingham, 176 Ala. 264 41
Whitling v. Fleming, 16 Ont. App. 263 40
Whitlock v. Castro, 22 Tex. 108 1147, 1878
v. Crew, 28 Ga. 289 1028, 2098, 2134
v. Ledford, 82 Ky. 390 553
v. Manciet, 10 Ore. 166 635
v. Mungiven, 36 R. I. 386 1365, 1377, 1384
v. Northern Pac. R. Co., 59 Wash. 15 3468, 3528
v. S. G. Mozley & Co., 142 Ga. 305 3220
Whitlow v. Nashville, etc., R. Co., 114 Tenn. 344 4952
Whitman v. Atchison, etc., R. Co., 85 Kan. 150 1332
v. Boston, etc., R. Co., 3 Allen 133 3957, 4112
v. Boston, etc., R. Co., 7 Allen 313 1419, 1443, 4133, 4134, 4155
v. Citizens' Bank, 110 Fed. 503 1047, 1077
v. Jones, 5 N. H. 362 1654
v. Merrill, 125 Mass. 127 4313
v. Namquit W. Co., 206 Fed. 549 2344, 2348
v. Reading, 191 Pa. 134 4091
Whitmark v. Lorton, 15 Daly 548 4223
Whitmarsh v. Littlefield, 46 Hun 418 2564
Whitmer v. El Paso, etc., R. Co., 201 Fed. 193 1278, 1309, 4861, 4867, 4926, 4934
Whitmire v. Cobb, 88 Fed. 91 2737
Whitmore v. Bischoff, 5 Hun 176 414, 3850, 3881
v. Bowman, 4 G. Greene 148 1431
v. Coats, 14 Mo. 9 2237, 2276
v. South Boston I. Co., 2 Allen 52 2376, 2406
v. Utah F. Co., 26 Utah 488 3798
Whitney v. Abbott, 191 Mass. 59 287, 2901, 2913
v. Allaire, 1 N. Y. 305 26, 533, 4382
v. Allen, 21 Cal. 233 1800
Whitney v. Bartholomew, 21 Conn. 213 3839
v. Beckford, 105 Mass. 267 51, 3282, 4293
v. Boardman, 118 Mass. 242 2242
v. Chicago Rys. Co., 185 Ill. App. 211 4945
v. Chicago & N. R. Co., 27 Wis. 327 1136, 3389, 3400
v. Cook, 99 U. S. 607 1256
v. Dinsmore, 6 Cush. 124 2116
v. Fred D. Jones Co., 174 Ill. App. 116 2576
v. Groot, 24 Wend. 82 2745, 2748
v. Heywood, 6 Cush. 82 2380, 2381
v. Hitchcock, 4 Denio 461 1308, 4767, 4772
v. Huntington, 37 Minn. 197 3788, 3789, 4260, 4263
v. Janesville Gazette, 5 Biss. 330 471, 4587
v. Lehmer, 26 Ind. 503 1681
v. Levon, 34 Neb. 443 4321
v. Lewis, 21 Wend. 131 2193
v. Lynn, 122 Mass. 338 4149
v. Martine, 88 N. Y. 535 2962
v. Merchants' Exp. Co., 104 Mass. 152 2922, 2944, 3395, 3425
v. Meyers, 1 Duer 266 537, 3121, 3129
v. Milwaukee, 65 Wis. 409 1495
v. Moignard, 24 Q. B. Div. 630 4515, 4565
v. Nat. Bank, 45 N. Y. 305 1869
v. New Orleans, 54 Fed. 617 2480
v. New York Ins. Co., 18 Johns. 208 3294
v. Olsen, 108 Fed. 292 4993
v. Richards, 17 Utah 226 4376
v. Rogers, 2 Disney 421 3294
v. Taylor, 54 Barb. 536 1458
v. Thacher, 117 Mass. 523 1436, 1444, 2303, 2304
v. Traynor, 74 Wis. 289 710, 712
v. Wyman, 24 Md. 134 2950
Whiton v. Mears, 11 Metc. (Mass.) 563 2780
v. Snyder, 88 N. Y. 299 1436
Whitsell v. Study, 37 Ind. App. 429 4609
Whitsett v. Forehand, 79 N. C. 230 2309
v. Union D. & R. Co., 10 Colo. 243 16
Whitson v. Sheffield Farms-S. D. Co., 76 N. Y. Misc. 180 869, 886
Whittaker v. Dunn, 3 T. L. Rep. 602 2666
v. Hueske, 29 Tex. 355 2379
v. McQueen, 128 Ky. 260 4570
v. Sandford, 110 Me. 77 4840, 4843
v. Stangvick, 100 Minn. 386 3737
v. Welch, 2 Pugs. 436 2321, 2346
Whittaker Chain Tread Co. v. Standard Auto Supply Co., 216 Mass. 204 757
Whittemore v. Boston & M. R. R., 77 N. H. 61 55, 3463
v. Coleman, 239 Ill. 450 2471, 2499
v. Cutter, 1 Gall. 478 37, 4442
v. Moore, 9 Dana 315 3099, 3101
v. People, 227 Ill. 453 1014, 1110
v. Weiss, 33 Mich. 348 4504
Whitten v. Fuller, 2 W. Bl. 902 4301, 4302
v. Krick, 31 Ind. App. 577 2149
v. Western U. Tel. Co., 141 N. C. 361 3634
v. Wright, 34 Mich. 92 677, 678
Whittier v. Collins, 15 R. I. 90 4401
v. Franklin, 46 N. H. 23 1422

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v. Roberts, 4 T. B. Mon. 173 696
Whittler v. Sharp, 43 Utah 419 33, 480
Whittlesey v. Sullivan, 33 Mo. 405 1805, 1806
Whitton v. Swope, 1 Litt. 160 1874
Whitwell v. Wells, 24 Pick. 25 1664, 4347, 4351
Whitwham v. Westminster Brymbo C. & C. Co., [1896] 2 Ch. 538, aff'g [1896] 1 Ch. 894 3747
Whitworth v. Ewing, 15 Lea 595 1085
v. Pool, 29 Ky. L. Rep. 1104 2011
v. Stuckey, 1 Rich. Eq. 409 2212
v. Tilman, 40 Miss. 76 2848, 2849
Whitworth's Distributees v. Oliver, 39 Ala. 286 1647
Whitzman v. Hirsh, 87 Tenn. 513 2112, 2124, 2126
Whizenant v. State, 71 Ala. 383 1279
Whorley v. Tennessee Cent. Exp. Co. (Tenn. Ch. App.), 62 S. W. 346 2322
Whorton v. Webster, 56 Wis. 356 459, 3836
Wibaux v. Grinnell L. S. Co., 9 Mont. 154, 162 832, 925, 929
Wibert v. New York & E. R. Co., 12 N. Y. 245 3329
Wichita Falls, etc., R. Co. v. Harvey, — Okla. —, 144 Pac. 581 3961, 4133
v. Holloman, 28 Okla. 419 4042
v. McAlary, — Okla. —, 144 Pac. 583 4132, 4133
v. Munsell, 38 Okla. 253 3976, 3979, 4140
v. Wyrick, — Tex. Civ. App. —, 147 S. W. 694 3866, 3877, 3976, 3979, 4101, 4136, 4142
Wichita G., etc., Co. v. Wright, 9 Kan. App. 730 3778
Wichita S. & D. Co. v. Weil, 80 Kan. 606 523
Wichita Val. Ry. Co. v. Boger, — Tex. Civ. App. —, 167 S. W. 767 3421
Wichita & W. R. Co. v. Beebe, 39 Kan. 465 372
v. Kuhn, 38 Kan. 104 3964, 4002, 4119, 4153
Wichmann v. Kansas City, etc., R. Co., 84 Kan. 339 3968
Wick v. Rea, 54 Wash. 424 2056
Wickenburg v. Minneapolis, etc., R. Co., 94 Minn. 276 124
Wicker v. Hoppock, 6 Wall. 94 2189, 2873, 2875
v. Hotchkiss, 62 Ill. 107 4644
Wickes v. Swift E. L. Co., 70 Mich. 322 2405
Wickham v. Freeman, 12 Johns. 183 3734
Wickliffe v. Clay, 1 Dana 585 1027, 2020
Wicks v. Fentham, 4 T. R. 247 4614
v. Shepherd, Cro. Car. 155 4556
Widell v. National Citizens' Bank, 104 Minn. 510 980
Widener v. State, 45 Ind. 244 1602, 1603
Widman I. Co. v. St. Joseph, 191 Mo. 459 4111
Widoe v. Webb, 20 Ohio St. 431 1850, 1851
Widrig v. Taggart, 51 Mich. 103 521
Wiebener v. Peoples, 44 Okla. 32, 142 Pac. 1036 2598, 2669
Wiechers v. Central T. Co., 80 Hun 576 4296
Wiedeman v. Keller, 171 Ill. 93 2369
Wiegand v. Fee, 73 App. Div. (N. Y.) 139 1481
v. Siddons, 41 App. Cas. (D. C.) 130 4032, 4107, 4131
Wiegel v. Boone, 64 Ark. 228 2708
Wiel v. Stewart, 19 Hun 272 3881, 3904
Wier v. Allen, 51 N. H. 177 4540, 4566
v. St. Louis, etc., R. Co., 40 Kan. 130 4101
Wiese v. Gerndorf, 75 Neb. 826 60
Wiesenberg v. Appleton, 26 Wis. 56 4748
Wiesenfeld v. Byrd, 17 S. C. 106 736
Wieser v. Times R. & C. (Misc.), 110 N. Y. Supp. 963 2696
Wiest v. Electric T. Co., 200 Pa. 148 434, 440, 4895
Wieting v. Bellinger, 50 Hun 324 571
v. Millston, 77 Wis. 523 103, 476
Wiffen v. Roberts, 1 Esp. 261 1817, 1820, 2783
Wigal v. City of Parkersburg, 74 W. Va. 25 113, 350, 4864
Wigg v. Shuttleworth, 13 East 87 1851
Wiggin v. Coffin, 3 Story 1 3527, 3528
v. Federal S. & G. Co., 77 Conn. 507 4239, 4244
v. Holbrook, 190 Mass. 157 2506
v. Suffolk Ins. Co., 18 Pick. 145 3009
v. Tudor, 23 Pick. 434 770, 773
Wiggins v. Bender, 132 N. C. 628 2143
v. Columbia F. P. Co., 227 Pa. 511 2684
v. Graham, 51 Mo. 17 2513
v. Jackson, 31 Okla. 292 193, 2404, 2453
v. Pender, 132 N. C. 628 2093, 2141
v. St. Louis R. Co., 119 Mo. App. 492 1430, 3749
v. St. Louis, etc., R. Co., 129 Mo. App. 369 3761
Wiggins F. Co. v. Chicago & A. R. Co., 73 Mo. 389 2698
v. Chicago & A. R. Co., 128 Mo. 224 231, 1102, 1142
v. Ohio & M. R. Co., 142 U. S. 396, 35 L. ed. 1055 3256
Wiggins' App., 100 Pa. 155 2825
Wight v. Shuck, Morris 425 870, 871, 985, 998
Wightman v. Chicago & N. R. Co., 73 Wis. 169 3474, 3520
v. Coates, 15 Mass. 1 3663
v. Devere, 33 Wis. 570 60, 4741, 4767
v. Macadam, 2 Brev. 230 3035, 3036
v. Providence, 1 Cliff. 530 4794
v. Western Ins. Co., 8 Robert. 482 3018, 3020
Wigle v. Gosfield South, 25 Ont. L. R. 646 395, 3888
Wigley v. Crozier, 9 Aust. Com. L. R. 425 1078
Wigmore v. Buell, 116 Cal. 24 531
Wigsell v. School for Indigent Blind, 8 Q. B. Div. 357 327, 1968
Wigton v. Elliott, 49 Colo. 115 1202, 1209
Wikel v. Garrison, 82 Iowa 453 585
Wikoff v. Davis, 4 N. J. Eq. 224 572
Wilber v. Dwyer, 69 Hun 507 1289
v. Follansbee, 97 Wis. 577 3241
v. Williamsburg City F. Ins. Co., 122 N. Y. 439 2914
Wilbur v. Beecher, 2 Blatch. 132 4446
v. Hubbard, 35 Barb. 303 443
v. Johnson, 58 Mo. 600 328, 3662, 3677

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Wilburn v. Grer, 6 Ark. 255 1887
Wilcox v. Alley, 140 Ky. 187 3826
v. Campbell, 106 N. Y. 325 2190
v. Carr, 37 Fed. 130 689
v. Cate. 65 Vt. 478 3138
v. Clarke, 21 Vict. L. R. 694 2985
v. Danforth, 5 Ill. App. 378 2144, 2145, 2148
v. Fairhaven Bank, 7 Allen 270 675, 741
v. Five Hundred Tons of Coal, 14 Fed. 49 3282, 3292
v. Howland, 23 Pick. 167 936, 1205
v. Hunt, 13 Pet. 378 1145
v. Morton, 132 Mich. 63 40
v. Parmalee, 3 Sandf. 610 3425
v. Plummer, 4 Pet. 172 39, 384
v. Richmond & D. R. Co., 52 Fed. 264 1229, 3480, 3643, 3644
v. St. Paul, etc., R. Co., 35 Minn. 439 4127
v. Southern R. Co., 91 S. C. 71 1312, 3504
Wilcox & W. O. Co. v. Lasley, 40 Kan. 521 656
Wilcoxen v. Reynolds, 46 Ala. 529 611
Wilcoxson v. Stitt, 65 Cal. 596 1935
Wilcus v. Kl ng, 87 Ill. 107 888
Wild v. Harris, 7 C. B. 1005 1561
v. Holt, 9 M. & W. 672 3790
Wild Rice L. Co. v. Benson, 114 Minn. 92 532
Wilday v. Morrison, 66 Ill. 532 870, 998, 1003
Wilde v. Clarkson, 6 T. R. 203 1561, 1568, 1571
v. Crow, 10 Up. Can. C. P. 406 1358, 1360
v. Jenkins, 4 Paige 481 759
v. Joel, 15 How. Pr. 320 1719
v. Joel, 6 Duer 671 1725, 1727
v. Sheridan, 21 L. J. (Q. B.) 260 1878
Wilder v. Boynton, 63 Barb. 547 537
v. Cowles, 100 Mass. 487 2383
v. Gaylor, 1 Blatch. 511 4488
v. Great Western C. Co. 134 Iowa 451 1502, 4700
v. House, 48 Ill. 279 3736
v. Ireland, 8 Jones 85 2130, 2131
v. St. Johnsbury, etc., R. Co., 65 Vt. 43 758
v. Seelye, 8 Barb. 408 808, 810, 811, 816
v. Stanley, 49 Vt. 105 538. 2465
Wilder's Co. v. The Lurline, 11 Hawaii 83, 94 2718, 2725
Wilderman v. Sandusky, 15 Ill. 59 1491
Wilders v. Stevens, 15 M. & W. 208 452
Wildes v. Robinson, 50 App. Div. (N. Y.) 192 1452, 2318
Wildey v. Fractional School Dist., 25 Mich. 419 537, 2650
Wildman v. North, 2 Lev. 92 4348
v. Norton, 1 Vent. 249 4348
v. Radenaker, 20 Cal. 615 827
Wiles v. Northern Pac. R. Co., 66 Wash. 337 1480, 1484, 1499, 3524
v. Robinson, 80 Mo. 47 663
Wiley v. Athol, 150 Mass. 426 542, 2576, 2614
v. Bunker Hill Nat. Bank, 183 Mass. 495 276
v. California H. Co., 97 Cal. 18 200
v. Hart, 74 Wash. 142 931, 2595, 2657
v. Howard, 15 Ind. 169 1956
Wiley v. Keokuk, 6 Kan. 94 1305
v. McGrath, 194 Pa. 498 1268, 1270, 4318
v. Stewart, 122 Ill. 545 449
v. West Jersey R. Co., 44 N. J. L. 247 118
v. White, 3 Stew. & P. 355 2196
Wilford v. Berkeley, 1 Burr. 609 4974
Wilhelm v. Eaves, 21 Ore. 194 918
v. Fimple, 31 Iowa 131 2027
v. Parkersburg, M. & I. R. Co., 74 W. Va. 678 3504, 4774
v. Schmidt, 84 Ill. 183 663, 674, 741
v. Western U. Tel. Co., 90 S. C. 536 1324, 3547, 3618
Wilhoit v. Hancock, 5 Bush 567 4962
Wilke v. Harrison, 166 Pa. 202 2552
Wilkens v. Wilkerson (Tex. Civ. App.), 41 S. W. 178 931
Wilkerson v. Crescent Ins. Co., 64 Ark. 80 2796
v. Farnham, 82 Mo. 672 531
v. McDougal, 48 Ala. 517 4337
Wilkes v. Bierne, 68 W. Va. 82 860, 918, 1552
v. Hungerford M. Co., 2 Bing. N. C. 281 16, 3214
v. Lion, 2 Cow. 333 3693
v. Southern R., 85 S. C. 346 4174
v. Stacy, 113 Ark. 556 227, 1362, 2345, 2694, 2695
v. Wood, Lofft 1, 18, 19, 19 How. St. Trials, 1153, 1167 1261
Wilkes-Barre v. Rockafellow, 171 Pa. 177 1582
Wilkesbarre Realty Co. v. Powell, 86 Misc. (N. Y.) 321 2793
Wilkie v. Raleigh, etc., R. Co., 128 N. C. 113 4665, 4723
v. Womble, 90 N. C. 254 2007
Wilkin v. American F. L. M. Co., 106 Ga. 182 1621
v. Reed, 6 Me. 220 682
Wilkins v. Batterman, 4 Barb. 47 591
v. Carmichael, 1 Doug. 101 591
v. Day, 12 Q. B. Div. 110 92
v. Detroit United R., 169 Mich. 437 4660
v. Earle, 44 N. Y. 179 3530
v. Gilmore, 2 Hump. 140 1499
v. Hogue, 2 Jones' Eq. 479 2212
v. Monson Con. S. Co., 96 Me. 385 3852
v. Nassau N. D. Exp. Co., 98 App. Div. (N. Y.) 130 1381
v. Stevens, 8 Vt. 214 2371
v. Treynor, 14 Iowa 391 4351
v. Wingate, 6 Wils. 62 3098
Wilkinson v. Arnold, 11 Ind. 45 4648
v. Black, 80 Ala. 329 384
v. Byers, 1 A. & E. 106 759
v. Clauson, 29 Minn. 91 3139
v. Clay, 6 Taunt. 110 2925
v. Colley, 6 Kulp 401 859
v. Colley, 164 Pa. 35 860, 892, 918, 929
v. Conley, 133 Ga. 518 2823
v. Connell. 158 Pa. 126 3734
v. Coverdale, 1 Esp. 75 2914
v. Daniels, 1 G. Greene 179 870, 975
v. Davies, 146 N. Y. 25 3111
v. Detmold, 16 Vict. L. R. 439 4429
v. District of Columbia, 22 App. (D. C.) 289 4128
v. Downton, [1897] 2 Q. B. 6 92, 96, 166
v. Drew, 75 Me. 360 1268, 1277, 1385

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v. Ferree, 24 Pa. 190 543
v. Holiday, 33 Mich. 386 2226
v. Laughton, 8 Johns. 213 2920
v. Lindo, 7 M. & W. 81 770
v. McCullough, 196 Pa. 205 2512
v. Moseley, 30 Ala. 562 1424
v. North East Borough, 215 Pa. 486 4751
v. Searcy, 76 Ala. 176 1278, 1385, 4165
v. Stewart, 30 Ill. 48 659
v. Washington T. Co., 102 Fed. 28 1121
v. Wilkinson, 62 Mo. App. 240 3097
Wilkirson v. Bradford (Tex. Civ. App.), 154 S. W. 691 1061
Wilks v. Davis, 3 Meriv. 507 2221
v. Vaughan, 73 Ark. 174 2797, 2852
Will v. Mendon, 108 Mich. 251 1380, 1424, 1472
v. Postal Tel.-C. Co., 3 App. Div. (N. Y.) 22 3556
v. Ritchie, 61 Kan. 715 3694
Will of Newcomb, In re, 98 Iowa 175 1081
Willamet Falls C. & L. Co. v. Kelly, 3 Ore. 99 2302
Willamette Valley, The, 71 Fed. 712 3475, 3477, 3498
Willard v. Bridge, 4 Barb. 361 4246
v. Harvey, 5 N. H. 252 826
v. Holmes, 2 N. Y. Misc. 303 4607
v. Holmes, 142 N. Y. 492 4607, 4635
v. Mellor, 19 Colo. 534 948
v. Press Pub. Co., 52 N. Y. App. Div. 448 4571
v. Rice, 11 Metc. (Mass.) 493 360, 361
v. Smith, 34 Mont. 494 1997
v. Stevens, 24 N. H. 271 1503, 2386
v. Stone, 7 Cow. 22 3686, 3688
v. Williams, 10 Colo. App. 140 2480
Willbarger County v. Robinson, 5 Tex. Civ. App. 10 2093
Willcox, In re, 165 App. Div. (N. Y.) 197 4086
Willcox v. Jones, 177 Fed. 870 1055
Willeford v. Bailey, 132 N. C. 402 4957, 4958, 4964, 4965
Willets v. Burgess, 34 Ill. 500 2153
Willett v. Herrin, — Tex. Civ. App. —, 161 S. W. 26 1007
v. St. Albans, 69 Vt. 330 1350
v. Scoville, 4 Abb. Pr. 415 1722, 1754
v. Stewart, 43 Barb. 98 2875
Willette v. Rhinelander P. Co., 145 Wis. 537 125, 1511, 1512
Willetts v. Buffalo, etc., R. Co., 14 Barb. 588 4853
Willever v. Delaware, L. & W. R. Co., 87 N. J. L. 348 5057
Willey v. Belfast, 61 Me. 569 1480, 1481
v. Carpenter, 64 Vt. 212 460, 463
v. Fredericks, 10 Gray 357 2626
v. Hightower, 6 Sm. & M. 345 2197
v. Hunter, 47 Vt. 479 3882
v. Paulk, 6 Conn. 74 1636
v. St. Charles H. Co., 52 La. Ann. 1581, 1602 1032
William Branfoot, The, 48 Fed. 914 1478, 4659, 4751
Wm. Foerster & Co. v. Faulk-Christian Lumber Co., 105 Miss. 612 40
William Gillam, The, 2 Low. 154 3036
William H. Bailey, The, 103 Fed. 799 1272, 4986
William Hamilton, The, 3 Hagg. Adm. 168 2735
Wm. Johnson & Co. v. Johansen, 30 C. C. A. 675, 86 Fed. 886 4980
William M. Rice Institute v. Freeman (Tex. Civ. App.), 145 S. W. 688 3791
William Miller & Sons Co. v. Homeopathic, etc., Dispensary, 243 Pa. 502 2607, 2612
William Smith, The, 59 Fed. 615 2730
William Smith, The, 71 Fed. 745 2735
William & Anthony Sts., In re, 19 Wend. 678 3146
Williams, The, 1 Brown's Adm. 208 2717
Williams, Ex parte, 1 Rose 399 1013
Ex parte, 17 S. C. 396 668, 678
Williams v. Allen, 21 Ky. L. Rep. 1191 1728, 1732
v. American Bank, 4 Metc. (Mass.) 317 1055, 1222
v. Anderson, 9 Minn. 50 287, 2556, 2568
v. Archer, 5 C. B. 318 4340
v. Armour Car Lines, 7 Pennew. (Del.) 275 3345, 3351
v. Arnold, 139 Wis. 177 377, 1360, 1971
v. Atlantic Coast Line R. Co., 56 Fla. 735 172, 3322
v. Atlantic Coast Line R. Co., 99 S. C. 397 3502
v. Ayers, 3 App. Cas. 133 1904
v. Baker, 67 Ill. 238 962
v. Ballard L. Co., 41 Wash. 338 143
v. Ballinger, 125 Iowa 410 1720, 1725, 1728
v. Bank of Commerce, 71 Miss. 858, 871 1738
v. Barton, 13 La. 404 170, 2327
v. Beede, 15 N. H. 483 4362
v. Beeman, 2 Dev. 483 2112, 2124, 2125, 2126
v. Benson, 87 Kan. 421 1278
v. Bienvenue, 109 La. 1023 2274
v. Bishop, 12 Ohio N. P. (N. S.) 7 4925
v. Brasfield, 9 Yerg. 270 1928
v. Braun, 14 Cal. App. 396 664
v. Brooklyn, 33 App. Div. (N. Y.) 539 477
v. Brown, 28 Ohio St. 547 1446, 2305, 2478
v. Burrell, 1 C. B. 402 2109, 3187, 3196
v. Campbell, 46 Miss. 57 611
v. Campbell, 22 Wyo. 1 4774, 4834
v. Carolina & W. R. Co., 144 N. C. 498 3439, 3447, 3471
v. Casebeer, 126 Cal. 77 417, 4624, 4645, 4647, 4649
v. Cawley, 18 Ala. 206 470
v. Chicago C. Co., 60 Ill. 149 287, 314, 476, 2561, 2566
v. Chicago, etc., R. Co., 153 Mo. 487 1102, 2684
v. Chicago, etc., R. Co., 169 Mo. App. 468 4904
v. Clark County, 143 Iowa 328 4742, 4751
v. Clowes, 75 Conn. 155 2509
v. Colby, 44 Vt. 40 2662
v. Commonwealth, 168 Mass. 364 3997, 4091
v. Craig, 1 Dall. 313, 338 1009, 1107
v. Crane, 153 Mich. 89 2542, 2575
v. Crary, 5 Cow. 308 639
v. Crosby L. Co., 118 N. C. 928 1407, 2237
v. Crum, 27 Ala. 468 4211
v. Currie, 1 Man., G. & S. 841 1269, 3800

[REFERENCES ARE TO PAGES]

Williams v. Dakin, 22 Wend. 201 856, 887
v. Deen, 5 Tex. Civ. App. 575 2219
v. De Soto Oil Co., 213 Fed. 194 2274, 2980, 2982
v. Detroit O. & C. Co., 103 Tex. 75, 52 Tex. Civ. App. 243 4389, 4433
v. Dickson, 122 Minn. 49 3233
v. Dockwiller, 19 N. M. 623 1922
v. Earle, 9 B. & S. 741 3171
v. Edmunds, 75 Mich. 92 4789
v. Eldridge, 9 Kulp 566 2525
v. Elm City L. Co., 154 N. C. 306 3773, 3774
v. Esling, 4 Pa. 486 43
v. Evans, 2 McCord 203 580, 581, 632
v. Fidelity & D. Co., 42 Colo. 118 1780
v. Finch, 155 Ala. 399 1670
v. Fitzhugh, 37 N. Y. 444 1159
v. Fowle, 132 Mass. 385 2189
v. French, 61 L. J. (Ch.) 22 1114
v. Fryharger, 9 Ind. App. 558 2120
v. Fulks, 113 Ark. 82 4510, 4512
v. Fuller, 68 Neb. 354 4505, 4508, 4591
v. Fulmer, 151 Pa. 405 3878, 3890, 3912
v. Galveston, etc., R. Co., 34 Tex. Civ. App. 145 149
v. Gilman, 3 Me. 276 2222
v. Glenny, 16 N. Y. 389 2482
v. Godwin, 4 Sneed 557 2242, 2248
v. Grant, 1 Conn. 487 140
v. Great Northern R. Co., 68 Minn. 55 1472, 1473
v. Greenville, 130 N. C. 93 3908
v. Greenwade, 3 Dana 432 4529, 4599
v. Greer, 4 Hayw. 235 2826
v. Hart, 2 Humph. 68 2390
v. Hartford Ins. Co., 54 Cal. 442, 450 3012
v. Hathaway, 19 Pick. 388 2053
v. Hathaway, 21 R. I. 566 3766
v. Hays, 143 N. Y. 442 57, 1287
v. Hedley, 8 East 378 712
v. Henley, 3 Denio 363 2231
v. Hewitt, 57 Wash. 62 1451, 2147, 2149, 2151, 2182
v. Hicks Printing Co., 159 Wis. 90 4507, 4508, 4523, 4531, 4534, 4542, 4587, 4591
v. Hide, Palm 548 2535
v. Hill, 19 Wend. 305 156, 4554, 4556
v. Hill I. Co., 48 Wash. 695 2010
v. Holdredge, 22 Barb. 396 4503
v. Hollingsworth, 6 Baxter, 12 3663, 3687
v. Houghtaling, 3 Cow. 86 711, 734, 739, 740, 1199, 1216
v. Houston C. Works, 46 Tex. Civ. App. 70 3108, 3121
v. Hunter, 3 Hawks 545 4606
v. Island City M. Co., 25 Ore. 573 234, 245, 266, 2599, 2625, 2626
v. Jenny Lind, The, 1 Newb. 443 2718
v. Johnson, 2 Bosw. 1 4485
v. Jones, 1 Bush 621 2225
v. Jones, 12 Ind. 561 2238, 2329
v. Keech, 4 Hill 168 2671
v. Kennedy, 134 Ga. 339 2741
v. Koehler, 41 App. Div. (N. Y.) 426 155
v. Ladew, 161 Pa. 283 7
v. Ladew, 171 Pa. 369 3098, 3103
Williams v. Lane, 62 Mo. App. 66 3256
v. Langford, 15 B. Mon. 566 748
v. Lay, 9 Ala. App. 373 2681
v. Littlefield, 12 Wend. 362 2911
v. Llandudno C. & C. Co., Ltd., [1915] 2 K. B. 101 5192, 5193
v. Luckett, 77 Miss. 394 379, 2465, 2525, 2542
v. Lyman, 88 Fed. 237 1593
v. McFadden, 23 Fla. 143 4378, 4392
v. McFall, 2 S. & R. 280 1530
v. Meeker, 29 Iowa 292 871, 1920
v. Metropolitan St. R. Co., 141 Mo. App. 625 4882, 4905
v. Miller, Kirby 189 1583
v. Miller, 21 Ark. 469 534
v. Miner, 18 Conn. 464 470, 1405
v. Missouri F. Co., 13 Mo. App. 70 395, 3913
v. Morton, 38 Me. 52 1590, 1653
v. Moseley, 2 Fla. 304 597, 1890
v. Mostyn, 4 M. & W. 145 34, 43, 1629, 1630
v. National Bank, 72 Md. 441, 450 674
v. Natural Bridge P. R. Co., 21 Mo. 580 4097
v. Neely, 134 Fed. 1 2193, 2210
v. New York Life Ins. Co., 122 Md. 141 1091
v. North China Ins. Co., 1 C. P. Div. 757 3006
v. Ogg & K. L. Co., 42 Tex. Civ. App. 558 2783
v. Oliphant, 3 Ind. 271 293, 3199, 3227
v. Oregon S. L. R. Co., 18 Utah 210 1383, 3336
v. Pearman, — Tex. Civ. App. —, 164 S. W. 43 2052
v. Pedigo, 158 Ky. 509 4188
v. Peel River, etc., Co., 55 L. T. Rep. 689 4252
v. Philadelphia, 208 Pa. 282 2489, 2495
v. Pickering L. Co., 125 La. 1087 4819
v. Pomeroy C. Co., 37 Ohio St. 583 396
v. Porter, 51 Mo. 441 2667, 2682
v. Railroad Co., 60 Tex. 205 4853
v. Reynolds, 6 B. & S. 495 183, 2298
v. Reynolds, 11 La. 230 2771
v. Riddle, 145 Ky. 459 4504, 4505, 4555
v. Robb, 104 Mich. 242 2231, 2237, 2241
v. Rome R. & L. Co., 4 Ga. App. 372 3459
v. Rome, etc., R. Co., 18 Blatch. 181 4453, 4474
v. Rorer, 7 Mo. 555 790, 801
v. Rosenbaum, 57 Wash. 94 888, 931
v. St. Louis, etc., R. Co., 119 Mo. App. 663 3506, 3527
v. Schmidt, 54 Ill. 205 549
v. Sheldon, 10 Wend. 654 432, 435, 436
v. Sherman, 7 Wend. 109 943, 1031, 3097
v. Sherman, 48 Barb. 402 2230
v. Shoudy, 12 Wash. 362 1041, 1185
v. Sims, 22 Ala. 512 2329, 2331
v. Smith, 2 Cai. 253 1243, 1246
v. Smith, 2 Hill 301 1817, 1819, 1822
v. Smith, 65 N. C. 87 1195

[REFERENCES ARE TO PAGES]

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v. Southern R., 115 Ky. 320 1330
v. Southern Ry. Co., 107 Miss. 99 1266, 3505
v. Spafford, 8 Pick. 250 2379
v. Spokane, 73 Wash. 237 4794
v. Spokane Falls & N. R. Co., 42 Wash. 597 270, 4723, 4823
v. Spokane Falls & N. R. Co., 44 Wash. 363 1508
v. Stanton, 1 Root 426 762
v. Starr, 5 Wis. 534 665
v. State, 37 Ark. 463 1228
v. Stephenson, 33 Can. Sup. Ct. 323 228
v. Storrs, 6 Johns. Ch. 353 1118
v. Tappan, 23 N. H. 385 1411
v. Taylor, 69 Ind. 48 585
v. Theobald, 15 Fed. 465, 471 3302
v. Thomas, 25 Ont. 536 1392
v. Thrall, 101 Wis. 337 2423
v. Tolbert, 76 S. C. 211 437
v. Underhill, 63 App. Div. (N. Y.) 223 166, 4689
v. United States F. & G. Co., 105 Md. 490 2744
v. Uzzell, 108 Ark. 241 630, 697
v. Vail, 9 Mich. 162 1674, 1681, 4358
v. Vance, 9 S. C. 344 862
v. Vanderbilt, 28 N. Y. 217 50, 222, 325, 328, 330, 3081, 3445, 3461, 3472, 4679
v. Wade, 1 Metc. (Mass.) 82 1150, 1151, 1905
v. Walden, 82 Ark. 136 2472
v. Walker, 2 Sandf. Ch. 325 688, 690, 698
v. Walton, 9 Houst. 322 4872
v. Webb, 27 N. Y. Misc. 508, 22 N. Y. Misc. 513 3539, 3540, 3541
v. Western U. Tel. Co., 136 N. C. 82 3559
v. Wetherbee, 1 Aik. 233 2058
v. Whitmore, 1 Tenn. Cas. 239 (1872) 1941, 1944
v. Williams, 20 Colo. 51, 63 1288, 1301, 1387, 4982
v. Williams, 5 Ohio 444 2834
v. Williams, 15 Lea 438 1088
v. Williams, L. R. 9 C. P. 659 3155, 3162
v. Wilson, 4 Dana 507 (1836) 2021, 2024
v. Wood, 55 Minn. 323, 61 Minn. 194 4265, 4314, 4322, 4351
v. Woods, 16 Md. 220 2293
v. Yoe, 19 Tex. Civ. App. 281 312, 344, 4191
Williams-A. E. Co. v. Model E. Co., 134 Iowa 665 386
Williams C. Co. v. Scofield, 116 Fed. 119 2282
Williams P. Co. v. Saunders, 113 Va. 156 4509, 4514, 4540, 4580
Williams Wagon Works v. Gunn, 14 Ga. App. 158 3189
Williamsburg City F. Ins. Co. v. Cary, 83 Ill. 453 3020
Williamsburgh Sav. Bank v. Solon, 136 N. Y. 465, 481 1210
Williamson v. Allison, 2 East 446 357, 4384
v. Barrett, 13 How. 101 65, 4186, 5003
v. Berry, 8 How. 544 2215
v. Brooklyn Heights R. Co., 53 App. Div. (N. Y.) 399 4805
v. Broughton, 4 McCord 123 1051
Williamson v. Central R. Co., 127 Ga. 125 95, 3481, 3507
v. Chiles, 5 Ired. 244 2749
v. Cole, 26 Ohio St. 207 712
v. Conday, 3 Ired. 349 2405
v. Dillon, 1 Har. & G 444 1437, 2275, 2406
v. Eckhoff, 185 Mo. App. 234 4523, 4524, 4549
v. Friend, 1 New South Wales St. Rep. (Eq.) 133 3936
v. Frun, L. R. 9 C. P. 393 4522
v. Hall, 62 Mo. 405 2182
v. Holt, 147 N. C. 515 2369
v. Jones, 43 W. Va. 563 3710
v. McGinnis, 11 B. Mon. 74 780, 781
v. Osenton, 136 C. C. A. 261, 220 Fed. 653 4979, 4980, 4981
v. Postal Tel. C. Co., 151 N. C. 223 3553
v. Powell (Tex. Civ. App.), 140 S. W. 539 2692
v. Prairie Oil & Gas Co., 94 Kan. 238 222
v. Roberts, 70 Ore. 126 624
v. St. Louis T. Co., 202 Mo. 345 149
v. Smith, 1 Cold. 1 611
v. Stevens, 84 App. Div. (N. Y.) 518 3191, 3192, 3195
v. Summers, 34 Ala. 691 2380
v. Test, 24 Iowa 138 2066, 2069, 2098, 2104
v. Western U. Tel. Co., 151 N. C. 223 3566
v. Williamson, L. R. 7 Eq. 542 1013
v. Williamson, 6 Paige 304 1080
v. Williamson, 71 Me. 442 303, 2110, 2130, 2131, 2137
v. Woolf, 37 Ala. 298 1559
Williamson County v. Farson, 101 Ill. App. 328, aff'd 199 Ill. 71 622, 807, 1220
Williamsport G. Co. v. Pinkerton, 95 Pa. 62 687
Williar v. Baltimore, etc., Ass'n, 45 Md. 546 26
Willie v. Green, 2 N. H. 333 977
Williford v. Western U. Tel. Co., 2 Tex. Civ. App. 574 3565
Willimantic T. Co. v. Clark T. Co., 27 Fed. 865 2441
Willing v. Swazey, 1 Browne 123 1482
Willingham v. Buckeye Cotton Oil Co., 13 Ga. App. 253 371
v. Hooven, 74 Ga. 233 174, 2405
v. Jordan, 75 Ark. 266 760
v. Lon. 47 Ga. 540 3709
v. Rushing, 105 Ga. 72 2974
Willings v. Consequa, Pet. C. C. 172 1107
v. Consequa, 1 Pet. C. C. 301 1145
Willis v. Branch, 94 N. C. 142 3743, 3749, 3808, 3811
v. Cameron, 11 Abb. Pr. 245 1178
v. Castles, 3 Gray 325 3142
v. Chowning, 18 Tex. Civ. App. 625 4165
v. De Castro, 4 C. B. (N. S.) 216 780
v. De Witt, 3 S. D. 281 4311
v. Dudley, 10 Ala. 933 2048, 2421
v. Dun, Wright 133 640
v. Forrest, 2 Duer 310 465, 4782
v. French, 84 Me. 593 1869
v. Gorrell, 102 Va. 740 689
v. Ivy, 16 Ariz. 120 1806
v. Jarrett C. Co., 152 N. C. 100 384, 485, 2214, 2251, 2254
v. Kentucky & I. B. Co., 104 Ky. 186 3985
v. McIntyre, 70 Tex. 34 715

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Willis v. McKinnon, 178 N. Y. 451, 79 App. Div. (N. Y.) 249 3695
v. McNeill, 57 Tex. 465 1312, 1339
v. Miller, 29 Fed. 238 1288, 1349, 4159
v. Missouri Pac. R. Co., 61 Tex. 432 4952
v. Morris, 66 Tex. 628 3695, 3702
v. Perry, 92 Iowa 297 7, 266, 3811, 3815
v. Quimby, 31 N. H. 485 1421
v. Rice, 157 Ala. 252 1121
v. Second Ave. T. Co., 189 Pa. 430 4704, 4729
v. Thacker, 20 Tex. Civ. App. 233 2971
v. Webster, 1 App. Div. (N. Y.) 301 926
v. Western U. Tel Co., 69 S. C. 531 3613, 3619, 3627, 3628, 3634
v. White, 150 N. C. 199 3853, 3937
v. Willis, 6 Dana 48 2225, 2226
v. Wozencraft, 22 Cal. 607 2000
Willis A. Holden, The, 174 Fed. 5 2725
Willison v. Smith, 60 Mo. App. 469 4327
Williston v. Mathews, 55 Minn. 422 861, 868
Willitts v. Chicago, etc., R. Co., 88 Iowa 281 3897, 3900
Willock v. Beaver Valley R. Co., 229 Pa. 526 3985, 4020
v. Hamilton, 51 Pa. Super. 1 1115
Willoughby v. Atkinson F. Co., 93 Me. 185 3163
v. Blackhouse, 4 Dowl. & Ry. 539, 2 B. & C. 821 26
v. Mackall, 1 D. C. App. Cas. 411 2490
v. Swinton, 6 East 530 1553
v. Thomas, 24 Gratt. 522 375, 2548, 2561
Willover v. Hill, 72 N. Y. 36 4580, 4585, 4587
Willow River L. Co. v. Luger F. Co., 102 Wis. 636 655, 663, 664, 666
Wills v. Allison, 4 Heisk. 385 800
v. Brown, 3 N. J. L. 548 1008
v. Forester, 140 Mo. App. 321 887, 928
v. Garland, 2 Va. Cas. 471 1527
v. Noyes, 12 Pick. 326 4603
v. Wells, 8 Taunt. 264 3026, 4280
v. Young, 15 Ga. App. 352 531
Wills Valley M. & M. Co. v. Galloway, 155 Ala. 628 303
Willson v. Baltimore, 83 Md. 203 858, 861, 867, 869, 883, 894, 920
v. Faxon, 138 App. Div. (N. Y.) 366 40
v. Love, [1896] 1 Q. B. 626 863
v. Marshall, 1 New Zeal. L. R. (Sup. Ct.) 28 2301
v. New York Cent. & H. River R. Co., 146 N. Y. Supp. 208 3846
v. Northern Pac. R. Co., 5 Wash. 621 3449, 3476, 3500, 3523, 3528
v. Willson, 25 N. H. 229 2060, 2153, 2157, 2181, 2874, 3196
Willy v. Fitzpatrick, 3 J. J. Marsh. 582 2211
Wilmes v. Minneapolis & N. R. Co., 29 Minn. 242 3964, 4125
Wilmette v. People, 214 Ill. 107 1046
Wilmington C. Co. v. Remington M. Co., 5 Penne. 543 2432
Wilmington T. Co. v. O'Neil, 98 Cal. 1 868, 883
v. The Old Kensington, 39 Fed. 496 2727
Wilmington & W. R. Co. v. Smith, 99 N. C. 131 4112
Wilmington, etc., R. Co. v. Stauffer, 60 Pa. 374 3964, 3978
Wilmot v. Gardner, [1901] 2 Ch. 548 1008
v. Hurd, 11 Wend. 585 557
v. McPadden, 79 Conn. 367 4864
v. Smith, 3 C. & P. 453 794, 2650
Wilmoth v. Hamilton, 127 Fed. 48 2343
Wilms v. White, 26 Md. 380 4524
Wilower v. Hill, 72 N. Y. 36 471
Wilson v. Adams, 15 Tex. 323 2539
v. Agnew, 25 Colo. App. 109 861, 868
v. Alcatraz A. Co., 142 Cal. 182 553, 2279, 2284, 2455
v. Allen, 11 Ore. 154 726
v. Apple, 3 Ohio 270 470, 472, 4581, 4583, 4584
v. Arecibo, 4 Porto Rico Fed. 293 3878
v. Arnold, 172 Pa. 264 1628
v. Atlantic C. L. R. Co., 142 N. C. 333 1280
v. Baltimore & O. R. Co., 32 Mo. App. 682 3541
v. Bauman, 80 Ill. 493 2687
v. Berryman, 5 Cal. 44 1481
v. Board of Trustees, 133 Ill. 443 4109
v. Borden, 68 N. J. L. 627 2688, 2697
v. Boulter, 26 Ont. App. 184 4771
v. Bowen, 64 Mich. 133 1300, 4613, 4621, 4635
v. Bowens, 2 T. B. Mon. 86 2893
v. Brown (Tex. Civ. App.), 154 S. W. 322 4868
v. Burfoot, 2 Gratt. 134 1588
v. Burgess, 34 Ill. 494 556
v. Burr, 25 Wend. 386 2489
v. Cantrel, 19 Ala. 642 1556, 1598
v. Central R. Co., 132 Ga. 215 149, 152
v. Chicago City R. Co., 144 Ill. App. 604 4721, 4732
v. Chicago, etc., R. Co., 68 Iowa 673 822
v. Churchman, 6 La. Ann. 468 1790
v. Clark, 35 Tex. Civ. App. 92 2501, 2970
v. Clark, 63 Wash. 136 1459, 4380
v. Clarke, 20 Minn. 367 1353
v. Cobb, 31 N. J. Eq. 91 1185
v. Cochran, 46 Pa. 229 2148, 2206, 2207, 2208
v. Conine, 2 Johns. 280 4232, 4273, 4291
v. Coulter, 29 App. Div. (N. Y.) 85 4981, 4983
v. Coupland, 5 B. & Ald. 228 629
v. Cross, 33 Cal. 61 3033
v. Danderand, 124 Minn. 120 2455
v. Darwin, 1 Hill 670 1403
v. Davisson, 2 Rob. (Va.) 384 3728
v. Dean, 10 Iowa 432 870, 871, 985, 998, 1000
v. Doran, 110 N. Y. 101 822
v. Dubois, 35 Minn. 471 1370, 4566
v. Dunville, 4 L. R. Ir. 249, 6 L. R. Ir. 210 171, 2433
v. Edwards, 6 Lans. 134 2758
v. Equitable G. Co., 152 Pa. 566 4033
v. Finch-Hatton, 2 Ex. Div. 336 3140
v. Fitch, 41 Cal. 363 471, 4577, 4596
v. Foot, 11 Metc. (Mass.) 285 2805
v. Forbes, 2 Dev. 30 2060, 2084
v. Forder, 20 Ohio St. 89 1830, 1848

[REFERENCES ARE TO PAGES]

Wilson v. General I. S. Co., 47 L. J. (N. S.) (Q. B.) 239 197
v. George, 10 N. H. 445 2337
v. Godkin, 136 Mich. 106 832, 912
v. Goit, 17 N. Y. 442 4555
v. Goodin, Wright 219 698
v. Graham, 16 Manitoba 101 2189
v. Granby, 47 Con. 47 4832
v. Greensboro, 54 Vt. 533 536, 2907
v. Gribben, 152 Iowa 379 1606
v. Guyandotte T. Co., 70 W. Va. 602 3880
v. Hamilton, 4 Ohio St. 722 3353
v. Hardesty, 1 Md. Ch. 66 978, 1194
v. Hendrix, 13 Ky. L. Rep. 687 (Ky. Super. Ct.) 1997
v. Herbert, 76 Md. 489 1026
v. Holden, 16 Abb. Pr. 133 1438, 1941, 2302
v. Hoy, 120 Minn. 451 1941
v. Hudspeth, 3 Dev. 57 1798
v. Hughes, 94 N. C. 182 534
v. Illinois Cent. R. Co. (Ky.), 92 S. W. 602 2588
v. Illinois, etc., R. Co., 130 Tenn. 92 4170
v. Imperial F. Co., 67 S. C. 467 2946
v. Irish, 62 Iowa 260 2074
v. Jones, 8 Ala. 536 2331
v. Jonesboro, 57 Ark. 168 834
v. Jordan, 3 Stew. & P. 92 1828, 1956
v. Keeling, 1 Wash. (Va.) 194 826
v. Kelly, 19 S. C. 160 1214
v. Kieffer, 141 Mo. App. 137 2852, 2859
v. King, Morris 106 962, 968
v. King, 59 Ark. 32 1780
v. Kisri, 18 New Zeal. 816 2564
v. Knott, 3 Humph. 473 2612
v. Laing, [1909] Ct. of Sess. Cas. 1230, 46 Sc. L. R. 843, 2 B. W. C. C. 118 5196
v. Lancashire, etc., R. Co., 9 C. B. (N. S.) 632 2276, 2368, 3349, 3353, 3356
v. Lazier, 11 Gratt. 477 1147
v. Lineberger, 88 N. C. 416 1121
v. Little, 2 N. Y. 443 2311
v. London & G. F. Co., 14 L. T. Rep. 15 [1897] 2320
v. Love, [1896] 1 Q. B. 626 916
v. McClean, 1 Cranch C. C. 465 1461
v. McElroy, 32 Pa. 82 521
v. McEvoy, 25 Cal. 169 305, 1719, 1727
v. McVey, 83 Ind. 108 790, 816
v. Mangold, 154 Iowa 352 4972
v. Marsh, 1 Johns. 503 2386
v. Martin, 1 Denio 602 1938
v. Martin, 40 N. H. 88 4173
v. Mathews, 24 Barb. 295 4246
v. Middleton, 2 Cal. 54 467, 1305
v. Minneapolis & N. R. Co., 31 Minn. 481 2482
v. Missouri Pac. R. Co., 66 Mo. App. 388, 395 3379
v. Morgan, 4 Robert. 58, 1 Abb. Pr. (N. S.) 174, 30 How. Pr. 386 600, 602, 800
v. Morgan, 58 N. J. L. 426 1494
v. Nations, 5 Yerg. 211 4568, 4569
v. New Orleans & N. R. Co., 63 Miss. 352 3447, 3507
v. New United States C. R. Co., 73 Fed. 994 2386, 2390, 2405, 4389, 4408
v. New York Cent. R. Co., 27 Hun 149 3336
v. Newport D. Co., L. R. 1 Ex. 177 149, 187, 195
v. Nichols, 72 Conn. 173 4365
Wilson v. Noonan, 35 Wis. 349 4507, 4509
v. Noonan, 27 Wis. 590 4529
v. Northampton, etc., R. Co., L. R. 9 Ch. 279 410, 2051, 2619
v. Northern Pac. R. Co., 5 Wash. 621 3482, 3485
v. Northern Pac. R. Co., 26 Minn. 278 148
v. Oatman, 2 Blackf. 223 3717
v. Oregon-W. R. & N. Co., 71 Wash. 102 389, 3886
v. Pearl, 12 Pa. Super. Ct. 66 1935
v. Peelle, 78 Ind. 384 2060, 2088, 2091
v. People, 19 Colo. 199 1581
v. Press Pub. Co., 14 Misc. (N. Y.) 514 2571
v. Raybould, 56 Ill. 417 3204
v. Reed, 3 Johns. 175 425, 774
v. Reedy, 32 Minn. 256 174, 217, 2436
v. Reedy, 33 Minn. 503 536
v. Robertson, 1 Brun. Coll. Cas. 109, 1 Overt. 464 2008
v. Robinson, 7 Q. B. 68 4569
v. Robinson, 14 L. J. (Q. B.) 196 4568
v. Rockford, etc., R. Co., 59 Ill. 273 3964, 3980, 3993, 4115, 4119
v. Root, 43 Ind. 486 1707
v. Runyon, Wright 651 4532
v. Russler, 91 Mo. App. 275 2341
v. St. Louis & S. F. R. Co., 160 Mo. App. 649 32, 165, 343, 3382, 3399, 4163
v. St. Louis, etc., R. Co., 129 Mo. App. 347 3399
v. Sears, — Tex. Civ. App. —, 166 S. W. 38 2506
v. Seattle, etc., R. Co., 55 Wash. 656 1359, 4186
v. Shelton, 9 Leigh 343 2068
v. Shepler, 86 Ind. 275 4969
v. Smith, 2 New South Wales St. Rep. 174 4484
v. Southern Pac. Co., 13 Utah 352, 360 4732
v. Spencer, 11 Leigh 261 1557, 1989, 1995
v. Sproul, 3 P. & W. 49 4964, 4968
v. State, 13 Ind. 341 1600
v. State, 67 Kan. 44 1595, 1597
v. Stilwell, 9 Ohio St. 468 2893, 2894, 2898
v. Strobach, 59 Ala. 488 495
v. Sullivan, 17 Utah 341 413
v. Taylor, 9 Ohio St. 595 2124
v. Thomson, 4 Vict. L. R. (law) 281 4321
v. Tolson, 79 Ga. 137 1815
v. Troy, 135 N. Y. 96 1042, 1044, 1097, 1142
v. Vaughn, 23 Fed. 229 1326, 1327, 1349
v. Wager, 26 Mich. 452 356, 2230
v. Wallace, 8 S. & R. 55 419
v. Ware, — Tex. Civ. App. —, 166 S. W. 705 739
v. Weber, 3 Ill. App. 125 1726
v. Webster, 88 Iowa 514 2512
v. Wernwag, 217 Pa. 82 226, 244, 259, 2907
v. Western U. Tel. Co., 124 Ga. 131 3571
v. Wheeling, 19 W. Va. 323, 350 1350
v. Whitaker, 40 Pa. 114, 117 2922
v. White, 161 Cal. 453 1997
v. White, 77 Neb. 351 443
v. Wichita County, 67 Tex. 648 1578

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v. Wiggin, 73 W. Va. 560 2375, 2376, 2455
v. Wilderness P. Farm, 82 N. J. L. 352 2465, 2514
v. Wilkinson, 97 Ga. 814 1071
v. Wilson, 17 Ohio St. 150 643, 701
v. Wilson, 26 Pa. 393 2925
v. Yocum, 77 Iowa 569 237, 1962
v. York, etc., R. Co., 18 Eng. L. & Eq. 557 3328
v. Young, 31 Wis. 574 412, 465, 1318, 1319, 3832, 4670, 4693
Wilson L. Co. v. Alderman, 75 S. C. 299 1310, 1312
Wilson S. M. Co. v. Moreno, 6 Sawyer 35 871
v. Moreno, 7 Fed. 806 1921
v. Sloan, 50 Iowa 367 2550
Wilson & Co. v. Illinois Cent. R. Co., 130 Tenn. 92 3391, 4177, 4188
Wilson's Case, 38 N. J. Eq. 205 1569, 1645
Wilson's Est., 18 Phila. 56 1215
Wilt v. Coughlin, 176 Mo. App. 275 3232
v. Franklin, 1 Bin. 502 765, 2067
v. Hammond Bros., 179 Mo. App. 406 2343
v. Vickers, 8 Watts 227 4742
v. Wabash R. Co., 21 Ohio C. C. 579 3440, 3465
Wiltburger v. Randolph, Walk. (Miss.) 20 1101, 1107
Wilton v. Webster, 7 C. & P. 198 4976
Wiltse v. Red Wing, 99 Minn. 255 3840
Wilty v. Hightower, 6 Sm. & M. 345 2212
Wilvert's Est., 11 Pa. Dist. 660 1121
Wimber v. Iowa Cent. R. Co., 114 Iowa 551 4804
Wimer v. Smith, 22 Ore. 469 4379
Winans v. Denman, 3 N. J. L. 124 431
v. Gibbs & S. Mfg. Co., 48 Kan. 777 2743
v. Huston, 6 Wend. 471 782
v. Sierra L. Co., 66 Cal. 61 2615
Winborne v. Elizabeth City L. Co., 130 N. C. 32 3741
Winburne v. Bryan, 73 N. C. 47 4196
Winch v. Mutual Ben. I. Co., 9 Daly 117 902, 926
v. Mutual Ben. Ice Co., 86 N. Y. 618 1038
v. Pardon, Buller's N. P. 174 938
Winchell v. Argus Co., 69 Hun 354 4506
v. National Exp. Co., 64 Vt. 15 1460
Winchester v. Craig, 33 Mich. 205 364, 3788, 3792, 4256, 4259, 4261
v. Osborn, 62 Barb. 337 13
v. Patterson, 17 Mass. 62 3389
Winchester R. A. Co. v. American B. & C. Co., 62 Fed. 278 4458, 4459, 4461
Windeler v. Rush County F. Ass'n, 27 Ind. App. 92 58, 66
Winder v. Caldwell, 14 How. 434 537, 547, 558
v. Diffenderffer, 2 Bland 166 1019
Windham v. Coates, 8 Ala. 285 1561
v. Wycombe, 4 Esp. 17 4976
Windland v. Deeds, 44 Iowa 98 2473
Windle v. Andrews, 2 Barn. & Ald. 696 1068
Windmiller v. Northern Pac. R. Co., 52 Wash. 613 3417
Windmuller v. Pope, 107 N. Y. 674 2237, 2256
Windon v. Stewart, 43 W. Va. 711 3243
Windsor v. Kennedy, 52 Miss. 164 709
Winfield v. Beavers T. Co., 229 Pa. 530 702
v. Kean, 1 Ont. 193 4633, 4634
v. New York Cent. & H. River R. Co., 216 N. Y. 284 5026, 5033
v. Potter, 38 N. Y. 67 1805
Winfield M. & T. Co. v. Robinson, 89 Kan. 842 1118
Winfree v. Jones, 104 Va. 39 113
Wing v. Davis, 7 Me. 31 786, 787, 789
v. Milliken, 91 Me. 387 4212, 4256, 4290
v. United States F. & G. Co., 150 Fed. 672 2627
Wing Chung v. Los Angeles, 47 Cal. 531 319, 324
Wingate v. Johnson, 126 Iowa 154 2404
v. Mechanics' Bank, 10 Pa. 104 2939
v. Neidlinger, 50 Ind. 520 645
v. Peoples' B. & L. Sav. Ass'n, 15 Tex. Civ. App. 416 731
v. Smith, 20 Me. 287 361, 3784
Wingfield v. Wabash R. Co., 257 Mo. 347 766
Winkelman v. Chicago, 213 Ill. 360 4148
Winkfield, The, [1902] Prob. 42 3396, 4174, 4175
Winklemans v. Des Moines N. W. R. Co., 62 Iowa 11 3993
Winkler v. Citizens' S. Bank, 89 Kan. 279 277, 278, 1281
v. Killian, 141 N. C. 575 2470, 2474
v. O'Donovan, 142 Wis. 412 532
v. Racine W. & C. Co., 99 Wis. 184 2548, 2556, 2561
v. Roeder, 23 Neb. 706 223, 1297
v. St. Louis, etc., R. Co., 21 Mo. App. 99 54, 135, 136, 3450, 4656, 4662
Winn v. Abeles, 35 Kan. 85 6, 3916
v. Cleveland, etc., R. Co., 143 Ill. App. 71 1476, 1480
v. Elliott, Hardin 482 3727
v. Peckham, 42 Wis. 493 1316
v. Sanford, 145 Mass. 302 2823, 2825
v. Southgate, 17 Vt. 355 2524, 2544
v. Young, 1 J. J. Marsh. 51 949, 1410, 1874
Winne v. Illinois Cent. R. Co., 31 Iowa 583 3385, 3404
v. Kelley, 34 Iowa 339 193, 2626
Winnebago P. Mills v. Travis, 56 Minn. 480 736
Winneshiek County v. Maynard, 44 Iowa 15 1583
Winnetka v. Clifford, 201 Ill. 475 12, 3968, 3993
Winniford v. MacLeod, 68 Ore. 301 225
Winningham v. Philbrick, 56 Wash. 38 1492
v. Redding, 6 Jones 125 1236
Winnipeg L. & Co. v. Witcher, 15 Manitoba 423 3099
Winnipiscogee P. Co. v. Eaton, 65 N. H. 13 2112
Winnt v. International, etc., R. Co., 74 Tex. 32 1395, 4865
Winona v. Jackson, 92 Minn. 453 2592, 2767
v. Minnesota R. & C. Co., 29 Minn. 68 4274, 4275
Winona L. Co. v. Church, 6 S. D. 498 2979
Winona, etc., R. Co. v. Denman, 10 Minn. 267 4101
v. Waldron, 11 Minn. 515 4025, 4101, 4110
Winpenny v. French, 18 Ohio St. 469 2969
Winship v. Bass, 12 Mass. 199 643

[REFERENCES ARE TO PAGES]

Winship v. Clendenning, 24 Ind. 439 1741, 1742
v. Enfield, 42 N. H. 197 105
Winside State Bank v. Lound, 52 Neb. 469 1451, 2303, 2309
Winslow v. Atlantic C. L. R. Co., 151 N. C. 250 3417
v. Atlantic C. L. R., 79 S. C. 344 3333, 3422
v. Draper, 8 Pick. 170 1486
v. Hardin, 3 Dana 543 664
v. Hathaway, 1 Pick. 211 1134
v. McCall, 32 Barb. 241 2115
v. People, 117 Ill. 152 1119, 1121
v. Robinson, 173 Ill. App. 84 542
v. Vermont, etc., R. Co., 42 Vt. 700 3425
Winslow E. & M. Co. v. Hoffman, 107 Md. 621 182, 253, 2622
Winsmore v. Greenbank, Willes 577, 580 2
Winsor v. Lombard, 18 Pick. 57 2377
Winstead v. Davis, 40 Miss. 785 2197
v. Hicks, 135 Ky. 152 2880
v. Hulme, 32 Kan. 568 223, 4321, 4322
Winsted Sav. Bank v. New Hartford, 78 Conn. 319 959
Winston v. Lusk, 186 Mo. App. 381 3473, 3525
v. Rives, 4 Stew. & Port. 269 1784
Winston C. Mach. Co. v. Wells-W. T. Co., 144 N. C. 421 295
Winter v. Gittings, 102 Md. 464 1093
v. Henn, 4 C. & P. 494 4974, 4977
v. Montgomery, 83 Ala. 589 4093
v. Pollak, — Ala. —, 66 So. 11 698
Winterfield v. Bradnum, 3 Q. B. Div. 324 528
Wintermute v. Cooke, 73 N. Y. 107 2311, 2954
v. Torrent, 85 Mich. 555 1815
Winters v. Baltimore & O. R. Co., 177 Fed. 44 54
v. Cowen, 90 Fed. 99 1288, 1314, 1338, 3505
v. Elliott, 1 Lea 676 2010, 2026
v. Minneapolis & St. L. R. Co., 126 Minn. 260 5064, 5131
Winters' App., 61 Pa. 307 13
Winterscheid v. Reichle, 45 Mont. 238 1316, 3826
Winthrop v. Carleton, 12 Mass. 4 1146, 1154, 1179, 1180, 1878
v. Curtis, 4 Me. 297 1244, 1246
v. Manhattan R. Co., 17 App. Div. (N. Y.) 509, aff'd 161 N. Y. 638 4083
v. Pepoon, 1 Bay 468 1179
v. Soule, 175 Mass. 400 1591
Winthrop Sav. Bank v. Jackson, 67 Me. 570 539, 677
Wintle v. Crowther, 1 Tyrw. 213 1830
Winton v. Cornish, 5 Ohio 477 3142
v. Little, 94 Pa. 64 2814
Wintz v. Morrison, 17 Tex. 372 2447, 4370, 4413
Wire v. Foster, 62 Iowa 114 40, 2275, 2280, 2299
Wirsing v. Smith, 222 Pa. 8 1267, 1305, 1309, 1510, 4776, 4779, 4816
Wirth v. Calhoun, 64 Neb. 316 2561
Wisconsin M. & F. Ins. Co. v. Durner, 114 Wis. 369 1721, 1732
Wisconsin R. P. B. Co. v. Hood, 67 Minn. 329 2375
Wisconsin Steel Co. v. Dixon, 159 Ky. 488 766
Wisdom v. Newberry, 30 Mo. App. 241 3243
Wise v. Falkner, 51 Ala. 359 3132
v. Fuller, 29 N. J. Eq. 257 4375
v. Hilton, 4 Me. 435 659
v. Morgan, 101 Tenn. 273 153
v. Outtrim, 139 Iowa 192 2472
v. St. Louis T. Co., 198 Mo. 546 4755
v. Shepherd, 13 Ill. 41 574, 577
v. Wabash R. Co., 135 Mo. App. 230 323
v. Wilson, 1 Car. & K. 662 2526
Wisecarver v. Chicago, etc., R. Co., 141 Iowa 121 435, 3328, 3329, 3334, 3345, 3403
v. Wisecarver, 97 Va. 452 1723
Wiseman v. Lyman, 7 Mass. 286 661
Wissler v. Atlantic, 123 Iowa 11 1391, 4787
Witham v. Atlanta Journal, 124 Ga. 688 4502
v. Cohen, 100 Ga. 670 55, 208
v. Witham, 57 Me. 447 1676
Witherbee v. Meyer, 155 N. Y. 449 172, 183, 228, 234
Witherby v. Mann, 11 Johns. 518 659, 764, 2843, 2874
Witherell v. Maine Ins. Co., 49 Me. 200 3048
Witherow v. Briggs, 67 Ill. 96 870, 975, 998, 1003
v. Witherow, 16 Ohio 238 2230
Withers v. Crenshaw (Tex. Civ. App.), 155 S. W. 1189 2063
v. Greene, 9 How. 213 515, 533, 534, 547, 1827, 2390, 2828
v. Macon, etc., R. Co., 35 Ga. 273 3287, 3291
v. Reynolds, 2 B. & Ad. 882 376, 415, 2231, 2543
Witherspoon v. Cross, 135 Cal. 96 1690
v. Duncan (Tex. Civ. App.), 131 S. W. 660 884, 888
v. McCalla, 3 Desaus. 245 2010, 2110
v. Musselman, 14 Bush 214 872, 1922, 1925
Withrow v. Commonwealth, 10 S. & R. 231 1599
v. Walker, 41 Pa. Super. 155 1417, 4210, 4269
Withy v. Mumford, 5 Cow. 137 2124, 2130
Witkowski v. Hill, 17 Colo. 372 4358, 4360
Witliff v. Spreen, 51 Tex. Civ. App. 544 4218, 4239
Witman & Geisinger's App., 28 Pa. 376 1121
Witmer v. Delone, 225 Pa. 452 1965
Witmer's App., 87 Pa. 120 1130
Witmore v. Rice, 1 Biss. 237 1556
Witrak v. Nassau E. R. Co., 52 App. Div. (N. Y.) 234 4684
Witt v. Dersham, 146 Mich. 68 820
v. Latimer, 139 Iowa 273 1373, 1484, 4652
v. Morris, 13 Wend. 496 1676
Witte v. Weinberg, 37 S. C. 579 546
Wittekoppe v. New York & P. S. S. Co., 189 Fed. 920 4993
Wittemann Bros. v. Wittemann Co., 88 N. Y. Misc. 266, aff'd 168 App. Div. (N. Y.) 930 4506
Wittenberg v. Fisher, 183 Mo. App. 347 1804
v. Mollyneaux, 60 Neb. 583, 59 Neb. 203 231, 1093, 1094
v. Onsgard, 78 Minn. 342 1475
Witter v. Biscoe, 13 Ark. 422 1953
Witthaus v. Shack, 38 Hun 560 3730

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v. O'Neal, 22 Fla. 592 1721, 1725, 1727
Wittkowski v. Harris, 64 Fed. 712 1020, 1144
Witty v. Hightower, 12 Sm. & M. 478 2094
v. Matthews, 52 N. Y. 412 3233
Wix v. Rutson, [1899] 1 Q. B. 474 3120
Woarms v. United States, 39 Ct. of Cls. 10 2602
Wobbe v. Schaub, 143 Ill. App. 361 1121
Woburn v. Henshaw, 101 Mass. 193 299
Woeckner v. Erie Electric M. Co., 182 Pa. 182 4767, 4768
Woerz v. Schumacher, 161 N. Y. 530, 37 App. Div. (N. Y.) 374 1024
Wofford v. Ashcraft, 47 Miss. 641 2197, 2211
v. Meeks, 129 Ala. 349 4504
v. Wyly, 72 Ga. 863 1208
Wolfe v. Howard Ins. Co., 7 N. Y. 583 3025
v. Howes, 20 N. Y. 201 2537
Wohler v. Buffalo, etc., R. Co., 46 N. Y. 686 3733
Wojahm v. National U. Bank, 144 Wis. 646 2464
Wojtylak v. Kansas & T. C. Co., 188 Mo. 260 4705
Wolcott v. Eagle Ins. Co., 4 Pick. 429 3010, 3034
v. Frick, 40 Ind. App. 236 840, 863
v. Hagerman, 50 N. J. L. 289 2865
v. Hall, 6 Mass. 514 469, 471, 4577, 4578
v. Hayes, 43 Ind. App. 578 2048
v. Mount, 36 N. J. L. 262 193, 238, 239, 241, 284, 375, 408, 2370, 2388, 2439
v. Sullivan, 6 Paige 117 3242
Woldert v. Arledge, 4 Tex. Civ. App. 692 2237, 2241, 2249
v. Nedderhut P. P. Co., 18 Tex. Civ. App. 602 1134
Woldert G. Co. v. Wilkinson, 39 Pa. Super. 100 2236
Woldson v. Larson, 164 Fed. 548 1266, 1267, 4974, 4977, 4981
Wolf v. American Exp. Co., 43 Mo. 421 3332
v. Boston V. B. Co., 109 Mass. 68 2715
v. Cincinnati E. E. Co., 6 Ohio Dec. 159 3875
v. Des Moines R. Co., 64 Iowa 380 848, 885, 930
v. Dietzsch, 75 Ill. 205 2271, 2272
v. Fink, 1 Pa. 435 2823
v. Frank, 92 Md. 138 4983
v. Galbraith, 35 Tex. Civ. App. 505 2343
v. Galbraith, 39 Tex. Civ. App. 351 2358, 2361
v. Goodhue F. Ins. Co., 43 Barb. 400 1497
v. Green Bay, etc., R. Co., 140 Wis. 337 4130, 4139
v. Humboldt County, 36 Nev. 26 748, 1414
v. Kilpatrick, 101 N. Y. 146 3126
v. Lacy, 30 Tex. 349 3389, 3401
v. Lake Erie & W. R. Co., 55 Ohio St. 517 4854
v. Madden, 82 Iowa 114 2807
v. National M. & F. Ins. Co., 20 La. Ann. 583 3027
v. Powers, 241 Ill. 9 1407
Wolf v. St. Louis I. W. Co., 15 Cal. 319 319
v. Schmidt & Sons B. Co., 236 Pa. 240 4715, 4751
v. Stewart, 48 La. Ann. 1431 314
v. Studebaker, 65 Pa. 459 2706, 3189, 3230, 3266
v. Trinkle, 103 Ind. 355 4662, 4668
v. Weiner, 7 Phila. 274 3122
v. Western U. Tel. Co., 62 Pa. 83 3550, 3555
Wolf Bros. & Co. v. Hamilton-B. S. Co., 206 Fed. 611 4488
Wolf Creek D. C. Co. v. Schultz, 71 Pa. 180 869, 886
Wolfe v. Georgia R. & E. Co., 2 Ga. App. 499 3468
v. Hauver, 1 Gill 84 2068
v. Howard Ins. Co., 1 Sandf. 124 3051
v. Howard Ins. Co., 7 N. Y. 583 3052
v. Howes, 20 N. Y. 197 2525, 2528, 2533, 2534, 2538
v. Johnson, 152 Ill. 280 1289
v. Koppel, 2 Denio 368, 5 Hill 458 2957, 2958
v. Parham, 2 Ark. 441 2666
v. Sharpe, 10 Rich. 60 1101
Wolff v. Cohen, 8 Rich. 144 1306
v. Georgia S. & F. R. Co., 94 Ga. 555 4108
v. Hyass, 11 N. Y. Misc. 561 3213
v. Liverpool & L. & G. Ins. Co., 50 N. J. L. 453 3017
v. Lockwood, 70 App. Div. (N. Y.) 569 4244
v. Love, 78 Wash. 561 2102
v. Meyer, 75 N. J. L. 181 1449
v. Oxholm, 6 M. & S. 99 1174
v. Schaeffer, 74 Mo. 154 1650
v. Smith, 112 Mich. 359 4575, 4587
v. Southern R. Co., 130 Ga. 251 2901, 2907
v. Walter, 56 Mo. 292 680
v. Western U. Tel. Co., 42 Tex. Civ. App. 30 3606
Wolff S. Co. v. Frankenthal, 96 Mo. App. 307 266
Wolfgram v. Schoenke, 123 Wis. 19 1489
Wolfinger v. Mayo M. Co., 21 Pa. Dist. 189 2284, 2341, 2435
v. Thomas, 22 S. D. 57 1019
Wolfley v. Rising, 12 Kan. 535 4359
Wolford v. Lyon Gravel G. M. Co., 63 Cal. 483 1495
Wolfort v. Reilly, 133 Mo. 463 1121
Wolfskehl v. Western U. Tel. Co., 46 Hun 542 3611
Wolfson v. Eyster, 7 Watts 38 1490
Wolkowsky v. Garfunkel, 65 Fla. 10 4532, 4548
Woll v. Voigt, 105 Minn. 371 34, 3735, 3782
Wollasten v. Hakewill, 3 M. & G. 297 3132
Wolley v. Van Volkenburgh, 16 Kan. 20 1916
Wolters v. St. Louis, 132 Mo. 1 3957
v. Schultz, 1 N. Y. Misc. 196 294, 3663, 3673, 3677
Wolveridge v. Steward, 1 Cr. & M. 644 3167
Wolverton v. Commonwealth, 7 S. & R. 273 1599
Womach v. St. Joseph, 201 Mo. 467 4757
Womack v. Coleman, 89 Minn. 17 842, 862
v. Coleman, 92 Minn. 328 848
v. Douglas, 157 Ky. 716 2506
v. McQuarry, 28 Ind. 103 3142

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Womble v. Hickson, 91 Ark. 266 2689, 2705
Wonderly v. Holmes L. Co., 56 Mich. 412 2249
Wonsettler v. Lee, 40 Kan. 367 2465
Wood, In re, 51 Barb. 275 2650
Wood v. Ashe, 3 Strobh. 64 2385, 2386
v. Barker, 49 Mich. 295 2480, 2481
v. Bell, 5 El. & B. 355 2225, 4237
v. Bibbins, 58 Ind. 392 2091
v. Bodwell, 12 Pick. 268 659
v. Braynard, 9 Pick. 322 4338, 4350
v. Brown, 104 Fed. 203 1766, 2805
v. Brush, 72 Cal. 224 524, 527
v. Bullens, 6 Allen 516 800
v. Callaghan, 61 Mich. 402 703, 722
v. Cascade F. & M. Ins. Co., 8 Wash. 427 1089, 3046
v. Chicago, etc., R. Co., 118 Minn. 316 3437
v. Chicago, etc., R. Co., 119 Mo. App. 78 4719
v. Claiborne, 82 Ark. 514 1118
v. Commissioners, 122 Mass. 394 4096
v. Cooper, 2 Heisk. 441 2945
v. Corl, 4 Metc. (Mass.) 203 1881
v. Cummings, 197 Mass. 80 34
v. Cunard S. S. Co., 192 Fed. 293 3530
v. Custer, 86 Kan. 387 4543, 4576
v. Deskins, 141 Fed. 500 1935, 1966
v. Detroit, — Mich. —, 155 N. W. 592 5153
v. Fales, 24 Pa. 246 361
v. Fithian, 24 N. J. L. 33 432
v. Franks, 56 Cal. 217 4177
v. Fuller, 34 Tex. Civ. App. 178 1665
v. Grand Valley R. Co., 26 Ont. L. R. 441 227
v. Griffin, 46 N. H. 231 3835
v. Griffith, 1 Swanst. 54 1978, 2052
v. Gulf Ref. Co., 128 La. 968 4863
v. Hammond, 16 R. I. 98 1079
v. Hickok, 2 Wend. 501 1102, 1108
v. Hilbish, 23 Mo. App. 389 1290
v. Hitchcock, 20 Wend. 47 807, 808, 809, 810
v. Hollander, 84 Tex. 394 1736
v. Howland, 127 Iowa 394 796, 1235, 1236
v. Hudson, 114 Mass. 513 4108
v. Iowa B. & L. Ass'n, 126 Iowa 464 2528
v. Joliet Gaslight Co., 111 Fed. 463 2624
v. Kennedy, 19 Ind. 68 1174, 1192, 1194
v. Kingston C. Co., 48 Ill. 356 2098, 2133
v. Lake, 13 Wis. 84 711
v. Leach, 69 Me. 560 1400
v. Leland, 1 Metc. (Mass.) 388 2835, 2871
v. Lemon, 1 Blackf. 198 1403
v. Lincoln & K. Ins. Co., 6 Mass. 479, 486 3027
v. Louisville & N. R. Co., 183 Ill. App. 543 334
v. Louisville & N. R. Co., 101 Ky. 703 1428, 3468
v. Louisville & N. R. Co., 88 Fed. 44 4803
v. Los Angeles T. Co., 1 Cal. App. 474 1416
v. Lowden, 117 Cal. 232 1614, 1615
v. McCann, 6 Dana 366 2494
v. Maine Cent. R. Co., 101 Me. 469 1511
v. Mathews, 47 Iowa 409 4974
Wood v. Merchants' Sav., L. & T. Co., 41 Ill. 267 687, 817
v. Merritt, 45 How. Pr. 471 587
v. Monteleone, 118 La. 1005 268
v. Morewood, 3 Q. B. 440 364, 365, 3786, 3790, 4260
v. Morgan, 6 Barb. 507 1399
v. New York Cent., etc., R. Co., 83 App. Div. (N. Y.) 604 149, 4681, 4682
v. Niagara Falls P. Co., 121 Fed. 818 832, 840, 845
v. Omaha, 87 Neb. 213 4862, 4900
v. Pacolet Mfg. Co., 80 S. C. 47 3736
v. Partridge, 11 Mass. 488 3131
v. Pennsylvania R. Co., 177 Pa. 306 132
v. Perry, 1 Barb. 114 1957
v. Phoenix Ins. Co., 1 Fed. 235 3035
v. Phoenix Ins. Co., 8 Fed. 27 3035
v. Poughkeepsie Ins. Co., 32 N. Y. 619 3039
v. Ravenscroft, 135 Iowa 346 2561, 2567
v. Robbins, 11 Mass. 504 1018, 1117, 1134
v. Roberts, 2 Stark. 417 747, 752, 756
v. Roeder, 50 Neb. 476 4378
v. Schettler, 23 Wis. 501 494
v. Sharpless, 174 Pa. 588 3243
v. Sherer, 186 Mass. 562 2482
v. Smith, 23 Vt. 706 1008, 1105, 1107, 1108
v. Snider, 187 N. Y. 28 443
v. Spring Garden Ins. Co. of Philadelphia, Pa., 215 Fed. 355 2918
v. State, 66 Md. 61 1723, 1741, 1749
v. Stenning, [1895] 2 Ch. 433 736
v. Torrey, 6 Wend. 562 633
v. United States, 36 Ct. of Cls. 418, 426 4439, 4442
v. Wack, 31 Ind. App. 252 1523, 2699
v. Wade, 2 Stark. 167 2192
v. Washington, 135 Wis. 299 2524
v. Watson, 53 Me. 300 616, 1907
v. Waud, 3 Exch. Rep. 748 36, 38
v. Weir, 5 B. Mon. 544 4606
v. Williamsburgh, 46 Barb. 601 429
v. Wood, 1 Metc. (Ky.) 512 2395, 2396
Wood M. & R. Mach. Co. v. Bobbst, 56 Mo. App. 427 2386
Wood R. & M. Co. v. Ascher, 103 Md. 133 2768
v. Smith, 50 Mich. 565 2235
Wood T. Co. v. Shelton, 180 Ind. 273 1442, 4173
Woodall v. McMillan, 38 Ala. 622 460
Woodard v. Bellamy, 2 Root 354 3686
v. Michigan, etc., R. Co., 10 Ohio St. 121 4954
Woodberry v. Warner, 53 Ark. 488 2514
Woodbine C. C. Co. v. Goldnamer, 134 Ky. 538 2226
Woodborne v. Scarborough, 20 Ohio St. 57 4274
Woodbridge v. Bropley, 2 West. L. Monthly 274 875
v. Spooner, 3 B. & Ald. 233 1853, 1856, 1857
Woodbridge I. Co. v. Semon I. C. Co., 81 Conn. 479 1353
Woodburn v. Cogdall, 39 Mo. 228 1136
v. Driver, 81 Ark. 333 1668
v. Woodburn, 115 Ill. 427 663
Woodbury v. Brazier, 48 Me. 302 2569
v. Jones, 44 N. H. 206 291, 293, 2568, 3199
v. Luddy, 14 Allen 1 1978

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v. Sparrell Print, 198 Mass. 1 435, 3110
v. Thompson, 3 N. H. 194 4554, 4555
v. Turner, etc., Mfg. Co., 96 Ky. 459 869
v. William Tackaberry Co., 166 Iowa 642 3232
v. Woodbury, 144 App. Div. (N. Y.) 680 3720
Wooddy v. Benton W. Co., 54 Wash. 124 4380
Wooden v. Western New York & P. R. Co., 126 N. Y. 10 1181, 4952, 4953, 4954
Woodenware Co. v. United States, 106 U. S. 432 3791, 3792, 4216, 4257, 4263
Woodes v. Dennett, 9 N. H. 55 2986
Woodfolk v. Nashville, etc., R. Co., 2 Swan 422 4119
Woodford v. Baltimore & O. R. Co., 70 W. Va. 195 3336, 3345
v. Kelley, 18 S. D. 615 833, 2667, 2670
v. Leavenworth, 14 Ind 311 2094
Woodford D Co. v. Remington T. Co., 174 Ill. App. 244 2393
Woodger v. Great Western R. Co., L. R. 2 C. P. 318 3364, 3366
Woodham v. Gelston, 1 Johns. 134 1628, 4197
Woodhouse v. Powles, 43 Wash. 617 41, 1302, 4552
v. Walker, 1 Q. B. Div. 408 3162
Woodhull v. Rosenthal, 61 N. Y. 393 3693, 3699, 3707, 3710, 3714
v. Wagner, 1 Bald. 296 616
Woodin v. Wentworth, 57 Mich. 278 3882, 3902
Wooding v. Thom (App. Div.), 132 N. Y. Supp. 50 1500
Woodland v. Union Pac. R. Co., 27 Utah 543 1141, 4170
Woodle v. Settlemyer, 71 Ore. 25 1595, 1764
Woodley v. Coker, 119 Ga. 226 4605, 4620
Woodlie v. Murry, 2 Tenn. Cas. 625 1765
Woodlief v. Logan, 51 La. Ann. 1935 2593
Woodling v. Knickerbocker, 31 Minn. 268 449
Woodman v. Blue Glass L. Co., 125 Wis. 489 2013
v. Boothby, 66 Me. 389 2780
v. Churchill, 52 Me. 58 1818
v. Hubbard, 25 N. H. 67 2493
v. Lydiard P. Co., 192 Fed. 67 4483
v. Nottingham, 49 N. H. 387 1680
v. Prescott, 66 N. H. 375 4602
v. Tufts, 9 N. H. 88 3842
Woodmansie v. Logan, 2 N. J. L. 93 10, 4609
Woodring v. Jacobino, 54 Wash. 504 60, 152
Woodrow v. Hawving, 105 Ala. 240 542
Woodruff v. Bacon, 35 Conn. 98 1221
v. Bradstreet Co., 35 Hun 16 4552
v. Brown, 17 N. J. L. 246 3723
v. Bunce, 9 Paige 443 2212
v. Cook, 25 Barb. 505 1356, 1369, 1392
v. Graddy, 91 Ga. 333 2454
v. Hough, 91 U. S. 596, 23 L. ed. 332 2684
v. Mississippi, 66 Miss. 298 596
v. Richardson, 20 Conn. 238 1489
v. Rochester & P. R. Co., 108 N. Y. 39 2657
v. Schultz, 155 Mich. 11 2793
Woodruff v. Scruggs, 27 Ark. 26 1189, 1193
v. Trapnall, 12 Ark. 811, 10 How. 190 627, 822, 1229
v. Webb, 32 Ark. 612 958, 1488, 1491
Woodruff Co. v. Exchange R. Co., 21 Cal. App. 607 2693
Woodruff S. & P. Coach Co. v. Diehl, 84 Ind. 474 3540
Woods v. Banks, 14 N. H. 101 3741
v. Commonwealth, 8 B. Mon. 112 156, 1643
v. Cramer, 34 S. C. 508 2242, 2244, 2369
v. Devin, 13 Ill. 746 3529, 3531
v. Finnell, 13 Bush 628 4608, 4609, 4623
v. Fulton, 2 Har. & Gill 71 1778
v. Gaar, 93 Mich. 143 4265
v. Huffman, 64 Tex. 98 1685
v. Hynes, 2 Ill. 103 1827
v. Kernan, 57 Hun 215 3189
v. Kessler, 93 Ind. 356 1673
v. Klein, 223 Pa. 256 4359
v. Metropolitan St. R. Co., 48 Mo. App. 125 3464
v. Nichols, 21 R. I. 537 4212
v. Nichols, 22 R. I. 225 4210
v. North, 84 Pa. 407 1924
v. Pangburn, 75 N. Y. 495 682, 4516
v. Pope, 6 C. & P. 782 3162
v. Rowan, 5 Johns. 42 2874
v. Shumard, 114 La. 451 2554
v. State, 10 Mo. 298 1558
v. Varnum, 21 Pick. 165 1618
v. Wallace, 30 N. H. 384 3728, 3730
v. Western U. Tel. Co., 148 N. C. 1 3557, 3633
Woods & L.'s Contract, In re [1898] 1 Ch. 433, [1898] 2 Ch. 211 1970
Woodside v. Globe M. Ins. Co., 73 L. T. Rep. 626 3012
Woodson v. Johns, 3 Munf. 230 1721
v. Scott, 20 Mo. 272 1499
v. Winchester, 16 Cal. App. 472 4381
Woodstock H. & S. Mfg. Co. v. Charleston L. & W. Co., 84 S. C. 306 3887, 3906
Woodstock I. Works v. Kline, 149 Ala. 391 4905, 4939
v. Standard P. Mfg. Co., 115 La. 829 2236
Woodstock Iron Works v. Stockdale, 143 Ala. 550 348, 3911
Woodward v. Aborn, 35 Me. 271 3839
v. Allan, 3 Dana 164 2094, 2095
v. Anderson, 9 Bush 624 4959
v. Boscobel, 84 Wis. 226 4679
v. Chicago & N. R. Co., 23 Wis. 400 417
v. Consolidated T. Co., 17 Pa. Super. Ct. 576 4795
v. Donnell, 146 Mo. App. 119 2482
v. Emmons, 61 N. J. L. 281 1837
v. Fuller, 80 N. Y. 312 520, 2657, 2674, 2675
v. Glidden, 33 Minn. 108 4840, 4841
v. Hill, 6 Wis. 147 638
v. Holmes, 67 N. H. 494 664
v. Illinois Cent. R. Co., 1 Biss. 403 3400, 3402
v. Jones, 15 N. Y. Misc. 1 3236
v. Leavitt, 107 Mass. 453 1483
v. McGaugh, 8 Mo. 161 525
v. Miles, 24 N. H. 289 762, 763
v. Miller, 119 Ga. 618 2431
v. Pierce, 147 Ill. App. 339 476, 2646
v. Powers, 105 Mass. 108 2774

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v. Rodgers, 20 Tex. 176 2204
v. Southern R. Co., 99 S. C. 251 3502
v. Suydam, 11 Ohio 361 2947, 2969
v. Thatcher, 21 Vt. 580 4410
v. Walton, 2 B. & P. N. R. 476 3825
v. Woodward, 2 Rich. Eq. 23 1086
Woodward I. Co. v. Cook, 124 Ala. 349 418
v. Curl, 153 Ala. 205 4768, 4772
Woodward's App., 227 Pa. 191 1117
Woodworth v. Bowes, 5 Ind. 276 2859
v. Curtis, 7 Wend. 112 2275
v. Gorsline, 30 Colo. 186 437, 4210
v. Hascall, 59 Neb. 124 4280
v. Huntoon, 40 Ill. 131 1818
v. Iowa Cent. Ry. Co., — Iowa —, 149 N. W. 522 4744, 4805
v. McLean, 97 Mo. 25 2697
v. Mills, 61 Wis. 44 4607, 4613
v. Northwestern Mut. L. Ins. Co., 185 U. S. 354 1771
Woody v. Louisville R. Co., 153 Ky. 14 1382, 4774
Woolcott v. McFarlan, 6 Hill 227 976
Wooldridge v. Wilkins, 3 How. (Miss.) 360 3718
Woolenslagle v. Runals, 76 Mich. 545, 553 4408, 4410
Wooley v. Campbell, 37 N. J. L. 163 361, 362
v. City of Fall River, 220 Mass. 584 4104
Woolf v. Schaefer, 103 App. Div. (N. Y.) 567 2274, 2630
Woolfolk v. Jones, 216 Fed. 807 1738, 1754
v. McDowell, 9 Dana 268 679, 749, 754, 761
Woolheather v. Risley, 38 Iowa 486 60, 445
Woolley v. Alexander, 99 Ill. 188 1104, 1193
v. Carter, 7 N. J. L. 85 3779, 3823, 4182
v. Friedlander, 67 Hun 321, aff'd 143 N. Y. 626 1934
v. Louisville B. Co., 81 Ky. 527, 538 2792, 2821
v. Plaindealer Pub. Co., 47 Ore. 619 4502, 4573
v. Van Volkenburgh, 16 Kan. 20 1814, 1910
v. Wathling, C. & P. 610 3102
Woolner v. Spalding, 65 Miss. 204 1692, 2890
Woolsey v. Bailey, 27 N. H. 217 2227
v. Crawford, 2 Camp. 445 1897, 1898, 1901
v. New York E. R. Co., 134 N. Y. 323, 31 N. Y. 891 3883, 4083
Wooster v. Kisch, 26 Hun 61 869, 886
v. Simonson, 16 Fed. 680 4440
v. Taylor, 14 Blatch. 403 4474
Wooten v. Buchanan, 49 Miss. 386 703, 705, 733
v. Martin, 140 Ky. 781 4504
v. United I. & R. M. Co., 128 La. 294 4863
Worcester Bank v. Wells, 8 Metc. (Mass.) 107 1878
Worcester County v. Ashworth, 160 Mass. 186 443
Worcester L. Co. v. Heald, 78 N. J. L. 172 759
Worcester School Trustees v. Rowlands, 9 C. & P. 734 3151, 3155
Word v. Cavin, 1 Head 506 2381
Worden v. Bielenberg, 119 Minn. 330 3760
v. Davis, 195 N. Y. 391 4836
Wordin v. Bemis, 32 Conn. 273 3302, 3304
Work v. Bennett, 70 Pa. 484 539, 2331, 4249
v. Gaskins, 33 Miss. 539 1226
Workman v. Great Northern R. Co., 32 L. J. (Q. B.) 279 474, 493
v. Miffin, 30 Pa. 362 3146
Works v. Farmers' Ins. Co., 57 Me. 281 3019
World's Columbian Exposition Co. v. Pasteur-C. F. Co., 82 Ill. App. 94 240, 254, 2588
Worley v. Cincinnati R. Co., 1 Handy 481 4846, 4847
v. Lineman, 6 Ind. App. 240 2099, 2131, 2136, 2173, 2192
Wormald v. Hill, 4 Ky. L. Rep. 723 4164
Worman v. Kramer, 73 Pa. 378 481
Wormley v. Mason City, etc., R. Co., 120 Iowa 684 3960
Wormley's Est., 137 Pa. 101 1070
Wormouth v. Cramer, 3 Wend 395 469
Wornell v. Williams, 19 Tex. 180 2815, 2818
Worrall v. Des Moines R. G.'s Ass'n, 157 Iowa 385 4178
v. Munn, 53 N. Y. 185, 38 N. Y. 137 2032, 3836
Worrell v. Hurtig, 11 Pa. Dist. 788 887
v. Kinnear Mfg. Co., 103 Va. 719 2268, 2270
v. McClinagan, 5 Strobh. 115 888
Worsham v. Lancaster, 20 Ky. L. Rep. 701 3710
v. Vignal, 5 Tex. Civ. App. 471 4232
Worsley v. Wood, 6 T. R. 710 3021
Wort v. Jenkins, 14 Johns. 352 1268
Worten v. Searing, 1 Vict. L. R. 122 4532
Worth v. Edmonds, 52 Barb. 40 39
v. Hill, 14 Wis. 559 574, 575
v. Smith, 5 B. Mon. 504 1774, 1783
v. Town of Westfield, — N. J. L. —, 90 Atl. 727 4015
Worthen v. Wilmot, 30 Vt. 555 2275, 2314
Worthington v. Campbell, 8 Ky. L. Rep. 416 2029
v. Gwin, 119 Ala. 44 2661, 2701
v. Hiss, 70 Md. 172 3705
v. McRoberts, 7 Ala. 814, 9 Ala. 297 1956
v. Morris, 98 Ky. 54 4190
v. Oak & H. Park I. Co., 100 Iowa 39 2548, 2558
v. Warrington, 8 C. B. 134 283
v. Warrington, 18 L. J. (C. P.) 350 2000
v. Young, 8 Ohio 401 3710
Worthley v. Emerson, 116 Mass. 374 730, 737
Worthy v. Battle, 125 Ga. 415 2799
v. Jones, 11 Gray 168 1936
v. Jonesville O. Mill, 77 S. C. 69 503
v. Patterson, 20 Ala. 172 2048, 2421
Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 508 4484, 4487
Wotring v. Shoemaker, 102 Pa. 496 2018
Wotton v. Shirt, Cro. Eliz. 742 3133
Wragg & Son v. Mead, 120 Iowa 319 2155, 2186, 2187
Wragge v. South Carolina, etc. R. Co., 47 S. C. 105 61
Wray v. Carpenter, 16 Colo. 271 2503

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v. Warner, 111 Iowa 64 1825, 1828
Wreford v. Kenrick, 107 Mich. 389 3123
Wren v. Holt, [1903] 1 K. B. 610 2378
v. Kirton, 11 Ves. 377 2945
v. Morgan, 148 N. C. 101 2455
v. Stokes, [1902] 1 Irish 167 1630
v. Weild, L. R. 4 Q. B. 213 4566
v. Winter, 6 Ohio Dec. 176 385
Wrenn v. Morgan, 148 N. C. 101 2387, 2404
v. University L. Co., 65 Ore. 432 971
Wrens v. Sammons, 129 Ga. 755 1497
Wright v. Acres, 6 A. & E. 726 759
v. Adams Exp. Co., 54 Pa. Super. Ct. 485 3338
v. Atlantic C. L. R. Co., 110 Va. 670 149
v. Baldwin, 51 Mo. 269 2984
v. Bank of the Metropolis, 110 N. Y. 237 2314, 2948, 2955, 2966, 4244
v. Beardsley, 46 Wash. 16 344, 1506, 3653
v. Bennett, 3 Barb. 451 423, 4359
v. Boggess, 24 Cal. App. 533 2152
v. Bott, — Tex. Civ. App. —, 163 S. W. 360 861, 1954
v. Brooks, 47 Mont. 99 2032
v. Broome, 67 Mo. App. 32 2464, 4322
v. Butler, 6 Wend. 284 2783
v. Central R Co., 78 Cal. 360 3459
v. Cormak, 186 Ill. App. 41 373
v. Chandler, 4 Bibb 422 1390, 3823
v. Clapin, 87 Hun 144 2874
v. Chicago, 137 Ill. App. 240 929
v. Clark, 50 Vt. 130 168, 4165
v. Compton, 53 Ind. 337 1379, 4662
v. Computing S. Co., 47 Wash. 107 317, 2421
v. Conservative I. Co., 49 Ore. 177 1019
v. Coules, 4 Cal. App. 343 4533
v. Crawfordsville, 142 Ind. 636 4905
v. Davenport, 44 Tex. 164 2390
v. Delafield, 23 Barb 498 1951
v. Donnell, 34 Tex. 291 1350
v. Eaves, 10 Rich. Eq. 582 1206
v. Falkner, 37 Ala. 274 2550
v. Fickett, 107 Me 448 4228
v. First C. W. Co., 1 N. H. 281 655
v. French, 94 Pa. 26 4362
v. Georgia Southern & F. R. Co., 66 Fla 510 3468
v. Glens Falls, etc., R. Co., 24 App. Div. (N. Y.) 617 1334
v. Gray, 2 Bay 464 163
v. Gregory, 9 App. Div. (N. Y.) 85 4507, 4519, 4521
v. Griffith, 121 Ind. 478 2750
v. Hanna, 210 Pa. 349 1877
v. Harris, 31 Iowa 272 1581
v. Hart, 44 Pa 454 1886
v. Hartford Ins. Co., 36 Wis. 522 3018
v. Haskell, 45 Me. 492 2662
v. Hayter, 5 Kan. App. 638 4633, 4634
v. Hollywood Cemetery Corp., 112 Ga. 884 343, 1292, 1343, 3827
v. Illinois, etc., Tel. Co., 20 Iowa 195 1483
v. Irwin, 33 Mich. 32 1827
v. Jacobs, 61 Mo. 19 606
v. Jennings, 1 Bailey 277 3718, 3720
Wright v. Kansas City, 187 Mo. 678 337
v. Keith, 24 Me. 158 324
v. Laing, 3 B. & C. 165 717, 721
v. Lang, 66 Ala. 389 1639
v. Lathrop, 2 Ohio 275 435
v. Lattin, 38 Ill. 293 3122, 3125, 3236, 3257
v. Lawton, 37 Conn. 167 659
v. Macdonnell, 88 Tex. 140 3255, 3256
v. Mathews, 2 Blackf. 187 4362
v. Mix, 76 Cal 465 637
v. Mulvaney, 78 Wis. 89 239, 3902, 4184, 4194
v. New York E. R. Co., 78 Hun 450 4081
v. Nipple, 92 Ind. 310 2060, 2088, 2091
v. Nutt, 3 Brown Ch. 326 2841
v. Pemigewasset P. Co., 75 N. H. 3 4001, 4150
v. Philadelphia R. T. Co., 236 Pa. 132 1281
v. Quirk, 105 Mass. 44 523, 1657, 1658, 1667
v. Reed, 3 T. R. 554 790, 1884
v. Roach, 57 Me. 600 4392, 4394
v. Robinson, 84 Hun 172 798, 801, 825, 826
v. Russell, 2 W. Bl. 934 2767
v. Sanders, 3 Keyes 323 1805
v. Sanderson & Sims, 20 Mo. App. 534 328, 2612
v. Schroeder, 2 Curt. 548, Fed. Cas. No. 18.191 4528, 4530, 4531, 4574
v. Skinner, 34 Fla. 453 361, 4208, 4212, 4216, 4221
v. Smith, 128 Ga. 432 34, 1365
v. Southern Pac. Co., 181 Mo. App. 137 3338
v. Southern Pac. R. Co., 14 Utah 383, 399 1505
v. Spencer, 1 Stewart 576 484, 4304
v. Taylor, 9 Wend. 538 2050
v. Templeton, 132 Mass. 50 104
v. Toronto R. Co., 20 Ont. L. R. 498 4694, 4695
v. Tracey, Irish Rep. 7 C. L. 134 916
v. Traver, 73 Mich. 493 1922
v. Treadwell, 43 Md 212 591
v. Turner, 1 Stew. 29 379
v. Union Pac. R. Co., 22 Utah 338 1481
v. Waddell, 89 Iowa 350 4620
v. Walker, Mart. & Hayw. 167 4209
v. Whiting, 40 Barb. 240 297
v. Wilcox, 19 Wend. 343 1329, 1335, 3508, 3509, 3510
v. Willoughby, 79 S. C. 438 3738
v. Wisconsin R. Co., 29 Wis. 341 4094
v. Woodgate, 2 Cr. M. & R. 573 4521
v. Wright, 1 Litt. 179 2525, 2655, 2664
v. Wright, 49 Mich 624 416
v. Wright, 70 N. Y. 96 587
v. Wright, 72 N Y. 149 727
v. Young, 6 Wis. 127 2047
v. Young, 176 Mass. 100 2501
Wright & Pole, Matter of, 1 A. & E. 621 3041
Wright's Automatic T. P. Mach. Co. v. American T. Co., 220 Fed. 163 4452
Wrightman v. Devere, 33 Wis. 570 4765
v. United States, 23 Ct. of Cls. 144 1039
Wrightsel v. Fee, 76 Ohio 529 3840
Wrightsville & T. R. Co. v. Gornto, 129 Ga. 204 4909

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Wrightup v. Chamberlain, 7 Scott 598 298, 304, 3161, 3196
Wrigley v. Cornelius, 162 Ill. 92 2243
v. Nasmyth, Wilson & Co., [1913] W. C. & Ins. Rep. 145 5196
Wrisley v. Burke, 203 Ill. 250 4742
Wrought Iron R. Co. v. Graham, 80 Fed. 474 1370
Wroughten v. Waffle, 122 Iowa 486 624
Wrout v. Dawes, 25 Beav. 369 525
Wrynn v. Downey, 27 R. I. 454 3664
Wuensch v. Morning Journal Ass'n, 4 App. Div. (N. Y.) 110 4572, 4573
Wuest v. American T. Co., 10 S. D. 394 4634, 4647
Wulff v. Jay, L. R. 7 Q. B. 756 2816
Wulschner v. Sells, 87 Ind. 75 2830
Wulstein v. Mohlman, 57 N. Y. Super. Ct. 50 74, 97
Wunderlich v. Pennsylvania R. Co., 223 Pa. 114 3895
Wunsch v. Northern Pac. R. Co., 62 Fed. 878 3532
Wurz v. Watts, 73 N. Y. Misc. 262 3124, 3258
Wyaft v. Dunn, 93 Mo. 459 2173
Wyandotte v. White, 13 Kan. 191 1361
Wyandotte P. C. Co. v. Bruner, 147 Mich. 400 564
Wyandotte, etc., G. Co. v. Schliefer, 22 Kan. 468 1101
Wyant v. Crouse, 127 Mich. 158 54, 68, 3819
v. Burdette, 43 Colo. 205 3192, 4634, 4647
v. Dunn, 93 Mo. 459 2174
v. Garlington, 56 Ala. 576 1943
v. Greer, 4 Stew. & P. 318 2211
v. Harrison, 3 B. & Ad. 875 6, 3916
v. Hill, 71 Vt. 468 4837
v. Pottorff, 37 Ind. 512 1918
v. White, 6 H. & N. 371 4643
Wyche v. Myrick, 14 Ga. 584 1600, 1607, 1608
Wyckoff v. Anthony, 9 Daly 417 786, 791, 796, 816
v. Anthony, 90 N. Y. 442 786
v. Bodine, 65 N. J. L. 95 4293
v. Meyers, 44 N. Y. 143 2684
v. O'Neil, 71 N. J. Eq. 729 1121, 1131
v. Runyan, 33 N. J. L. 107 1835, 1837
v. Wyckoff, 44 N. J. Eq. 56 963
Wycoff v. Longhead, 2 Dall. 92 986
Wyeman v. Deady, 79 Conn. 414 334, 359, 1350
Wyler v. Louisville & N. R. Co., 6 Ohio N. P. (N. S.) 589 3322, 3345
Wyley v. Bull, 41 Kan. 306 2474
Wylie v. Birch, 4 Q. B. 566 34, 1629, 1630
v. Gallagher, 46 Pa. 205 1583, 1597
v. Ohio River & C. R., 48 S. C. 405 4173
v. Smitherman, 7 Ired. 236 4159, 4171
Wyly S. Co. v. Burnett, 43 Ga. 438 361
Wyman v. American P. Co., 8 Cush. 168 291, 2310, 2330
v. Ballard, 12 Mass. 304 2129, 2151, 2152, 2157
v. Bridgen, 4 Mass. 150 2157
v. Cochrane, 35 Ill. 152 870
v. Fort Dearborn Nat. Bank, 181 Ill. 279 682
v. Heald, 17 Me. 329 1847
v. Hubbard, 13 Mass. 232 1117
Wyman v. Leavitt, 71 Me. 227 77, 343, 348, 3643, 3647, 4662, 4664, 4687
v. Lexington, etc., R. Co., 13 Metc. (Mass.) 316 4130
v. Passmore, 146 Iowa 486 2462
v. Robinson, 73 Me. 384 1568, 1570, 1574, 1575
v. Winslow, 11 Me. 398 624
Wymore v. Mahaska County, 78 Iowa 396 109
Wyngert v. Norton, 4 Mich. 286 2540
Wynkoop v. Cowing, 21 Ill. 570 803
v. Ludlow V. Mfg. Co., 153 App. Div. (N. Y.) 507 4797
v. Van Beuren, 63 Hun 500 1715
Wynn v. Atlantic Coast Line R. Co., 66 Fla. 604 32
v. Brooke, 5 Rawle 106 297, 298, 2848, 2862, 3195
v. Hiday, 2 Blackf. 123 515, 1847
v. Longley, 31 Ill. App. 516 4395
v. Poynter, 3 Bush 54 1873
Wynne v. Atlantic Ave. R. Co., 14 N. Y. Misc. 394 4693
v. Mason, 72 Miss. 424 1721
v. Parsons, 57 Conn. 73 1314, 4507, 4545
v. Schnabaum, 78 Ark. 402 2946, 2947
Wyoming Nat. Bank v. Brown, 7 Wyo. 494 962, 1047
Wyrley C. Co. v. Bradley, 7 East 368 3917
Wyse v. Russell, 16 N. Y. Misc. 53 3182
Wythe v. Myers, 3 Sawyer 598 3711, 3715
Wytheville Ins. & B. Co. v. Teiger, 90 Va. 277 627
Wyvell v. Barwise, 43 Minn. 171 586

X

Xenia Branch Bank v. Lee, 7 Abb. Pr. 372 531, 551

Y

Yaeger v. Chicago City R. Co., 166 Ill. App. 506 1382
Yager v. Bruce, 116 Mo. App. 473 4513, 4569, 4571, 4572, 4573, 4577, 4585
Yahoola, etc., Hydraulic & M. Co. v. Irby, 40 Ga. 479 3788
Yakima Nat. Bank v. Knipe, 6 Wash. 348 1920
Yale v. Coddington, 21 Wend. 175 2228
v. Saunders, 16 Vt. 243 481, 4296, 4301
Yale L. Mfg. Co. v. Sargent, 117 U. S. 536 4474
Yallop-De G. Co. v. Minneapolis, etc., R Co., 33 Minn. 482 4358
Yamaoka v. Kloeber, 71 Wash. 598 2348
Yan Yean, The, 8 Prob. Div. 147 2724
Yancey v. Tatlock, 93 Iowa 386 2174
Yancy v. Lewis, 4 Hen. & Munf. 390 2211
Yandt's App., 13 Pa. 575 1200
Yanelli v. Littlejohn, 172 Mich. 91 4391
Yankey v. Lockheart, 4 J. J. Marsh. 277 2786
Yarbrough v. Weaver, 7 Tex. Civ. App. 215 223
Yater v. Mullen, 24 Ind. 277 4211
Yates v. Burch, 87 N. Y. 409 1766
v. Crozer Coal & Coke Co., — W. Va. —, 84 S. E. 626 47, 4800
v. Dunster, 11 Ex. 15 3164
v. Fassett, 5 Denio 21 4338
v. Foot, 12 Johns. 1 421

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v. Jones Nat. Bank, 206 U. S. 158 4
v. Joyce, 11 Johns. 136 1756, 4429
v. New York, etc., R. Co., 67 N. Y. 100 466
v. Paddock, 10 Wend. 528 3716
v. Shepardson, 39 Wis. 173 1099
v. South Kirby, F. & H. Collieries, Ltd., [1910] 2 K. B. 538 5190
v. Southwestern B., etc., Co., 40 La. Ann. 467 4829
v. Valentine, 71 Ill. 643 658, 666, 669
v. Whyel Coke Co., 221 Fed. 603 266
v. Whyte, 4 Bing. N. C. 272 489
Yatsuyanagi v. Shimamura, 59 Wash. 24 889
Yawger v. American Surety Co., 212 N. Y. 292 1576, 2852
Yazoo, etc., R. Co. v. Aden, 77 Miss. 382 135, 3458
v. Allen, — Miss. —, 63 So. 572 3323
v. Banister, 89 Miss. 808 2097
v. Christmas, 89 Miss. 686 1280, 3343, 3403
v. Cobb, 94 Miss. 561 1511
v. Consumers' Ice & Power Co., — Miss. —, 67 So. 657 225
v. Davis, 73 Miss. 678 4002, 4145
v. Fisher, 102 Miss. 702 3328, 3369
v. Fitzgerald, 96 Miss. 197 3502, 3506, 3528
v. Georgia Home Ins. Co., 85 Miss. 7 3531
v. Grant, 86 Miss. 565 3334, 3527
v. Hardie, 100 Miss. 132 3501, 3502
v. Hardie, 106 Miss. 436 3450
v. Hubbard, 85 Miss. 480 408, 3800
v. Jennings, 90 Miss. 93 3979, 4019
v. Kelly, 98 Miss. 367 1508
v. Lakeview T. Co., 100 Miss. 281 3696
v. Longview Sugar Co., 135 La. 542 4026
v. May, 104 Miss. 422 168, 1266
v. Mitchell 83 Miss. 179 3502
v. Payne, 92 Miss. 126 371
v. Roberts, 88 Miss. 80 125, 3501
v. Robinson, — Miss. — 65 So. 241 1465
v. Sanders, 87 Miss. 607 3840, 3911
v. Shelby, 95 Miss. 155 1330
v. Smith, 82 Miss. 656 54
v. Sultan, — Miss. —, 63 So. 672 321, 1364
v. Teissier, 134 La. 958 3961, 3972, 4026, 4051
v. Wallace, 90 Miss. 609 1519
v. Wallace, 91 Miss. 492 4728, 4793, 4806
v. Williams, 87 Miss. 344 1276, 1494, 3506, 4159
Yeager, The, 20 Fed. 653 489
Yeager v. Berry, 82 Mo. App. 534 4783
v. Chicago, etc., R. Co., 156 Iowa 166 4905
v. Fairmont, 43 W. Va. 259 429
v. Groves, 78 Ky. 278 793
v. Spirit Lake, 115 Iowa 593 4720, 4733
v. Wallace, 44 Pa. 94 418
v. Weaver, 64 Pa. 425 3189, 3199, 3227
Yearteau v. Bacon's Est., 65 Vt. 516 1107, 2459
Yeates v. Allin, 2 Dana 134 3736
v. Illinois Cent. R. Co., 241 Ill. 205 152
v. Reed, 4 Blackf. 463 4588, 4596
Yeatman v. Corder, 38 Mo. 339 2970, 2976
Yeatman v. Cullen, 5 Blackf. 240 1150, 1151, 1905
Yeatman's App., 102 Pa. 297 1131, 1248
Yeaton v. Boston & M. R., 73 N. H. 285 4668
v. Fry, 5 Cranch 342 3004
Yeats v. Ballentine, 56 Mo. 530 356, 2682
Yegana v. Green, 6 Philip. Isl. 750 2691
Yellow Jacket M. Co. v. Legarden, 104 Ark. 573 2404, 2409, 2422
Yellow Poplar L. Co. v. Chapman, 74 Fed. 444 2275, 2280
Yellow River R. Co. v. Harris, 35 Fla. 385 3734
Yellowstone Park R. Co. v. Bridger C. Co., 34 Mont. 545 1367, 3976, 4124, 4134
Yelton v. Hawkins, 2 J. J. Marsh. 1 2067
v. Slinkard, 85 Ind. 190 1661, 1664, 1682
Yenner v. Hammond, 36 Wis. 277 860, 864, 899
Yeo v. Merceran, 18 N. J. L. 387 3727
Yeomans v. Bell, 151 N. Y. 230 4417
Yergy v. Helena L. & R. Co., 39 Mont. 213 1511, 4887, 4908
Yerian v. Linkletter, 80 Cal. 135 1279
Yerkes v. Northern Pac. R. Co., 112 Wis. 184 4748, 4804
Yerrington v. Greene, 7 R. I. 589 2556
Yetter v. Hudson, 57 Tex. 604 844
Yndart v. Den, 116 Cal. 533 959
Yoakum v. Dunn, 1 Tex. Civ. App. 524 3369, 3383, 3393, 3399, 3433
v. Polly, 1 B. Mon. 358 4645
v. Tilden, 3 W. Va. 167 683
Yoder v. Allen, 2 Bibb 338 2310
v. Strong, 227 Pa. 432 833, 842, 862
Yoders v. Amwell, 172 Pa. 447 104
Yokom v. McBride, 56 Iowa 139 2008
Yokum v. Thomas, 15 Iowa 67 2117, 2137, 2142, 2145
Yolo County v. Sacramento, 36 Cal. 193 3935
Yon v. Blanchard, 75 Ga. 519 2945
Yonge v. Pacific Mail S. S. Co., 1 Cal. 353 222, 3444
Yonkers, etc., F. Ins. Co. v. Hoffman Ins. Co., 6 Roberts 316 3093
Yoos v. Rochester, 92 Hun 481, aff'd 159 N. Y. 541 3932, 3933
Yore v. Meshew, 146 Mich. 80 1443
Yorgensen v. Yorgensen, 6 Neb. 383 3735
York v. Allen, 30 N. Y. 104 2211
v. Everton, 121 Mo. App. 640 4695, 4735
v. Farmers' Bank, 105 Mo. App. 127 1110
v. Pease, 2 Gray 282 4521
v. Stewart, 21 Mont. 515 3126, 3127, 3182, 3234
v. York R. Co., 229 Pa. 236 842, 866, 886
York County v. Watson, 15 S. C. 1 1581
York-D. M. Co. v. Lusk, 6 Kan. App. 629 2275, 2290
v. Lusk, 45 Kan. 182 2288
York Mfg. Co. v. Illinois Cent. R. Co., 1 Biss. 377 3335
York, etc., Co. v. Gallatin, 186 Pa. 150 708, 709, 711
Yorton v. Milwaukee, etc., R. Co., 62 Wis. 367 592, 3464, 3500
v. Milwaukee, etc., R. Co., 54 Wis. 234 3464
Yorty v. Case T. M. Co., 91 Neb. 449 1374

[REFERENCES ARE TO PAGES]

Yost v. Anchor F. Ins. Co., 38 Pa. Super. Ct. 594 3024
v. Conroy, 92 Ind. 464 1444
v. Ramey, 103 Va 117 1559
v. State, 80 Ind 350 1652
v. Tracey, 13 Utah 431 4840, 4844
v. Union Pac. R. Co., 245 Mo. 219 4822
Youghiogheny & O. C. Co. v. Verstine, 176 Fed. 972 2277
Youmans v Heartt, 34 Mich 397 733
Young v. Adams, 6 Mass. 182 647, 648, 651
v. American B. Co., 228 Pa. 373 2758, 2793
v. Aylesworth, 35 R. I. 259 432, 434, 1328, 4363
v. Ballarat & B. East W. Com'rs, 5 Vict. L. R. 503 2684, 2687
v. Bank of Miami, — Tex Civ. App. —, 161 S. W. 436 2769
v. Bennett, 5 Ill 43 4572, 4580
v. Berman, 96 Ark. 78 3236, 3243, 3258
v. Beveridge, 81 Neb. 180 1425, 4871, 4877, 4896
v. Borzone, 26 Wash. 4. 20 822
v. Broadbent, 23 Iowa 539 1687
v. Brown, 53 Wis. 333 2749
v. Bruh, 18 Abb. Pr. 171 1546
v. Butler, 1 Head 640 2211, 2212
v. Clark, 2 Ala. 264 2864
v. Cole, 3 Bing. N. C. 724 2271, 2385
v. Commissioners, 53 Fed. 895 3712
v. Courtney, 13 La Ann. 193 223
v. Cowden, 98 Tenn. 577 1512
v. Crawford, 23 Mo. App. 432 2464
v. Cureton, 87 Ala. 727 1431, 2275, 2341
v. Currier, 63 N. H 419 775
v. Dalton, 83 Tex. 497 2229
v. Dickey, 63 Ind. 31 1102
v. English, 7 Beav 10 710
v. Extension D. Co., 13 Idaho 174 369, 1502, 3881, 3889
v. Filley, 19 Neb. 543 2405
v. Fluke, 15 Up. Can. C. P. 360 870, 975
v. Fox, 26 App. Div. (N. Y.) 261 4507
v. Fresno Flume & Irrigation Co., 24 Cal App 286 4933
v. Gant 69 Ark. 114 832, 893
v. Gentis, 7 Ind. App. 199 3893
v. Godbe, 15 Wall. 562 941, 948, 1183
v. Gormley, 119 Iowa 546 1329
v. Gormley, 120 Iowa 372 4836, 4840
v. Gravenhurst, 22 Ont. L. R 291 4653, 4768
v. Gravenhurst, 24 Ont. L. R. 467 1511, 4767
v. Hare, 11 Humph. 303 1599
v. Hargrave, 7 Ohio 394 548
v. Harrison, 17 Ga. 30 3957, 4033, 4050, 4108
v. Hartford F. Ins. Co., 45 Iowa 377 3021
v. Hill, 67 N. Y. 162 1202, 1203, 1204
v. Hockley, 3 Wils 346 1867
v. Hoover, 4 Cranch C. C. 187 493
v. Hosmer, 11 Mass. 89 497, 2931
v. Hubbard, 154 Mich. 218 2507
v. Johnson, 46 Hun 164 501
v. Kimber, 44 Colo. 448 1015, 1129, 1243, 2961
v. Lanznar, 133 Mo. App. 130 2485, 2524, 2540
Young v. Leach, 27 App. Div. (N. Y.) 293 17
v. Lloyd, 65 Pa. 199 1437, 2294, 4260
v. Louisville & N. R. Co., 121 Ky. 483 4856
v. Lyons, 8 Gill 162 2863
v. McClung, 9 Gratt. 336 2212
v. Maine Cent. R. Co., 113 Me. 113 3334
v. Mertens, 27 Md. 114 1268, 2238, 2242, 2244
v. Metcalf L. Co., 18 N. D. 441 2501
v. Miller, 5 El. & B. 775 3303
v. Murphy, 3 Bing. N. C 54 3685
v. Overhaugh, 76 Hun 151 2044
v. Park, 6 J. J. Marsh. 540 695
v. Pate, 3 J. J. Marsh. 100 1252
v. Plumeau, Harp. 349 2456
v. Plumeau, Harp. 543 569
v. Polack, 3 Cal 208 941
v. Potter, 150 Mich. 375 1075
v. Reynolds, 4 Md 375 1556
v. St. Louis, etc., R. Co., 227 Mo. 307 4865
v. Shunk, 30 Minn. 503 2859
v. Spencer, 10 B. & C. 145 43, 3836
v. State, 36 Ore. 417 1040
v. State Bank, 54 Tex. Civ. App. 206 1918
v. Stevenson, 75 Ark. 181 3219, 3770, 3825
v. Stone, 4 W. & S. 45 2191
v. Stone, 55 Ohio St. 125 2498
v. Tacoma, 31 Wash. 153 1066
v. Tarbell, 37 Me. 509 3728
v. Thompson, 2 Kan. 83, aff'g Dudley v. Reynolds, 1 Kan. 285 870, 967, 975
v. Thrasher, 115 Mo. 222 3717, 3718
v. Trainor, 158 Ill. 428 2512
v. Union Ins. Co., 24 Fed. 279 3031
v. Van Natta, 113 Mo. App 550 2387, 2410, 2414, 2421
v. Waters, 5 Pa. Co. Ct. 127 3166
v. Watson (Tex. Civ. App.) 140 S. W. 840 2542, 2547
v. West, 130 Ill App. 216 3894
v. Western U. Tel. Co., 65 N. Y. 163 3555
v. Western U. Tel Co., 107 N. C. 370 352 3611, 3621, 3641
v. White, 5 Watts 460 888
v. Willet, 8 Bosw 486 4334, 4338
v. Winkley, 191 Mass 570 1075
v. Young, 2 J. J. Marsh. 72 1800
v. Young, 141 Ky. 76 57
Young Men's C. Ass'n v. Harmon, 61 Ill. App. 639 4302
Young & C. Mfg. Co. v. Wakefield, 121 Mass 91 2394
Youngblood v. South Carolina & G. R. Co., 60 S. C. 9 4683, 4780
Younger v. Givens, 6 Dana 1 1928
Youngman v. Linn, 52 Pa. 413 2206, 2207
Youngquist v. Minneapolis St. R. Co, 102 Minn. 501 4935
Youngs v. Kent, 2 Sweeny 257 2229
v. Lee, 18 Barb. 187, aff'd 12 N. Y. 551 669, 1819
v. McDonald, 56 App. Div. (N. Y.) 14 1729
v. McDonald, 166 N. Y. 639 1729
v. Stahelin, 34 N. Y. 258 656, 666
Younker v. Western U. Tel. Co., 146 Iowa 499 3607, 3610
Yount v. Carney, 91 Iowa 559 1605, 1608
v. Strickland, 17 Wyo. 526 1425

[REFERENCES ARE TO PAGES]

Yuen Suey v. Fleshman, 65 Ore. 606 883, 3695, 3698
Yundt v. Hartrunft, 41 Ill. 9 4973
Yundt's App., 13 Pa. 575 1121
Yurkonis v. Delaware, L. & W. R. 213 Fed. 537 1502

Z

Z. L. Adams, The, 26 Fed. 655 3306
Zabel v. New State Tel. Co., 127 Mich. 402 1433
Zabriskie v. Central Vermont R. Co., 131 N. Y. 72 2371
v. Smith, 13 N. Y. 322 4363, 4845
Zabron v. Cunard S. S. Co., 151 Iowa 345 3438, 3482
Zagelmeyer v. Cincinnati, etc., R. Co., 102 Mich. 214 3441
Zahm v. First Nat. Bank, 103 Pa. 576 2781
v. Royal F. Union, 154 Mo. App. 70 1806
Zale v. Zale, 24 Wend. 76 3121, 3122
Zaleski v. Clark, 44 Conn. 218 2235
Zane v. Peck, 13 Fed. 475 4473, 4474
Zang v. Wyant, 25 Colo. 551 1077
Zehner v. Dale, 25 Ind. 433 2238
Zealand, The, 1 Low. 1, Fed. Cas. No. 18,205 2732, 2735
Zebley v. Farmers' L. & T. Co., 139 N. Y. 461 823
v. Storey, 117 Pa. 478 4603, 4616, 4837
Zeevin v. Cowell, 2 Taunt. 203 1232
Zehner v. Shepp, 54 Pa. Super. Ct. 529 3737
Zeibert v. Grew, 6 Whart. 404 1865
Zeibold v. Foster, 118 Mo. 349 4025
Zeigler v. Henry, 77 Mich. 480 1802
v. Wells, Fargo & Co., 23 Cal. 179 3395, 4278
Zeimantz v. Blake, 39 Wash. 6 820
Zelenka v. Port Huron Mach. Co., 144 Iowa 592 4210
Zeliff v. Jennings, 61 Tex. 458 4502, 4514, 4538, 4546
Zell v. Dunaway, 115 Md. 1 1267, 1315
Zell G. Co. v. Chrislip, 58 W. Va. 414 1745
Zeller v. Leiter, 114 App. Div. (N. Y.) 148 951, 1877
Zender v. Seliger-T. Co., 17 N. Y. Misc. 126 2551
Zenobia, The, 1 Abb. Adm. 80 222, 3449
Zent v. Picken, 54 Iowa 535 2135
Zerbe v. Missouri, etc., R. Co., 80 Mo. App. 414 581
Zerfing v. Mourer, 2 Greene 520 502
Zerrano v. Wilson, 8 Cush. 424 662
Zetler v. Tonopah & G. R. Co., 35 Nev. 381 3334
Zibbell v. Southern Pac. Co., 160 Cal. 237
3, 1506, 4708, 4792, 4792, 4797, 4819
Zibold v. Reneer, 73 Kan. 312 60
Ziebarth v. Nye, 42 Minn. 541 3760, 3769, 3974
Ziegler, Ex parte, 83 S. C. 78 681
Ziegler v. Commonwealth, 12 Pa. 227 1607
v. Gerlach (Tex. Civ. App.), 125 S. W. 80 2241
v. Hallahan, 126 Fed. 788 2792
v. Powell, 54 Ind. 173 223, 306
Ziehen v. Smith, 148 N. Y. 558, rev'g 73 Hun 571 2151
Zier v. Hofflin, 33 Minn. 66 4565
Zikos v. Oregon R. & Nav. Co., 179 Fed. 893 5049
Zilke v. Johnson, 22 N. D. 75 4732
Zillwood v. Winch, [1914] W. C. & Ins. Rep. 87, 7 B. W. C. C. 60 5203
Zimbleman v. Finnegan, 141 Iowa 358 1824
Zimmer v. Becker, 66 Wis. 527 757
v. Third Ave. R. Co., 36 App. Div. (N. Y.) 265 1360
Zimmerman v. Conrad (Mo. App.) 74 S. W. 139 858
v. Druecker, 15 Ind. App. 512 536, 2370, 2392, 2428
v. Erhard, 83 N. Y. 74 382
v. Franke, 34 Kan. 650 15
v. Galbraith, 4 Penny. 297 1959
v. Harding, 227 U. S. 489 255
v. Klauber, 139 App. Div. (N. Y.) 26 952
v. Marrin (Misc.), 86 N. Y. Supp. 112 2592
v. Shreeve, 59 Md. 357 3734, 3741, 3742
v. Timmermann, 193 N. Y. 486 2290, 2298
v. Union R. Co., 28 App. Div. (N. Y.) 445 108
v. Zimmerman, 129 Pa. 229 2472
Zimmerman Mfg. Co. v. Daffin, 149 Ala. 380 3742
v. Dunn, 163 Ala. 272 4208
v. Dunn, 151 Ala. 435 4229, 4259
Zindorf v. Western American Co., 26 Wash. 695 4210, 4222
Zingrebe v. Union R. Co., 56 App. Div. (N. Y.) 555 4760, 4763
Zink v. Langton, 2 Doug. 749 1052
Zinn v. New Jersey S. Co., 49 N. Y. 442 3363
v. Rice, 161 Mass. 571 4607, 4631, 4642
Zinser v. Board of Sup'rs, 137 Iowa 600 4110
v. Sanitary Dist., 175 Ill. App. 9 3879, 3886
Zinsmeister v. Rock Island C. Co., 145 Ky. 25 2235, 2240, 2246
Zion v. Southern Pac. Co., 67 Fed. 500 3483, 3502, 3522, 3528
Zipperlein v. P. C. & St. L. R. Co., 8 Ohio Dec. 587 1142, 4830, 4831
Zirker v. Hughes, 77 Cal. 235 372
Zitnik v. Union Pac. R. Co., 95 Neb. 152 4871, 4880, 4881, 4882, 4895, 4907
Zitske v. Goldberg, 38 Wis. 216 4323
Zobel v. Rawlings M. Co., 49 Colo. 134 434
Zobrist v. Estes, 65 Ore. 573 4407
Zoebisch v. Von Minden, 120 N. Y. 406 757
Zogbaum v. Parker, 55 N. Y. 120 580, 585
Zolawenski v. Aberdeen, 72 Wash. 95 4676, 4757
Zoller Hop Co. v. Southern Pac. Co., 72 Ore. 262 3338
Zorkowski v. Astor, 13 N. Y. Misc. 507 3112
Zottman v. San Francisco, 20 Cal. 96 2674, 2675
Zouave, The, 29 Fed. 296 532
Zouch v. Chesapeake & O. R. Co., 36 W. Va. 524 3411
Zuellig v. Hemerlie, 60 Ohio St. 27 2843
Zuelly v. Casper, 37 Ind. App. 186 1132
Zuller v. Rogers, 7 Hun 540 294, 2433
Zurawski v. Reichmann, 116 Iowa 388 4592
Zuzuarregui v. Martinez, 2 Porto Rico Fed. 1 4192

INDEX

A

Abandonment
actions, accord and satisfaction, consideration, act or promise which is new consideration, § 249.
agency, particular duties and liabilities of agent, principal's right to indemnity, § 771.
appeal abandoned, appeal and supersedeas bonds, interest and damages, award on appeal, § 539.
attorney's abandonment of case, contracts for services, necessity of full performance, inability to perform, § 687.
building contracts
breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
recovery by contractor on quantum meruit, § 711.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.
performance prevented, contractor's rights, certainty of proof of profits, § 714.
compensatory damages, breach of contract, motive as affecting damages, § 99.
contracts for services, entire and apportionable contracts, § 691.
easements, eminent domain, injury to property not taken, ascertainment, § 1070.
husband and wife, as affecting recovery under Federal Employers' Liability Act, § 1335.
insurance, fire insurance, losses, right of abandonment, § 824.
marine insurance, total loss, abandonment of proceeds, § 807.
landlord and tenant, abandonment of lease, damages, § 844.
rent, duty to pay, effect of partial destruction of demised property, liability under statutes, § 851.
repairs, lessor's covenant to repair, breach, measure of liability, § 872.
performance of contract, liquidated damages, necessity of valid contract, § 280.
railroads, side-track abandoned, carriers of goods, refusal to carry, damages, increased expenses, loss of customers, § 901.
salvage services, necessity of saving property, § 718.
vessels, freight charges, time when freight is due and earned, § 887.
voyage abandoned, causes of action, entirety, double remedies, § 119.
certainty of damages, § 61.
anticipated profits, § 60.

Abatement and Revival
plea in abatement
misjoinder of plaintiffs, objection as fatal, § 134.
non-joinder of parties jointly liable, objection by plea in abatement, § 135.

Abatement and Revival—continued.
survival of actions
cause of action, entirety, release or death of one of several parties entitled to damages, § 133.
death by wrongful act, nature of statutory action, § 1260.
death of party, payment of money into court, effect, admission of cause of action, § 435.
defendants, joinder, effect of non-joinder and misjoinder, § 135.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
interest as damages incident to debt, § 372n.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
payment of money into court, admission of cause of action, § 435.
personal injuries, right of action, effect of death at common law, § 1259.
right to damages, survival, § 7, n 3.
vendor and purchaser, breach of contract by vendor, damages, suits for specific performance, § 590.

Abduction
elements of damage, mental suffering, § 95.
exemplary damages, allowance in actions for personal injuries, § 1253.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405n.
restriction and denial, Massachusetts rule, § 397.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, admissibility of evidence, § 1255.

Ability Impaired
see Earning Capacity.

Abortion
see Miscarriage.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.

Absence
creditors, interest, rate applicable after debt is due, § 309.

Abstracts of Title
negligence of abstractor, consequential damages, § 705.
examination of record, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
interest in actions for torts, § 355.
losses as elements of damage, what losses consist of, § 79.
measure of agent's liability, defaults in regard to bills and notes, § 776.
vendor and purchaser, breach of contract by vendor, measure of damages, conflict of American decisions, § 579.
nominal damages, § 582.
damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.
measure of damages, English rule application, § 581.
nominal damages, elements of damages, § 582.

Abstracts of Title—continued.
vendor—continued.
damages recoverable by vendor against purchaser, necessity that seller convey perfect title, effect of condemnation proceedings, § 672.
fees, breach of contract by vendor, rescission, adjustment of counter demands, § 587.
interest on purchase money, action by vendor against purchaser, § 577.
necessity that vendor convey perfect title, § 572.

Abuse of Process
see Malicious Prosecution; Process.

Abusive Language
see Assault and Battery.
acts of servants, exemplary damages, parties liable, master's liability for acts of servant, § 410.
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
ejection of passenger, exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
mental anguish independent of other injury, § 943.
physical and mental suffering of passenger, injury to character, § 942.
character as affecting damages for personal injuries, § 94n.
miscarriage, consequential damages, nervous shock without impact, right to recover damages, § 24.
mitigation of damages, words as provocation for assault, § 151.
servant discharged, contracts for services, necessity of full performance of contract, § 686.
sick person injured, consequential damages, act or omission as proximate cause of damage, § 29.
trespass, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
elements of damage, insults, § 1029.
trespass to real property, aggravation and special damages, § 1029.

Abutting Owners
see Highways and Streets.

Acceptance
see Bills and Notes.

Accident
attachment, forthcoming bonds, conditions, breach, § 517.
bills and notes, partial failure of consideration, nature of defense, cross action, § 546.
bonds of employees, contracts not to be extended by construction, rule as to bonds of surety companies, § 725n.
business injured, certainty of damages, tortious interference with business, § 70.
civil damage laws, consequential damages, extension of liability by statutes, § 16.
consequential damages for torts, right to damages, § 16.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
contracts for services, necessity of full performance, inability to perform, § 689.

Accident—continued.
covenants for title, breach, mitigation or prevention of damages, § 601.
object of covenants, indemnity if title fails, § 591.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
delay in transportation, negligence, proximate cause, § 903.
falling from train, consequential damages for torts, liability, illustration, § 18.
landlord and tenant, covenant for repairs, § 855.
partial destruction of demised property, effect as to rent, § 851.
replevin bonds, judgment, what may be shown in defense or in mitigation, § 507.
sales, breach of contract by seller, non-delivery of property contracted for, damages in favor of vendor when delivery is impossible, § 655.
salvage service, necessity that property be saved, § 718.

Accident Insurance
see Insurance.

Accommodation Paper
see Bills and Notes.

Accord and Satisfaction
accrual of actions, tender stopping interest, time of making tender, § 386.
agreement, necessity of full execution, § 252.
composition with creditors, § 250.
compromise of disputed claim, § 251.
consideration, § 247.
act or promise which is new consideration, sufficiency, § 249.
definition, §§ 214, 246.
parties, joint liability, extinguishment or severance, § 136.
payment, definition, § 214.
part of debt paid, agreement to discharge whole, §§ 248-248a.
who may make payments, § 230.
pleading, § 232.
necessity of pleading, § 232.
release, distinction, § 254.
replevin bonds, judgment, what may be shown in defense or in mitigation, § 507.
rescission or exoneration before breach, § 252a.
tender, conditions, tender must be unconditional, § 270.

Accounts
accord and satisfaction, consideration, compromise of disputed claim, § 251.
action on account, payment, mode of payment, § 215.
agents, duty to inform principal, reports, § 769.
effect of misrepresentations, § 784.
failure to sue, measure of agent's liability, defaults in regard to bills and notes, § 775.
false reports, § 774.
rights of agents, reimbursement of expenditures, § 789.
violation of duty, secret profits § 768.
assessment of damages, admission of damages by default or demurrer, § 429.
assignments, consequential damages, certainty of damages, proximate result of act or omission, § 53.
attorney's fee, interest, allowance of interest on judgments, § 333n.
banks, interest on stockholders' statutory liability, § 343.

Accounts—continued.
book accounts, breach of contract, recovery on quantum meruit, § 679n.
destruction, necessity of alleging special damages, illustrations, § 420.
evidence of payment, § 233.
breach of contract, damages recoverable by purchaser against vendor of land, measure of damages, nominal damages, § 582.
brokers, liability, § 786.
carriers, delay in delivery of account, statute of limitations operating to bar account, liability of carrier, § 914.
collection, suretyship, contract not to be extended by construction, § 727.
contracts for services, evidence of value, § 680.
implied contracts, duty to pay for services rendered, § 679n.
evidence, intendments against defendant for holding back evidence, § 439.
factors, duty to render accounts, effect of misrepresentation, § 784.
guardian and ward
bonds, liability as between sets of sureties, § 498.
liability of sureties, § 496.
insurance, proof of loss, information of insurer, § 811.
interest, allowance of interest on accounts, §§ 349-350.
as damages incident to debt, § 372n.
compensation, tacit agreement to pay interest on accounts, § 322.
compound interest, computation, application, and effect of partial payments, § 378.
conflict of laws, law governing as to interest, parties in different states, § 360.
delay, payment unreasonably and vexatiously delayed, § 323.
demand, necessity of, § 351.
infant's liability for interest, § 338.
mutual accounts, allowance of interest, § 349.
pleading, how interest claimed in pleading, § 387.
right to interest between partners, § 342.
items, assessment of damages, default or demurrer as admission, § 429.
cause of action, splitting, § 111.
mutual credit, compensation by mutual demand, § 148.
officers, bonds, neglect of duty by other officers, effect, § 482.
partnership, interest as between partners, § 342.
payment, application by creditor, § 239.
creditor's right to make application, § 238.
debtor's right to direct application, § 235.
general payment applied to oldest debt, § 243.
pro rata application, § 242.
pleading, interest, manner of claiming interest in pleading, § 387.
probate bonds, estates of decedents, bonds for administration, § 493.
guardian's bond, mitigation of damages, § 497.
sureties' liabilities, § 496.
sales, executed sales, recovery by seller after rescission of contract, price fixed by third party, § 643.
trusts, failure to account, interest, allowance against agents, trustees and officers, § 353.

Account Stated
evidence of value of services, opinion evidence, § 680.
interest, allowance of interest on accounts, § 349.
compound interest, § 373.
computation, manner of claiming interest in pleading, § 387.
trover, money securities, action, measure of damages, § 1132.

Accrual of Damages
see Actions.

Accusations
see Abusive Language.

Acetylene Gas
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Acknowledgments
defects, breach of covenant of warranty and quiet enjoyment, damages, expenses, costs and counsel fees as damages, § 619.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.

Acquiescence
see Waiver.
breach of contract, damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.
contract for particular work, contractor's liability for damages for delay, rental value, expenses, § 703.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.
creditor, tender, waiver and omission of tender, sufficiency of excuse, § 273.
liquidated damages, waiver of right to liquidate damages, § 299.
vendor and purchaser
breach of contract by vendor, measure of damages, nominal damages, § 582.
rescission, adjustment of counter demands, § 587.
interest on purchase money, action by vendor against purchaser, § 577.
title, time for conveyance of good title, § 572.

Act of God
attachment, forthcoming bonds, failure to deliver property, damages, § 517.
bonds, impossible conditions, effect, § 476.
carriers of goods, duty of carrier, care of property, § 916.
liability for consequential damages, intervening cause, § 37.
consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
torts, intervening cause, § 37.
contracts for services, express contract, necessity of full performance, inability to perform, § 689.
recovery on quantum meruit, § 686.
stipulation for notice where servant quits employ, § 690.
contracts for works, accident preventing performance, liability, § 700.
demands for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, § 709.
crops, landlord and tenant, rent payable in specific articles, recovery, § 846.
rent, recovery of rent payable in specific articles or taxes, § 846.
replevin bonds, actions, defenses, mitigation of damages, § 507n.
sales
breach of contract by seller, delivery impossible, damages, § 655.
non-delivery of property contracted for, damages in favor of vendor when delivery is impossible, § 655.
vessel wrecked, consequential damages, intervening cause, canal boat delayed and wrecked by flood, § 37.

Actions
abandonment, accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
accrual of cause of action, attachment bonds, § 510.
injunction bond, right of action, when it arises, parties who may sue, § 522.
interest, suspension, tender stopping interest, when tender may be made, § 385.
splitting causes of action, damages accruing subsequent to action, § 113.
suretyship, contribution, accrual of right of action, § 759.
express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 765.
remedy for indemnity, accrual of right of action, § 747.
tender stopping interest, time of making tender, § 386.
actionable injuries, right to damages, nominal damages, § 9.
agency, authority, agent acting without or in disregard of authority, damages, § 787.
reciprocal obligations of principal and agent, secret profits, form of action against agent, §§ 768-769.
breach of contract not to sue, elements of damage, losses, § 79.
breach of covenants for title, measure of damages, nominal damages, number of actions, § 600.
breach of covenants of warranty and quiet enjoyment, measure of damages, suit against remote covenantor, § 614.
cause of action as chose in action, § 7.
causes of action, assignment, entirety, effect of release by or death of one of several entitled to entire damages, § 133.
assignments for benefit of creditors, severance of entire demand, § 109.
attachment, right of action, damnum absque injuria, § 3.
bills and notes
consideration, partial failure of consideration, admissibility of evidence, § 547.
availability of defense, § 545.
demand, what is an entire demand, § 108.
elements of damages, motive, distinction made for bad motive, contracts, § 99.
entirety, Ch. IV, §§ 106-142.
assumpsit, implied assumpsit follows consideration, § 132.
cause of actions not divisible, § 106.
continuance of wrong not presumed, § 126.
contracts, continuous breach of contract or infraction of right not an entirety, § 125.
parties, actions under statutes, § 129.
contract apportioning legal interests, § 131.
damages to parties jointly injured, entirety of, § 128.
joinder of defendants; effect of non-joinder and misjoinder, § 135.
misjoinder of plaintiffs, objection as fatal, § 134.
recovery by person in whom legal interest is vested, § 130.
release or death of one or several entitled to damages, § 133.
successive actions for damage to real property, § 115.
joinder, contract to do several things successively or one thing continuously, § 110.
pain and suffering and pecuniary loss in case of death, § 1336.
trespass to real property, suit by executors, damages, § 1013.
liquidated damages, effect of stipulation upon right of action, § 298.
prospective damages, personal injuries, § 123.
public officer, right of action against, § 484.

Actions—continued.
causes of action—continued.
recoupment, constituent features of, § 172.
right to damages, nature, § 7.
set-off, counterclaim and recoupment, cross-claim must rest on contract or subject-matter of action, § 178.
splitting, breach of contract, § 110.
continuing obligations, § 112.
contract of indemnity, § 117.
contract to do several things successively or one thing continuously, § 110.
damage to person and injury to person; injury to person and damage to reputation by same act, § 118.
damage to real property, §§ 114-116.
damages accruing subsequent to action, § 113.
demand, what is an entire demand, § 108.
distinction between demands which are single or separable, § 110.
entire demand may be severed, § 109.
items of account, § 111.
liquidated damages, certainty, contracts for payment of money, § 287.
necessity and advantage of successive actions, § 127.
parties to issue, §§ 138-142.
present and future damages, § 107.
prospective damages, § 120.
remedies, what is not a double remedy, § 119.
torts, § 110.
suspension, payment by bill, note or check, § 226.
verdict, general verdict on several counts, effect, § 462.
what constitutes entire demand, § 108.
chose in action, covenant against incumbrances, assignment, § 621.
payment by note, bill or check, § 226.
sales, warranties of title, existence, § 668.
corporations, transfer of stock, cause of action not divisible, separate actions, § 106.
death, right of action at common law, § 1259.
failure to sue on account, measure of agent's liability, defaults in regard to bills and notes, § 775.
forfeiture of right to damages, sales, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
form of action, contracts for particular work, contractor's right to payment, rights in insurance money, interest, § 706.
indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 765.
injunction bonds, right of action, when it arises, who may sue, § 522.
liquidated damages, effect of stipulation on right of action, § 298.
malicious prosecution, unauthorized suit or appeal, liability for damages, § 1236.
motive in bringing action, damnum absque injuria, § 3.
nuisance, successive actions, continuity, damages recoverable in first action, § 1039.
parties, action for benefit of another, bills and notes, recovery of principal sum, § 541.
payment, creditor's right to make application of payment, § 238.
personal injuries, actions, number of actions maintainable, prospective damages, § 1251.
probate bonds, execution of probate bonds, manner, recoveries which may be had, § 494.
public officers, mode of redress for official dereliction, § 486.
right of action against officers, § 484.

Actions—continued.
release, execution of release by or to one or several claiming or liable, § 257.
who may execute, § 256.
right to sue, damnum absque injuria, § 3.
when rights vests, § 7.
telegraphs and telephones, form of action for negligence in transmitting message, § 972.
who may sue, § 972.
time of bringing action, wrongful dismissal of employee, measure of damages, remedies, § 692.
tort or contract, trover, damages, general rule, exception as to place of conversion, § 1109.
wrongful dismissal of employee, measure of damages, remedies, § 692.

Actors
see Theaters and Shows.
contracts for services, entire and apportionable contracts, § 691.
injuries to actor, slander and libel, consequential damages, act or omission as proximate cause of injury, § 29.

Actual Damages
see Compensatory Damages.
ad damnum, limit of recovery, erroneous claim of damages, § 417.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
attachment bonds, wrongful attachment, actual damages, § 512.
exemplary damages, § 514.
bail bonds in civil actions, measure of damages, § 539n.
"compensatory damages" defined, synonym of actual damages, § 3n.
contract for particular work, material not furnished, effect of not abandoning contract, contract's rights, § 714.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
covenants of seizin and good right to convey, breach, nominal damages recoverable if actual loss not shown, § 597.
exemplary damages, basis of exemplary damages on actual damages, nominal damages, § 406.
interest as compensation, § 320.
patents, infringement, damages recoverable at law, profits as damages, 1185.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
vendor and purchaser, breach of contract by vendor, defaulting vendee's right, § 586.
conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.
verdict, amendment and correction of verdict, § 458.
excessive or insufficient verdict, power of court, remittitur, § 460.

Ad Damnum
amendments, bail bonds in civil actions, measure of damages, § 539b.
replevin bonds, actions, effect of judgment in replevin suit, § 506.
interest, pleading, how interest claimed in pleading, § 387.
limit of recovery, erroneous claim of damages, § 417.
pleading ad damnum, sufficiency, § 414.
demand for damages in code complaint, § 415.

Additional Damages
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
interest, tender stopping interest, time of making tender, § 385.

Additional Damages—continued.
trespass, additional injury to land beyond taking away timber and minerals, liability, § 1021.

Adjoining Landowners
see Lateral Support; Party Walls.
breach of contract to leave property vacant, elements of damage, losses, § 79.
covenants, incumbrances, what are incumbrances, § 620n.
eminent domain, compensation, injury to property not taken, § 1065.
evidence of value, actual sales, § 447.
excavation, cause of action, entirety, successive actions for damage to real property, § 114.
lateral support destroyed, consequential damages for torts, liability, illustration, § 18.
fences, consequential damages, fence statutes, § 20.
floods, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
landlord and tenant, damages for not making repairs, special cases, § 860.
lateral support, excavation by railroad, consequential damages, § 18.
injuria sine damno, § 3.
injury to foundation of house, action for cost of repairing, items, § 860.
nominal damages, right to nominal damages, § 10.
removal of, lateral support, right to damages, § 1053.
trespass to real property, permanent wrong, damages, § 1017.
parties, joint and several liability for torts, § 141.
party walls, breach of covenants of warranty and quiet enjoyment, measure of damages, existence of lien, satisfaction, § 609.
injuries, damages recoverable, § 1025.
consequential damages, certainty, liability for principal loss extending to details and incidents, § 54.
mitigation of damages, consent of plaintiff to act complained of, § 162.
pleading, § 166.
money paid, allowance of interest on money paid, § 327.
parties, joint and several liability for torts, § 141.
use of party wall, mitigation of damages, consent of plaintiff to act complained of, § 162.
trespass, destruction of property, damages, compensation, § 1015.
permanent injury, estimate of damages, § 1017.

Adjustment
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
rescission, adjustment of counter demands, § 587.

Administrators
see Executors and Administrators.

Admiralty
see also Vessels.
actions, right of action under statutes, measure of damages, § 1259.
appeal and supersedeas bonds in federal supreme court, § 532.
liability if judgment is in part for money or in rem, rule of U. S. Supreme Court, § 533.
carriers, duty of carrier, goods lost or injured, interest on damages, § 920.
freight charges, when pro rata freight is due, common law and admiralty rules, § 890.

Admiralty—continued.
carriers—continued.
interest on damages, § 920.
costs, interest, allowance of interest on judgments, § 333n.
death, right of action at common law, § 1259.
nominal damages, recovery, § 1264.
exemplary damages, allowance, § 392.
rule of United States Supreme Court, § 392.
interest and damages awarded on appeal, § 538.
interest on judgments pending review, § 389.
judicial process, payment, mode of payment, § 216.
marine insurance, interest, allowance, money due on insurance policy and on premium, § 346.
valued policies, admiralty and fire, § 806.
rules of Federal Court, interest on judgment pending review, § 389.
salvage service, agreements, right to fix specific amount as compensation for salvage service, § 716.
derelict property, amount recoverable, § 720.
forfeiture of right to compensation, § 721.
interest, conflict of laws, § 719.
nature of peril, duty of claimant, persons who may be salvors, § 717.
necessity of saving property, § 718.
requisites, parties liable, § 715.
salvors, definitions, § 718.
torts, Ch. XXXIX, §§ 1286-1296.
certainty of damages, § 1289.
collision cases, division of loss, contribution between joint wrongdoers, § 1287.
contributory negligence, damages recoverable, § 1288.
difference between liability in admiralty and at common law, § 1286.
exemplary damages, § 1286.
interest, right to recover interest on damages, total or partial loss, § 1294.
mitigation of liability, § 1295.
partial loss, elements of damages, § 1292.
interest, right to recovery, § 1294.
parties who may sue, recovery by owner of cargo, § 1296.
passengers, measure of damages, nominal damages, § 1288.
proximate loss, limitation of liability to proximate loss, § 1289.
total loss, elements of damage, § 1290.
interest, right to recovery, § 1294.
what constitutes, § 1291.
verdicts, excessive or insufficient verdict, power of court, remittitur, § 460.

Admissions
assessment of damages, default or demurrer as admission, § 429.
bills and notes, parol evidence to show defect of consideration, admissibility, § 551.
evidence, adaptation of evidence to damages claimed, § 437.
evidence of value of services, opinion evidence, § 680.
insurance, proof of loss, information of insurer, § 811.
payment of money into court, effect, admission of cause of action, § 435.
personal injuries, expressions, conduct and religious belief of sufferer as evidence of damages, § 453.
receiver's bonds, liability of sureties, pleading, § 539a.
tender, effect of acceptance, § 271.
money paid into court, § 276.

Admissions—continued.
vendor and purchaser, recovery by vendor when contract does not fix price, § 575.

Adoption
Federal Employers' Liability Act, recovery in case of, § 1332.

Adulteration
sales
warranty of quality, damages for breach, interest, expenses and special injuries, § 671.
sale of butter, § 675.

Advancements
covenant against incumbrances, breach, measure of damages, remote losses, § 622.
interest on advancements, § 345.

Advances
agency
expenditures of agent, right to reimbursement, § 789.
effect of mode of doing business, § 792.
attachment bonds, damages recoverable, § 513.
bills and notes, parol evidence to show defect of consideration, admissibility, § 551.
contracts to advance money, breach of contract, special obligations, measure of damages, § 77.
factors, reimbursement, right of factor to reimburse himself by sales, § 790.
sales, measure of liability for selling at unauthorized price, § 779.
interest, conflict of laws, contracts between parties in different states, § 360.
right to interest between partners, § 342.
loss, attachment bonds, wrongful attachment, damages recoverable, § 513.
money paid, allowance of interest, §§ 326, 327.
rent, interest, lessee's liability for interest, § 854.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
executed sales, recovery by seller against buyer, § 642.
part of stipulated quantity received, recovery by seller, § 646.

Adverse Possession
breach of covenants against incumbrances, amount paid to remove incumbrance as damage, § 623.
breach of covenants for title, measure of damages, conveyances, § 599.
injury to premises, § 601.
nominal damages, actual loss not shown, § 598.
breach of covenants of warranty and quiet enjoyment, measure of damages, existence of lien, satisfaction, § 609.
expenses, costs and attorney's fees as damages, § 617.
extinguishment of adverse title by covenantee, § 610.
what constitutes breach, § 604.
trespass to real property, color of title, damages where person in possession under color of title sues, § 1012.
vendor and purchaser, action for purchase money, defenses and counter claims, Pennsylvania rule, § 639.
recoupment and counterclaim between vendor and purchaser, § 184.

Advertisement
breach of contract
certainty of damage required, § 61.
contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
contractor's right to payment, rights in insurance money, interest, § 706.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
compensation, mode of compensating profits, § 684.
termination of contracts at will, damages, § 684.
costs, sales, breach of contract by seller, delay in delivery, damages, § 664.
statutory duty of postmaster to advertise letters, breach of duty, who may bring action for breach, § 32.
trespass to personal property, damages, ascertainment of value of non-marketable property, § 1099.

Advice of Counsel
see Attorneys.

Affidavits
replevin, bond to retain property, breach, measure of damages, § 509.
evidence of value, suit on replevin bond, § 504.
verdicts, impeachment of verdict by affidavit, § 456.

Affirmance
judgment affirmed on appeal, see Appeal and Error.

Affray
mitigation of damages, assault, provocation, agreement to fight, payment of fine, § 151.

Age
death by wrongful act, damages, determination, facts and circumstances to be considered, § 1268.
evidence of injury, annuity and life tables, § 455.
exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.

Agency
Ch. XVIII, §§ 768-800.
see Brokers; Factors.
abandonment, agent's particular duties and liabilities, principal's right to indemnity, § 771.
accord and satisfaction, release, distinctions, § 254.
accounts, agent's violation of duty, secret profits, § 769.
actions
agent's rights, reimbursement, expenditures, § 789.
reimbursement, effect of mode of doing business, § 792.
agent's violation of duty, remedies, § 768.
authority, agent acting without or in disregard of authority, damages, § 788.
assumption of, breach of contract by vendor, elements of damage, § 584.
liability to third persons, § 796.
implied warranty of authority, § 797.
measure of damages, actions without authority, § 798.
unauthorized act, attachment, bonds, exemplary damages, § 514.

Agency—continued.
authority—continued.
warranty of authority, indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
bills and notes, measure of liability of agents for defaults in regard to commercial paper, §§ 775, 776.
value of bills and notes, solvent parties, measure of damages, § 565.
bonds, neglect of duty by other officers, effect, § 482.
books of agents, evidence of payment, § 233.
breach of contract, damages recoverable by purchaser against vendor of land, elements of damage, mitigation, § 584.
measure of damages, when English rule does not apply, § 581.
brokers, compensation, manner of performance of duty, effect of misconduct, § 683.
liability, § 786.
liability to third persons, measure of damages, action without authority, § 798.
burden of proof, agent's disregard of orders, purchase, shipment and sale of goods, § 773.
carriers, criminal act of agent, liability of carrier, § 931.
causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
collection, action for benefit of another, bills or notes, recovery of principal sum, § 541.
failure to collect, measure of agent's liability under various circumstances, § 774.
defaults in regard to bills and notes, § 776.
commercial agency, proof of damages, certainty of damages, § 69.
compensation, agent's rights, § 788.
contracts for services quantum meruit recovery, defenses, § 679.
factor's rights, reimbursement by sales, § 790.
indemnity, agent's right to indemnity for losses or damages, § 793.
interest, allowance against agents, trustees and officers, § 353.
right of agent to compensation, duties, secret profits, § 768.
compensatory damages, value of property as measure of damages, § 105.
construction, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
contract, nature, reciprocal obligations, § 768.
contracts for services, contract of hiring and contract employing agent distinguished, determination, insanity of employer, incorporation of employer's business, § 678.
measure of damages, modes of compensating for services, § 684.
conversion by agent, losses as elements of damage, what losses consist of, § 79.
measure of agent's liability under various circumstances, § 774.
customs and usages, agent's particular duties and liabilities, principal's right to indemnity, § 770.
death of principal, evidence of payment, § 233.
payment by note, bill or check, § 225.
person to whom payment may be made, § 231.
demand of principal, payment, what is not payment, § 217.
devise or legacy, payment by, § 220.
duties, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, §§ 770, 771.
contract, nature, reciprocal obligations, § 768.
measure of agent's liability under various circumstances, § 774.
neglect of duty or agreement concerning insurance, § 772.

Agency—continued.
duties—continued.
possession of property as possession of principal, accounting, duty of agent, § 769.
violation of duty, secret profits, § 768.
exclusive agency, contracts for services, wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
value of exclusive agency, evidence, admissibility, § 445.
opinion evidence as to value of property, § 446.
exemplary damages, joint liability for, § 407.
parties liable, master's liability for acts of servant, §§ 408, 410.
expenditures, collections, right of agent to charge for exchange and interest, § 791
measure of agent's liability under various circumstances, § 774.
measure of recovery in an action by agent against principal, recovery of judgment against agents, § 795.
right of agent to reimbursement, § 789.
effect of mode of doing business, § 792.
factors, accounts, duty of factor to render, effect of misrepresentation, § 784.
claims, liability of factors, sale on unauthorized terms, § 782.
duties as to sale of goods, neglect to care for them, § 777.
duty to render accounts, effect of misrepresentation, § 784.
guarantied commission, recovery against factor whose commission is guarantied, § 783.
liability, failure to sell at certain time, § 780.
sale on unauthorized terms, § 782.
remitting funds, effect of failure to obey orders, § 785.
rights, reimbursement by sales, § 790.
sales, liability for failure to sell at certain time, §§ 780, 781.
liability for making sale on unauthorized terms, § 782.
measure of liability for selling at unauthorized price, §§ 778, 779.
false representations, cause of action, benefit from deceit, effect of, § 1166.
liability for damages, exchange of property effected, § 1174.
person to whom false representations are made, representations need not be made to plaintiff, § 1170.
fraud, agent's violation of duty, remedies, § 768.
parties, plaintiffs and defendants, § 1179.
general agent, certainty of damages, contract between agents and principals, § 69.
indemnity
right to indemnity, losses or damages, § 793.
unlawful act, § 794.
losses as elements of damage, money paid to third persons, § 82.
necessity of notice to indemnitor to fix liability, § 86.
instructions, authority, agent acting without or in disregard of authority, damages, § 787.
departure from, elements of damage, value of property, § 105.
purchase, shipment and sale of goods, § 773.
duty of agent to adhere to instructions, liability for exceeding commission, § 774.
factors, duties, measure of liability, sale at unauthorized price, § 778.
liability for failure to sell at certain time, § 780.
funds, remitting, consequences of failure to obey orders, § 785.
measure of agent's liability, under various circumstances, § 774.
neglect of duty of agreement concerning insurance, § 772.
right of agent to reimbursement, effect of mode of doing business, § 792.
violation of duty, secret profits, § 768.

Agency—continued.
instructions—continued.
agent's particular duties and liabilities, principal's right to indemnity, § 771.
insurance, agency, proof of damages, certainty, § 69.
neglect by agent of duty or agreement concerning insurance, §§ 771, 772.
interest, allowance, money paid, § 326.
allowance of interest against agents, trustees and officers, § 353.
conflict of laws, law governing as to interest, parties in different states, § 360.
measure of agent's liability, defaults in regard to bills and notes, § 776.
joint liability, exemplary damages, joint liability for, § 407.
liability for acts of agents, assault, exemplary damages, parties liable, § 409.
attachment bonds, exemplary damages, recovery, § 513.
exemplary damages, parties liable, liability of master for acts of servants, § 408.
parties, joint and several liability for torts, § 140.
measure of agent's liability, defaults in regard to bills and notes, § 775.
misconduct, agent's liability for tort, § 800.
authority, agents acting without or in disregard of authority, damages, § 787.
mitigation of damages, official neglect, § 160.
negligence, agent's liability for tort, § 800.
elements of damage, value of property, § 105.
interest, actions for torts, § 355.
measure of agent's liability, defaults in regard to bills and notes, § 775.
particular duties and liabilities, principal's right to indemnity, § 771.
parties plaintiff, person in whom legal interest is vested, § 130.
payment, application by creditor, § 240.
application by debtor, § 235.
debtor's right to direct application, evidence, § 237.
evidence of payment, books of agent, § 233.
mode of payment, § 214.
person to whom payment may be made, § 231.
person who may make payment, § 230.
what is not payment, belief that agent is principal, § 217.
presumptions, agent's particular duties and liabilities, principal's right to indemnity, § 770.
price, factors, duties, measure of liability, sale at unauthorized price, § 778.
liability for failure to sell at certain time, § 780.
profits, agent's disregard of orders, purchase, shipment and sale of goods, § 773.
public officers, absolute liability for money received, § 479.
agent's liability to third persons, § 796.
quantum meruit recovery for services, evidence, defenses, § 679.
ratification, attachment bonds, exemplary damages, § 514.
authority, agent acting without or in disregard of authority, damages, § 787n.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
reimbursement
agent's rights, § 788
reimbursement, for expenditures, § 789.
mode of doing business, § 792.
factor's rights, reimbursement by sales, § 790.

Agency—continued.
relation, agent acting without or in disregard of authority, damages, § 787.
repairs, agent's rights, reimbursement of expenditures, § 789.
replevin bonds, actions, effect of judgment in replevin suit, § 506.
reports, agent's duty to inform principal, §§ 769, 771.
false reports, § 774.
measure of agent's liability under various circumstances, § 774.
violation of duty, secret profits, § 769.
revocation
certainty of damages, § 69.
anticipated profits, § 60.
contract between agent and principal, § 69.
liability for expenses and lost commissions, § 694.
sales, acceptance of goods, liability for not accepting, remedies of sellers, § 647.
disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
executed sales, recovery after rescission of contract, price fixed by third party, § 653.
fraud, false representations, measure of damages, elements, costs of suit, § 1173.
liability for failure to sell at certain time, § 781.
measure of liability for selling at unauthorized price, § 778.
salvage service, nature of peril, duty of claimant, who may be salvors, § 716.
secret profits, § 768.
form of action against agent, §§ 768, 769.
liability of agents to principal, disregard of instructions, § 774.
slander and libel, exemplary damages, § 1216.
stock received in violation of trust, liability of agent to principal, § 773.
sub-agents, agent's liability to third persons, torts, § 800.
authority, agents acting without or in disregard of authority, damages, § 787.
suretyship, surety's remedies for indemnity, action against principal, who is principal, § 746.
telegraphs and telephones, actions, form, parties, § 972.
fraudulent act of agent, inducing bank to pay money to third person, damages recoverable, § 966.
negligence in transmission of message, liability for expenses, § 966.
tender, persons by whom tender may be made, § 264.
persons to whom tender should be made, § 265.
third persons
agent's liability to, § 796.
acts in excess of or without authority, measure of damages, § 798.
implied warranty of authority, § 797.
recovery of money from agent, § 799.
torts, § 800.
assumption of agency, liability to third persons, § 796.
implied warranty of authority, agent's liability, general rule, § 797.
trover, damages, general rule, exception as to place of conversion, § 1109.
undisclosed principal, agent's liability to third persons, § 796.
causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
elements of damage, notice to indemnitor to fix liability, necessity, § 87.

Agency—continued.
undisclosed principal—continued.
indemnity, necessity of notice to indemnitor to fix liability, § 87.
liability of agents, § 769.
violation of duty, secret profits, §§ 768, 769.

Aggravation
see Exemplary Damages.
arrest, illegality, circumstances warranting enhancement of damages, § 151.
assault, pleading matters of aggravation, traverse, § 423.
provocation, agreement to fight, payment of fine, mitigation of damages, § 151.
attachment bonds, damages recoverable, § 512.
breach of contract, damages as including other than pecuniary elements, § 92.
breach of marriage promise, seduction, medical expenses, child-birth, or miscarriage, § 985.
carriers of passengers, compensation, physical and mental suffering of passengers, injury to character, § 942.
refusal to carry, exemplary damages, § 937.
eminent domain, injury to property not taken, ascertainment, § 1070.
evidence, adaptation to damages claimed, § 437.
exemplary damages
enhancement and mitigation, § 404.
wealth of defendant, scope of inquiry, § 405.
grounds authorizing allowance, § 393.
malice in law and malice in fact, § 394.
parties liable, master's liability for acts of servant, § 410.
restriction and denial, rule as to compensatory damages, § 395.
malicious prosecution, damages, elements, aggravation of damages, wrongful imprisonment, expenses, § 1237.
nuisance, permanent injury, depreciation and market value as damages, § 1047.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, etc., § 1244.
pleading, necessity of alleging matters of aggravation, § 422.
special damages, necessity of alleging, § 421.
traverse, matters of aggravation not traversable, § 423.
replevin, exemplary damages, right to recover, aggravating circumstances, § 1145.
slander and libel
aggravation, §§ 1208, 1209.
wealth and rank of parties, § 1210.
trespass to personal property, aggravation increasing damages, injuries to feelings, exemplary damages, § 1095.
remedy, comprehensiveness of remedy, § 1094.
trespass to real property, definition, scope of remedy, § 1010.
pleading special damages, §§ 1028-1030.
trover, special and consequential damages, § 1129.
wilful or malicious injuries, consequential damages, § 44.

Agreements Not to Sue
breach, circuity of action, § 144.
extinguishment of debt, § 144.
reciprocal obligations, circuity of action, § 147.

Alabama
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.

Alabama—continued.
attachment bonds, damages recoverable, § 512.
defenses or mitigation of damages, what may be shown, § 515.
exemplary damages, § 514.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
carriers of goods
delay, liability where facts are known, § 913.
negligence, proximate cause, § 903.
covenants, breach, defenses and cross-claims against purchase money, Alabama rule, § 634.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
exemplary damages, basis on actual damages, nominal damages, § 406.
parties liable, master's liability for acts of servant, § 410.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
interest, compound interest, interest on instalments of interest, § 375.
conflict of laws, pleading and proof of foreign law, § 367.
pleading, how interest claimed in pleading, § 387.
judicial sales, vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
landlord and tenant, repairs, lessee's duty, recovery for making, § 873.
malicious prosecution, elements of damage, § 1237.
mitigation, evidence, § 1240.
mitigation of damages, attachment bonds, defenses, § 515.
nuisance, damages recoverable, first action, § 1039.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.
power of court over verdicts, § 460.
probate bonds, liability as between sets of sureties, § 498.
railroads, animals injured, interest in actions for torts, § 355.
replevin, bonds, actions, damages recoverable, § 505.
damages, defendant's right, § 1155.
intermediate injury and depreciation, § 1151.
use and increase in value of property, § 1150.
sales, breach of contract by seller, payment in specific articles, value, damages, § 659.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
suretyship, right of surety to put creditors in motion, § 741.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
mental anguish, damages, evidence, § 975.
trespass to personal property, damages, mental suffering, § 1095.
exemplary and statutory damages, § 1031.
special and consequential damages, § 1100.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, property of fluctuating value, § 1118.
rule in particular states, § 1111.
usury, effect, contracts not void, for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, Alabama rule, § 634.

Alaska
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
usury, recovery under usury statute, § 317.

Alienation of Affections
action, right to maintain, parties, § 1285.
wife's action, damages recoverable, evidence, § 1285.
damages, amount of damages, presumptions, § 1285.
mental anguish, § 1285.
evidence, what must be proved, § 1285.
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
mental anguish, recovery of damages for mental suffering, § 979.
mitigation, evidence, character of wife, § 1285.
parents, actions against parents, guardian or brother, § 1285.
damages recoverable in action against parents, § 1285.
pleading, necessity of alleging special damages, § 421.
slander and libel, damages, special damages, proximate result of slander, § 1215.

Aliens
death, rights of non-resident aliens, statutes as to death by wrongful act, § 1261.
Federal Employers' Liability Act, recovery under, § 1332.
suspension of interest, war preventing payment, § 382.

Alighting from Train
see Carriers of Passengers; Railroads.
delay, damages peculiar to passenger, § 939.
jumping from train failing to stop, passenger injured, consequential damages, § 36.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
parties, joint and several liability for torts, § 141.
place, alighting at wrong place, damages peculiar to passenger, § 939.
loss of time, expenses, exposure, § 938.
refusal to stop train, exemplary damages, § 937.
verdicts excessive, damages recoverable by passenger, § 953n.

Alimony
see Divorce.
interest, allowance of interest on judgments, §§ 333n, 334.

Alluvium
see Riparian Owners.

Alterations
contracts for work, demands for extra work, basis for adjustment, § 707.
liability of employer for delaying or stopping work, effect of not abandoning contract, § 714.
suretyship, discharge or reduction of surety, act of creditor, § 735.
release by creditors of one or more parties, effect, § 742.

Amendments
ad damnum, erroneous claim of damages, effect, § 417.
limit of recovery, erroneous claim of damages, § 417.
replevin bonds, actions, effect of judgment in replevin suit, § 506.
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
complaint or declaration, attachment bonds, defenses, mitigation of damages, § 515.
bail bonds in civil actions, measure of damages, § 539b.
exemplary damages, pleading, matter of aggravation, necessity of alleging, § 422n.

Amendments—continued.
judgment, effect, assessment of damages, § 465.
pleading, issues, effect of not answering allegation of damages, § 416.
items, necessity of itemizing damages in pleadings, § 424.
verdicts, amendments of verdicts, §§ 457, 458.
general verdict on several counts, § 462.

Ammunition
sale, consequential damages, breach of contract, liability under special circumstances, § 51.

Amount of Damages
see Nominal Damages; Compensatory Damages.
ascertainment, § 2.
constituents of compensation, elementary limitation of damages, § 75.
evidence, necessity of proof, § 2.
exemplary damages, § 2.
grounds authorizing allowance of exemplary damages, § 393.
judgments, certainty, necessity that judgment be certain, § 467.
verdict, necessity that judgment follow verdict, § 466.
necessity of stating case which entitles plaintiff to damages, § 413.
opinion evidence, amount of damages, opinions, admissibility, § 444.
remittitur, excessive and insufficient verdict, lack of evidence to sustain, § 459.
verdict, certainty, necessity of verdict being certain, § 461.
deliberations of jury, amount of damages, § 456.
excessive and insufficient verdicts, § 460.
issues at new trial, § 459.
setting aside, § 2.
variance and inconsistent findings in verdict, effect, § 461.

Amusements
see Theaters and Shows.
bath houses, ticket revoked, breach of contract, damages as including other than pecuniary elements, § 92.
exclusion of person, consequential damages, injury to public, § 32.

Anaesthetics
personal injuries, physical examination of plaintiff, discretion of court, § 451.

Anchor Lost
sale of defective cable, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Ancient Lights
causes of action, entirety, damage to real property, § 115.
use of property, damnum absque injuria, § 3.

Anguish
see Mental Anguish.

Animals
attachment, bonds, damages recoverable, injuries to animals, §§ 512, 513.
sheriff's negligence, official bond, measure of damages against sureties, § 488.
breach of contract to treat sheep when diseased, measure of damages, § 79.

Animals—continued.
breeding, breach of warranty, certainty of damage required, § 61.
guaranty, measure of guarantor's liability, § 729.
remote damages, depreciation in value, § 1028.
carriers of goods, breach of contract, remote consequences, § 902.
freight charges, time when freight is due and earned, § 887.
loading stock, icy chute, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
loss of property, museum, mental suffering, § 915.
negligent delay in transportation
loss of market value of property, § 907.
quantity or quality, § 906.
certainty of damages, anticipated profits, growth of animals, § 62.
prospective growth of animals, § 62.
consequential damages, intoxicated person placed in charge of horse, § 16.
proximate cause, wrongful act as proximate cause of damage, § 38.
contracts for services, compensation, mode of compensating, profits, § 684.
express contract, necessity of full performance of contract, entire and apportionable contract, § 691.
cruelty to animals, consequential damages, breach of statutory duties, § 32.
disease
breach of contract to treat sheep, elements of damage, losses, § 79.
employee's liability for violation of contract, consequential losses, § 695.
communicated disease, consequential damages, § 17.
consequential damages, acts of third persons, § 41.
liability, illustrations, § 18.
proximate cause, act of third person as cause, § 40.
fraud, natural and proximate consequences of fraud, § 1165.
public wrongs, right of action, remedies available, § 4.
shipment, right to damages for buying diseased animals, § 4.
trespass to real property, aggravation, special damages, § 1028.
distrained animals, nominal damages, right to nominal damages, § 10.
escape of animals, consequential damages, injury not foreseen, § 28.
duty of carrier, goods lost or injured, recovery by shipper for expenses and labor in lessening loss, § 921.
trespass to real property, aggravation, special damages, § 1028.
evidence, admissibility, necessity of alleging special damage, § 420.
value, property without market value, § 448.
exemplary damages, personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
feed
sales, non-delivery of property contracted for, consequential damages, § 663.
warranties of quality, existence, § 667.
poisoned feed, interest, expenses and special injuries, § 672.
fences removed, consequential damages, tendency of act or omission to cause damages, injury need not be foreseen, § 28.
frightened animals
consequential damages, act of injured party, fraud and exposure to peril, § 39.
acts of third person, § 40.
injury not foreseen, § 28, n 22.
intervening cause, § 38.
defects in highways, consequential damages, § 26.

Animals—continued.
frightened animals—continued.
militia drilled, consequential damages, § 17.
runaway, consequential damages, § 26.
guaranty, measure of guarantor's liability, lost profits, remote damages, § 729.
increase, causes of action, entirety, prospective damages, § 120.
injunction bonds, erection of stable enjoined, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
use of animals, enjoined, damages recoverable, damages from restraint of injunction, § 526.
injuries to animals
amount of damages, opinions of witnesses, admissibility, § 444.
attachment bonds, wrongful attachment, damages recoverable, § 513.
carriers, duty of carrier, care of property, burden of proof as to injury or loss, § 917.
injuries to or loss of non-marketable property, § 919.
loss of or injury to goods, compensation on basis of market value, § 918.
proof of value, § 933.
recovery by shipper for expenses and labor in lessening loss, § 921.
refusal to transport, breach of contract, remote consequences, § 902.
causes of action, entirety, prospective damages, § 120.
severance, contract to do several things successively, or one thing continuously, § 110n.
collisions with automobiles, consequential damages, nervous shock as physical injury, right to recover for nervous shock, § 22.
consequential damages, act complained of must be efficient cause of damages, § 31.
extension of liability by statutes, § 16.
fence statutes, scope of, § 20.
liability, illustration, §§ 17, 18.
liability as affected by extraordinary circumstances, illustrations, § 35.
what constitutes, award for probable consequences, § 15.
contract to do several things successively or one thing continuously, § 110, n 42.
defect in highway, consequential damages, recovery for successive consequences, illustrations, § 57.
defective chute for loading animals, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
eminent domain, injury to property not taken, expenditures to lessen loss, § 1072.
what may be considered in ascertaining damages, § 1066.
escape of animals through railroad fence, consequential damages, § 18.
railroad not fenced, § 19.
fences, consequential damages, fence statutes, § 20.
hole on railroad track, consequential damages for torts, liability, illustrations, § 19.
interest, allowance of interest, in actions of torts, § 355.
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.
mental anguish, recovery of damages for mental suffering, § 979.
mitigation of damages, measures of prevention, § 157.
return of property, discharge of plaintiff's debt, § 156.

Animals—continued.
injuries to animals—continued.
nuisance, injuries to crops, damages recoverable, § 1049.
parties, joint and several liability for torts, § 141.
pleading, special damages, necessity of alleging, §§ 420, 421.
prospective damages, certainty of proof, § 121.
railroads, crossings, consequential damages for torts, liability, illustrations, § 19.
fences, consequential damages, breach of contract, proximate consequences of breach, § 45n.
interest, actions for torts, § 355.
snow storm, consequential damages, proximate consequences of act of omission, effect of extraordinary circumstances, § 35.
speed of train, consequential damages for torts, liability, illustrations, § 19.
remote consequences of nuisance, liability for, § 1051.
runaway, flat taken from ferry wrongfully, certainty of damages required, § 53.
special damages, necessity of alleging, § 420.
splenetic fever, liability of carrier, § 931.
telegrams, delay of messages, failure to deliver, knowledge of sender's purpose, necessity of disclosure of details, § 969.
message not delivered, damages recoverable, § 961.
trespass, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
consequential damages, under fence statutes, scope of statutes, § 20.
special and consequential damages, remote damages, § 1101.
wilful or malicious injuries, consequential damages, § 44.
injuries to children
consequential damages, acts as efficient cause, § 31.
anticipation of injury, proximate cause, § 25.
deformity or disfiguration, damages recoverable, § 952.
earning capacity diminished, evidence, § 1248.
expenses for surgical and medical aid, recovery, § 1250.
mental anguish, recovery of damages for mental suffering, § 979.
mitigation of damages, evidence disclosing fact reducing injury, § 159.
pain and suffering, recovery for mental suffering, aggravated wrong, § 1243.
parties, joint and several liability for torts, § 141.
property injured, consequential damages, tendency of act or omission to cause damages, injury need not be foreseen, § 28.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
intervening cause, what constitutes, § 37.
leases, business, recovery for damages to business of lessee, § 868.
licenses of real estate, revocation, sale of animals, consequential damages for torts, § 16n.
loss of weight and growth, amount of damages, opinions of witnesses, admissibility, § 44.
market value, opinion evidence as to value of property, § 446.
pasturage, lack of, elements of damage, expense incurred to prevent or lessen damages, extent of duty, § 90.
pedigree, value of property, elements, evidence, § 448.
replevin, consequential damages, damages arising naturally and proximately from wrong, § 1146.
defendant's rights, mitigation of damages, § 1159.
special and consequential damages, § 1158.

Animals—continued.
replevin—continued.
recovery for intermediate injury and depreciation of property, § 1152.
special damages, § 1146.
sales, action by seller against purchaser, recovery on executed sales, § 642.
breach of contract by seller, consequential damages, § 662.
measure of damages, remoteness or uncertainty of stipulated compensation, § 684.
non-delivery of property contracted for, consequential damages, § 662.
payment in specific articles, presumed value of notes, etc., § 660.
proof of value of property, § 654.
breach of warranty, breeding qualities, certainty of damages, § 61.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
quality or quantity, damages, interest, expenses, and special injuries, §§ 671, 672, 675.
fraud
measure of damages, § 1171n.
elements, costs of suit, § 1173.
remote, conjectural and contingent damages, § 1176.
time for rescission of sale of worthless horse, § 1173.
natural and proximate consequences of fraud, § 1165.
recoupment and counterclaim, connection between cause of action and cross-claim, § 183.
telegraphs and telephones, liability for error or delay in transmission of messages, damages recoverable, § 961.
trespass, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
railroads, occupation of land by railroads, liability for damages, rental value, § 1016.
trespass to personal property, damages exceeding compensation, exemplary damages, § 1092.
market value of property, damages recoverable, § 1098.
mitigation of damages, § 1104.
application of property to owner's benefit, § 1105.
recovery of expense for disposing animal killed, § 1103.
special and consequential damages, remote damages, §§ 1100, 1102.
trespass to realty, consequential damages for torts, liability, illustration, § 18.
damages, compensation, § 1011.
fences, destruction of fences, injury, damages, § 1024.
taking animals, compensatory damages, § 1011.
trover, allowance of interest, amount, § 1115.
measure of damages, property fluctuating in value, rule in different states, §1111.
mitigation of damages, § 1139.
special or consequential damages, § 1129.
warranty, what constitutes, obvious defect, § 668.
wild animals, mitigation of damages, § 154.

Ankle Injured
excessive or inadequate verdicts, § 1242n.
discretion of jury as to damages, instructions, § 1256.
pain and suffering, amount to be allowed, § 1242n.
pleading, special damages, necessity of alleging, § 421.

Annoyance
see Inconvenience.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
nuisance, remote consequences, liability, § 1051.
telephones, removal of telephone, damages, annoyance, inconvenience and humiliation, § 965.
train not stopping, pleading special damages, necessity of alleging, § 421.

Annuities
breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
interest, allowments of interest on annuities and legacies, § 344.
suspension, miscellaneous cases, § 380.
liquidated damages, large sum to secure payment of smaller sum, § 288.
payment of annuity, breach of covenants, assignment, § 472.

Annuity Tables
see Mortality Tables.

Answer
see also Pleading.
covenants
defenses and cross-claims against purchase money, New York rule, § 633.
under the code, counterclaim, actions for purchase money, § 640.
issues, effect of not answering allegation of damage, § 416.

Anticipation of Injury
consequential damages, anticipation of injury as to person, illustrations, § 25.

Appeal and Error
abandonment of appeal, appeal and supersedeas bonds, interest and damages, award on appeal, § 539.
admiralty, appeal and supersedeas bonds, liability if judgment is in part for money or for rem, § 533.
affirmance, interest and damages awarded on appeal, § 538.
interest on judgments, allowance, § 334.
payment, application, general payment applied to debt bearing interest, first to interest, § 244.
appeal and supersedeas bonds
conditions, liability of sureties, § 531.
instances of liability under statutes specifying certain conditions of appeal bonds, §§ 536, 537.
Federal supreme court, § 532.
interest and damages awarded on appeal, §§ 538, 539.
liability, in state courts, § 535.
where judgment is in part for money or in rem, § 533.
measure of damages, official bonds, failure to file bond, § 488.
surety's liability, § 723n.
validity, common law bond, § 531.
remedies, § 531.
attachment bonds, damages recoverable, costs and expenses of defending against attachment, § 516.
wrongful attachment, actual damages, § 512.

Appeal and Error—continued.
bill of exceptions, interest and damages awarded on appeal, § 539.
costs of appeal, nominal damages, allowance, § 11.
disposition on appeal, assessment of damages, correction of error in assessment, § 434.
excessive or insufficient verdict, cure of error, reversal in part, § 459.
exemplary damages as matter of right, power of court over verdict, § 403.
verdict, erroneous statements, findings beyond issues, surplusage, § 461.
general verdict, on several counts, effect, § 462.
false return of appeal by justice, measure of damages against sureties on official bonds, § 488.
Federal Employers' Liability Act, actions under, § 1358.
frivolous appeal, interest and damages awarded on appeal, § 539.
injunction bonds, dissolution of injunction, right of action, when it arises, who may sue, § 522.
interest, condemnation proceedings, allowance, §§ 336, 1091.
judgments pending review, § 389.
tender, time of making tender, § 262.
verdict before judgment, § 388.
malicious prosecution, unauthorized suit or appeal, liability for damages, § 1236.
objections, ad damnum as limiting amount of recovery, § 417.
assessment of damages, admission by default or demurrer, § 429.
time of objection, recovery of excessive amount, § 417.
questions reviewable, verdicts, excessive or insufficient verdicts, § 459.
remittitur, ad damnum as limiting amount of recovery, § 417.
excessive and insufficient verdicts, § 460.
cure of error, § 459.
improper argument of counsel, § 459.
lack of evidence to sustain verdict, § 459.
new trial and remittitur, § 1257.
propriety of remittitur, excessive damages, § 459.
setting aside verdict, § 459.
interest on judgment pending review, § 389.
verdict, necessity that judgment follow verdict, § 466.
reversal, nominal damages, effect of failure to allow, § 11.
restitution after reversal of judgment, compensation for loss or use of property, liability of third parties, § 469.
manner of making, § 468.
verdicts, excessive or insufficient verdicts, setting aside, § 459.
violation of rights, actual damages, triviality right to nominal damages, § 11.
rules of Federal Court, interest on judgment pending review, § 389.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.
set-off of judgments, when granted, § 199.
supersedeas, restitution after reversal of judgment, compensation for loss or use of property, liability of third parties, § 469.
tender, acceptance, effect, § 271.
when tender may be made, § 262.
transcript not filed, interest and damages awarded on appeal, § 539.
writ of error, interest on judgments pending review, § 389.

Apportionment
see also Federal Employers' Liability Act.
breach of covenant against incumbrances, English and Canadian rule of damages, § 624.

Apportionment—continued.
breach of covenants for title, damages, recovery of proportion of consideration, part of title lost, § 602.
carriers of goods, apportionment of damage, mutual fault, § 928.
contracts for services, entire and apportionable contracts, § 691.
landlord and tenant, apportionment of damages between landlord and tenant, § 1033.
partial destruction of demised property, effect as to rent, § 851.
rent, apportionment, §§ 849, 850.
liquidated damages, waiver of right, § 299.
verdicts, where there are several parties, § 463.

Apprentices
bills and notes, want or failure of consideration, § 542.
bonds, actual damages, necessity of proving actual injury, § 75.
contracts for services, wrongful discharge, measure of damages, § 694.
enticement, certainty of proof of future damages, action for enticing away apprentice, servant or son, or procuring discharge of servant, § 122.
wilful or malicious injuries, consequential damages, § 44.

Arbitration and Award
bonds, breach, non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III., § 472.
liability of sureties, measure of damages, § 539c.
limit of liability, § 526n.
penalty as limit of recovery, exception as to interest, § 478n.
consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
injunction bonds, right of action, when it arises, who may sue, § 522.
insurance, extent of injury, contract methods for ascertainment of damages, § 808.
liquidated damages in lieu of performance, § 297.
marine insurance, liability of insurer under valued policies, admiralty and fire policies, § 806.
payment, mode of payment, § 215.
penalties, bond, limit of recovery, interest, § 478.
performance, breach of covenants, assignment, § 472.
rent, amount of rent recoverable as affected by subsequent facts, income from premises, arbitration, § 845.
revocation of agreement wrongfully, certainty in nature and cause of damages required, § 53.
sales, executed sales, recovery after rescission of contract, price fixed by third party, § 643.

Architects
compensation, quantum meruit recovery, defenses, § 679.
contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
certificate of architect, engineer, etc., necessity, effect, upon whom binding, § 712.
demands for extra work, basis for adjustment, § 707.
employer's liability for delaying or stopping work, recovery on contract or quantum meruit, consequential losses, mitigation of damages, § 713n.
parties, joint liability, extinguishment or severance, § 136.
quantum meruit, recovery for services, evidence, defenses, § 679.
defects in plans, non-performance, liability of contractor, § 701.

Arizona
bills and notes, damages on protested foreign bills, re-exchange, § 563n.

Arkansas
baggage, disclosure of value, § 954.
bills and notes, interest, compound interest, interest on instalments of interest, § 375.
damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
bonds, default, when action of debt will lie, § 474.
covenants, breach, defenses and cross-claims against purchase money, § 636.
warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
eminent domain, evidence of value and damages, § 1089.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
evidence, physical examination of plaintiff, § 451.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
fellow-servants, contractual exemption from liability for damages, § 6.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
nuisance, continuity, when nuisance is not continuous wrong, § 1045.
railroads, animals injured, interest, actions for torts, § 355.
replevin, damages, increase in value by defendant, § 1154.
defendant's rights, damages, mitigation, § 1159.
suit on bond, assessment of damages, § 502.
telegraphs and telephones, actions, form, parties, § 972.
mental anguish, damages, evidence, § 975.
trespass to personal property, damages, mental suffering, § 1095.
trespass to real property, trees and mining ores, liability, § 1019.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.
wilful or malicious injuries, consequential damages, § 43.

Arm Injured
amount to be allowed for pain and suffering, verdicts, § 1242n.
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
excessive or inadequate verdicts, § 1242n.
discretion of jury as to damages, instructions, § 1256.
pleading, special damages, necessity of alleging, § 421.

Arms
see Weapons.

Army Supplies
sales, part of stipulated quantity received, recovery by seller, § 646.

Arrest
see False Imprisonment; Malicious Prosecution.
bail, official bonds, private injuries covered by official bonds, § 487.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
carriers of passengers, duty of carrier, protection of passenger, § 941.

Arrest—continued.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
consequential damages, proximate cause, act of third person as cause, § 40.
torts, liability, illustrations, engineer arrested, § 19.
discharge, appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
mitigation of damages, absence of malice, § 150.
illegal arrest, § 151.
pleading, necessity of pleading facts in mitigation, § 165.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
pleading, mitigation of damages, § 165.
threats to arrest debtor, consequential damages for torts, illustrations, § 19.
husband, consequential damages, § 19.
miscarriage of wife, § 19.
nervous shock without impact, right to recover damages, § 24.
nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
wrongful arrest, debtor, parties, joint and several liability for torts, § 141.
replevin, special damages, § 1146.

Artificial Limbs
personal injuries, physical examination of plaintiff, discretion of court, § 451.

Ascertainment of Damages
insurance, contract methods for ascertainment of damages, § 808.

Assault and Battery
see Carriers of Passengers.
actions, parties, actions under civil damage laws, § 1252.
actual damages, necessity of proving actual injury, § 75.
ad damnum, limit of amount of plaintiff's recovery, § 417.
erroneous claim of damages, § 417n.
agreement to fight, mitigation of damages, consent of plaintiff to act complained of, §§ 151, 162.
assessment of damages, admission of damages by default or demurrer, § 429.
attachment, assault by officer, mitigation of damages, evidence disclosing fact reducing injury, § 159.
bills and notes, want or failure of consideration, note given to mother of child assaulted, § 542.
causes of action, entirety, damage to property and injury to persons by same act, § 118.
character as affecting damages for personal injuries and in actions for death, § 94.
consequential damages, act complained of as efficient cause of injury, § 29.
injury through third person, § 33.
liability as affected by extraordinary circumstances, illustrations, § 35.
nervous shock as physical injury, right to recover for nervous shock, §§ 22, 24.

Assault and Battery—continued.
consequential damages—continued.
proximate cause, act of third person as cause, § 40.
exemplary damages, allowance in actions for personal injuries, § 1253.
compensation and punishment, who may recover, § 401.
denial or restriction of exemplary damages, reasons for rule, New Hampshire rule, § 396.
rule in Michigan, § 399.
grounds upon which allowed, § 393.
malice in law and malice in fact, § 394.
parties liable, master's liability for acts of servant, § 408.
impairment of ability, special damages, necessity of alleging, § 421.
indecent assault, expenses for physical and surgical aid, recovery, § 1250.
mental anguish, recovery of damages for mental suffering, § 979.
mitigation of damages, admissibility of evidence, § 1255.
conduct or character of plaintiff, § 163.
pleading special damages, necessity of alleging, § 420.
interest, allowance of interest on unliquidated demands, § 347.
intoxicating liquors, consequential damages for torts, § 19.
civil damage laws, extension of liability by statutes, § 16.
master's liability for acts of servants, exemplary damages, § 408.
mental suffering, § 95.
compensatory damages, mental suffering independent of physical harm, § 96.
necessity that anguish proceed from act causing physical injury, § 95.
nervous shock without impact, right to recover damages, §§ 24, 95.
physical and mental pain, § 1242.
recovery for aggravated wrong, § 1243.
rule where negligence only is alleged and where wrong was wilful, § 1245.
mitigation of damages, agreement to fight, §§ 151, 162.
character of party assaulted, § 151.
evidence disclosing fact reducing injury, § 159.
payment of fine, § 151.
pleading, § 166.
res gestæ, fuller proof of res gestæ, trespass, negligence, etc., § 159.
resistance, § 155.
trespass, breaking and entering house, intent to ravish woman, § 1027.
nominal damages, illustration of right to, § 10.
pain and suffering, amount to be allowed, verdicts, § 1242n.
special damages, necessity of alleging, § 421.
parent, assault of son, damages for injuries to feelings of parents, § 952.
passengers
abusive language, ejection, damages recoverable, § 942.
female passengers, § 943.
insane servant, § 943.
mental suffering independent of other injury, § 943.
assault by fellow-passenger, damages recoverable, § 941.
consequential damages, § 19.
assault by servant, damages for physical and mental suffering, § 942.
consequential damages, assault on woman in station, child frightened and killed by train, liability, § 35.
liability, illustrations, § 19.
nervous shock without impact, right to recover damages, § 24.

Assault and Battery—continued.
passengers—continued.
damages recoverable by passenger, verdicts excessive, § 953n.
duty of carrier, protection of passenger, § 941.
seats, wrongfully placing passenger in second class coach, damages recoverable, § 948.
threat of ejection, recovery for mental suffering independent of other injury, § 943.
tickets, passenger alighting at wrong place, damages peculiar to passengers, § 939.
verdicts, excessive, § 953n.
paupers, consequential damages, injury through third person, § 33.
pleading
aggravation, matters of, not traversable, § 423.
necessity of alleging, § 422.
issues, effect of not answering allegation of damages, § 416.
special damages, necessity of alleging, § 421.
provocation, mitigation of damages, admissibility of evidence, § 1225.
wealth of defendant, exemplary damages, scope of inquiry, § 405.
words as provocation for assault, § 151.
resistance, mitigation of damages, § 155.
right to damages, when right vests, § 7.
set-off, counterclaim and recoupment, cause of action, cross-claim, § 183, n 77.
special damages, necessity of alleging, § 420.
trespass, elements of damage, insults, § 1029.
exemplary damages, mitigation, § 1032.

Assessment of Damages
see Writ of Inquiry.
admission of damages by default or demurrer, § 429.
arbitration bonds, liability of sureties, measure of damages, § 539c.
assault and battery, default or demurrer as admission of damages, § 429.
assignment, assessment of damages, American statutes and practice, § 474.
breach of bond or non-performance of agreement, statute of 8 and 9 William III., § 472.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
breach of covenants against incumbrance, damages where incumbrance is permanent, § 628.
building contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
cause of action, right to controvert, § 431.
certainty of damages, anticipated profits, § 60.
contracts for services, wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
copyright, infringement, compensatory and penal recoveries, § 1199.
default, admission of damages by default, § 429.
demurrer, admission of damages by demurrer, § 429.
error, correction of error in assessment, § 434.
injunction bonds, damages, facts not defenses, § 529.
mode of assessing, § 523.
judgment, effect of judgment, assessment of damages, § 465.
jury, assessment of damages without jury, § 428.
new trial, when new trial may be called, § 433.
tam quam jury, § 432.
motion to set aside, correction of error in assessment, § 434.
excessive or insufficient verdict, setting aside, § 459.
pleading, issues, effect of not answering allegation of damages, § 416.
reduction of damages, evidence of defendant, § 430.
remittitur, verdict, necessity that judgment follow verdict, § 466.

Assessment of Damages—continued.
replevin bonds, assessment of damages in suit on bond, § 502.
judgment in replevin suit, effect, § 506.
sureties, non-liability for judgment in replevin suit, § 503.
vendor and purchaser, damages recoverable by purchaser against vendor of land, suits for specific performance, § 590.
verdict, parties, verdict where there are several parties, § 463.
rendition and amendment of verdict, § 457.
writ of inquiry, § 427.
admission of damages by default or demurrer, § 429.

Assessments
see Fraternal Benefit Societies; Public Improvements.

Assignments
accounts, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
attachment, action for wrongful attachment, parties who may sue, § 511.
attorney's compensation, actions for compensation, value of services rendered, admissibility of evidence, § 682.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
measure of damages, § 539b.
bills and notes, consideration, parol evidence to show defect of consideration, § 554.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
breach of bonds, assignment, § 474.
assessment of damages, American statutes and practice, § 474.
statute of 8 and 9 William III., § 472.
consideration, parol evidence to show defect of consideration, § 554.
debt, action of time of bringing, default, § 474.
certainty in nature and cause of damage required, § 53, n 7.
claims against government, evidence of value, property without market value, § 448.
claim of government, recoupment and counterclaim, parties, § 176.
contracts, certainty of damages, anticipated profits, § 59n.
value of property, evidence, actual sales, offers for property, market quotations, § 447.
vendor and purchaser, damages recoverable by purchaser against vendor of land, oral contract, § 583.
covenant against incumbrances, assignment, § 621.
breach, rule of damages, remote losses, § 622.
covenants for title, breach of covenant, conveyances, measure of damages, § 599.
causes of action, damage accruing subsequent to action, § 113.
entirety, release or death of one or several parties entitled to damages, § 133.
covenants of warranty and quiet enjoyment, § 619.
extinguishment of adverse title by covenantee, § 610.
debts, assignment for collection, wrong without injury, § 3.
deeds, breach of covenants, assignment, § 472.
condition of deed, contract for services of attorney, evidence of value, § 682.
judgments
injunction bonds, damages, defenses, § 530.
restitution after reversal of judgment, § 469.
compensation for loss of use of property, liability of third parties, § 469.
landlord and tenant, rent, apportionment, § 850.

Assignments—continued.
leases, assignment or subletting, breach of covenant not to assign, damages, § 861.
business, recovery for damages to business of lessee, § 867.
contract for particular work, breach, consequential losses, contractor's liability, § 702n.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
damages recoverable by purchaser against vendor of land, adjustment of counterdemands on rescission, § 587.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
repairs, assignee's liability for repairs, § 859.
marshaling and distribution, rights of creditors where funds belong to two depositors, § 1961.
money paid, allowance of interest, § 326.
mortgages
breach of contract to assign, consequential damages, § 45n.
value of property, elements of value, presumptions, § 448.
injunction bonds, damages from restraint of injunction, § 527.
payment, guaranty of payment, measure of liability, of guarantor, § 732.
persons to whom payment may be made, § 231.
suretyship, contribution, basis, liability for costs, § 756.
tender, necessity that tender be unconditional, § 270.
officers, nonperformance of official duties, right of action, § 484.
parties, availability of set-off against assignees, § 176.
bonds, wrongful attachment, parties who may sue, § 511.
patents, assignment of damages, recovery by assignee, § 1186.
payment, application, debtor's right to direct application, § 235.
effect, § 218.
mode of making payment, § 216.
persons to whom payment may be made, § 231.
recoupment, validity of claim essential, § 174.
rent, apportionment of rent, § 850.
sales, assignment of claim for goods sold, value of property, elements, evidence, § 448.
warranties of title, existence, § 668.
set-off of judgments, assignee's rights, absolute purchase of judgment, § 202.
interest of real parties considered, § 200.
suretyship
surety's remedies for indemnity, adjustment of rights of co-sureties, § 758.
contribution between co-sureties, conclusiveness of judgment, § 760.
surety's right to call upon creditor to collect debt, damages, § 741.
tender, conditions, tender must be unconditional, § 270.
usury, who may take advantage of usury, § 314.

Assignments for Benefit of Creditors
see Insolvency.
bonds, suretyship, contract not to be extended by construction, § 726.
cause of action, entire demand may be severed, § 109.
insurance, collateral security, life insurance as collateral, violation of condition by insured, § 834.
interest, judgments pending review, § 389.
suspension of interest, process, payment prevented by legal process, § 381.
parties, joinder of parties, general and special owners, § 139.
payments, application, pro rata application, § 242.

Assignments for Benefit of Creditors—continued.
suretyship, contracts not to be extended by construction, illustrations, § 726.
unliquidated claims, surety's right to set up recoupment, equitable offset of joint indebtedness, § 744.
telegraph messages, delay in transmission or delivery, damages, loss of claim, attachment of property by other creditors, § 965.
usury, who may take advantage of usury, § 314.

Associations and Societies
actions, parties plaintiff, person in whom legal interest is vested, § 130.
exemplary damages, liability of voluntary societies for exemplary damages, § 412.
expulsion, consequential damages, certainty, § 57.
losses as elements of damage, what losses consist of, § 79.
mental suffering, § 96.
compensatory damages, mental suffering independent of physical harm, § 96.
regalia, baggage, what constitutes baggage, § 954.

Assumpsit
assessment of damages, jury, when new trial may be called, § 433.
bills and notes, partial failure of consideration, § 544.
breach of contract, damages recoverable by vendor against purchaser, measure of damages, § 570.
brokers, liability, disregard of instructions, § 786.
carriers of passengers, duty of carrier, protection of passenger, § 941.
cause of action, entirety, implied assumpsit follows consideration, § 132.
contracts for services, implied contracts, right of finder of property to recover for services, § 679.
measure of damages, effect of express contract fixing compensation, § 678.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
contracts for works, demands for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, § 709.
interest on judgments, § 333.
judgment, necessity of certainty, § 467.
landlord's action for use and occupation, measure of recovery, § 842.
nature, lease as evidence of value, § 841.
lost property found, recovery on quantum meruit, § 679.
master and servant, breach of contract, compensation as measure of damages, § 678.
wrongful discharge of employees, measure of damages, remedies, § 692.
mitigation of damages, action for rebuilding house, § 544.
measure of prevention, return of property, discharge of plaintiff's debt, § 156.
payment, pleading, § 232.
sales, executed sales, recovery by seller of full value, payment by bill or note, § 644.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
cause of action and cross-claim, § 183, n77.
specific performance, vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
suretyship
remedies for indemnity, action against principal for money paid, § 745.

Assumpsit—continued.
surety ship—continued.
contribution between cosureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
payment giving right to reimbursement, § 750.
when right of action accrues, § 747.
usury, recovery under usury statutes, § 317.
verdicts, amendment and rendition of, § 458.
certainty, necessity that judgment be certain, § 467.
parties, verdict where there are several parties, § 463.

Assumption of Risk
contributory negligence distinguished from, § 1325.
Federal Employers' Liability Act, risks assumed under, § 1322.

Attachment
act of God, destruction of property, forthcoming bonds, conditions, breach, § 517.
actual damages, attachment bonds, damages recoverable, § 512.
agency, implied warranty of authority, agent's liability, general rule, § 797.
liability to third persons, attachment bonds, exemplary damages, § 514.
payments, application by debtor, § 235.
animals injured, sheriff's neglect, official bonds, measure of damages against sureties, § 488.
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
assault by officer, mitigation of damages, evidence disclosing fact reducing injury, § 159.
bankruptcy, attachment bonds, wrongful attachment, damages recoverable, § 512.
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bond to satisfy judgment, conditions, § 519.
bonds, accrual of cause of action, § 510.
consequential damages, certainty, recovery of items of damages which are certain, § 55.
recovery for successive consequences of act or omission, § 58n.
costs and expenses of defending against attachment, § 516.
damages recovered by officer, recoupment, parties, § 175.
defenses or mitigation of damages, what may be shown, § 515.
exemplary damages, § 513.
wrong done with bad motive, violation of contract, § 390n.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
indemnity, agent's liability to third persons, implied warranty of authority, § 797.
pleading and proof of wrongful attachment, § 510.
replevin bonds, conditions required by statute, § 501.
statutory bonds, condition required by statute, necessity of compliance, § 475.
statutory bonds and undertaking to pay damages and costs, damages recoverable, § 85.
surety's liability, measure of damages, § 723n.
wrongful attachment, actual damages, §§ 512, 513.
breach of contract to discontinue action, elements of damage, losses, § 79.

Attachment—continued.
breach of covenant against incumbrances, rule of damages, payment of incumbrances, damages if not paid, § 623.
causes of action
entirety, double remedies, § 119.
what is not a double remedy, § 119.
conspiracy to prevent, act or omission as proximate cause, certainty, § 30.
costs and attorney's fees, consequential damages, recovery of successive consequences, § 58.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
dissolution, attorney's fees, right to, § 3, n24.
bonds, damages recoverable, § 512.
elements of damage, losses, bonds and undertakings, damages and costs, § 85.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
exemplary damages, allowance, § 393.
restriction and denial, Washington rule, § 400.
exempt property, trover, mitigation of damages, § 1138.
foreign attachment, payment, to whom payment may be made, § 231.
forthcoming bonds, § 517.
measure of damages, § 518.
fraud, false representations, remote, conjectural and contingent damages, § 1176.
indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
injury to property, opinion evidence, instances of rejection and admission of opinions, § 443.
interest, allowance of interest on judgments, § 333.
damages incident to debt, § 372.
suspension of interest, process, payment prevented by legal process, § 381.
lost property, measure of damages against officers for neglect of duty, nominal damages, § 491.
malicious issuance, elements of damage, mental suffering, § 95.
malicious prosecution, damages, elements, expenses, § 1238.
"malice," defined, § 1239.
officers, neglect of duty, measure of damages, nominal damages, § 490.
official bonds, neglect of duty, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
parties, bonds, wrongful attachment, parties who may sue, § 511.
joinder of parties, general and special owners, § 139.
payment, to whom payment may be made, § 231.
pleading, necessity of alleging special damages, § 421.
recoupment and counterclaim, parties, § 175.
release of property, officers, neglect of duty, measure of damages, nominal damages, § 490.
replevin
bonds, conditions required by modern statutes, § 501.
sureties, non-liability for judgment in replevin suit, § 503.
defendant's rights, recovery of damages as affected by title or interest in property, § 1160.
right of action, damnum absque injuria, § 3.
sale illegal, officers, neglect of duty, measure of damages, nominal damages, § 491.
sheriff's, official bonds, private injuries covered by official bonds, § 487.

Attachment—continued.
suretyship, creditor's duty to acquire liens, necessity of notice of reliance, § 739.
trespass to personal property, mitigation of damages, § 1104.
special and consequential damages, remote damages, § 1102.
trover
mitigation of damages, §§ 1138, 1141.
wilful taking or refusal to surrender, § 1140.
usury, who may take advantage of usury, § 314.
vacation, breach of contract, measure of damages, losses as elements of damage, § 79.
violation of rights, actual damages, triviality, right to nominal damages, § 11.
wrongful attachment, cause of action, entirety, what is not a double remedy, § 119.
definition, § 510.
measure of damages, injuries to business because of attachment, § 1237.
mitigation of damages, measures of prevention, § 157n.
return of property, discharge of plaintiff's debt, § 156.
pleading, special damages, necessity of alleging, § 420.

Attorneys
abandonment of case, contracts for services, necessity of full performance, inability to perform, § 687.
admissions, trespass to personal property, mitigation of damages, ownership of property, motive, § 1107.
advice of counsel, attachment bonds, exemplary damages, §§ 513, 514.
exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
restriction and denial, Washington rule, § 400.
malicious prosecution, probable cause as defense, § 1240.
mitigation of damages, § 154.
absence of malice, § 150.
trespass to real property, mitigation of damages, § 1027.
agent's duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
argument of counsel, verdicts, excessive and insufficient verdicts, improper argument of counsel, § 459.
bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
payment, application by creditor, § 240.
breach of duty, contract for services of attorney, evidence of value, § 682.
compensation, actions for compensation, value of services, evidence, § 682.
contracts for services, quantum meruit recovery, defenses, § 679.
evidence, pecuniary items, necessity of proof by plaintiff, opinions, § 441.
value of services, judicial notice, § 680.
opinion evidence, §§ 445, 446.
compromise and settlement, contract for services of attorney, evidence of value, § 682.
consequential damages, loss of right of action for slander, § 16.
contingent fees, actions by attorneys for compensation, value of services rendered, admissibility of evidence, § 682.
contracts for services, entire and apportionable contracts, performance, § 691.
necessity for full performance, inability to perform, § 687.
dissolution of relation, contracts for services of attorney, evidence of value, § 682.
docket fees, officers and public employees, bonds, construction, § 485.

Attorneys—continued.
election of officers, contracts for services, inability to perform § 687.
employment, injunction bonds, defenses, facts not available as defenses, § 529.
employment, agent's liability to third persons, implied warranty of authority, § 797.
fees, costs, see Costs.
fraud, contracts for services of attorney, evidence of value, § 682.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
instructions violated, agent's particular duties and liabilities, principal's right to indemnity, § 771.
interest, allowance against agents, trustees and officers, § 353.
joint liability, exemplary damages, joint liability for, § 407.
judgments, payment, to whom payment may be made, § 231.
license fees, bonds of public officers, construction, § 485.
liens, right to lien, set-off of judgments, § 204.
tender, effect, collateral securities, § 277.
money paid into court, § 278.
mitigation of damages, official neglect, § 160.
money withheld, interest as damages incident to debt, § 372n.
negligence, act or omission as proximate cause of injury, consequential damages, § 30n.
contracts for work, defects, consequential damages, § 705.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
loss of right of action, consequential damages for torts, right to damages, § 16.
measure of agent's liability, defaults in regard to bills and notes, § 776.
papers, baggage, what constitutes baggage, § 954.
parties, joint and several liability for torts, § 140.
payment, to whom payment may be made, § 231.
quantum meruit, contract for services of attorney, evidence of value, § 682.
evidence, defenses, § 679.
stipulation, replevin bonds, judgment, what may be shown in defense or in mitigation, § 507.
tender, necessity of keeping tender good, § 272.
persons to whom tender should be made, § 265.
sufficiency, amount, § 266.
time lost, carrier's refusal to carry, damages, loss of time, expense, exposure and humiliation, § 936.
violation of duty, exemplary damages, allowance, rule of United States Supreme Court, § 392.

Attractive Dangers
infant injured, consequential damages for torts, liability, illustrations, § 19.

Auctions
agency
duty to adhere to instructions, § 774.
implied warranty of authority, agent's liability, general rule, § 797.
liability to third persons, acts in excess of or without authority, § 798.
measure of damages, action without authority, § 798.
possession of property as possession of principal, accounting, duty of agent, § 769.
rights, reimbursement of expenditures, § 789.
violation of duty, secret profits, § 769.

Auctions—continued.
authority to purchase, agent's liability to third persons, implied warranty of authority, § 797.
breach of covenant against incumbrances, rule of damages, remote losses, § 622.
broker's compensation, amount of compensation, usual and customary rate, no special contract, § 683.
carriers of goods, loss or injury to property, proof of value, § 933.
contracts for services, wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
duties, liability of auctioneer who misdescribes land, § 782.
evidence of value, actual sales, § 447.
expenditures of agent, right to reimbursement, § 789.
factors, liability, sale on unauthorized terms, § 782.
fraud, false representations, measure of damages, removal of goods purchased at auction sale, § 1173.
natural and proximate consequences of fraud, § 1163.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
action by purchaser against seller, proof of value of property, § 654.
action by seller against purchaser, breach of contract, damages, § 647.
value of property, evidence, actual sales, offers for property, market quotations, § 447.
vendor and purchaser, breach of contract by purchaser, measure of damages, § 570n.
breach of contract by vendor, measure of damages, nominal damages, § 582.
oral contract, damages recoverable by purchaser, § 583.
damages recoverable by purchaser against vendor of land, suits for specific performance, § 590.

Australia
interest, allowance on annuities and legacies, § 344.
trover, special and consequential damages, § 1129.

Automobiles
collisions, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.
fraud, sale of automobile, misrepresentations as to ability to pay, damages, § 1174.
painting, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
repair, evidence, opinions on subjects of common experience and observation, admissibility, § 443.

B

Back Injured
consequences of injury, recovery for secondary consequences, aggravation of disease, etc., § 1244.
pleading, necessity of alleging special damages, § 421.
verdicts, amount to be allowed for pain and suffering, § 1242n.
excessive or inadequate verdicts, discretion of court as to damages, instructions, § 1256.

Baggage
abusive language, ejection of passenger, mental suffering, § 943.
alighting at wrong place, damages peculiar to passengers, § 939.
carried beyond destination, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 43.
definition, what is baggage, § 954.

Baggage—continued.
ejection of passenger at wrong place, damages, separation from baggage, § 939.
exemplary damages, negligence or breach of duty by carrier, § 950.
loss of, or injury to baggage, §§ 954, 955.
marine insurance, losses, general average, § 818.
mental anguish independent of other injury to passenger, § 943.
sleeping car companies, liability, § 956.
value, disclosure, § 954.

Bail
appeal, interest and damages awarded on appeal, § 539.
bonds, actions as to sureties, liability for executor's debt to estate, § 495.
conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
measure of damages against officers for neglect of duty, bonds insufficient, nominal damages, § 491.
breach of contract, damages recoverable by purchaser against vendor of land, defaulting vendee's rights, conflict of American cases, § 586.
civil actions, bail bonds and penal bonds, distinctions, § 539b.
insufficient bonds, officers, neglect of duty, measure of damages, nominal damages, § 491.
interest, demand, necessity to secure allowance of interest, § 351.
malicious prosecution, mitigation of damages, evidence that plaintiff could have secured release on bail, § 1240.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.
official bonds, private injuries, covered by official bonds, § 487.
replevin bonds, original conditions, § 499.

Bailments
animals, necessity of alleging special damages, illustrations, § 420.
compensation, contracts for services, quantum meruit recovery, defenses, § 679.
value of property as measure of damages, § 105.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
recovery only when contemplated by parties, § 46.
conversion, breach of duty by bailee, elements of damage, losses, § 79.
parties, joinder of parties, general and special owners, § 139.
delivery, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
depositaries, bonds, absolute liability for money received, § 479.
evidence of value, admissibility, § 445.
horse injured by negligent driving, consequential damages, § 57.
interest, allowance of interest, money had and received, § 352.
money loaned, § 325.
losses as elements of damage, what losses consist of, conversion by bailee, § 79.
negligence, consequential damages, acts of third person, § 42.
elements of damage, value of property, § 105.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
probate bonds, liability as between sets of sureties, § 498.
public officers, absolute liability for money received, § 479.
replevin bonds, damages when plaintiff recovers as special owner, § 508.
sales, value of property, evidence, actual sales, offers for property, market quotations, § 447.

Bailments—continued.
trespass to personal property, title or interest of plaintiff in property, amount of damages recoverable, § 1097.
trover, time of conversion, § 1112.
value of property, proof of value, § 1113.

Balloons
trespass to real property, aggravation, special damages, § 1028.

Bankruptcy
agent's liability to third persons, scope of authority, § 796.
attachment, action for wrongful attachment, parties who may sue, § 511.
bonds, damages recoverable, § 512.
bills and notes, amount recoverable by holder of bill or note, principal sum, § 541.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
penalty as limit of recovery, exception as to interest, § 478n.
guaranty, collateral, guarantor's liability where collateral is given, § 734.
interest, allowance of interest on judgments, § 333.
suspension of interest, miscellaneous cases, § 380.
tender stopping interest, § 383.
judgments, interest on, § 333.
malicious prosecution, damages, elements, § 1238.
mitigation of damages, benefit not derived from defendant, § 158.
parties, bonds, wrongful attachment, parties who may sue, § 511.
payment, application, debtor's right to direct application, § 236.
penalties, bonds, limit of recovery, interest, § 478.
personal injuries, damages, earning capacity diminished, § 1246.
expenses for physical and surgical aid, recovery, § 1250.
release, execution of release by or to one of several claiming or liable, effect, § 257.
suretyship, creditor's duty to realize on securities, refusal of payment, application of deposit to indebtedness, § 737.
tender, suspension of interest, § 383.
trespass to personal property, remedy, comprehensiveness of remedy, § 1094.
trover, recovery of value of property sold in bankruptcy proceedings, § 1116.
usury, who may take advantage of usury, § 314.

Banks and Banking
accounts, payment, application of general payment to oldest debt, § 243.
agents and officers, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
bonds, liquidated damages, alternative contracts, § 282.
consequential damages, injury through third person, stockholder's right of action for negligence in conducting corporation, § 33.
duty of agent to adhere to instructions, liability for exceeding commissions, § 774.
implied warranty of authority, agent's liability, general rule, § 797.
liability to third persons, implied warranty of authority, § 797.
payment, to whom payment may be made, § 231.
right of agent to compensation, duties, secret profits, § 768.
tender, to whom tender may be made, § 265.
bank books, trover, conversion of money securities, measure of damages, § 1132.

Banks and Banking—continued.
banknotes
tender, requisites, in what money tender must be made, § 263.
sufficiency, amount, § 267.
waiver and omission of tender on sufficient excuse, § 273.
bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
payment in money only, § 559.
bonds, discharge or reduction of surety's responsibility by act of creditor, § 735.
employee's bond, liquidated damages, alternative contracts, § 282.
breach of contract to pay money, special obligations, measure of damages, § 77.
cashier
guaranty, measure of guarantor's liability, § 729.
lost profits, remote damages, § 729.
interpretations of surety's contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
contract not to be extended by construction, § 726.
charter, interest, rate applicable after debt is due, § 308.
checks
certification, payment by, § 226.
collection, liability of drawer and indorser for principal sum, § 555.
dishonored, character and feeling, injuries to, § 163.
mental anguish, § 95.
mitigation of damages, conduct or character of plaintiff diminishing injury, § 163.
pleading, special damages, necessity of alleging, § 420.
evidence of payment, § 233.
forged check, sale, warranties of title, existence, § 668.
liquidated damages, contracts for payment of money, interest as damages, § 287.
measure of agent's liability, defaults in regard to bills and notes, § 775.
payment of checks, breach of contract to pay money, § 77.
collateral collected or lost by negligence of collector as payment, § 228.
evidence of payment, § 233.
forged indorsement, interest, quantum meruit claim to interest, § 324.
medium of payment, §§ 207, 225, 227.
note, bill or check as payment, § 226.
duty of creditor, § 227.
what is not payment, § 217.
raised checks, liability of drawer and indorser for principal sum, § 555.
tender, amount, sufficiency, § 267n.
in what money tender may be made, § 263.
necessity that tender be unconditional, § 270.
sufficiency, amount, § 267.
collection, measure of agent's liability, defaults in regard to bills and notes, §§ 775, 776.
consequential damages, intervening cause, money deposited in bank lost, measure of damages, § 37.
currency depreciated, partial failure of consideration, availability of defense, § 545.
deposits, attachment bonds, damages recoverable, § 512.
creditor's right to make application of payments, § 238.

Banks and Banking—continued.
deposits—continued.
insolvent bank, measure of agent's liability, defaults in regard to bills and notes, § 776.
interest, allowance of, necessity of demand, § 351.
money had and received, § 352.
money intermingled, interest, allowance against agents, trustees, and officers, § 353n.
money lost, consequential damages, measure of damages, § 37.
payment, manner, what is not, § 217.
persons who may make, § 230.
suretyship, discharge or reduction of surety, act of creditor, § 735n.
dividends, interest, suspension, payment prevented by legal process, § 381.
drafts, factor's rights, reimbursement by sales, § 790.
payment, measure of agent's liability under various circumstances, § 774.
forgery, interest, quantum meruit claim to interest, § 324.
fraud, false representations, belief of defendant in representations, § 1169.
guaranty, contracts not to be extended by construction, illustrations, § 726.
insolvency, fraud, natural and proximate consequences of fraud, § 1165.
payment, medium, bills of insolvent banks, § 224.
interest, agreements for interest, rate fixed by law or custom, § 306.
allowance against agents, trustees, and officers, § 253n.
allowance, money paid, § 327.
money had and received, § 352.
allowance from time when money ought to be paid, § 329.
demand, necessity, § 351.
judgment pending review, § 389.
quantum meruit claim to interest, § 324.
rate applicable after debt is due, charter of bank, § 308.
law or custom fixing rate, § 306.
stockholders' statutory liability, § 343.
suspension, payment prevented by legal process, § 381.
tender stopping interest, when tender may be made, § 385.
tacit agreements to pay interest on accounts, § 322.
landlord and tenant, rent, apportionment, § 850.
liquidated damages, certainty, contracts for payment of money, § 287.
negligence in transmission of message, damages, injury to credit, § 965.
payment, application by court, § 241.
application by creditor, § 238.
to debt bearing interest, application to interest first § 244.
elements of damage, § 77.
mode of payment, § 215.
persons to whom payment may be made, § 231.
public officers, bonds, neglect of duty by other officers, effect, § 482.
rent, apportionment of rent, § 850.
reports, fraud, person to whom false representations are made, representations need not be made to plaintiff, § 1170.
special damages, necessity of alleging, checks dishonored, § 420.
stock, trover, measure of damages, property of fluctuating value, Pennsylvania rule, § 1[illegible].
suretyship, creditor's duty to realize on securities, refusal of payment, application of deposit to indebtedness, § 737.
discharge or reduction of surety's responsibility by act of creditor, § 735n.
telegraphs and telephones, damages, loss of claim, § 965.

Banks and Banking—continued.
tender, manner, in what money tender may be made, § 263.
persons to whom tender should be made, § 265.
place of making, § 269.
treasurer, agent's violation of duty, secret profits, § 768.

Barge
deviation from course, agent's particular duties and liabilities, principal's right to indemnity, § 770.
hiring barge, cause of action, entirety, items of accounts, § 111.

Barrels
pork damaged, barrels leaking, expenses to prevent or lessen damages between vendor and vendee, § 89.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Bastards
agreement for support, cause of action, severance, contract to do several things successively, or one thing continuously, § 110n.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
measure of damages, § 539b.
bonds, measure of damages against officers for neglect of duty, nominal damages, § 489.
penalty as limit of recovery, exception as to interest, § 478.
causes of action, entirety, parties to actions under statutes, § 129.
Federal Employers' Liability Act, illegitimates as beneficiaries under, § 1332.
interest, allowance of interest on judgments, § 333.
libel and slander, special damages, accusations not actionable per se, § 1219.
parties plaintiff, action under statutes, § 129.

Bathhouse
revocation of ticket of admission, elements of damage, pecuniary elements, other elements, § 92.

Battery
see Assault and Battery.

Beams
easements, beam right, covenants against incumbrances, definition, what are incumbrances, § 620n.
sales, breach of contract by seller, delay in delivery, damages, § 664.
defective lintel sold, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Beans
sales, delay in delivering property, damages, action by purchaser against seller, § 664.

Beer
sales, warranties of quality, existence, § 667.

Bequests
see Wills.

Berths
see Sleeping Car Companies.

Beverages
sale of beverage containing broken glass, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Bicycle
baggage, what constitutes baggage, § 954.

Bills and Notes
Ch. XII, §§ 540-565.
acceptance, agents, measure of liability of agents for defaults in regard to commercial paper, § 776.
bills of exchange, liability of acceptor, § 540.
conflict of laws, law governing contract, § 563.
consideration, want or failure of consideration, § 542.
interest as damages, payment by maker or acceptor, § 557.
parties, liability of drawer and indorser for principal sum, § 555.
principal sum, certainty, § 541.
re-exchange and damages, dishonored bills, § 561.
when not recoverable, § 562.
suretyship, assumption of contract, method, § 731.
accommodation paper, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
bills of exchange, liability of acceptor, § 540.
consideration, parol evidence to show defect of consideration, § 554.
want or failure of consideration, § 542.
drawers, liability of drawer and indorser for principal sum, § 555.
interest, conflict of laws, general rule as to contracts, § 357n.
damages to be paid by maker or acceptor, § 557.
parol evidence to show defect of consideration, admissibility, § 551.
parties, liability of drawer and indorser for principal sum, § 555.
payment, application of general payment to debt least secured, § 245n.
recoupment, election of defendant to file cross-claim or sue upon his demand, § 187.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
suretyship, assumption of contract, methods, bills, and notes, § 731.
contribution, who are co-sureties, § 755.
liability of principal for surety's costs, § 752.
accord and satisfaction, consideration, act or promise which is new consideration, § 249.
actions and defenses, circuity of action, § 143.
endorsee's action, amount recoverable against drawer and acceptor, partial payment, § 541.
recovery of principal sum, § 541.
parties, joinder of defendants, effect of non-joinder and misjoinder, § 135.
parties plaintiff, person in whom legal interest is vested, § 130.
agents, measure of liability of agents for defaults in regard to commercial paper, §§ 775, 776.
assessment of damages, admission of damages by default or demurrer, § 429.
correction of error, § 434.
jury, assessment of damages without jury, § 428.
assignment, consideration, parol evidence to show defect of consideration, § 554.
parties, liability of drawer and indorser for principal sum, § 555.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
bankruptcy, principal sum, certainty, § 541.

Bills and Notes—continued.
bills of exchange, acceptance, effect, liability for re-exchange, § 561.
acceptor's liability, nature of agreement, § 540.
attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
conflict of laws, law governing contract, § 563.
consideration, defects shown by parol evidence, §§ 551, 554.
fraudulent or illegal in part, § 549.
want or failure of consideration, § 542.
partial, § 544.
definitions, object, § 560.
dishonored bills, re-exchange, §§ 560, 561.
doctrine of re-exchange, foundation on equitable principles, § 561.
drawers, liability of drawer and indorser for principal sum, § 555.
endorser's liability for principal sum, § 555.
interest, § 556.
rate applicable after debt is due, § 309.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 557.
liability of parties, acceptors, § 540.
drawer and indorser, liability for principal sum, § 555.
payment only in money, § 559.
principal sum, certainty, § 541.
re-exchange and damages, dishonored bills, §§ 560, 561.
protested foreign bills, § 563n.
when not recoverable, § 562.
sales, warranties of title, existence, § 668.
suretyship, assumption of contract, method, bills and notes, § 731.
contribution, who are cosureties, § 755.
trover, conversion of money securities, § 1132.
value of notes and bills, § 565.
bona fide purchasers, amount recoverable by holder of bill or note, defenses, § 542.
consideration, want or failure of consideration, § 542.
drawers, liability of drawer and indorser for principal sum, § 555.
guaranty, effect of indorsing negotiable paper, § 730.
payment, guaranty of payment, measure of liability of guarantor, § 732.
principal sum, certainty, § 541.
breach of contract, damages recoverable by vendor against purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
special obligations, measure of damages, contract to pay money, § 77.
breach of covenant of warranty and quiet enjoyment, damages, interest and taxes as items of damages, § 616.
burden of proof, consideration, want or failure of consideration, § 542.
carriers, delay in delivery of account, statute of limitations operating to bar account, liability of carrier, § 914.
cause of action, severance of entire demand, § 109.
certain sum payable in money, amount recoverable by holder of note, principal sum, § 541.
checks, certification, payment by check, § 226.
collection, liability of drawer and indorser for principal sum, § 555.
dishonored checks, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, conduct or character of plaintiff diminishing injury, § 163.

Bills and Notes—continued.
checks—continued.
pleading, special damages, necessity of allegation, § 420.
evidence of payment, § 233.
liquidated damages, contract for payment of money, interest as damages, § 287.
measure of agent's liability, defaults in regard to bills and notes, § 775.
negligence in transmission of telegraph message, damages, injury to credit, § 965.
payment, bill of exchange as payment, § 226.
breach of contract, measure of damages, § 77.
check as payment, § 226.
duty of creditor, § 227.
evidence of payment, § 233.
forged checks, § 223.
forged indorsement, interest, quantum meruit claim to interest, § 324.
note as payment, § 226.
what is not payment, § 217.
raised check, bill and notes, liability of indorser and drawer for principal sum, § 255.
tender, amount, sufficiency, § 267n.
conditions, necessity that tender be unconditional, § 270.
manner, in what money tender may be made, § 263.
sufficiency, amount, § 267.
collection, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
guaranty of collection, liability for costs, diligence, § 733.
liability where collateral is given, § 734.
measure of guarantor's liability, § 729.
measure of agent's liability, defaults in regard to bills and notes, §§ 775, 776.
value of notes and bills, § 565.
conflict of laws
interest, §§ 556, 557.
effect of change in law of place of contract, § 368.
law governing where usury is involved, §§ 362, 364.
place of contracting, determination, § 358.
law governing liabilities on bills and notes, § 563.
law of place of contract, effect of change, § 369.
re-exchange, law governing liabilities on bills and notes, § 563.
consideration, accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
apprentices, total failure of consideration, illustration, § 542.
bona fide holders, want or failure of consideration, § 542.
drawers, liability of drawer and indorser for principal sum, § 555.
fraud, consideration fraudulent in part, §§ 549, 550.
illegality, consideration illegal in part, §§ 549, 550.
effect of illegality, § 550.
parol evidence to show defect of consideration, admissibility, §§ 551, 554.
different agreement, § 552.
partial failure of consideration, §§ 544-548.
admissibility of evidence, § 547.
availability of defense, § 545.
defense as resting on principle of rescission of contract, § 548.
distinctions, § 544.
fraud or illegality as defense, availability, § 549.
nature of defense, cross-action, § 546.
partial want of consideration, effect, § 543.

Bills and Notes—continued.
consideration—continued.
parties, liability of drawer and indorser for principal sum, § 555.
payment only in money, § 559.
principal sum, certainty, § 541.
recoupment, maturity of claim or demand, statute of limitations, § 177.
nature of defense, § 170.
total failure of consideration, illustration, § 542.
vendor and purchaser, breach of contract by purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
want or failure of consideration, § 542.
construction, vendor and purchaser, breach of contract by purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
contracts, effect of fraud, necessity of rescission, § 549.
maker of note, contract of, § 540.
conversion, interest, allowance of interest on judgments, § 334.
limitation of recovery to plaintiff's interest in property, § 1137.
money securities, conversion, action, measure of damages, § 1132.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
suretyship, express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 766.
costs, stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
creditor's right to make application of payments, §§ 238, 240.
cross-actions, consideration, partial want of consideration, §§ 545-548.
days of grace, payment before debt is due, effect, § 219.
defenses
consideration, defects shown by parol evidence, §§ 552, 554.
partial failure of consideration, availability of defense, § 545.
partial want of consideration, §§ 544, 546, 548.
value of bills and notes, § 565.
vendor and purchaser, breach of contract by purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
delivery, discharge of debt, payment by gift inter vivos, § 221.
guaranty, effect of indorsing negotiable paper, § 730.
parties, liability of drawer and indorser for principal sum, § 555.
demand, interest, § 556.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 557.
re-exchange and damages when not recoverable, § 562.
demand notes, consideration, defects shown by parol evidence, § 552.
interest, allowance of interest on account, § 350.
necessity of demand, § 351.
drafts, acceptance, effect, liability for re-exchange, § 561.
agreement to accept draft, non-performance, measure of damages, § 540.
bills of exchange, liability of acceptor, § 540.
factor's rights, reimbursement by sales, § 790.
payment, interest as damages accessory to principal, § 372.
measure of agent's liability under various circumstances, § 774.
eviction of lessee, recovery of rent barred, § 848.
evidence
consideration, defects shown by parol evidence, §§ 551-554.

Bills and Notes—continued.
evidence—continued.
partial want of consideration, § 547.
interest, § 556.
interest as damages, payment by maker or acceptor, § 557.
payment, § 233.
suretyship, contribution, who are cosureties, § 755.
value, actual sales, § 447.
property without market value, § 448.
expenditures, collections, right of agent to charge for exchange and interest, § 791.
factors, accounts, duty of factor to render, effect of misrepresentation, § 78.
funds, remitting, consequences of failure to obey orders, § 785.
reimbursement, right of factor to reimburse himself by sales, § 790.
right of factor to do business in his own name, § 782.
failure of consideration, parol evidence to show defect of consideration, § 553.
fraud
consideration fraudulent or illegal in part, § 549.
partial want of consideration, §§ 545, 548.
want or failure of consideration, § 542.
expenses of litigation, recovery in addition to actual damages, § 1177.
false representations, measure of damages, difference in value, § 1171.
note of insolvent, purchase induced by false representations, measure of damages, § 1171.
parties, liability of drawer and indorser for principal sum, § 555.
principal sum, certainty, § 541.
gifts, consideration, want or failure of consideration, § 542.
guaranty, collateral, guarantor's liability where collateral is given, § 734.
conflict of laws, law governing contract, § 563.
contracts not to be extended by construction, illustrations, § 726.
distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
effect of indorsing negotiable paper, § 730.
indorsement of negotiable paper, effect, § 730.
liability where collateral is given, § 734.
measure of guarantor's liability, lost profits, remote damages, § 729.
guaranty of collection, liability for costs, diligence, § 733.
illegality, consideration, want or failure of consideration, § 542.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
indorsement, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
conflict of laws, law governing contract, §§ 358, 563.
consideration, partial want of consideration, § 545.
drawer, liability of drawer and indorser for principal sum, § 555.
fraud, false representations, remote, conjectural and contingent damages, § 1175.
guaranty, effect of indorsing negotiable paper, § 730.
guaranty of collection, liability for costs, diligence, § 733.
interest as damages, liability of drawer or indorser, § 558.
parties, liability of drawer and indorser for principal sum, § 555.
payment, guaranty of payment, measure of liability of guarantor, § 732.
principal sum, certainty, § 541.

Bills and Notes—continued.
indorsement—continued.
re-exchange and damages, dishonored bills, §§ 560, 561.
warranties of title, existence, § 668.
suretyship, assumption of contract, method, bills and notes, § 731.
contribution, who are cosureties, § 755.
infants, makers, release, execution by or to one of several claiming or liable, effect, § 257n.
trover, mitigation of damages, § 1139.
interest, accounts, allowance of interest, § 350.
agreements for interest, different rate after debt is due, § 311.
more than legal rate before maturity, usury, effect, § 313.
rate applicable after debt due, § 309.
allowance against government, § 332.
allowance from time when money ought to be paid, § 329.
bills and notes, interest on, § 356.
bills of exchange, liability of acceptor, § 540.
compound interest, interest on instalments of interest, § 375.
periodical interest after maturity of debt, § 377.
separate agreements for interest, § 376.
conflict of laws, effect of change in law of place of contract, § 369.
effect of usury, § 362.
law governing rate of interest as damages, § 366.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 557.
judgments, interest on, § 333.
money paid, allowance of interest on, § 326.
nature of contract to pay interest, § 300n.
necessity of demand, § 351.
partners, right to interest between, § 342.
pleading, how interest claimed in pleading, § 387.
rate applicable after debt is due, § 308.
re-exchange and damages, dishonored bills, § 560.
when not recoverable, § 562.
suspension, miscellaneous cases, § 380.
payment prevented by legal process, § 381.
tender stopping interest, § 383.
time, when tender may be made, § 385.
joint and several notes, consideration fraudulent or illegal in part, effect, § 549.
drawers, liability of drawer and indorser for principal sum, § 555.
partial failure of consideration, availability of defense, § 545.
judgment, necessity of judgment following verdict, § 466.
usury, effect of usury, § 313.
liquidated damages, contracts for payment of money, interest as damages, § 286.
mode of liquidating, computation of time, § 281.
loss of note, measure of agent's liability, defaults in regard to bills and notes, § 776.
maturity, interest as damages, liability of drawer or indorser, § 558.
value of notes and bills, § 565.
mitigation of damages, consideration, partial want of consideration, § 545.
neglect of duty by notary, extent of duty to lessen or prevent damages, § 90.
money, necessity that bills and notes be payable only in money, § 559.
mutilation, payment, what is not payment, § 217.
negligence, note not protested, measure of agent's liability, defaults in regard to bills and notes, § 775.
signer's negligence, want or failure of consideration, § 542.

Bills and Notes—continued.
Negotiable Instruments Act, interest, § 556.
negotiability, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
liability of drawer and indorser for principal sum, § 555.
payment only in money, § 559.
principal sum, certainty, § 541.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.
official bonds, private injuries covered by official bonds, § 487.
parties, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
conflict of laws, law governing contract, § 563.
consideration, defects shown by parol evidence, §§ 551, 554.
fraudulent or illegal in part, § 549.
partial want of consideration, § 545.
want or failure of consideration, § 542.
drawers, liability of drawer and indorser for principal sum, § 555.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 557.
measure of agent's liability, defaults in regard to bills and notes, § 775.
principal sum, certainty, § 541.
liability of drawer and indorser for, § 555.
re-exchange and damages, dishonored bills, §§ 560, 561.
when not recoverable, § 562.
recoupment and counterclaim, parties, § 176.
set-off against assignees, availability of, § 176.
suretyship, assumption of contract, method, bills and notes, § 731.
contribution, who are cosureties, § 755.
liability of principal for surety's costs, § 752.
payment, agent's duty to adhere to instructions, liability for exceeding commission, § 774.
application, court, § 241.
debtor's right to direct application, evidence, § 237.
pro rata application, § 242.
attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
bills, notes and checks, duty of creditor, § 227.
collateral collected or lost by negligence of collector as payments, § 228.
conflict of laws, law governing contract, § 563.
consideration, defects shown by parol evidence, § 554.
fraudulent or illegal in part, § 550.
evidence of payment, § 233.
presumptions, § 233.
forged notes, § 223.
gift inter vivos, § 221.
guaranty, measure of guarantor's liability, §§ 729, 732.
interest, § 556.
interest as damages, liability of drawer or indorser, § 558.
measure of agent's liability under various circumstances, § 774.
mode of payment, §§ 214, 215.
checks, §§ 225-227.
what is not payment, § 217.
money, payment only in, § 559.
persons to whom payment may be made, § 231.
persons who may make payment, § 230.
pleading, § 232.
principal sum, certainty, § 541.

Bills and Notes—continued.
payment—continued.
quantum meruit claim to interest, payment of check bearing forged indorsement, § 324.
re-exchange and damages, dishonored bills, §§ 560, 561.
when not recoverable, § 562.
suretyship, right of surety to defend between principals, § 743.
value of notes and bills, § 565.
vendor and purchaser, breach of contract by purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
what is not payment, § 217.
who may make payments, § 230.
pleading
consideration, defects shown by parol evidence, §§ 552, 554.
want or failure of consideration, § 542.
interest, manner of claiming interest in pleading, § 387.
pledges, amount recoverable by holder of bill or note, principal sum, § 541.
principal sum, certainty, § 541.
trover, mitigation of damages, § 1138.
presentment, measure of agent's liability, defaults in regard to bills and notes, § 775.
presumptions, conflict of laws, law governing contract, § 563.
consideration, want or failure of consideration, § 542.
guaranty, effect of indorsing negotiable paper, § 730.
parties, liability of drawer and indorser for principal sum, § 555.
suretyship, assumption of contract, method, bills and notes, § 731.
value of notes and bills, § 565.
elements, evidence, § 448.
promissory notes, amount payable at maturity, ascertainment, § 540.
attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
conflict of laws, law governing contract, § 563.
consideration, defects shown by parol evidence, §§ 551-554.
fraudulent or illegal in part, § 549.
partial want of consideration, §§ 543-547.
want or failure of consideration, § 542.
form, construction of language, § 540.
interest, § 556.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 557.
liability of parties, makers, § 540.
principal sum, certainty, § 541.
re-exchange and damages, dishonored bills, §§ 560, 561.
when not recoverable, § 562.
value of notes and bills, § 565.
protest, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
measure of agent's liability, defaults in regard to bills and notes, § 775.
negligence in transmission of telegraph message, damages, injury to credit, § 965.
official bonds, measure of damages against sureties, § 488n.
omission to give notice of protest, elements of damage, § 90.
re-exchange and damages, dishonored bills, § 560.
foreign bills, § 563n.
when not recoverable, § 562.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
attorneys' fees and costs, stipulations for, effect on negotiability, § 564.

Bills and Notes—continued.
recoupment and counterclaim—continued.
consideration, partial want of consideration, § 546.
want or failure of consideration, § 542.
vendor and purchaser, § 184.
re-exchange and damages, conflict of laws, law governing contract, § 563.
dishonored bills, §§ 560, 561.
when not recoverable, § 562.
release, definition, validity, §§ 253, 258.
requisites, what will operate as release, § 258.
renewal notes
consideration fraudulent or illegal in part, effect, § 549.
parol evidence to show defect in consideration, § 552.
want or failure of, § 542.
payment by note, bill or check, § 226.
recoupment for breach of warranty, § 179.
sales, breach of contract, payment in specific articles, presumed value of notes, etc., §§ 659-661.
evidence of value of property, breach of contract by seller, § 654.
executed sales, recovery, payment by bill or note, § 644.
fraud, false representations, measure of damages, § 1173.
what are false representations, § 1166.
warranties of title, existence, § 668.
implied warranty, § 668.
seal, consideration, defects shown by parol evidence, § 552.
set-off, counterclaim and recoupment, acts which may be basis of recoupment, § 181.
cause of action, connection between and cross-claim, § 183.
statutes, law governing liabilities on bills and notes, allowance of damages, § 563.
Negotiable Instruments Act, interest, § 556.
stipulations, attorneys' fees and costs, stipulations for, effect on negotiability, § 564.
payment, application by creditor, § 238.
suretyship, assumption of contract, method, bills and notes, § 731.
contract not to be extended by construction, § 726.
contribution between cosureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
who are cosureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
creditor's duty to realize on securities, limitation of release to injury sustained by surety, § 738.
refusal of payment, application of deposits to indebtedness, § 737.
discharge or reduction of surety's responsibility by act of creditor, § 735.
release limited to injuries sustained by surety, § 738.
liability of principal for surety's costs, § 752.
methods by which surety's contract may be assumed, commercial paper, § 731.
payment giving right to reimbursement, §§ 750, 751.
principal's liability for surety's costs, § 752.
recoupment, right to set up, equitable offset to joint indebtedness, § 744.
remedy for indemnity, accrual of right of action, § 747.
payment giving right to reimbursement, § 751.
right to defend between principals, § 743.
subrogation, right, when and to whom available, § 736.
surety's remedies for indemnity, action against principal, measure of recovery, § 748.

Bills and Notes—continued.
suretyship—continued.
who is principal, § 746.
tender, amount, sufficiency, § 266.
conditions, tender must be unconditional, § 270.
persons to whom tender should be made, § 265.
sufficiency, amount, §§ 266, 267.
time when tender may be made, § 262.
time, interest, § 556.
trover, conversion of money securities, § 1132.
usury, conflict of laws, law governing where usury is involved, § 363.
contracts not void for usury, § 315.
payment, guaranty of payment, measure of liability of guarantor, § 732.
recovery under usury statutes, § 316.
validity
consideration, defects shown by parol evidence, § 552.
fraudulent or illegal in part, §§ 549, 550.
partial want of consideration, § 546.
note in violation of criminal laws, effect, § 542.
parties, liability of drawer and indorser for principal sum, § 555.
value of property, evidence, actual sales, offers for property, market quotations, § 447.
solvent parties, measure of damages, § 565.
vendor and purchaser, breach of contract by purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
verdict, assessment of damages, error, correction of error in assessment, § 434.
certainty, necessity of, § 461n.

Bill of Exceptions
see Appeal and Error.

Bill of Exchange
see Bills and Notes.

Bill of Lading
delay in delivery, breach of contract, consequential damages, notice of special circumstances, § 52.
demurrage, detention of goods, § 897.
duty of carriers to care for property, § 916.
goods lost or injured, liability for partial loss when value is limited, § 927.
loss at place of shipment, § 924.
freight charges, demurrage and detention of cars, § 897.
time when freight is due and earned, § 887.
indorsement, carrier's action for freight charges, § 884.
limitation of liability, contracts, Carmack Amendment to Interstate Commerce Act, § 904.

Bill of Particulars
pleading, itemization of damages, demands unliquidated, § 424.

Birth
see Child Birth.

Blacklisting Employees
exemplary damages, allowance, in what actions recoverable, § 392.

Bladder Injured
pleading, necessity of alleging special damages, § 421.
verdicts, excessive or inadequate verdicts, § 1256n.

Blasting
eminent domain, property not taken, consequential injury, § 1062.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.

Blood Poisoning
pleading, special damages, necessity of alleging, § 421.

Boards of Trade
certainty of damages, profits from commercial ventures, § 67.
speculation, future bargains, profits of labor, certainty of damages, § 66.

Boats
see Vessels.
application of Federal Employers' Liability Act to, see Federal Employers' Liability Act.

Boilers
installation, contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699.
sales, evidence of value of property, breach of contract by seller, § 654n.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Bona Fide Purchasers
see Bills and Notes.

Bonds
Ch. XI, §§ 470-539.
see Official Bonds.
accord and satisfaction, agreement, necessity of full execution, § 252.
consideration, act or promise which is new consideration, § 249.
agency, authority, agent acting without or in disregard of authority, damages, § 787.
alteration, discharge or reduction of surety's responsibility by act of creditor, § 735n.
appeal and supersedeas
conditions, instances of liability under statutes specifying certain conditions, §§ 536, 537.
liability of sureties, § 531.
Federal Supreme Court, § 532.
interest and damages awarded on appeal, §§ 538, 539.
liability if judgment is in part for money or in rem, § 533.
liability in state courts, §§ 534, 535.
apprentices, actual damages, necessity of proving actual injury, § 75.
arbitration bonds, § 539c.
assignments, bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bills and notes, consideration, parol evidence to show defect of consideration, § 554.
breach of bond, § 474.
assessment of damages, American statutes and practice, § 474.
statute of 8 and 9 William III., § 472.
interest, suspension, payment prevented by legal process, § 381.
attachment, accrual of cause of action, § 510.

Bonds—continued.
attachment—continued.
damages recoverable, costs and expenses of defending against attachment, § 516.
wrongful attachment, actual damages, §§ 512, 513.
defenses or mitigation of damages, what may be shown, § 515.
exemplary damages, recovery, § 513.
express indemnity, damages recoverable, § 762.
forthcoming bonds, § 517.
measure of damages for failure to deliver property, § 518.
judgment, bond to satisfy, conditions, § 519.
parties, who may sue, § 511.
pleading and proof of wrongful attachment, § 510.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bastardy, penalties, bonds, limit of recovery, interest, § 478.
bills and notes, liability of drawer and indorsers for principal sum, § 555.
parol evidence to show defect of consideration, admissibility, § 551.
payment in money only, § 559n.
breach of bond, § 474.
assessment of damages, American statutes and practice, § 474.
statutes of 8 and 9 William III., § 472.
damages recoverable by vendor against purchaser, measure of damages, § 569.
debt, action of, time of bringing default, § 474.
liquidated damages, alternative contracts, § 282.
payment, measure of liability of guarantor of payment, § 732.
breach of covenants, assignment, § 472.
breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
business, agreement to relinquish, causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
carriers of goods, freight charges as affected by value of property, § 885.
cause of action, entirety, damages accruing subsequent to action, § 113.
compensatory damages, property sued for improved by wrong-doer, § 102.
conditions, attachment, forthcoming bonds, measure of damages for failure to deliver property, § 518.
illegal act, effect, § 474.
impossible conditions, effect, § 476.
penalties, limit of liability, penal bond, § 478.
construction, § 526.
injunction bonds, damages from restraint of injunction, § 526.
contracts, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
contracts of railroads, certainty of damages, anticipated profits, § 59n.
coupons, compound interest, separate agreement for interest, § 376.
creditors, agreement with, breach of contract, compensation for gains, profits, and losses sustained, § 78.
definition of single bond, § 470.
depreciation, injunction bonds, damages from restraint of injunction, § 527.
elements of damage, losses, bonds and undertakings, damages and costs, § 85.
employees, liquidated damages, alternative contracts, § 282.
executors and administrators, interest, necessity of demand, § 351.
exemplary damages, compensation for wrongs done with bad motive, liability of sureties, § 412.

Bonds—continued.
exemplary damages—continued.
violation of contract, § 390.
fraud, false representations, remote, conjectural and contingent damages, § 1176.
title of real estate, § 1171.
guaranty, contract of surety not to be extended by construction, illustrations, § 727.
measure of guarantor's liability, lost profits, remote damages, § 729.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
breach of covenant against incumbrances, rule of damages, payment of incumbrances, damages if not paid, § 623.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
penalties, amount of damages, recovery, power of court of equity, § 474.
injunction, bonds, damages, costs and expenses, attorneys' fees, §§ 524-528.
defenses, facts not available as defenses, § 529.
what may be shown as defense, § 530.
mode of assessing, § 523.
power of court of equity, § 521.
right of action, when it arises, who may sue, § 522.
scope and effect of obligation, § 520.
stay of injunctions, § 530a.
surety's liability, measure of damages, § 723n.
validity, effect, § 520.
interest, agreements for interest, construction, § 305.
allowance, against government, § 332.
money loaned, § 325.
money paid, § 326.
allowance from time when money ought to be paid, § 329.
bonds to the United States, law governing as to interest, § 359.
compound interest, periodical interest after maturity of debt, § 377.
conflict of laws, effect of usury, § 364.
demand, necessity of, § 351.
miscellaneous cases of suspension of interest, § 380.
rate applicable after debt is due, § 309.
law or custom fixing rate, § 306.
suretyship, contract not to be extended by construction, § 727.
suspension, miscellaneous cases of suspension of interest, § 380.
process, payment prevented by legal process, § 381.
war preventing payment, § 382.
interpleader, interest on judgments pending review, § 389.
judgment, acceptance of bond in lieu of, causes of action, splitting, damages accruing subsequent to action, § 113.
agreement not to enter judgment, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
default, nominal damages, right to nominal damages, amount, § 9.
verdict, necessity of judgment following, § 466.
liens, bond to prevent, contracts for work, measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
liquidated damages, alternative contracts, § 282.
amount, large sum to secure payment of small sum, § 288.
distinction from penalty, § 283.
intention to liquidate, evidence and effect of, § 284.

Bonds—continued.
market value of property, value, evidence, admissibility, § 445.
mortgages, satisfaction, breach of covenant to pay incumbrances, measure of damages, § 631.
municipal bonds, bills and notes, liability of drawer and indorsers for principal sum, § 555.
obligation, effect of failure to perform, at law and in equity, § 470.
payment, application, general payment applied to debt bearing interest, first to interest, § 244.
compound interest, computation, application, and effect of partial payments, § 379.
effect, § 218.
evidence of payment, § 233.
gift inter vivos, § 221.
mode of payment, § 215.
instalments, breach of covenants, assignment, § 472.
persons to whom payment may be made, § 231.
penalties, condition of defeasance of bonds, payment before or pending suit, statute 4 and 5 Anne, § 473.
interest, allowance of, § 331.
judgments, § 333.
limit of recovery, interest, §§ 477, 478.
relief from penalties, American statutes and practice, § 474.
verdict, necessity that judgment follow verdict, § 466.
probate bonds, actions on bonds as to sureties, liability for executor's debt to estate, § 495.
conditions in general, § 493.
estates of decedents, bonds for administration, § 493.
execution of probate bonds, manner, recoveries which may be had, § 494.
guardian's bond, mitigation of damages, § 497.
sureties' liabilities, § 496.
sets of sureties, liability as between, § 498.
process, wrongful issuance, parties, joint and several liability for torts, § 140.
public officers, absolute liability for money received, § 479.
adjustment of liability between sets of sureties, §§ 480, 481.
construction of bonds, § 485.
measure of damages against officers for neglect of duty, nominal damages, §§ 489, 492.
mode of redress for official dereliction, § 486.
neglect of duty by other officers, effect, § 482.
private injuries covered by official bonds, § 487.
right of action against officers, § 484.
sureties on official bonds, measure of damages against, § 488.
receiver's bonds, liability of sureties, § 539a.
replevin bond by defendant to retain property, damages, § 509.
replevin bonds, assessment of damages in suit on bond, § 502.
conditions of replevin bonds, § 499.
conditions for return of property, § 500.
conditions required by modern statutes, § 501.
damages recoverable, § 505.
damages when plaintiff recovers as special owner, effect of change in statute, § 508.
effect of judgment in replevin suit, § 506.
evidence of value of property, § 504.
judgment, what may be shown in defense or in mitigation, § 507.
sureties, when not liable for judgment in replevin suit, § 503.
sales
breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
non-delivery of stock, § 657.

Bonds—continued.
sales—continued.
payment in specific articles, value, damages, § 659.
proof of value of property, § 654.
special bonds, liability as between sets of sureties, § 498.
statutory bonds, condition required by statute, necessity of compliance, § 475.
stock converted into bonds, transfer, refusal to issue or transfer, rule of damages, § 657.
suretyship, creditor's duty to realize on securities, limitations of release to injury sustained by surety, § 738.
liability of surety company, expenses of procuring new bonds, § 838.
payment by administrators of estate, § 222.
sureties' remedies for indemnity, consequential damages, liability of principal, § 753.
contribution between cosureties, actions, conclusiveness of judgment, § 760.
who are cosureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
payment giving right to reimbursement, § 750.
right of subrogation, when and to whom available, § 736.
right to call upon creditor to collect debt, damages, § 741.
right to defend between principals, § 743.
tender, amount, sufficiency, § 266.
trover, conversion of money securities, measure of damages, § 1132.
deeds, bonds to convey land, conversion, measure of damages, § 1134.
time of conversion, § 1112.
value of property, elements, evidence, § 448.
use of property prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.

Book-Bindery
contract to furnish steam, contractor's liability, consequential damages for defective work, § 705.

Books
carriers, duty, damages for injuries to or loss of non-marketable property, § 919.
proof of value, § 933.
copyright, statutory right to property, § 1198.
delay in publication, liquidated damages, stipulation when damages are uncertain, § 291.
manuscript, baggage, what constitutes baggage, § 954.
pamphlets, trover and conversion, damages, § 1117.
record book of nurse, what constitutes baggage, § 954.
trover, measure of damages, property without market value, § 1117.
mitigation of damages, wilful taking or refusal to surrender, § 1140.
value of property, proof of value, § 1113.

Bottles
sales, breach of contract, consequential damages, § 52.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 672.

Boundaries
breach of contract, damages, right of seller of land to recover purchase price and interest, abatement of price, § 567.
trespass to real property, exemplary damages, mitigation, § 1032.

Bounties
salvage service, agreements, right to fix specific amount as compensation for salvage service, § 716.
requisites, parties liable, § 715.

Brain Injured
carriers of passengers, injury to passenger, proof of damage, § 945
excessive or inadequate verdicts for personal injuries, discretion of jury as to damages, instructions, § 1256n.
pleading, special damages, necessity of alleging, § 421.

Brakeman Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Brandy
vessels, carriers of goods, breach of contract, remote consequences, § 902.

Breach of Contract
see Contracts.

Breach of Covenants
see Covenants.

Breach of Marriage Promise
Ch. XXIII, §§ 983-990.
aggravation of damages, disease, §§ 985, 986.
rape or mere sexual commerce, § 984.
seduction, § 984.
consequences, medical expenses, child-birth or miscarriage, § 985.
certainty of damages, mitigation of breach, § 73.
defenses, amount of damages, consideration of nature of defense set up, § 986.
disapproval of marriage by family, mitigation of damages, evidence disclosing fact, reducing injury, § 159.
disease, mitigation of damages, evidence disclosing fact reducing injury, § 159.
elements of damage, pecuniary elements, other elements, § 92.
evidence, adaptation to damages claimed, § 437.
expressions, conduct and religious belief of sufferer, § 453.
intimacy of parties, engagement, etc., § 986.
physical examination of plaintiff, § 451.
excuse for breach of contract, disease, § 989.
impotency, insanity, § 989.
lack of chastity, § 989.
exemplary damages, compensation for wrongs done with bad motive, violation of contract, § 390.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
right to recover exemplary damages, § 987.
expressions, conduct and religious belief of sufferer as evidence of damages, § 453.
injury to feelings, affections, and wounded pride, damages, § 983.
injury to feelings or health, damages, § 986.
liquidated damages, stipulations when damages are uncertain, § 290.
loss of opportunity to marry, element of damage, §§ 983, 986.
losses as elements of damage, labor and expenditures, § 80n.
mental anguish, § 986.
recovery of damages for mental suffering, § 979.
mitigation of damages, § 154.
conduct or character of plaintiff diminishing injury, § 163.

Breach of Marriage Promise—continued.
mitigation of damages—continued.
lack of chastity, seduction, disease, § 990.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
nature of action, § 983.
parties, who may sue, § 983.
physical examination of plaintiff, discretion of court, § 451.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
presumption of chastity, excuse for breach of contract, § 989.
remarks of counsel, enhancement of damages, § 986.
right to damages, nature, survival, § 7.
seduction, mitigation of damages, recovery of exemplary damages in action for breach of promise, § 1284.
slander, defamatory words, elements of damages, § 986.
survival of action, § 7.
wealth of defendant as element of damages, § 988.
evidence, reputation, § 988.

Bread
compensatory damages, property sued for improved by wrong-doer, § 102.

Breeding
see Animals.

Bribery
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.

Brick Yard
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1069.

Bricks
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647n.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Bridges
contracts for work, accident preventing performance, liability, § 700.
contractor's liability, damages for delay, actual loss, § 704.
delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
demands for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, §§ 710, 711.
eminent domain, compensation, basis for estimating value of land, § 1074.
deduction for benefits, special benefits, § 1084.
injury to property not taken, ascertainment, § 1068.
railroad property taken for railroad uses, § 1078.
right to compensation, § 1061.
value for condemnor's purpose, § 1075.
franchises, compensation for injury to franchise, ascertainment of value, § 1079.
material sold, breach of contract by seller, consequential damages, § 663.
repairs, consequential damages, act complained of must be efficient cause, § 29.

Bridges—continued.
repairs—continued.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.

Brokers
agent's liability to third persons, acts in excess of, or without authority, measure of damages, § 798.
implied warranty of authority, § 797.
authority, agent acting without or in disregard of authority, damages, § 787.
bills and notes, consideration, parol evidence to show defect of consideration, § 553.
compensation, amount, basis for computation, § 683.
charter, compensation for procuring, § 679.
forfeiture of compensation, bad faith of broker, § 683.
liquidated damages, mode of liquidating, computation of time, § 281.
manner of performance of duty, effect of misconduct, § 683.
modes of compensating for services, § 684.
mutual credit, compensation by mutual demand, § 148.
necessity of completing sale, effect of custom or usage, § 683.
reasonable amount where principal refuses to sell land, § 683.
negligence in transmission of telegraph message, loss of employment and profits of business, § 967.
recoupment for fraud, breach of warranty, etc., § 180.
revocation of authority, amount of compensation, where principal refuses to sell land, § 683.
right to compensation, performance of services, § 683.
sale for agent's advantage, § 683.
telegrams, negligent delay in transmission or delivery of message, liability for loss of employment and profits of business, § 967.
liability when object of sender is known, §§ 961, 963.
knowledge of sender's purpose, details, §§ 969, 971.
usual and customary rate, no special contract, § 683.
vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
fraud, natural and proximate consequences of fraud, § 1163.
implied warranty of authority, agent's liability, general rule, § 797.
instructions, duty of agent to adhere to instructions, liability for exceeding commission, § 774.
liability, disregard of instructions, § 786.
insurance, agent's neglect of duty or agreement concerning insurance, § 772.
liquidated damages, manner of liquidating, computation of time, § 281.
loan brokers, liability to principal, § 786.
nature, broker's agency, liability to principal, § 786.
performance of services, broker's compensation for services, measure of compensation, § 683.
reimbursement, mode of doing business, § 792.
revocation of authority, broker's compensation for services, measure of compensation, § 683.
sales, liability for failure to sell at certain time, § 781.
ship brokers, compensation by mutual demand, § 148.
stock brokers, agent's liability to third persons, acts in excess of, or without authority, measure of damages, § 798.
duties, liability, disregard of instructions, § 786.
expenditures of agent, right to reimbursement, § 789.
indemnity, agent's right to indemnity for losses or damages, § 793.

Brokers—continued.
stock brokers—continued.
right of agent to reimbursement, effect of mode of doing business, § 792.
sales, breach of contract, non-delivery of stock, damages, § 657.
stock received in violation of trust, liability of agent to principal, § 773.
suretyship, surety's remedies for indemnity, payment giving right to reimbursement, § 751.
telegraphs and telephones, mitigation of damages by injured party, negligence in transmission or delivery of messages, § 973.
trover, measure of damages, property of fluctuating value, § 1119.
mitigation of damages, § 1138.
recoupment of advances and compensation, § 180.
time of conversion, § 1112.

Bronchitis
consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.

Brooms
building for storage, contract for particular work, contractor's liability, damages for delay, actual loss, § 704n.

Buckwheat Threshed
evidence, opinions on subjects of common experience and observation, § 442.

Building and Construction Contracts
abandonment of contract, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
accident preventing, performance, contracts for works, liability, § 700.
agent's liability to third persons, torts, § 800.
articles falling, consequential damages, § 19.
assumpsit, mitigation of damages, action for rebuilding house, § 544.
bills and notes, partial failure of consideration, § 544.
bonds, contract of surety not to be extended by construction, illustrations, § 727.
discharge or reduction of surety's responsibility by act of creditor, § 735n.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
damages recoverable, mental and physical suffering, liability for original trespass, § 763.
liability of surety company, expense of procuring new bonds, § 838.
suretyship, construction of contract, § 724n.
contract not to be extended by construction, § 726.
measure of surety's liability, § 723n.
breach of contract, accident preventing performance, contractor's liability, § 700.
certainty in nature and cause of damages required, § 53.
consequential damages, proximate consequences of breach, § 45.
certainty of damages, necessity, proximate result of act or omission, § 53.
contractor's liability, § 697.
consequential losses, liability for expenses, defects to be remedied, § 699n.
defects, consequential damages, § 705.
liability for non-performance, consequential losses, § 702.
liability for profits lost and expenses incurred, § 698.

Building and Construction Contracts—continued.
breach of contract—continued.
pleading, special damages, necessity of alleging, § 419.
profits, required certainty of anticipated profits, § 60.
repairs, elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.
certificate of architect, engineer, etc., necessity, effect, upon whom binding, § 712.
contractor's liability, consequential damages for defective work, § 705.
damages for delay, actual loss, § 704.
rental value, expenses, § 703.
general rule, benefit of contract to employer, cost and inconvenience, § 697.
liability for profits lost and expenses incurred, § 698.
covenants, warranty and quiet enjoyment, measure of damages, for breach, § 605.
defects, consequential damages, § 705.
elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.
necessity of remedying, liability for expenses and subsequential losses, § 699.
defects in plans, non-performance, liability of contractor, § 701.
delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
nuisance, remote consequences of injury, recovery of damages, § 1050.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
delaying or stopping work, liability of employer, effect of not abandoning contract, performance stopped by law, certainty of proof of profits, collateral contract, § 714.
recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, § 713.
demand for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, §§ 709, 710.
elements of damage, losses, expense incurred to prevent or lessen damage, employer may finish work at contractor's expense, § 91.
evidence, opinions on subjects of common experience and observation, § 442.
excavation, lateral support destroyed, consequential damages for torts, liability, illustration, § 18.
exemplary damages, parties liable, master's liability for acts of servant, § 408.
extra work, basis for adjustment, § 707.
express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
falling objects, consequential damages for torts, liability, illustrations, § 19.
guaranty, measure of guarantor's liability, § 729.
injunction bonds, damages from restraint of injunction, § 526.
insurance money, rights of contractor in insurance money on building under construction, § 706.
interest, allowance on unliquidated demands, § 347.
ladder falling, consequential damages, intervening cause, ladder on sidewalk striking pedestrian, § 37.
liquidated damages, alternative contracts, § 282.
manner of liquidating, computation of time, § 281.
necessity of valid contract, § 280.

Building and Construction Contracts—continued.
liquidated damages—continued.
part performance accepted where damages are liquidated, effect of, § 296.
stipulation when damages are uncertain, § 291.
illustrations, § 293.
waiver of right, § 299.
marine insurance, damages in case of partial loss, § 816.
materials, delay in furnishing, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.
material sold, breach of contract by seller, consequential damages, § 663.
mistake, erection on land of another, damages, mitigation of damages, § 1027.
mitigation of damages, reduction of loss or benefit, action against contractor, § 164.
negligence, causes of action, entirety, damage to real property, § 116.
consequential damages, § 18.
non-expert testimony, opinions upon subjects of common experience and observation, § 442.
nuisance, remote consequences, liability, § 1050.
parties, joint liability, extinguishment or severance, § 136.
payment, contracts for work, approval, payment, § 706.
contractor's right to payment, rights in insurance money, interest, § 706.
persons to whom payment may be made, § 231.
persons who may make payment, § 230n.
performance, demand for part for performance of entire contract, recovery by contractor on quantum meruit, § 709.
liability of employer for delaying or stopping work, effect of not abandoning contract, § 714.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
necessity of full performance, inability to perform, § 688.
special damages, necessity of alleging, § 419.
plans, duty of carrier, damages for injuries to or loss of non-marketable property, § 919.
recoupment and counterclaim, election to file cross-claim or sue on demand, § 187.
repairs, breach of contract to repair, losses as elements of damages, expenses to prevent or lessen damages, § 88.
consequential damages, act complained of must be efficient cause of damage, § 29.
defenses, circuity of action, operation of principle in favor of plaintiff, § 145.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
request not to perform certain work, contract price as measure of damages, action by contractor against employer, § 706.
sales, defective lintel, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
soil defective, contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
suretyship, interpretation of surety's contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
right of subrogation, availability, § 736n.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.

Building and Construction Contracts—continued.
vendor and purchaser—continued.
damages recoverable by vendor against purchaser, recovery when contract does not fix price, § 575.
waiver of requirements, contracts for particular work, contract price as measure of damages, action by contractor against employer, § 706.
walls falling, contracts for work, defects, consequential damages, § 705.
excavation, consequential damages, liability extending to details and incidents, § 54.

Building and Loan Associations
interest, allowance from time when money ought to be paid, § 329.
liquidated damages, certainty, contracts for payment of money, § 287.
payments, application by debtor, § 235.

Building Restrictions
breach of contract, damages recoverable, vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
breach of covenants against incumbrance, damages where incumbrance is permanent, § 627.
what are incumbrances, § 620n.
damages, contracts to replace or rebuild, failure to rebuild, rebuilding not permitted, § 830.
eminent domain, compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
intoxicating liquors, covenant against incumbrances, damages for breach, permanent incumbrance, § 627.
vendor and purchaser, conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.

Buildings
adjoining owners, lateral support, removal, buildings threatened, damnum absque injuria, § 3.
agent's liability for tort, § 800.
attachment bonds, damages recoverable, § 512.
causes of action, entirety, successive actions for damage to real property, § 114.
consequential damages for torts, § 16n.
covenants for title
breach, measure of damages, costs of eviction, expenses, § 593.
recovery of nominal damages, actual loss not shown, § 598.
what constitutes breach, § 592.
covenants of warranty and quiet enjoyment,
breach, consideration as measure of recovery, rule in England and Canada, § 607.
parties, notice of suit to covenantor, § 615.
value of land at time of loss as measure of damages, Torrens Act, § 608.
derailment of train, car falling on building, consequential damages, nervous shock, § 24.
destruction, consequential damages for torts, liability, illustration § 18.
damnum absque injuria, § 3.
fire, consequential damages, § 18.
mitigation of damages, § 154.
mitigation of damages, trespass, § 1027.
special damages, necessity of alleging, § 420.
eminent domain, assessments of damages and benefits, lands to be considered, § 1088.

Buildings—continued.
eminent domain—continued.
basis for estimating value of land, § 1074.
cause of action, entirety, successive actions for damage to real property, § 116.
injuries to various interests, damages in favor of tenants, § 1081.
injury to property not taken, ascertainment, § 1066.
expenditures to lessen loss, § 1072.
facts which may be considered, § 1073.
measure of compensation, market value of property, § 1064.
encroachment
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
definition, what are incumbrances, § 620n.
farm leases, repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
fire
consequential damages, acts or omission as proximate cause of damage, § 29.
liability, illustration, § 18.
mitigation of damages, § 154.
parties, joint right or liability, determination, principles, § 137.
destruction of property to prevent fire as damnum absque injuria, § 3.
fraud, false representations, remedies by purchaser of property, § 1174.
injunction bonds, damages from restraint of injunction, § 528.
lateral support, landlord and tenant, damages for not making repairs, special cases, § 860.
leases, covenants, special and consequential damages for breach of various covenants, § 865.
covenants for repairs, § 855.
measure of liability for not making repairs, § 858.
destruction of demised premises, effect as to rent, § 852.
liquidated damages, effect of part performance, acceptance, § 296.
mesne profits, action for, damages recoverable, consequential and punitive damages, § 994.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
nuisance, continuing liability of person causing nuisance, § 1040.
special elements of damages, repairs, § 1048.
persons falling, consequential damages for torts, liability, illustrations, § 18.
pleading, special damages, necessity of alleging, § 420.
power to operate elevators sold, breach of contract by seller, delay in delivery, evidence of rental value, § 665.
removal, injunction bonds, damages from restraint of injunction, § 528n.
replevin, house removed, measure of damages, § 1144.
sales, breach of contract, non-delivery of property contracted for, property not in market, recovery of lost profits, § 652.
delay in delivering property, loss of rental value, evidence, action by purchaser against seller, § 665.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
train colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23.
trespass, destruction of property, damages, compensation, § 1015.
permanent injury, estimate of damages, § 1017.
remedial injuries, estimate of damages, § 1018.
suit by tenant, possessor or licensee, damages, § 1012.

Buildings—continued.
trover, measure of damages, liability of purchaser, effect of wilfulness, § 1110.
special or consequential damages, § 1129.
vehicle colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23a.
vendor and purchaser, damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.

Burden of Proof
agency, sales, disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
breach of covenant against incumbrances, rule of damages, payment of incumbrance, damages if not paid, § 623.
breach of covenants of warranty and quiet enjoyment, damages, expenses, costs and counsel fees as damages, § 618.
carriers, duty, care of property, burden of proof as to injury or loss, § 917.
goods lost or injured, apportionment of damages in case of mutual fault, § 928.
contracts for work, liability of employer for delaying or stopping work, recovery on contract and quantum meruit; consequential losses, mitigation of damages, action by contractor against employer, § 713.
damages, burden of proof, § 438.
factor's duty, sale of goods, care, § 777.
landlord and tenant, partial destruction of demised property, effect as to rent, § 851.
master and servant, wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
negligence, assessment of damages, evidence of defendant in reduction of damages, § 430.
officers, neglect of duty, measure of damages, nominal damages, § 489.
payment, application by debtor, evidence, § 237.
personal injuries, mitigation of damages, admissibility of evidence, § 1255.
sales, executed sales, recovery by seller after rescission of contract, price fixed by third party, § 643.
set-off, counterclaim and recoupment, measure of damages, § 188.
suretyship, release of securities by creditors, injury to surety, value of released securities, § 740.
telegraphs and telephones, mitigation of damages by injured party, burden of proof, questions for jury, § 973.
trespass to real property, crops injured or destroyed, damages, § 1023.

Burglar Alarm System
failure of system to work, consequential damages, act complained of must be efficient cause of damage, § 29.
installation, contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Burglar Proof Safe
breach of warranty of sale, consequential damages, proximate consequences of breach, illustrations, § 46.

Business
breach of contract, measure of damages, losses as elements of damages, § 79.

Business—continued.
certainty of damages, profits from commercial venture, § 67.
tortious interference, § 70.
competition
breach of contract not to compete, consequential damages, proximate consequences, § 45n.
evidence of value, § 445.
liquidated damages, payment of fixed sum for partial or total breach of contract, § 295.
stipulations when damages are uncertain, § 290.
exemplary damages, allowance, in what actions recoverable, § 392.
conspiracy, measure of damages sustained by one driven out of business, § 1174.
damnum absque injuria, business injured by competition, § 3.
ejectment, certainty of damages, anticipated profits, § 60.
elements of damage, losses, expense incurred to prevent or lessen damages, extent of duty, § 90.
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.
injury to property not taken, remote damages, § 1071.
exemplary damages, joint liability for, § 407.
goodwill, evidence of value, property without market value, § 448.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
injuries to business, attachment bond, consequential damages, certainty, recovery of items of damages which are certain, § 55.
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
certainty of damages, tortious interference with business, § 70.
credit injured, attachment bonds, wrongful attachment, damages recoverable, § 512.
evidence, opinions on common experience and observation, admissibility, § 442.
injunction bonds, damages from restraint of injunction, § 528.
interruption, attachment bonds, wrongful attachment, damages recoverable, § 512.
landlord and tenant, lessee's right to damages for injury to business, § 867.
pleading special damages, necessity of alleging, § 420.
trespass to real property, aggravation and special damages, § 1029.
party wall injured, damages, § 1025.
wilful or malicious injuries, consequential damages, § 44.
leases, covenants, special and consequential damages for breach of various covenants, § 865.
lessees, mitigation of damages by lessee, § 871.
recovery for damages to business of, §§ 867, 870.
liquidated damages distinguished from penalty, § 283.
loss of business, breach of contract to pay money, special obligations, measure of damages, § 77n.
carriers of passengers, injury to passenger, proof of damage, § 945.
eminent domain, injury to property not taken, ascertainment, § 1068.
consequential injury, § 1062.
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.
malicious prosecution, elements of damage, § 1237.
replevin, defendant's rights, special and consequential damages, § 1158.
slander and libel, accusations actionable per se, § 1213.

Business—continued.
loss of business—continued.
special damages, accusations, not actionable per se, § 1218.
special damages, necessity of alleging, § 420.
malicious prosecution, damage, elements, loss of business, § 1237.
exemplary damages, injury to business, § 1237.
market value of property, evidence, admissibility, § 445.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
nuisance, interference with business, elements of damages, § 1054.
successive actions, continuity, damages recoverable in first action, § 1039.
personal injuries, earning capacity diminished, evidence, § 1248.
injury to business as element of damage, § 1246.
preventing trade, firing on negroes, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
public amusement, exclusion of person, consequential damages, injury to public, § 32.
sales
bills and notes, consideration, parol evidence to show defect of consideration, § 552.
partial failure of consideration, admissibility of evidence, § 547.
breach of contract by seller, delay in delivery, damages, § 664.
causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
consequential damages, recovery only when contemplated by parties, § 45.
dentist business sold, bills and notes, partial failure of consideration, § 547.
evidence of value, actual sales, § 447.
breach of contract by seller, § 654.
fraud, false representations, measure of damages, § 1171n.
goodwill sold, breach of contract by seller, certainty of proof, § 658.
evidence of value of property, § 654.
liquidated damages, stipulations when damages are uncertain, §§ 290, 291.
payment, mode of payment, § 214.
recoupment and counterclaim, connection between cause of action and crossclaim, § 183.
slander and libel, injury to public, consequential damages, injury through third person, § 33.
reputation, accusations actionable per se, injuries to business, § 1212.
special damages, words not actionable per se, § 1218.
suspension, receiver's bonds, liability of sureties, § 539a.
telegrams
delay in transmission or delivering, damages recoverable, loss of employment and profits of business, § 967.
knowledge of sender's purpose, details, § 969.
liability when object of sender is known, § 961.
loss of employment and profits of business, damages, § 967.
trespass to personal property, special and consequential damages, remote damages, § 1100.
trespass to real property, special damages, injury to business, loss of profits, § 1029.
value of property, elements, evidence, § 448.
property without market value, § 448.

Butter
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

C

C. O. D.
collection, failure to collect, measure of agent's liability under various circumstances, § 774.

Cab Injured
causes of action, entirety, damage to property and injury to persons by same act, § 118.

Cabbage Seed
sales, warranty of quality, damages for breach, interest, expenses and special injuries, §§ 673, 674.

Cable
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

California
agent's liability to third persons, measure of damages, action without authority, § 798.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537n.
attorney's fees, restitution after reversal of judgment, § 469.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
bonds, administration of estates, liability of sureties, § 495.
statutory bonds, liability of sureties, § 475.
brokers, liability, § 786.
business sold, bills and notes, consideration, parol evidence to show defect of consideration, § 552.
carriers of passengers, liability for exemplary damages, § 951.
recovery for injury to wife, child or servant, § 952.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, value for condemnor's purpose, § 1075.
compensation, what is just compensation, § 1063.
deduction for benefits, special benefits, § 1087.
exemplary damages, § 1145.
interest, allowance, stockholders' statutory liabilities, § 343.
allowance on unliquidated demands, § 347.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
lessee's right to damages for injury to business, § 870.
malicious prosecution, elements of damage, § 1238.
patents, infringement, compensation in equity, computation, to what time made, § 1192.
personal injuries, loss of capacity for enjoyment as damages, § 1243.
replevin, suit on bond, assessment of damages, § 502.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
warranties of quality and quantity, breach, damages, § 670.

California—continued.
seduction, evidence for plaintiff, damages recoverable, § 1283.
slander and libel, aggravation of damages, wealth and rank of parties, § 1210.
telegraphs and telephones, repetition of message, limitation of liability, § 958.
trade-marks, infringement, measure of damages in equity and at law, § 1202.
trespass to personal property, damages, mental suffering, § 1095.
trespass to real property, permanent wrong, damages, § 1017.
trover, damages, attorney's fees, § 1130.
property of fluctuating value, §§ 1118, 1119.
value of property enhanced by defendant, § 1127.
vendor and purchaser, breach of contract by vendor, measure of damages, English rule, application, § 581.

Canada
carriers of goods, delay in transportation, loss of market value, § 909.
contracts for particular work, breach, liability for profits lost and expenses incurred, § 698.
covenant against incumbrances, breach, English and Canadian rule of damages, § 624.
covenants of warranty and quiet enjoyment, breach, measure of damages, consideration as measure of recovery, rule in England and Canada, § 607.
death by wrongful act, damages, restriction to pecuniary losses, rule in England and Canada, § 1262.
recovery for death of child, § 1272.
dower, damages for detention of dower, § 1003.
eminent domain, interest, element of compensation, § 1091.
evidence, physical examination of plaintiff, § 451.
exemplary damages, liability of officers, § 412.
interest, allowance against government, § 332.
compound interest, periodical interest after maturity of debt, § 377.
landlord and tenant, assignment or subletting, breach of covenant not to assign, damages, § 861.
lessee's right to damages for injury to business, § 869.
partial destruction of demised property, effect as to rent, § 851.
nuisance, continuity, when nuisance is not continuous wrong, § 1045.
personal injuries, damages where negligence only is alleged, mental anguish, § 1245.
sales, breach of contract by seller, non-delivery of stock, § 657.
warranty of title, breach, measure of damages, § 669.
suretyship, express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 765.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, property of fluctuating value, measure of damages, English, Canadian and Australian cases, § 1123.
vendor and purchaser, interest on purchase money, action by vendor against purchaser, § 577.

Canals
construction, contracts for services, necessity of full performance of express contract, inability to perform, § 688.
public wrongs, right of action, remedies available, § 4.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, §§ 1067, 1070.
what is just compensation, § 1063.
exclusion of vessel, consequential damages, breach of statutory duties, § 32.

Canals—continued.
leases, injury to vessel, act or omission as proximate cause of injury, consequential damages, § 30.
nuisance, continuance of liability of person who causes nuisance, § 1040.
remote consequences of injury, recovery of damages, § 1050.
successive actions, damages recoverable in first action, § 1039.
passenger in stage coach drowned, consequential damages, acts of third person, § 42.
public wrongs, obstruction of canal, right to damages, § 4.
repair, consequential damages, act complained of must be efficient cause of damage, § 30.
sale of railroad and canal, repairs, covenant of purchaser to keep property in repair, effect, measure of damages for breach of covenant, § 860.
stage coach falling into canal, consequential damages, proximate cause, act of third person as cause, § 42.
vessel, trover, value of property, proof of value, § 1113.
vessel wrecked, consequential damages, intervening cause, canal boat delayed and wrecked by flood, § 37.

Cancellation of Instruments
deeds, appeal and supersedeas bonds, instances of liability, specific conditions, § 537n.
recoupment and counterclaim between vendor and purchaser, § 184.
usury, interest, agreements for more than legal rate before maturity, effect, § 313.

Cancer
pleading, necessity of alleging special damages, § 421.

Cans
carriers of goods, delay, liability where facts are known, § 913.

Car Repairer Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Cargo
see Vessels.

Carlisle Tables
see Death by Wrongful Act.

Carpenters
contracts for services, continuation of original contract, § 685.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Carriage
see Vehicles.
breach of contract, damages as including other than pecuniary elements, § 92.

Carried Beyond Destination
consequential damages, distinction between liability in tort and on contract, § 49.
damages recoverable by passenger, verdicts excessive, § 953n.
distinction between liability in tort and on contract, § 49.
heat, car unheated, illness of passenger as proximate consequence of failure to notify passenger of destination, § 36.
husband carried beyond destination, loss of services of wife, expenses, § 36.

Carried Beyond Destination—continued.
injury to passenger, mental anguish independent of other injury, § 943.
nervous shock without impact, right to recover damages, § 24.
notice, failure to notify passenger of destination, § 36.
passenger alighting at wrong place, damages peculiar to passengers, § 939.
loss of time, expenses, exposure, § 938.
passenger's indiscreet acts not grounds for damages, § 940.
verdicts excessive, § 953n.

Carriers
Federal Employers' Liability Act, who are within, § 1305.

Carriers of Goods
see also, Bills of Lading.
acceptance, freight charges, time when freight is due and earned, § 887.
actions, breach of contract, remote consequences, § 902.
carrier's action for freight charges, § 884.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
duty of agent to adhere to instructions, liability for exceeding commission, § 774.
apportionment of damages, mutual fault, § 928.
breach of contract, elements of damage, mental suffering, § 95.
breach of contract to furnish goods for shipment,
charter parties, damages for breach of charter to load with enumerated articles, § 883.
mitigation of damages, duty of carrier, § 880.
burden of proof, § 882.
partial breach, measure of damages, § 879.
shipper's rights in profits made by carrier, § 881.
distinction between contracts, § 877.
measure of damages, § 877.
burden of proof, injury or loss of goods by carriers, §§ 917, 931.
connecting carriers, freight charges, amount of charges in absence of express agreement, § 884.
goods lost or injured or delayed, damages, effect of Carmack Amendment to Interstate Commerce Act, § 932.
live stock injured, splenetic fever, liability of carrier, § 931.
negligent delay in transportation, liability for loss of market value of property, quantity or quality, § 906.
parties, joint and several liability for torts, § 141.
consequential damages for torts, intervening cause, § 37.
liability of carriers, extraordinary circumstances, § 36.
construction prevented, injunction bonds, damages from restraint of injunction, § 528n.
contractual exemptions from liability for damages, § 6.
criminal act of agent, liability of carrier, § 931.
delay in transportation, breach of contract, consequential damages, notice of special circumstances, § 52n.
certainty of damages, chances for prizes and promotions, § 71.
connecting carriers, damages, interstate commerce, § 931.
consequential damages, liability, intervening cause, § 37.
dead bodies, transportation, physical and mental suffering as elements of damage, § 915.
delivery of account, statute of limitations operating to bar account, liability of carrier, § 914.
expenses of further transportation, liability for, § 912.
goods to be used for competing for prizes, measure of damages, § 71.

Carriers of Goods—continued.
delay in transportation—continued.
interest, liability for, § 905.
live stock, opinion evidence, instances of rejection and admission of opinions, § 443.
market value, loss of, § 906.
application of rule to ocean carriage, § 909.
basis of rule imposing liability, §§ 907, 908.
quantity or quality, § 906.
medicine for sick person, consequential damages, § 36.
negligence, liability, proximate cause, § 903.
notice, liability of carrier, § 905.
knowledge of or notice to carrier that goods must not be delayed, §§ 913, 914.
liability where facts are known, § 914.
notice of arrival, neglect to give notice of refusal to receive goods, § 910.
omission to transport and deliver within reasonable time, liability, § 905.
perishable goods, ordinary goods, measure of damages, § 905.
physical and mental suffering, liability, § 915.
recoupment, breach of warranty, etc., § 180.
negligence, § 180.
refusal to receive property, damages, § 905.
special circumstances, consequential damages, §§ 52n, 92.
value of use of property, unmarketable property, § 905.
delivery, breach of contract by seller, delay in delivery, mitigation of liability, § 666.
burden of proof as to injury or loss of goods by carriers, § 917.
charges and expenses, delivery hindered or prevented, § 894.
time when freight is due and earned, § 887.
mistake, delivery to wrong person, liability of carrier, § 931.
refusal to deliver, recovery for time and expenses of obtaining property, § 911.
refusal to receive property, damages, § 905.
demurrage, charges and expenses, delivery hindered or prevented, § 894.
delay in transportation, negligence, proximate cause, § 903.
detention of goods, § 897.
deviation from route, breach of contract, remote consequences, § 902.
consequential damages, intervening cause, § 37.
injury to or loss of goods having market value, damages, § 918.
losses, liability of carrier, § 931.
discrimination, freight charges, unlawful discrimination, damages recoverable, §§ 886, 898.
duties of carriers
care of property, § 916.
acts of public authority, effect, § 916.
inherent vice, § 916.
recovery for injury to or loss of goods by bailee, § 918.
refrigerators, defective machinery, § 916.
duty of carrier to transport, § 905.
rates, breach of duty or contract, carrier's liability, § 898.
duty to carry for all persons, liability, § 916.
failure to transport, elements of damage, losses, expense incurred to prevent or lessen damage, § 91.
refusal to transport, exemplary damages, § 930.
expenses, delay, liability for expense of further transportation, § 912.
delivery hindered or prevented, § 894.
explosion caused by fire, consequential damages, extraordinary circumstances, liability of carriers, § 36.
explosives, anticipation of injury to persons, illustrations, § 25.

Carriers of Goods—continued.
fire, carrier's negligence as proximate cause of injury, empty car marked as containing explosives, property destroyed by fire, § 36.
fire caused by explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.
fraud, freight charges as affected by value of property, § 885.
freight charges, amount of charges in absence of express agreement, § 884.
charter to load with enumerated articles, § 895.
contracts, limitation of common-law liability, Carmack Amendment to Interstate Commerce Act, § 904.
definitions, freight, § 887.
demurrage, § 897.
delivery of goods to consignee rather than pledgee, recovery of freight charges, § 931.
delivery of goods hindered or prevented, § 894.
demurrage and detention of cars, § 897.
duty of carrier, refusal to transport, exemplary damages, § 930.
duty to pay, § 917.
injury or loss of goods, recovery by shipper of market value, liability for freight charges, § 918.
pro rata freight charges, circumstances entitling shipper to take goods without being liable for freight charges, § 889.
rule for adjustment, § 893.
time when pro rata freight is due, common law and admiralty rules, § 890.
transshipment of freight, § 891.
recoupment against freight, negligence or violation of contract, § 896.
right to freight when cargo is insured, § 892.
sales
breach of contract by seller, evidence of loss, § 653.
non-delivery of property in market, damages recoverable by buyer, § 651.
stopping goods at intermediate point, § 888.
time when due and earned, prepayment, §§ 887, 888.
unlawful discrimination, damages recoverable, §§ 886, 898.
value of property, § 885.
freight, marine insurance, losses, general average, § 818.
injury to or loss of goods, apportionment of damages in case of mutual fault, § 928.
burden of proof as to injury or loss, § 917.
compensation on basis of market value, § 918.
damages, injury to or loss of non-marketable property, § 919.
what law governs, § 918.
damages less than value of goods at destination, § 922.
criticism of rule, § 923.
loss at place of shipment, § 924.
exemplary damages, § 930.
interest on damages, § 920.
liability of shipper for freight charges, § 918.
measure of agent's liability, defaults in regard to bills and notes, § 775.
mitigation of liability by insurance, § 929.
money stolen, § 916.
museum, liability of carrier for loss of, mental suffering, § 915.
official bond, measure of damages against sureties, property taken from letter, § 488.
pictures, damage to, necessity of notice to indemnitor to fix liability, § 87n.
proof of value, § 933.

Carriers of Goods—continued.
injury to or loss of goods—continued.
qualification of carrier's liability by notice, effect of Carmack Amendment, § 926.
recovery by shipper for expenses and labor in lessening loss, § 921.
limitation of liability, contractual exemption from liability for damages, § 6.
common-law liability, limitation of Carmack Amendment, § 904.
delay in transportation, liability for loss of market value of property, basis of rule, § 908.
transportation of dead bodies, physical and mental suffering as elements of damage, § 915.
duty of carrier, care of property, burden of proof as to injury or loss, § 917.
loss of or injury to goods, compensation on basis of market value, § 918.
conduct of shipper as affecting damages, § 925.
liability for partial loss when value is limited, § 927.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
duty to carry for all persons, liability, § 916.
freight charges as affected by value of property, § 885.
trover, evidence of value, § 1113.
live stock, amount of damages, opinions of witnesses, admissibility, § 444.
cars, duty in furnishing, § 898.
consequential damages, breach of contract, proximate consequences of breach, § 45n.
effect of extraordinary circumstances, defective chute for loading animals, § 35.
contracts, limitation of common-law liability, Carmack Amendment to Interstate Commerce Act, § 904.
delay in transportation, amount of damages, opinion evidence, § 444.
liability for negligence, proximate cause, § 903.
loss of market value, § 906.
basis of rule, § 907.
quantity or quality, § 906.
fraud, false representations by carriers as to safety of road, damages to live stock, § 1173.
injury to or loss of goods, burden of proof as to injury or loss, § 917.
compensation on basis of market value, § 918.
damages where there are successive carriers, effect of Carmack Amendment to Interstate Commerce Act, § 932.
disease, public wrongs, right of action, remedies available, § 4.
failure to feed and water, parties, joint and several liability for torts, § 141.
market value, damages, § 918.
proof of value, § 933.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
recovery by shipper for expenses and labor in lessening loss, § 921.
snow storm, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
splenetic fever, liability of carrier, § 931.

Carriers of Goods—continued.
live stock—continued.
parties, joint and several liability for torts, § 141.
refusal to transport, breach of contract, carrier's liability for remote consequences, § 902.
replevin, special damages, § 1146.
market value, delay in transportation, loss of market value, § 906.
mistake, losses, liability of carrier, § 931.
negligence, contractual exemption from liability for damages, § 6.
employees, limitation of liability by contract, interstate commerce, § 904.
notice, delay, liability where facts are known, § 913.
qualification of carrier's liability by notice, interstate commerce, § 926.
perishable property, liability of carrier, property not protected from weather, § 931.
recoupment against freight, § 896.
refusal to transport
breach of contract, carrier's liability for remote consequences, § 902.
rates, carrier's liability, § 893.
damages, increased expenditures, loss of customers, § 901.
measure of damages, § 905.
measure by cost of transportation, decline in value, increased cost, § 899.
duty of carrier to transport, § 905.
duty to carry for all persons, liability, § 916.
elements of damage, losses, expense incurred to prevent or lessen damage, § 91.
exemplary damages, § 930.
liability for loss of shipper's profits, notice to carrier of contract for profits, shipper's good faith, § 900.
route, measure of agent's liability under various circumstances, § 774.
salvage services, nature of peril, duty of claimant, persons who may be salvors, § 717.
telegraph and telephone companies, nature of duty, § 957.
transportation
breach of contract, consequential damages, liability under special circumstances, § 51.
recovery for costs of other means of transportation, § 91.
charter-parties, breach of contract to furnish goods, measure of damages, § 878.
consequential damages, anticipation of injury to person, proximate cause of injury, § 25.
contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
trover, value of property, proof of value, § 1113.
unloading goods, consequential damages, recovery only when contemplated by parties, § 45, n 25.
value, freight charges as affected by value of property, § 885.

Carriers of Passengers
admiralty, torts, recovery of damages by passengers, measure of damages, nominal damages, § 1288.
alighting, consequential damages, passenger injured by jumping from train failing to stop, § 36.
parties, joint and several liability for torts, § 141.
refusal to stop train, exemplary damages, § 937.
wrong place, damages peculiar to passenger, § 939.
assault, damages for assault on passenger, excessive verdicts, § 953n.
assault by fellow passenger, consequential damages, § 19.
damages recoverable, § 941.

Carriers of Passengers—continued.
assault by fellow passenger—continued.
protection of passengers, duty of carrier, § 941.
assault by servant, compensation, physical and mental suffering of passenger, injury to character, § 942.
exemplary damages, parties liable, master's liability for acts of servant, § 408.
baggage, abusive language, ejection of passenger, mental suffering independent of other injury, § 943.
disclosure of value, § 954.
duty of carrier, goods lost or injured, qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
exemplary damages, § 950.
loss of or injury to baggage, § 954.
measure of damages, § 955.
place, removal of passenger at wrong place, damages, separation from baggage, § 939.
sleeping car companies, liability for baggage, § 956.
what is baggage, § 954.
breach of contract to carry passengers, agreement to furnish stage line, measure of damages, § 877n.
consequential damages, recovery for successive consequences, §§ 57, 58.
costs of other means of transportation, recovery for, § 91.
damages as including other than pecuniary elements, § 92.
distinction between liability in tort and on contract, § 48.
elements of damage, pecuniary elements, other elements, § 92.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
car unheated, illness of passenger as proximate consequence of failure to notify passenger of destination, § 36.
carried beyond destination
consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
failure to notify passenger of destination, § 36.
husband carried beyond destination, loss of services of wife, expenses, § 36.
distinction between liability in tort and on contract, § 49.
nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
verdicts, excessive, § 953n.
character as affecting damages for personal injuries, § 94.
child injured, actions, § 952.
damages for physical injury to child, excessive verdicts, § 953n.
connecting carriers, ejection, refusal to pay fare, right to recover damages, § 940.
passenger's indiscreet acts not grounds for damages, § 940.
consequential damages, act of injured party, fraud and exposure to peril, § 39.
carrier's liability, extraordinary circumstances, insanity of injured person, § 36.
certainty, recovery for successive consequences of act or omission, § 58.
injured passenger rendered susceptible to disease, § 36.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
dead bodies, transportation, recovery for mental suffering, independent of other injury, § 943.
delay, breach of contract, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
breach of guaranty, liability for special loss, § 947.

Carriers of Passengers—continued.
delay—continued.
damages peculiar to passenger, § 939.
passenger's indiscreet acts not grounds for damages, § 940.
recovery by passenger for special loss, § 947.
verdicts, excessive, § 953n.
delay in making trip with special train, § 953n.
derailment of train, distinction between liability in tort and on contract, § 49.
disease, passenger infected with smallpox from ticket agent, recovery for special loss, § 947.
duties, nature of obligation, liability of carrier in tort, § 934.
ejection, character as affecting damages for personal injuries, § 94n.
condition of health of passenger, § 935.
connecting carriers, refusal to pay fare, right to recover damages, § 940.
consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
extraordinary circumstances, § 36.
nervous shock, proximate consequences of act or omission, § 36.
death of passenger struck by train as proximate consequence of ejection, § 36.
destination, necessity that ejected passenger attempt to reach destination, § 36.
distinction between liability in tort and on contract, § 49.
drunken man ejected, nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
enhancement of damages, negro trainman assisting in making ejection, § 938.
exemplary damages, § 937.
allowance, grounds upon which allowed, § 393n.
enhancement and mitigation, § 404.
wealth of defendant, scope of inquiry, § 405.
injury, damages for ejection without physical injury, excessive verdicts, § 953n.
mental anguish independent of other injury, § 942.
mental suffering, elements of damage, § 95.
mitigation of damages, fraudulent or objectionable conduct on part of plaintiff, evidence, § 949.
nervous shock without impact, consequential damages, § 21, n 15.
pain and suffering, past and prospective damages, § 944.
passengers indiscreet acts not grounds for damages, § 940.
physical and mental suffering, injuries to character, § 942.
place, removal of passenger at wrong place, damages peculiar to passenger, intervening cause, § 939.
damages sustained on track, § 939.
inconvenience, sickness, death, § 939.
loss of time and expense, consequences of exposure, § 938.
negligence of hotel proprietor, liability of carrier, § 939.
separation from baggage, § 939.
refusal to carry, damages, § 935.
refusal to pay fare, right to recover damages, § 940.
remedies, action in tort, breach of contract, § 934.
tender of fare, amount, sufficiency, § 267n.
threat to push passengers from platform, jumping, damages recoverable, § 942.
threats, damages for threatened ejection, excessive verdicts, § 953n.
exemplary damages, § 937.
mental suffering independent of other injury, § 943.
verdicts excessive, damages recoverable, by passenger, § 953n.

Carriers of Passengers—continued.
ejection—continued.
wilful or malicious injuries, consequential damages, § 44.
evidence of damage, loss of mental and physical capacity, § 946.
loss of business, earning capacity, § 945.
exemplary damages, negligence or breach of duty, § 950.
difference in rule in some states, § 951.
parties liable, master's liability for acts of servant, assault, § 410.
expenses, alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
refusal to carry, damages, loss of time, expenses, exposure, humiliation, § 936.
exposure, alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
damages recoverable, § 936.
consequential damages, breach of statutory duty, illness of passenger, § 32.
refusal to carry, damages, loss of time, expenses, exposure, humiliation, § 936.
fraud, false representations by carriers, loss of time of passengers, damages, § 1173.
free pass, contractual exemptions from liability for damages, § 6.
heat, car unheated, illness of passenger as proximate consequence of failure to notify passenger of destination, § 36.
humiliation, refusal to carry, damages, loss of time, expenses, exposure, humiliation, § 936.
inconvenience as ground of damages, § 939.
injury to female passenger, loss of marriage prospects, § 947n.
injury to wife, child or servant, actions, § 952.
insanity of injured person, consequential damages, extraordinary circumstances, § 36.
limitation of liability, duty of carrier, goods lost or injured, qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
mental suffering, recovery independent of other injury, § 943.
mitigation of damages, § 949.
benefit not derived from defendant, § 158.
salary of injured person not stopped, § 158.
nature of injury, damages, § 942.
notice to board train, consequential damages, death of passenger struck by train as proximate consequences of ejection, § 36.
pain and suffering, past and prospective damages, § 944.
passenger's indiscreet acts, right to damages, § 940.
physical and mental suffering, injury to character, damages for, § 942.
platforms and depots, ejection of passenger, consequential damages, liability of carriers, extraordinary circumstances, § 36.
injury caused by obstacle at depot, consequential damages, act of third person, § 42.
pleading, recovery by passenger for special loss, § 947.
special damages, necessity of alleging, § 421.
proof of damages, §§ 945, 946.
protection of passengers, duty of carrier, acts of servants, § 941.
adequate protection and shelter, consequential damages, breach of statutory duties, § 32.
proximate cause, passenger's indiscreet acts not grounds for damages, § 940.
rates, discrimination, negligence or breach of duty, exemplary damages, § 950.
refusal to carry, § 935.
character as affecting damages for personal injuries and in actions for death, § 94.

Carriers of Passengers—continued.
refusal to carry—continued.
consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
exemplary damages, §§ 937, 950.
loss of time, expense, exposure and humiliation, § 936.
loss of services of wife of passenger, § 935.
motive, distinction made for bad motive, contracts, § 99.
passenger's indiscreet acts, § 940.
time, failure to transport passenger within appointed time, damages recoverable, § 939.
relation, continuance, when terminated, § 941.
creation, purchase of ticket, § 941.
protection of passengers, duty of carrier, § 941.
seats, failure to provide, damages recoverable, § 941.
white passenger in coach for colored people, § 948.
wrongfully placing passenger in second class coach, § 948.
separation of passenger and children, recovery for mental suffering independent of other injury, § 943.
servant injured, actions, § 952.
servants, abusive language, ejection of passengers, damages recoverable, § 942.
assault, conduct of insane servant, recovery by passengers, mental suffering independent of other injury, § 943.
damages for physical and mental suffering, § 942.
duty of carrier, protection of passenger, § 941.
exemplary damages, parties liable, liability of master for acts of servants, § 410.
sleeping car companies, liability for baggage, § 956.
placing white passengers in negro's coach, damages, § 956.
refusal to furnish berth, damages, § 956.
special loss, loss of employment or in business, § 947.
loss of marriage prospects, injury to female passenger, § 947n.
passenger infected with smallpox from ticket agent, § 947.
special train, delay, excessive verdicts, § 953n.
suicide, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
ticket agent, special damages, passenger inflicted with smallpox from ticket agent, § 947.
tickets
alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
damages peculiar to passengers, § 939.
damages for refusal to carry, § 935.
exemplary damages, § 937.
injury to passenger, mental anguish independent of other injury, § 943.
passenger's indiscreet acts not grounds for damages, § 940.
time, negligence or breach of duty, failure to transport passenger within appointed time, damages recoverable, guaranty, § 939.
time, loss of, alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
refusal to carry, damages, loss of time, expenses, exposure, humiliation, § 936.
transportation, character as affecting damages for personal injuries, § 94.
duty of carrier to transport, § 905.
trespassers, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.
verdicts, negligence or breach of duty, excessive verdicts, § 953.
white passengers in negroes' coach, damages, liability of sleeping car companies, § 956.

Carriers of Passengers—continued.
wife injured, actions, § 952.
wrong destination
consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
distinction between liability in tort and on contract, § 48.
extraordinary circumstances, § 36.
passenger directed to leave train three miles from destination, liability for injuries, § 36.
railroad car unheated, illness of passenger as proximate consequence of failure to notify passenger of destination, § 36.

Cashiers
see Banks and Banking.

Castings
sales, warranty of quality, existence, remedies on breach, § 668n.

Castor Beans
sales, oats containing castor beans, animals injured, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Caterer
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Cattle
carriers, burden of proof as to injury or loss of goods by, § 917.
delay in transportation, negligence, proximate cause, § 903.
limitation of liability by contract, interstate commerce, § 904.
loss or injury to property, expenses and labor in lessening loss, recovery, § 921.
liability of carrier, § 931.
market value, damages, § 918.
proof of value, § 933.
depreciation, trespass to real property, aggravation and special damages, § 1028.
easements, eminent domain, injury to property not taken, ascertainment, § 1067.
erection of stable enjoined, injunction bonds, damages from restraint of injunction, § 528.
feed sold, breach of contract by seller, consequential damages, § 663.
market value, § 52n.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
opinion evidence as to value of property, § 446.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647n.
breach of contract by seller, evidence of loss, § 653n.
evidence of value of property, § 654.
breach of contract to buy, contracts for services, mode of compensating, § 684.
executed sales, recovery by seller against buyer, § 642.
warranty of quality, damages for breach, interest, expenses and special injuries, § 675.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, §§ 961, 962, 964.
trespass to personal property, special and consequential damages, §§ 1100, 1101.
trespass to real property, destruction of fences, damages, § 1024.
trover, special and consequential damages, § 1129.

Cattle Guard
animals injured, consequential damages under fence statutes, scope of statutes, § 20.
passenger alighting at wrong place, consequential damages, liability of carriers, extraordinary circumstances, § 36.

Causes of Action
see Actions; Circuity of Action.

Caustic Soda
sales, breach of contract by seller, consequential damages, § 663.

Caveat Emptor
bills and notes, partial failure of consideration, § 544.
payment in counterfeit money, bills of broken banks, forged notes and checks, §§ 223-224.
judicial sales, warranties of title, existence, § 668.
payment, medium, bills of insolvent banks, § 224.
sales, warranty of quality, determination, § 667.
warranty of title, implied warranty, § 668.

Cellar
goods frozen, false deeds to land taken, inability to provide cellar, necessity that damages result from injuries, proximate cause, § 29.

Cement
sales, warranty of quality, damages for breach, interest, expenses and special injuries, §§ 672, 675.

Cemeteries
see also, Sepulchre.
exclusion of person, exemplary damages, malice in law and malice in fact, § 394.
removal of dead bodies, trespass, recovery for injury to feelings, § 1029.
violation of burial, elements of damage, mental suffering, § 95.

Certainty of Damages
admiralty, torts, § 1289.
attachment prevented, act or omission as proximate cause of damages, certainty of damages, § 30.
breach of marriage promise, uncertain mitigation, § 73.
commercial agencies, proof of damages, § 69.
consequential damages, only items which are certain are recoverable, § 55.
recovery for successive consequences, § 56.
illustrations, § 57.
contingent advantage, § 72.
contract for particular work, material not furnished, effect of not abandoning contract, contractor's rights, § 714.
performance prevented, contractor's rights, certainty of proof of profits, § 714.
contracts for services, wrongful discharge, measure of damages, liability for expenses and for lost commissions, § 694.
damages must be certain in nature and cause, § 53.
details and incidents, liability for principal loss extends to details and incidents, § 54.
elements of damage, motive, tort actions, § 100.
insurance agencies, proof of damages, § 69.
interest, allowance of interest on accounts, § 349.
judgment, necessity that judgment be certain, § 467.

Certainty of Damages—continued.
landlord and tenant, lessee's right to damages for injury to business, § 867.
violation of contract to lease, certainty of damages, § 65.
liquidated damages, stipulation when damages are uncertain, §§ 290, 293.
stipulation where damages otherwise certain are uncertain, § 285.
stipulation where damages are certain and easily proved, § 289.
municipal corporations, failure to provide sinking fund, § 74.
prizes and promotions, chances for, § 71.
profits, animals, prospective growth, § 62.
commercial ventures, § 67.
labor, § 66.
orchard, prospective growth, § 62.
partnership, dissolution, § 68.
required certainty of anticipated profits, §§ 59, 60.
special contract, §§ 63, 64.
prospective damages, certainty of proof, § 121.
sales, breach of contract, sale of good will, compensation, certainty of proof, § 658.
warranties of seeds and breeding quality of animals, etc., § 61.
tortious interference with business, § 70.
trespass to personal property, certainty of damages, § 1093.
verdict, necessity of verdict being certain, § 461.
when verdict is deemed certain, § 461.

Certified Checks
see Banks and Banking.

Certiorari
attachment, bonds, recovery of costs and expenses of attachment suit, § 516.
interest on judgments pending review, § 389.
reversal, restitution after reversal of judgment, how made, § 468.

Chain, Defective
sale, consequential damages, breach of contract, liability under special circumstances, § 51.

Chairs
patents, infringement, damages, whole article not patented, mitigation of liability, § 1194.

Champerty and Maintenance
attorney's compensation, actions by attorney, value of services rendered, admissibility of evidence, § 682.

Chancery
see Equity.

Chandeliers
repairs, contracts for services, entire and apportionable contracts, § 691.

Change of Grade
see Highways and Streets.

Character
alienation of affections, mitigation, evidence, character of wife, § 1285.
assault and battery, character as affecting damages for personal injuries, § 94.

Character—continued.
assault and battery—continued.
mitigation of damages, effect of criminal prosecution and fine of offender, § 151.
carriers of passengers, negligence or breach of duty, damages for physical and mental suffering, injury to character, § 942.
causes of action, entirety, injury to person and damage to reputation by same act, § 118.
elements of damage, character as affecting damages for personal injuries and in actions for death, § 94.
exemplary damages, enhancement and mitigation, § 404.
malicious prosecution, elements of damage, character injured, § 1237.
mitigation of damages, assault, § 151.
character and feelings, injuries to, § 163.
libel and slander, § 152.
personal injuries, mitigation of damages, admissibility of evidence, § 1255.
character as affecting damages, § 94.
slander and libel
mitigation, character of defendant, poverty, § 1233.
evidence, plaintiff's bad character, conduct and declaration, § 1126.
trespass to real property, mitigation of damages, § 1027.

Charge of Court
see Instructions.

Charter Parties
see Vessels.

Chastity
elements of damage, character as affecting damages for personal injuries and in actions for death, § 94.
indecent assault, personal injuries, mitigation of damages, admissibility of evidence, § 1255.
slander and libel
accusations actionable per se, § 1213.
want of chasity, evidence in mitigation, § 1231.
special damages, accusations not actionable per se, § 1219.

Chattel Mortgages
creditor's right to make application of payments, § 239.
failure to deliver, contracts for work, defects, consequential damages, § 705.
foreclosure, payment, mode of making payment, § 216.
payment, application by creditor, § 239.
mode of payment, § 216.
records, failure to record, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
redemption, tender, when tender may be made, § 262.
replevin, cause of action, mistake of remedy, effect, § 106.
cause of action not divisible, § 106.
sales, appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
measure of damages against officers for neglect of duty, nominal damages, § 491.
measure of damages against sureties on official bonds, § 488.
tender, conditions, tender must be unconditional, § 270.
persons by whom tender may be made, § 264.
time of making tender, § 262.
trover, conversion of money securities, measure of damages, § 1132.
mitigation of damages, § 1139.

Chattel Mortgages—continued.
trover—continued.
measure of prevention, § 157.
parties, joinder of parties, general and special owners, § 139.

Chattels
see Personalty.

Checks
see Banks; Bills and Notes.

Cheese Sold
fraud, evidence of value, § 445n.

Chemist
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Child a ventre sa mere
injuries to unborn child, right to damages, § 8.

Child Birth
carriers, charges for children born in transit, § 887.
personal injuries, damages, pain and suffering, recovery for mental suffering, aggravated wrong, § 1243.
premature birth, increase of suffering, § 1244.
telegraphs and telephones, delay in delivering message, damages recoverable, physical pain, loss of life, § 965.

Child Injured
see Infants.

Chloroform
consequential damages, intervening cause, sale of chloroform to intoxicated person, § 38.

Chose in Action
see Actions.

Christian Scientist
ejection, passenger who is Christian Scientist, damages recoverable, control of feelings, § 940.

Churches
see Religious Societies.

Cinders
eminent domain.
injury to property not taken, ascertainment, § 1066.
compensation, § 1065.
consequential injury, § 1062.

Circuity of Action
agreements not to sue, § 144.
breach of covenant, actions for purchase money, defenses or cross-claims against, § 632.
damages must be equal, § 146.
defense of, § 143.
operation, principle operates in favor of plaintiff, § 145.
reciprocal obligations, § 147.
recoupment, acts which may be basis for recoupment, § 181.
burden of proof, § 188.

Circuity of Action—continued.
recoupment—continued.
liquidated and unliquidated damages, § 185.
nature of defense, § 171.
validity of claim essential, § 174.
release, covenant not to sue as release, § 258.
what constitutes release, § 259.

Civil Damage Laws
see Intoxicating Liquors.

Civil Law
admiralty torts, difference between liability in admiralty and at common law, § 1286.
bills and notes, liability of drawer and indorser for principal sum, § 555.
diversion of surface water, rule of civil law, recovery of nominal damages, § 3.
municipal bonds, bills and notes, liability of drawer and endorser for principal sum, § 555.

Civil Rights
see Carriers of Passengers.

Clay Sold
acceptance of goods, liability for not accepting, remedies of seller, § 647.

Clerks
see Agency; Master and Servant.
compensation for services, remoteness of stipulated compensation, § 684.
malicious prosecution, elements of damage, clerk injured, § 1237.
tender, persons to whom tender should be made, § 265.
wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.

Clerks of Court
assessment of damages without jury, § 428.
docket fees, officers and public employees, bonds, construction, § 485.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.

Clock Sold
breach of warranty, recoupment and counterclaim, nature of defense, § 170.

Clothing
baggage, what constitutes baggage, § 954.
carriers of goods, delay in transportation, loss of market value, § 908.
duty of carrier, damages for injuries to or loss of non-marketable property, § 919.
contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
contracts for services, mode of compensating, § 684.
injury to clothing, personal injury, actions, parent's action, § 1252.
parent and guardian, bond, mitigation of damages, § 497.
sales, breach of contract, consequential damages, market value, § 52n.
payment in specific articles, presumed value of notes, etc., § 660.
trover, measure of damages, value of property enhanced by defendant, § 1128.

Coal
contracts for services, compensation, mode of compensating, profits, § 684.
dam obstructed, parties, joint and several liability for torts, § 141.
drainage contracts, suretyship, measure of surety's liability, coal burned, § 723n.
eminent domain, injury to property not taken, ascertainment, § 1067.
landlord and tenant, rent, amount as affected by subsequent facts, § 845.
sales
acceptance of goods, liability for not accepting, remedies of seller, § 647.
refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by seller, consequential damages, § 663.
delay in delivery, damages, § 664.
liability under special circumstances, § 51.
non-delivery of property contracted for, consequential damages, illustration, § 663.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 673.
liquidated damages, stipulations when damages are uncertain, § 293n.
part of stipulated quantity received, recovery by seller, § 646.
transportation, contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
trespass to real property, trees and mining ores, liability, § 1019.
trover, damages, value of property enhanced by defendant, § 1126.
vessels, carriers of goods, refusal to carry, increased expenses, loss of customers, § 901.

Coal Dust
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Coffin Sold
pine box substituted for coffin, breach of contract, damages as including other than pecuniary elements, § 92.

Collar Bone Broken
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
excessive or inadequate verdicts, discretion of court as to damages, instructions, § 1256.

Collections
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
measure of agent's liability under various circumstances, § 774.
factors, remitting funds, effect of failure to obey orders, § 785.
measure of agent's liability under various circumstances, § 774.

Collectors
customs duties, officers, neglect of duty, measure of damages, nominal damages, § 492.

Colliery
nuisance, joint and several liability, private and public nuisance, § 1059.
trespass to real property, measure of damages, benefit received, § 1014.

Collisions
automobiles, collision with vehicle, nervous shock as physical injury, consequential damage, § 22.
consequential damages, extension of liability by statutes, § 16.
fence statutes, scope of statutes, § 20.
interest, allowance of interest in actions for torts, § 355.
train colliding with building, consequential damages, nervous shock, right to recovery for injury to health, § 23.
trains colliding, consequential damages, nervous shock without impact, right to recover damages, § 24.
parties, joint and several liability for torts, § 141.
vehicles colliding, consequential damages, proximate cause, act of third person as cause, § 40.
injury to pedestrian, consequential damages, liability, § 19.
wagon injured, consequential damages for torts, liability, illustration, § 18.
vehicles colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23a.
vessels
admiralty, torts, collision cases, division of loss, contribution between joint wrong-doers, § 1287.
difference between liability in admiralty and at common law, § 1286.
compensation by mutual demand, § 148.
consequential damages, certainty, liability for principal loss extending to details and incidents, § 54.
liability, illustrations, § 18.
injury to or loss of goods having market value, damages, § 918.
interest, actions for torts, § 355.
marine insurance, cause of damage must be proximate, § 803.
mitigation of damages, measures of prevention, § 157.

Colorado
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
covenants, warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
death by wrongful act, beneficiaries, § 1261.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
evidence of value and damages, § 1089.
exemplary damages, restriction or denial, § 400.
interest, allowance, stockholders' statutory liabilities, § 343.
judgments, interest, pleading, how interest claimed in pleading, § 387.
personal injuries, excessive or insufficient verdicts, power of court over verdicts, § 460.
railroads, animals injured, interest, actions for torts, § 355.
trover, damages, interest and value of use of property, § 1115.

Combinations and Monopolies
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.

Commercial Agencies
certainty of damages, contract between agents and principals, § 69.

Commission Merchants
accounts, interest, conflict of laws, contracts between parties in different states, § 360.
fire insurance, damages, goods held for sale on commission, § 828.
measure of agent's liability under various circumstances, § 774.
telegraphs and telephones, knowledge of sender's purpose, details, § 969.

Commissions
see Agency; Brokers; Master and Servant.
broker's compensation for services, measure of compensation, § 683.
contracts for services, compensation, mode of compensating, profits, § 684.
duty of agent to adhere to instructions, liability for exceeding commission, § 774.
master and servant, servant's violation of contract, recoupment of damages, consequential losses, § 695.
telegraphs and telephones, negligence in transmission of message, liability for expenses, loss of commissions, § 966.
wrongful discharge of servant, liability for expenses and lost commissions, § 694.

Common Law
accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
adequate relief for violation of rights, § 1.
admiralty torts, difference between liability in admiralty and at common law, § 1286.
mitigation of liability, § 1295.
appeal, validity of supersedeas bonds, § 531.
assessment of damages, writ of inquiry, § 427.
bills and notes
partial failure of consideration, § 544.
admissibility of evidence, § 547.
nature of defense, cross-action, § 546.
bonds, obligation, effect of failure to perform at law and in equity, § 470.
breach of contract, damages recoverable by vendor against purchaser, legal remedy, injury resulting from non-performance, § 568.
carriers, freight charges, when pro rata freight is due, common law and admiralty rules, § 890.
causes of action, entirety, parties to actions under statutes, § 129.
consequential damages, extension of liability by statute, § 16.
covenants against incumbrances and covenants of seizin, similarity, § 625.
death, action, right of action at common law, § 1259.
dower, damages for detention of dower, § 1003.
extinguishment of dower right, § 1004.
eminent domain, right to compensation, § 1061.
interest, common law in America, § 303.
judgments, interest on, § 333.
quantum meruit claim to interest, § 324.
right to take interest, § 301.
statute, interest in England legalized by statute, § 302.
joint injury, entirety of causes of action, damages to parties jointly, § 128.
landlord and tenant
covenants for repairs, § 855.
breach of covenant, measure of liability, § 858.
legal system, object of system of law, adequate relief for violation of rights, § 1.
limitation of liability, contracts, limitation of common law liability, Carmack Amendment to Interstate Commerce Act, § 904.
mesne profits, claims for improvement, taxes, § 999.
remedy under the code, § 1000.
municipal bonds, bills and notes, liability of drawer and endorser for principal sum, § 555.
nuisance, mitigation of damages, deduction for benefits, § 1056.
officers, measure of damages against officers for neglect of duty, nominal damages, English rule, § 492.

Common Law—continued.
parties, joint right or liability, determination, principles, § 137.
penalties in affirmative agreements, breach, remedies, § 471.
pleading, statutory damages, necessity of specially alleging, § 425.
reprisals at common law, deduction from dower, § 1005.
salvage services, requisites, parties liable, § 715.
statutory damages, necessity of specially claiming or alleging, § 425.
suretyship, surety's remedies for indemnity, contribution between co-sureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
tender, right to make, § 260.
time when tender may be made, § 262.
usury, when contracts not void for usury, § 315.

Compensatory Damages
Ch. III, §§ 12-105.
see Actual Damages.
adequate relief for violation of rights, § 1.
admiralty torts, partial loss, elements of damages, § 1292.
agents, liability for acts of agents, exemplary damages, parties liable, liability of master for acts of servants, § 410.
amount, ascertainment, § 2.
assault, mitigation of damages, effect of criminal prosecution and fine of offender, § 151.
attachment bonds, exemplary damages, recovery, § 513.
building and construction contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
carriers, dead bodies, recovery for mental suffering, independent of other injury, § 943.
delay, liability for loss of market value of property, basis of rule imposing liability, §§ 907, 908.
delivery, refusal to deliver, recovery for time and expenses of obtaining property, § 911.
ejection of passengers, place, removal of passengers at wrong place, loss of time and expense, consequences of exposure, § 938.
certainty of damages required, §§ 53-74.
"compensatory damages" defined, synonym of actual damages, § 3n.
consequential damages, breach of contract, §§ 45-52.
tort, §§ 15-44.
contracts for services, measure of damages, recovery under statutes for unpaid wages, § 678.
contracts for works for particular purposes, liability for non-performance, consequential losses, § 702.
copyrights, infringement, compensatory and penal recoveries, § 1199.
corporations, stockholders, agreement not to sell stock, elements of damage, liability for gains and losses, § 78.
covenant against incumbrances, covenant running with the land, damages recoverable for breach, rule in some states, § 625.
damages for breach, permanent incumbrance, § 627.
payment of incumbrance, damages if not paid, § 623.
effect on executory contract, § 621.
covenants of warranty and quiet enjoyment, measure of damages for breach, §§ 605, 606.
damages affected by object of action, distinction in pursuit of property, detinue and replevin, § 1146.
direct and consequential damages, § 13.
direct damages, § 14.
elements of damages, §§ 75-105.
mental suffering, §§ 95, 96.
pecuniary elements, other elements, § 92.
eminent domain, what is just compensation, § 1063.

Compensatory Damages—continued.
equity, object of law of damages, § 12.
excessive or insufficient verdicts, remission of compensatory damages, § 459.
exemplary damages as compensation and punishment, who may recover, § 401.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
enhancement and mitigation of exemplary damages, § 404.
wealth of defendant, scope of inquiry, § 405.
grounds authorizing allowance of exemplary damages, § 393.
restriction and denial of exemplary damages, § 395.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
injunction bonds, damages from restraint of injunction, §§ 526, 527.
interest, allowance from time when money ought to be paid, § 329.
compensation, § 320.
tacit agreement to pay interest on accounts, § 322.
right not absolute, § 321.
joinder of actions, parties, joint and several liability for torts, § 140.
leases, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
legal system, object of system of law, adequate relief for violation of rights, § 1.
mesne profits, compensation on recovery of term, § 998.
motive, right to compensation not affected by motive, § 98.
nuisance, depreciation in value as damages, § 1047.
object of law of damages, award of compensation, § 12.
personal injuries, discretion of jury, instructions, § 1256.
pain and suffering, physical and mental pain, § 1242.
pleading, sufficiency of allegations, right to damages, § 413.
rule as to compensatory damages, § 395.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract, damages, sales of realty and personalty, § 566.
salvage service, considerations upon which compensation is fixed, § 719.
derelict property, § 720.
forfeiture of right to compensation, § 721.
interest, conflict of laws, § 719.
seduction, damages recoverable, compensatory and exemplary damages, § 1283.
slander and libel, damages, mental suffering and physical incapacity, § 1214.
telegraphs and telephones, actions, form, parties, § 972.
knowledge of sender's purpose, notice to company, § 968.
negligence in transmitting cipher messages, § 959.
trespass to real property, damages, compensation, § 1011.
destruction of property, damages, § 1015.
vendor and purchaser, breach of contract by purchaser, measure of damages, § 569.
damages recoverable by purchaser against vendor, adjustment of counter equities in specific performance, § 588.
defaulting vendee's rights, § 585.
measure of damages, conflict of American decisions, § 579.
measure of damages in England, § 578.
when English rule does not apply, § 581.
oral contract, § 583.
suits for specific performance, § 590.
verdict, excessive or insufficient verdict, setting aside, § 459.
statutory, double and treble damages, power of court or jury, § 464.

Compensatory Damages—continued.
verdict including compensatory and exemplary damages, cure by remittitur, § 459.

Competition
certainty of damages, loss of profits, inaccurate transmission of message preventing horse from being entered in race, § 71.
damnum absque injuria, business injured by competition, § 3.
eminent domain, injury to property not taken, remote damages, § 1071.
exemplary damages, allowance of exemplary damages, rule of United States Supreme Court, § 392.

Complaint
ad damnum, erroneous claim of damages, effect, § 417.
limit of amount of plaintiff's recovery, § 417.
necessity of stating, § 414.
code complaint, § 415.
amendment, attachment bonds, defenses, mitigation of damages, § 515.
bail bonds in civil actions, measure of damages, § 539b.
bills and notes, partial failure of consideration, nature of defense, cross-action, allegations, § 546.
want or failure of consideration, allegations, § 542.
carriers of passengers, recovery by passenger for special loss, § 947.
code pleading, demand of damages in code complaint, § 415.
counts, ad damnum, necessity of stating, § 414.
verdict, general verdict on several counts, effect, § 462.
courts, statutory, double and treble damages, power of court or jury, § 464.
dismissal, injunction bond, right of action, when it arises, parties who may sue, § 522.
issues, effect of not answering allegation of damage, § 416.
necessity of stating case which entitles plaintiff to damages, § 413.
nuisance, continuity, when nuisance is not continuous wrong, election to treat as permanent wrong, effect, § 1046.
officers and public employees, bonds, mode of redress for official dereliction, allegations, § 486.
proof under general allegations of damage, § 418.
special damages, necessity of alleging, § 419.
illustrations, §§ 420, 421.

Composition with Creditors
accord and satisfaction, § 250.
attachment, bond to satisfy judgment, conditions, § 519.

Compound Interest
see Interest; Usury.

Compromise and Settlement
see Accord and Satisfaction; Release.
agent's particular duties and liabilities, instructions violated, principal's right to indemnity, § 771.
attorney's compensation, actions by attorneys for compensation, value of services rendered, admissibility of evidence, § 682.
bills and notes, consideration, parol evidence to show defect of consideration, different agreement, § 552.
partial want of consideration, effect, § 543.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
breach of covenant for title, measure of damages, costs of eviction, expenses, § 593.
breach of covenant of warranty and quiet enjoyment, measure of damages, suit against remote covenantor, § 614.

Compromise and Settlement—continued.
criminal prosecutions, bills and notes, consideration fraudulent or illegal in part, § 550.
death by wrongful act, action, nature of statutory action, § 1260.
Federal Employers' Liability Act, effect under, § 1340.
fraud, false representations as to other settlements, suit in assumpsit, § 1174.
indemnity, agent's right to indemnity for losses or damages, § 793.
insurance, evidence of value, § 445.
interest, allowance from time when money ought to be paid, § 329.
compensation, tacit agreement to pay interest on accounts, § 322.
market value of property, evidence, admissibility, § 445.
money paid, allowance of interest on money paid, § 327.
payment, application, debtor's right to direct application, § 235.
personal representative, power to compromise under Federal Employers' Liability Act, § 1344.
release, who may execute, § 256.
suretyship, release of one or more of several parties, effect, § 742.
surety's remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
tender, amount, sufficiency, § 266.
value of property, evidence, actual sales, offers for property, market quotations, § 447.

Computation
judgment, effect of judgment, assessment of damages, § 465.
liquidated damages, stipulation for payment of fixed sum for partial or total breach, § 295.
verdict, certainty, when verdict is deemed certain, § 461.

Condemnation Proceedings
see Eminent Domain.

Conduct
exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.

Conductor of Train
allowing persons to ride on freight train contrary to rules, agent's particular duties and liabilities, principal's right to indemnity, § 771.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
falling from train, consequential damages for torts, liability, illustration, § 18.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Confession of Judgment
see Judgments.

Conflict of Laws
allowance of interest in actions for torts, § 355.
assessment of damages without jury, § 428.
attorney's compensation, actions by attorneys for compensation, value of services rendered, admissibility of evidence, § 682.
bills and notes
interest, § 556.
interest as damages, liability of drawer or indorser, § 558.
payment by maker or acceptor, § 556.
law governing liabilities on bills and notes, § 563.
place of contract, determination, § 358.

Conflict of Laws—continued.
bills and notes—continued.
protested foreign bills, re-exchange, § 563n.
when not recoverable, § 562.
bonds, penalty as limit of recovery, exception as to interest, § 478n.
broker's compensation, amount, usual and customary rate, no special contract, § 683.
carriers
goods lost or injured, damages less than value of goods at place of destination, § 924.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
what law governs, § 918.
contracts, general rule as to contracts, § 357.
place of contract, determination, § 357.
covenants for title, breach, measure of damages, conflict of laws, § 593.
covenants of seizin and good right to convey, damages for breach of covenants, § 593.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and counsel fees as damages, § 618.
measure of damages, conflict of laws, what law controls, § 605.
death by wrongful act, conflict of laws, injury inflicted in another state, § 1280.
exemplary damages, law governing as to right to recover exemplary damages, § 392.
exemptions from liability for damages, law governing, § 6.
future damages, ascertainment, present worth of future damages given, § 124.
interest, actions for torts, § 355.
annuities and legacies, § 344.
bills and notes, § 556.
law governing, § 358.
bonds to the United States, § 359.
effect of change in law of place of contract, §§ 368-370.
importance of subject as to law governing, § 356.
parties in different states, §§ 360-361.
pleading and proof of foreign law, § 367.
rate of interest as damages, § 366.
usury, effect of change in law of place of contract, § 370.
law governing where usury is involved, § 362.
measure of damages, laws governing, breach of contract, tort, § 7.
money, legal tender act, § 210.
value of money at time of contracting, § 209.
payment to be made in money of country of performance, § 206.
salvage service, considerations upon which compensation is fixed, interest, conflict of laws, § 719.
suretyship, right of surety to defend between principals, § 743.
surety's remedies for indemnity, contribution between co-sureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
telegraphs and telephones, limitation of liability, extent of power to limit liability, persons bound by stipulations, conflict of laws, § 958.
mental anguish, effect of statute allowing recovery for mental anguish, messages sent out of state, § 972.
validity of contract, note in violation of criminal laws, effect, § 542.

Confusion of Goods
agents, duty of agent to adhere to instructions, liability for exceeding commission, § 774.
measure of agent's liability under various circumstances, § 774.
violation of duty, secret profits, § 769.

Confusion of Goods—continued.
bank deposits, interest, allowance against agents, trustees and officers, § 353n.
compensatory damages, motive as affecting damages, tort actions, § 101.
consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
elements of damage, motive, how motive affects consequences of confusion of goods, § 101.
evidence, intendments against defendant for holding back evidence, § 439.
replevin, exemplary damages, right to recovery, aggravating circumstances, § 1145.
trover, measure of damages, value of property enhanced by defendant, § 1128.

Conjectural Damages
see Remote Damages.

Connecticut
assessment of damages, default or demurrer as admission, § 429.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
guaranty, effect of indorsing negotiable paper, § 730.
principal sum, certainty, § 541.
child birth, personal injuries, premature birth, increase of suffering, § 1244.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
covenants, warranty and quiet enjoyment, breach, measure of damages, value of land at time of loss, § 608.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
eminent domain, compensation, what is just compensation, § 1063.
exemplary damages, restriction or denial, § 400.
fraud, damages, expenses of litigation, § 1177.
highways and streets, consequential damages in highway cases, § 26.
interest on bills and notes, § 556.
nuisance, permanent injury, estoppel from recovery of future damages, § 1046.
officers, neglect of duty, measure of damages, nominal damages, §§ 489, 490.
personal injuries, earning capacity diminished, loss of time, pleading, § 1247.
slander and libel, damages, consideration upon which based, § 1207.
exemplary damages, § 1216.
mental suffering and physical incapacity, § 1214.
suretyship, creditor's duty to acquire liens, notice of reliance thereof, § 739.
trespass to personal property, special and consequential damages § 1102.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, damages, property of fluctuating value, § 1119.
usury, effect, contracts not void for usury, § 315n.
verdicts, general verdict on several counts, § 462.

Connecting Carriers
see Carriers of Goods.

Consequential Damages
see Proximate Result; Remote Damages.
act complained of must be efficient cause of injury, §§ 29-31.
acts of injured party, fraud and exposure to peril, § 39.

Consequential Damages—continued.
acts of third person, §§ 40-42.
existence of remedy against third person, § 42.
agency, articles falling, proximate cause, § 19.
particular duties and liabilities of agent, principal's right to indemnity, § 770.
animals, injuries to animals, consequential damages for torts, liability, illustrations, § 17.
attachment, trespass to personal property, special and consequential damages, remote damages, § 1100.
anticipation of injury as to person, illustrations, § 25.
breach of contract, §§ 45-52.
breach of statutory duties, § 32.
carriers of goods, breach of contract, remote consequences, § 902.
carriers of passengers, passengers' indiscreet acts not grounds for damages, § 940.
refusal to carry, damages, § 935.
cause of damage, marine insurance, necessity that cause be proximate cause, § 803.
certainty in nature and cause of damage required, § 53.
certainty of anticipated profits, required, §§ 59, 60.
contract for particular work
breach, consequential losses, contractor's liability, § 702.
defects to be remedied, liability for expenses and consequential losses, § 699.
contractor's liability, consequential damages for defective work, § 705.
damages for delay, actual loss, § 704.
liability of employer for delaying or stopping work, § 713.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
distinction between consequential liability in tort and on contract, §§ 48, 49.
elements of damage, losses, indemnity, liability for losses and expenses, § 84.
personal torts, § 93.
eminent domain, compensation, what is just compensation, § 1063.
injury to property not taken, ascertainment, § 1066.
right to compensation, § 1061.
express indemnities, damages recoverable; costs, expenses and attorney's fees, remote and consequential losses, § 762.
extension of liability by statutes, § 16.
extraordinary circumstances, liability as affected by, § 34.
illustrations, § 35.
liability of carriers, § 36.
fence statutes, consequential damages under, § 20.
fire insurance, general rule of damages, § 821.
highway cases, § 26.
illustrations, torts, § 18.
imputed negligence, § 27.
injury through third person, § 33.
intervening cause, §§ 37, 38.
leases, covenants, special and consequential damages for breach of various covenants, § 865.
repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
limitation of damages to natural and proximate consequences of injury, § 13.
master and servant, servant's violation of contract, recoupment of damages, consequential losses, § 695.

Consequential Damages—continued.
mesne profits, limitation of damages to value of use, consequential and punitive damages, § 994.
nervous shock as physical injury, §§ 22-24.
nervous shock without impact, § 21.
particular injury not foreseen, § 28.
pleading, allegation of damage, nuisance, § 1060.
probable consequences, damages awarded for, § 15.
profits, required certainty of anticipated profits, §§ 59, 60.
replevin, § 1146.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, evidence of loss, § 653.
non-delivery of property contracted for, consequential damages, § 662.
warranty of quality or quantity, interest, expenses and special injuries, § 671.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
suretyship, express indemnity, damages recoverable, § 762.
surety's remedies for indemnity, consequential damages, liability of principal, § 753.
torts, illustrations, §§ 17-19.
rule of consequential damages, § 16.
trespass to personal property, special and consequential damages, § 1100.
trespass to realty, animals, consequential damages for torts, liability, illustration, § 18.
trover, special or consequential damages, § 1129.
wilful or malicious injuries, §§ 43, 44.

Consideration
see also Contracts, etc.
accord and satisfaction, § 247.
act or promise which is new consideration, sufficiency, § 249.
compromise of disputed claim, § 251.
release, distinction, § 254.
bills and notes, consideration fraudulent or illegal in part, § 549.
liability of drawer and indorsers for principal sum, § 555.
parol evidence to show defect of consideration, § 551.
partial failure of consideration, § 544.
partial want of consideration, § 543.
principal sum, certainty, § 541.
want or failure of consideration, § 542.
cause of action, what constitutes entire demand, § 108.
covenants, breach, defenses and cross-claims against purchase money, § 637.
Alabama rule, § 634.
covenants for title
measure of damages, consideration not measure of damages, § 595.
consideration paid and interest, § 593.
presumption of consideration, admissibility of evidence, § 594.
reconveyances, § 599.
recovery of proportion of consideration, part of title lost, § 602.
covenants of warranty and quiet enjoyment
consideration as measure of damages, English rule, § 607.
conflict of laws, § 605.
damages, interest and taxes as items of damages, § 616.
property as consideration, § 606.
suit against remote covenantor, § 614.

Consideration—continued.
illegality
bills and notes, liability of drawer and indorsers for principal sum, § 555.
want or failure of consideration, § 542.
release, definition, validity, § 253.
suretyship, surety's liability, measure of damages, § 723.
vendor and purchaser, action for purchase money, defenses and counterclaims, failure of consideration, §§ 632-634.

Conspiracy
attachment prevented, act or omission as proximate cause of damages, certainty of damages, § 30.
business, measure of damages sustained by one driven out of business, § 1174.
consequential damages, act complained of must be efficient cause of damage, § 30.
contract to do several things successively or one thing continuously, § 110.
exemplary damages, joint liability, § 407.
fraud, parties, plaintiffs and defendants, § 1179.
joint and several liability for torts, § 140.
joint liability for exemplary damages, § 407.
recoupment, breach of warranty, etc., § 180.

Constipation
personal injuries, verdicts, excessive or inadequate verdicts, § 1242n.

Constitutional Law
see Eminent Domain; Police Power.
assessment of damages without jury, § 428.
usury, when contracts not void for usury, § 315.

Construction of Contracts
insurance policies, ascertainment of extent of injury, § 804.
fire insurance contracts, § 820.
marine insurance contracts, § 805.
release, construction, extrinsic evidence, § 255.
requisites, what will operate as release, § 258.
what constitutes, covenant not to sue, § 259.
surety's contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
contract not to be extended by construction, § 725.

Contagious Diseases
see Animals; Disease; Health.

Contingent Damages
see Remote Damages.

Continuances
costs, replevin bonds, actions, damages recoverable, § 505.
injunction bonds, damages, costs and expenses, attorneys' fees, § 524.

Contractors
see Building and Construction Contracts; Contracts for Particular Works.

Contracts
action on contract, agent's violation of duty, remedies, § 768.
master and servant, breach of contract, compensation as measure of damages, § 678.

Contracts—continued.
action on contract—continued.
parties, joinder of defendants, effect of non-joinder and misjoinder, § 135.
verdicts, excessive or insufficient verdict, power of court, § 460.
agent's liability to third persons, acts in excess of or without authority, measure of damages, § 798.
alternative contracts, liquidated damages, § 282.
amount due, money, effect of changes in value of money, § 208.
assessment of damages, cause of action, right to controvert, § 431.
assignments, certainty of damages, anticipated profits, § 59n.
value of property, evidence, actual sales offers for property, market quotations, § 447.
attorney's compensation, actions by attorneys for compensation, value of services rendered, admissibility of evidence, § 682.
breach of contract
animals, contract to treat sheep when diseased, measure of damages, § 79.
annuity and life tables, admissibility, § 455.
assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
attachment bonds, damages recoverable, wrongful attachment, actual damages, § 512.
defenses or mitigation of damages, what may be shown, § 515.
attorney's fees, consequential damages, recovery for successive consequences, § 58.
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
damages on bills of exchange dishonored, re-exchange, § 560.
brokers, agency, duties, liability, disregard of instructions, § 786.
carriers of goods, contract to furnish goods for shipment, charter-parties, damages for breach of charter to load with enumerated articles, § 883.
refusal to transport, damages, increased expenditures, loss of customers, § 901.
carriers of passengers, alighting at wrong place, damages peculiar to passenger, § 939.
consequential damages, passenger directed to leave train three miles from destination, § 36.
remedies for ejection of passengers, tort or breach of contract, § 934.
causes of action, damage accruing subsequent to action, § 113.
entirety, continuous breach of contract or infraction of rights, § 125.
contract apportioning legal interests, § 131.
prospective damages, § 120.
what is an entire demand, § 108.
present and future damages, § 107.
splitting, § 110.
contract to do several things successively, or one thing continuously, § 110.
necessity and advantage of successive actions, § 127.
certainty in nature and cause of damage required, § 53.
certainty of damages, § 61.
contingent advantage, § 72.
contract to lease premises, § 65.
profits from commercial ventures, § 67.
profits on dissolution of partnership, § 68.
special contracts; profits, § 63.
collateral ventures or financial condition of party, liability not affected by, § 47.
compensation, object of law of damages, § 12, n 1.

Contracts—continued.
breach—continued.
compensatory damages, breach of contract, motive as affecting damages, § 99.
consequential damages
certainty of damages, necessity, proximate result of act or omission, § 53.
recovery for successive consequences of act or omission, § 57.
injury not foreseen, § 28.
market value, § 52.
mental suffering, right to recover for, § 24.
proximate consequences of act or omission, wilful or malicious injuries, § 44.
recoverable only when contemplated by the parties, § 45.
illustrations, § 46.
resale, § 52.
successive consequences, recovery for, illustrations, §§ 57, 58.
what constitutes, award for probable consequences, § 15.
contracts for works, accident preventing performance, liability, § 700.
non-performance, liability, consequential losses, § 702.
damnum absque injuria, performance prevented by law, § 3.
death of son, consequential damages, act or omission as proximate cause of injury, § 29.
direct damages, what constitutes direct damages, § 14.
disregard of instructions, loss resulting from sale, measure of damages, § 79.
distinction between consequential liability in tort and on contract, §§ 48, 49.
elementary limitation of damages, § 75.
elements of damages, distinction in matter of proof, § 104.
gains and losses, liability for, § 78.
interest, greater damage than interest for failure to pay or to loan money, § 77.
losses, § 79.
damage by relying on performance, § 81.
expenses incurred to prevent or lessen damage, § 88.
employer may finish work at contractor's expense, § 91.
extent of duty, § 90.
indemnity, liability for losses and expenses, § 84.
liability of third person, covenants of indemnity, § 82.
mental suffering, § 95.
motive, distinction made for bad motive, contracts, § 99.
tort actions, § 100.
pecuniary elements, other elements, § 92.
value of property, § 105.
evidence, adaptation of evidence to damages claimed, § 437.
annuity and life tables, § 455.
intendments against defendant for holding back evidence, § 439.
liquidated damages, stipulation when damages are uncertain, § 292.
pecuniary items, necessity of proof by plaintiff, opinions, § 441.
exemplary damages, compensation for wrongs done with bad motive, violation of contract, § 390.
freight charges, recoupment against freight, negligence or violation of contract, § 896.
gas, failure to supply, consequential damages for torts, liability, illustration, § 18.

Contracts—continued.
breach—continued.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
insurance, paid up policy, refuse to issue, measure of damages, § 839.
interest, agreements for different rate after debt due, § 311.
allowance of interest in actions for torts, § 355.
unliquidated demands, §§ 347, 348.
law governing, parties in different states, §§ 360, 361.
manner of claiming interest in pleading, § 387.
quantum meruit claim to interest between vendor and purchaser, § 328.
pleading, how interest claimed in pleading, § 387.
invasion of rights, presumptions of injury, right to damages, § 2.
joint injury, entirety of causes of action, damages to parties jointly, § 128.
knowledge of parties, consequential damages, special circumstances, § 52.
liability under special circumstances, contemplation of parties, §§ 50, 51.
liquidated damages, certainty, contracts for payment of money, § 287.
contracts, validity, § 279.
distinction from penalty, § 283.
effect of stipulation upon right of action, § 298.
payment of fixed sum for partial or total breach of contract, § 294.
part performance accepted where damages are liquidated, effect of, § 296.
performance, liquidated damages in lieu of, § 297.
stipulation for payment of fixed sum for partial or total breach, §§ 294, 295.
stipulations when damages are uncertain, § 291.
stipulations where damages are certain and easily proved, § 289.
validity of contract, § 279.
waiver of right, § 299.
loan of money refused, profits, required certainty of anticipated profits, § 60.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
labor and expenditures, § 80.
money paid to third persons, § 82.
what losses consist of, § 79.
measure of damages, law governing, breach of contract and tort, § 7.
remoteness or uncertainty of stipulated compensation, § 684.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
recovery of damages for, § 979.
mitigation of damages, § 154.
benefit not derived from defendant, § 158.
extent of duty to lessen or prevent damages, § 90.
measures of prevention, § 157.
return of property, discharge of plaintiff's debt, § 156.
reduction of loss or benefit, § 164.
mortgages, breach of contract to assign, value of property, elements of value, presumptions, § 448.
necessity of stating case, which entitles plaintiff to damages, § 413.
new trial, allowance of nominal damages, rule in California, § 11.

Contracts—continued.
breach—continued.
nominal damages, illustrations of right to nominal damages, § 10.
object of law of damages, award of compensation, § 12.
officers, non-performance of official duties, right of action, § 484.
opinion evidence as to value of property, § 446.
partnership articles, breach of, right of action, § 68.
payment of money, measure of damages, breach of contract to pay money, § 76.
measure of liability of guarantor of payment, § 732.
pecuniary elements, damages as including other than, § 92.
performance prevented by law, damnum absque injuria, § 3.
pleading, ad damnum, sufficiency, § 414.
demand of damages in code complaint, § 415.
special damages, necessity of alleging, § 419.
sufficiency of allegations, right to damages, § 413.
presumptions, damages recoverable only when contemplated by parties, § 45.
profits, special contract, certainty of damages, § 64.
recoupment, definition and history of, § 169.
required certainty of anticipated profits, §§ 59, 60.
right to damages, nature, survival, § 7.
rule of damages, § 566.
sales, breach of contract by seller, consequential damages, § 662.
disregard by agent or orders for the purchase, shipment and sale of goods, loss of profits, § 773.
servants, violation of contract, recoupment of damages, consequential losses, § 695.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
set-off, counterclaim and recoupment, cause of action, connection between and crossclaim, § 183.
special damages, necessity of alleging, §§ 419, 420.
stipulated sum where damages otherwise certain or uncertain, § 285.
support of parent, consequential damages, act complained of must be efficient cause, § 29.
telegrams, error or delay in transmission of messages, damages recoverable, § 961.
loss of employment and profits of business, § 967.
tender, right to make, demands, § 261.
vague and indefinite contract, certainty in nature and cause of damage required, § 53, n 6.
value of property, elements, evidence, § 448.
sales offers for property, market quotations, § 447.
vendor and purchaser
damages recoverable by purchaser, adjustment of counter demands on rescission, § 587.
adjustment of counter equities in specific performance, §§ 588, 589.
defaulting vendee's rights, conflict of American cases, § 586.
elements of damage, mitigation, § 584.
measure of damages, conflict of American decisions, what law governs, § 580.
English rule, § 578.
when not applicable, § 581.
nominal damages, elements, § 582.
oral contract, § 583.
damages recoverable by vendor against purchaser, assailability invalidity of contract, § 574.
conveyance in consideration of non-pecuniary covenants, § 576.

Contracts—continued.
breach—continued.
eminent domain, title, necessary that seller convey perfect title, § 572.
interest on purchase money, § 577.
legal remedy, injury resulting from non-performance, § 568.
measure of damages, §§ 569, 570.
assumption of mortgage, § 571.
notes given for price, § 571.
price, right of seller to recover purchase price and interest, § 567.
recoupment for defective title and for tort, § 573.
recovery when contract has not fixed price, § 575.
title, necessary that seller convey perfect title, effect of condemnation proceedings, § 572.
recoupment for defective title, § 573.
torts, recoupment, § 573.
default, rights of vendor, § 585.
elements of damage, motive, distinction for bad motive, § 99.
liens, failure to remove vendor's lien, special contract to pay damages, § 631.
oral contract for sale of land, damages, § 583.
sale of realty and personalty, damages for breach, § 566.
special contract to pay damages, failure to remove vendor's lien, § 631.
verdicts, excessive or insufficient verdict, power of court, remittitur, § 460.
general verdict on several counts, § 462.
broker's compensation, necessity of completing sale, effect of custom or usage, § 683.
burden of proof of damages, § 438.
business, contracts not to engage in, liquidated damages, § 295.
carriers of passengers, nature of obligation, liability of carrier in tort, § 934.
cause of action
entirety, continuous breach of contracts or infraction of rights not an entirety, § 125.
contract of indemnity, § 117.
items, § 111.
prospective damages, § 120.
recovery by party in whom legal interest is vested, § 130.
release or death of one or several parties entitled to damages, § 133.
splitting, § 110.
what constitutes entire demand, § 108.
certainty, contracts for support, what services included in contract, § 678.
common law, bills and notes, partial failure of consideration, nature of defense, cross-action, § 546.
conflict of laws, general rule as to conflict of laws, as to contracts, § 357.
interest, effect of change in law of place of contract, § 368.
law governing where usury is involved, § 362.
place of contract, determination, § 357.
consideration
bills and notes, partial failure of consideration, effect, § 544.
partial want of consideration, effect, § 543.
want or failure of, § 542.
mitigation of damages, res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.

Contracts—continued.
construction, entire contracts, intention of parties, § 691.
fire insurance, nature of contract, manner of making, § 820.
insurance policies, how construed, ascertainment of extent of injury, § 804.
marine insurance, interpretation of contract, § 805.
releases, extrinsic evidence and construction, § 255.
suretyship, construction of contract, § 724.
continuance of guaranty, § 724.
contingency, breach of contract, certainty of damages, contingent advantage, § 72.
contractual exemption from liability for damages, § 6.
default, contract to do several things successively or one thing continuously, § 110.
defendants, joinder, effect of non-joinder and mis-joinder, § 135.
elements of damages, motive, distinction made for bad motive, contracts, § 99.
entire contracts, construction, intention of parties, § 691.
evidence, contracts for services, implied contracts, duty to pay for services rendered, § 679.
executed contracts, illegal transactions, right to damages, § 5.
express contracts, exclusion of implied promise where there is express contract, § 686.
quantum meruit recovery for services, presumptions where family relation exists, § 679.
necessity of full performance of entire contract, entire and apportionable contract, § 691.
sales, recovery by seller against buyer, § 642.
fraud, effect, § 549.
false representations, materiality, § 1167.
necessity of rescission, § 549.
implied contracts, breach of contract, recovery on quantum meruit, § 679.
contracts for services, compensation, statute of frauds, § 684.
contracts for work, demands for part performance of entire contract, allowance of recovery on quantum meruit action by contractor against employer, § 711.
exclusion of implied promise where there is express contract § 686.
sales, recovery by seller against buyer, § 642.
interest
agreements for interest, § 304.
interest due by agreement as debt, § 371.
interest from date until debt paid, § 310.
legal or stipulated rate applies from date, § 307.
more than legal rate after maturity, §§ 318, 319.
promise to pay money with interest, rule of construction, § 305.
rate applicable after debt due, § 308.
rate fixed by law or custom, § 306.
usury, agreements for more than legal rate before maturity, effect, § 313.
recovery under usury statute, § 316.
when contracts not void for usury, § 315.
when debtor relieved, § 319.
compensation, right to interest, § 321n.
tacit agreement to pay interest on accounts, § 322.
compound, § 373.
separate agreement for interest, § 376.
conflict of laws, interest, effect of change in law of place of contract, §§ 368-370.
judgments, interest on, §§ 333, 334.
money paid, allowance of interest on money paid, § 327.
quantum meruit claim to interest, § 324.
right to interest, § 300.

Contracts—continued.
leases, business, recovery for damages to business of lessee, § 868.
liquidated damages, amount, large sum to secure payment of small sum, § 288.
distinguished from penalty, § 283.
intention to liquidate, evidence and effect of, § 284.
mitigation of damages, evidence disclosing fact reducing injury, § 159.
non-performance, bills and notes, consideration, partial failure of consideration, defense as resting on principle of rescission of contract, § 548.
parties, joint liability, extinguishment or severance, § 136.
misjoinder of plaintiffs, objection as fatal, § 134.
part performance, entire demand may be severed, § 109.
payment, pleading, § 232.
penalties in affirmative agreements, breach, remedies, § 471.
performance, attachment bonds, damages recoverable, wrongful attachment, actual damages, § 512.
elements of damage, damage by relying on performance, § 81.
labor and expenditure, § 80.
liquidated damages, stipulations when damages are uncertain, § 290.
waiver of right, § 299.
opinion evidence as to value of property, § 446.
wrongful interference with performance, elements of damage, § 79.
pleading, ad damnum, § 414.
necessity of demand of damages in code complaint, § 415.
performance, partial failure of consideration, § 546.
proof of value, actual sales, offers for property, market quotations, § 447.
remedies, agency, remedies of principal against agent, § 768.
sales, executed sales, what constitutes express contract, implied contracts, § 642.
set-off, counterclaim and recoupment, acts which may be basis of recoupment, § 181.
crossclaim must rest on contract or subject matter of action, § 178.
validity of claim essential, § 174.
severable contracts, recovery on part performance, action by contractor against employer, § 708.
stipulated sum where damages otherwise certain or uncertain, § 285.
stipulations, contracts for work, certificate of architect, engineer, etc., necessity, effect, upon whom binding, § 712.
suretyship, construction of contract, § 724.
liability of sureties, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
validity, conflict of laws, general rule as to contracts, § 357.
contract to liquidate damages, § 279.
insurance, contract methods for ascertainment of damages, validity, § 808.
note in violation of criminal laws, effect, § 542.
stipulated damages, necessity of valid contract, § 280.
vendor and purchaser, validity, purchaser's right to assail validity of contract, § 574.
verdict, interest on verdict before judgment, § 388.
parties, verdict where there are several parties, § 463.
waiver of requirements, contracts for particular work, contract price as measure of damages, action by contractor against employer, § 706.

Contracts for Particular Works
Ch. XVI, §§ 696-721.
contractor's liability to employer, accident preventing performance, § 700.
assessment of damages, § 697.

Contracts for Particular Works—continued.
contractor's liability to employer—continued.
attorney's fees, liability for damages, § 704.
benefit of contract to employer, § 697.
bond of indemnity, liens, § 699.
breach of contract, contractor's liability, § 698.
damages recoverable, § 704.
non-performance, works contracted for particular purpose, consequential losses, § 702.
compensatory damages, losses, § 704.
consequential damages, § 704.
defective work, § 705.
non-performance, works contracted for particular purpose, § 702.
costs, contractor's liability, § 697.
customs and usages, accident preventing performance, damages, § 700.
defective work, consequential damages, § 705.
defects in plans, liability of contractor, § 701.
defects to be remedied, measure of damages, § 699.
delay, damages, §§ 703, 704.
evidence, non-performance, works contracted for particular purpose, consequential losses, § 702.
expenses, accident preventing performance, damages, § 700.
contractor's liability, §§ 697, 698.
defects to be remedied, § 699.
loss, § 703.
general rule as to contractor's liability, § 697.
inconvenience, contractor's liability, § 697.
interest, damages recoverable, § 703.
non-performance, works contracted for particular purpose, consequential losses, § 702.
manufacture, non-performance, works contracted for particular purpose, consequential losses, § 702.
measure of damages, accident preventing performance, § 699.
contractor's liability, § 697.
defects to be remedied, § 699.
price, contractor's liability, § 698.
mitigation of damages, delay of contractor, § 704.
employer's duty, § 698.
mutual fault, effect, § 703.
nominal damages, § 697.
notice, non-performance, works contracted for particular purpose, consequential losses, § 702.
payments, non-performance, works contracted for particular purpose, consequential losses, § 702.
performance, breach of contract, contractor's liability, § 698.
contractor's liability, § 697.
defects to be remedied, contractor's liability, § 699.
delay, damages, § 703.
liability for non-performance, work for particular purpose, consequential losses, § 702.
plans, defects, liability of contractor, § 701.
presumptions, accident preventing performance, damages, § 700.
profits
loss, § 703.
contractor's liability, § 698.
damages recoverable, § 704.
non-performance, works contracted for particular purpose, consequential losses, § 702.
proximate result of breach, damages recoverable, § 704.
rental value, loss, § 703.
repairs, damages recoverable, § 703.

Contracts for Particular Works—continued.
contractor's liability to employer—continued.
stipulated damages, delay, contracts, § 697n.
sub-contractors, liability for damages, § 704.
value, breach of contract, contractor's liability, § 698.
defects to be remedied, contractor's liability, § 699.
non-performance, works contracted for particular purpose, consequential losses, § 702.
employer's liability to contractor
abandonment of work, delaying or stopping work, employer's liability, § 713.
effect of not abandoning contract, § 714.
part performance of entire contract, quantum meruit recovery, §§ 709, 711.
acquiescence, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
act of God, part performance of entire contract, quantum meruit recovery, § 709.
adjustment, demands for extra work, § 707.
agents, authority, demands for extra work, § 707.
alterations, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
demands for extra work, § 707.
apportionment of damages, part performance of entire contract, quantum meruit recovery, § 709.
architects, authority, demands for extra work, § 707.
certificate of architect, engineer, etc., effect, necessity, § 712.
assumpsit, part performance of entire contract, quantum meruit recovery, § 709.
breach of contract, part performance of entire contract, quantum meruit recovery, § 709.
burden of proof, extra work, § 707.
certainty of damages, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
certificate of architect, engineer, etc., effect, necessity, § 712.
collateral contracts, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
compensation, demands for extra work, § 707.
consequential damages, delaying or stopping work, employer's liability, § 713.
covenants, part performance of severable contracts, § 708.
defects remedied, part performance of entire contract, quantum meruit recovery, § 710.
delaying or stopping work, employer's liability, §§ 713, 714.
deviation from contract, part performance of entire contract, quantum meruit recovery, § 711.
engineers, certificate of architect, engineer, etc., effect, necessity, § 712.
enhancement of damages, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
equity, delaying or stopping work, employer's liability, § 713.
part performance of entire contract, quantum meruit recovery, § 711.
evidence, certificate of architect, engineer, etc., effect, necessity, § 712.
part performance of entire contract, quantum meruit recovery, § 710.
profits, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
expenses, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
extra work, delaying or stopping work, employer's liability, § 713.
demands, basis for adjustment, § 707.

Contracts for Particular Works—continued.
employer's liability to contractor—continued.
fraud, certificate of architect, engineer, etc., effect, necessity, § 712.
good faith, defects, part performance of entire contract, quantum meruit recovery, § 710.
injunction, delaying or stopping work, employer's liability, § 713.
installments, part performance of severable contract, § 708.
insurance money, rights in, § 706.
interest, § 706.
part performance of entire contract, quantum meruit recovery, § 711.
implied contract, part performance of entire contract, quantum meruit recovery, § 711.
labor, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
mistake, certificate of architect, engineer, etc., effect, necessity, § 712.
measure of damages, contract price, § 706.
delaying or stopping work, employer's liability, § 713.
part performance of entire contract, quantum meruit recovery, § 710.
reasonable value, § 706.
mitigation of damages, delaying or stopping work, employer's liability, § 713.
notice, delaying or stopping work, employer's liability, effect of not abandoning contract, § 714.
omitting work, presumptions, § 706.
payment, certificate of architect, engineer, etc., effect, necessity, § 712.
extra work, § 707.
measure of damages, § 706.
part performance of severable contract, § 708.
performance, § 713.
prevented by law, § 714.
part performance of entire contract, quantum meruit recovery, § 709.
presumptions, delaying or stopping work, § 713.
omitting work, § 706.
profits, delaying or stopping work, § 713.
prospective damages, delaying or stopping work, § 713.
quantum meruit, delaying or stopping work, § 713.
part performance of entire contract, § 709.
part performance of severable contract, § 708.
recoupment, part performance of entire contract, § 710.
refusal, certificate of architect, engineer, etc., effect, necessity, § 712.
statutes, delaying or stopping work, § 714.
sub-contractors, part performance of entire contract, quantum meruit recovery, § 709.
waiver of contract's requirements, damages, § 706.
delaying or stopping work, § 714.
salvage service
amount recoverable, agreement, § 716.
basis of compensation, § 719.
conflict of laws, § 719.
derelict property, § 720.
interest, § 719.
derelict property, § 720.
duty of claimant, § 717.
forfeiture of right to compensation, § 721.
interest, amount recoverable, § 719.
parties liable, § 715.

Contracts for Particular Works—continued.
salvage service—continued.
peril, nature of, § 717.
requisites of salvage service, § 715.
persons who may be salvors, § 717.
saving property, necessity, § 718.

Contracts for Services
Ch. XV, §§ 677-695.
abandonment of performance, necessity of full performance of contract, inability to perform, § 689.
actions
assumpsit, quantum meruit recovery, compensation for services, § 679.
wages, recovery where wages are fixed, § 678.
wrongful dismissal of employee, damages, number of actions, § 692.
act of God, performance, necessity of full performance of contract, inability to perform, § 689.
apportionment, entire and apportionable contracts, § 691.
apportionment of damages, performance, necessity of full performance of contract, inability to perform, § 688.
apprentices, wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
architects, quantum meruit recovery, compensation for services, § 679.
attorneys, election to office, necessity of full performance of contract, inability to perform, § 688.
services, judicial notice of value, § 680.
recovery for, § 682.
auctioneer, wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
bailee, violation of contract, recoupment of damages, consequential losses, § 695.
broker's services, measure of compensation, misconduct, effect, § 683.
certainty of damages, wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
commissions, wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
compensation, attorney's services, recovery for, § 682.
broker's services, measure of compensation, misconduct, effect, § 683.
entire and apportionable contract, § 691.
mode of compensating for services, § 684.
performance, necessity of full performance of entire contract, § 686.
inability to perform, § 689.
presumption where family relation exists, § 679.
quantum meruit recovery, § 679.
wrongful dismissal of employee, damages, actions, § 692.
duty to mitigate damages, presumptions of subsequent employment, § 693.
liability for expenses and lost commissions, § 694.
consequential damages, violation of contract by employee, recoupment of damages, consequential losses, § 695.
consideration, entire and apportionable contract, § 691.
mode of compensating for services, § 684.
contracts, attorney's services, recovery for, § 682.
continuance of original contract, § 685.
entire and apportionable contracts, § 691.
mode of compensating for services, § 684.
nature of contract for services, § 678.
performance, necessity of full performance of entire contract, § 686.

Contracts for Services—continued.
contracts—continued.
inability to perform, §§ 687-690.
quantum meruit recovery, compensation for services, § 679.
services included in contract, § 678.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
wages, recovery where wages are fixed by contract, § 678.
wrongful dismissal of employee, damages, actions, § 692.
liability for expenses and lost commissions, § 694.
customs and usages, broker's services, measure of compensation, misconduct, effect, § 683.
death, necessity of full performance of contract, inability to perform, § 687.
default, violation of contract by employee, recoupment of damages, consequential losses, § 695.
defenses, quantum meruit recovery, compensation for services, § 679.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
evidence, attorney's services, recovery for, § 682.
broker's services, measure of compensation, misconduct, effect, § 683.
quantum meruit recovery, compensation for services, § 679.
value of services, § 680.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
wrongful dismissal of employee, § 694.
presumptions of subsequent employment, § 693.
expenses, necessity of full performance of contract, inability to perform, § 688.
wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
duty to mitigate damages, presumptions of subsequent employment, § 693.
expert and opinion evidence, value of services, § 680.
factors, violation of contract, recoupment of damages, consequential losses, § 695.
family relation, presumptions, compensation for services, § 679.
fire, violation of contract by employee, recoupment of damages, consequential losses, § 695.
forfeiture of compensation, broker's services, misconduct, effect, § 683.
performance, necessity of full performance of contract, inability to perform, § 689.
fraud, compensation, determination by employer, § 678.
quantum meruit recovery, compensation for services, § 679.
frauds, statute of, mode of compensating for services, § 684.
gift, quantum meruit recovery of compensation for services, § 679.
hours of work, statutes, § 681.
illness, necessity of full performance of contract, inability to perform, § 687.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
infants, quantum meruit recovery of compensation for services, § 679.
violation of contract, recoupment of damages, consequential losses, § 695.
wrongful dismissal, damages, liability for expenses and lost commissions, § 694.
intention of parties, entire and apportionable contract, § 691.
interest, quantum meruit, recovery of compensation for services, § 679.
wrongful dismissal of employee, damages, actions, § 692.

Contracts for Services—continued.
judicial notice of value of attorney's services, § 680.
lost property, quantum meruit recovery for services, § 679.
measure of damages, effect of express contract fixing compensation, § 678.
mode of compensating for services, § 684.
wages, recovery where wages are fixed, § 678.
wrongful dismissal of employee, duty to mitigate damages, presumptions of subsequent employment, § 693.
mechanics, quantum meruit recovery for services, § 679.
middleman, broker's services, measure of compensation, misconduct, effect, § 683.
mitigation of damages, wrongful dismissal of employee, duty to mitigate damages, presumption of subsequent employment, § 693.
negligence, attorney's services, recovery for, § 682.
quantum meruit recovery for services, § 679.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
nominal damages, wrongful dismissal of employee, duty to mitigate damages, presumptions of subsequent employment, § 693.
notice, necessity of full performance of contract, inability to perform, § 689.
violation of contract by employee, recoupment of damages, consequential losses, § 695.
officers, quantum meruit recovery for services, § 679.
wrongful dismissal, duty to mitigate damages, presumptions of subsequent employment, § 693.
overseers, violation of contract, recoupment of damages, consequential losses, § 695.
part performance, necessity of full performance of entire contract, § 686.
payment, mode of compensating for services, § 684.
wrongful dismissal of employee, duty to mitigate damages, presumptions of subsequent employments, § 693.
performance of services, broker's services, measure of compensation, misconduct, effect, § 683.
entire and apportionable contract, § 691.
necessity of full performance of entire contract, § 686.
inability to perform, §§ 687-690.
wrongful dismissal of employee, damages, actions, § 692.
liability for expenses and lost commissions, § 694.
physicians, quantum meruit recovery for services, § 679.
policeman, wrongful dismissal, duty to mitigate damages, presumptions of subsequent employment, § 693.
presumptions, attorney's services, recovery for, § 682.
continuance of original contract, § 685.
quantum meruit recovery, presumption where family relation exists, § 679.
wrongful dismissal of employee, duty to mitigate damages, presumptions of subsequent employment, § 693.
preventing performance, damages, § 678.
profits, mode of compensating for services, § 684.
wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
quantum meruit, recovery, § 679.
broker's services, measure of compensation, misconduct, effect, § 683.
mode of compensating for services, § 684.
performance, necessity of full performance of entire contract, § 686.
inability to perform, §§ 688, 689.

Contracts for Services—continued.
quantum meruit—continued.
presumption where family relation exists, quantum meruit recovery, § 679.
wrongful dismissal of employee, damages, actions, § 692.
duty to mitigate damages, presumptions of subsequent employment, § 693.
receivers, quantum meruit recovery for services, § 679.
recoupment, violation of contract by employee, recoupment of damages, consequential losses, § 695.
remedies, wrongful dismissal of employee, damages, actions, § 692.
sales of realty, broker's services, measure of compensation, misconduct, effect, § 683.
salesman, evidence of value of services, § 680.
seduction of employer's daughter, violation of contract by employee, recoupment of damages, consequential losses, § 695.
statutes, attorney's services, recovery for, § 682.
hours of work, § 681.
Sunday, violation of statute, recovery for services, § 681.
wages, recovery under statute, § 678.
stipulated compensation, mode of compensating for services, § 684.
stipulation, entire and apportionable contract, § 691.
Sunday, violation of statute, recovery for services, § 681.
superintendent, wrongful dismissal, damages, liability for expenses and lost commissions, § 694.
teacher, wrongful dismissal, duty to mitigate damages, presumptions of subsequent employment, § 693.
termination of employment, attorney's services, recovery for, § 682.
mode of compensating for services, § 684.
performance, necessity of full performance of entire contract, § 686.
trustees, quantum meruit recovery for services, § 679.
value of services, attorney's services, recovery for, § 682.
evidence, § 680.
judicial notice, attorney's services, § 680.
opinion evidence, weight, § 680.
quantum meruit recovery, § 679.
wrongful dismissal of employee, damages, liability for expenses and lost commissions, § 694.
wages, compensation, determination by employer, § 678.
recovery under statute, § 678.
recovery where wages are fixed by contract, § 678.
statute fixing compensation, effect, § 678.
wrongful dismissal of employee, damages, actions, § 692.
waiver, violation of contract by employee, recoupment of damages, consequential losses, § 695.
wrongful dismissal of employee, damages, actions, § 692.
liability for expenses and lost commissions, § 694.

Contribution
admiralty, torts, collision cases, division of loss, contribution between joint wrong-doers, § 1287.
conflict of laws, suretyship, contribution, accrual of right of action, § 759.
express indemnity, contribution or indemnity between wrong-doers, basis upon which made, § 764.
fire insurance, contribution, several policies on destroyed property, § 822.
interest, allowance, money paid, § 326.
marine insurance, general average, duty to contribute, § 818.
suretyship
contribution between co-sureties, § 754.
accrual of right of action, § 759.

Contribution—continued.
suretyship—continued.
actions, conclusiveness of judgment, § 760.
basis of contribution, liability for torts, § 756.
insolvency of co-surety, firm as one surety, § 757.
who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
release of one or more of several parties, effect, § 742.
right of subrogation, availability, § 736.

Contributory Negligence
see Negligence.
assumption of risk distinguished from, § 1325.
Federal Employers' Liability Act, effect under, § 1324.

Conventional Liquidations and Discharges
Ch. VII, §§ 214-219.

Conversion
see Trover and Conversion.

Conveyances
see Deeds.

Convicts
rape by escaped convict, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Copyrights
Ch. XXXII, §§ 1198, 1199.
husband and wife, infringement, compensatory and penal recoveries, § 1199.
infringement, compensatory and penal recoveries, § 1199.
injunction bonds, damages from restraint of injunction, copyright enjoined, § 526.
jurisdiction, infringement, compensatory and penal recoveries, § 1199.
nature of copyright. property right granted by statute, § 1198.
statutory right, § 1198.

Corn
compensatory damages, property sued for improved by wrong-doer, § 103.
replevin, damages, use and increase in value of property, § 1150.
telegraphs and telephones, knowledge of sender's purpose, details, message as to sale of corn, § 969.

Corporations
see Associations and Societies.
accounts, collection, suretyship, contract not to be extended by construction, § 727.
discharge, payment by note, bill or check, § 225.
admiralty torts, parties, who may sue, recovery by owner of cargo, § 1296.
assault, personal injuries, mitigation of damages, admissibility of evidence, § 1255.
bonds, interest, rate, law or custom fixing rate, § 306.
breach of contract to provide medical services to employee, consequential damages recoverable only when contemplated by parties, illustrations, § 46.

Corporations—continued.
contracts for services, contract of hiring and contract employing agents distinguished, determination, incorporation of employer's business, § 678.
express contract, necessity of full performance of contract, entire contract, entire and apportionable contract, § 691.
death by wrongful act, conflict of laws, injury inflicted in another state, § 1280.
dividends, interest, suspension, payment prevented by legal process, § 381.
ejection, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
eminent domain, time of assessment of damages and benefits, § 1083.
evidence of value, actual sales, offers for property, market quotations, § 447.
exemplary damages
allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
parties liable, master's liability for acts of servant, § 408.
foreclosure of mortgages, appeal and supersedeas bonds, liability if judgment is in part for money or for rem., § 533.
fraud, false representations, belief of defendant in representations, § 1169.
guaranty, contracts not to be extended by construction, rule as to bonds of surety companies, § 725n.
indebtedness, fraudulent increase, consequential damages, § 16, n 20.
indemnity, contract of surety not to be extended by construction, illustrations, § 727.
injunction bonds, damages, defenses, § 530.
injury to crops, consequential damages for torts, liability, illustrations, § 19.
insolvency, interest, allowance from time when money ought to be paid, § 329.
interest, allowance, judgments, § 334.
money loaned, § 325.
quantum meruit claim to interest, § 324.
rate applicable after debt is due, § 309.
suspension, payment prevented by legal process, § 381.
landlord and tenant, rent, amount as affected by subsequent facts, § 845.
loans, breach of contract to furnish loan, liability under special circumstances, damages contemplated by parties, § 51.
malicious prosecution, false petition to wind up trading companies, § 1235.
parties liable, § 1235.
medical services, breach of agreement to furnish, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
negligence of employee, carriers of goods, limitation of liability by contract, interstate commerce, § 904.
officers and agents
attachment, bonds, exemplary damages, § 514.
bonds, neglect of duty by other officers, effect, § 482.
compensation, actions by attorneys for compensation, § 682.
claim for services, interest, quantum meruit, claim to interest, § 324.
express contracts, termination, continuation of original contract, § 685.
implied contracts, duty to pay for services rendered, § 679.
consequential damages, injury through third persons, stockholder's right of action for negligence in conducting corporations, § 33.

Corporations—continued.
officers and agents—continued.
contracts for services, continuation of original contract, § 685.
directors, negligence in management, consequential damages, injury through third person, § 33.
duty of agent to adhere to instructions, liability for exceeding commission, § 774.
election, certainty in nature and cause of damage required, § 53, n 6.
exemplary damages, parties liable, liability of master for acts of servants, §§ 408, 411.
insolvency, elements of damage, losses, § 79.
losses as elements of damage, what losses consist of, § 79.
measure of agent's liability under various circumstances, § 774.
patents, infringement, persons liable for infringement, § 1186.
payment, persons to whom payment may be made, § 231.
notice of change of officers, § 232.
stock received in violation of trust, liability of agent to principal, § 773.
tender, persons by whom tender may be made, § 264.
trade-marks, infringement, parties defendant, § 1200.
organization, violation of agreement, certainty in nature and cause of damages required, § 53.
promoters, contracts for services, compensation, mode of compensating, profits, § 684.
fraud, false representations, measure of damages, § 1171.
difference between real value and amount paid, § 1172.
natural and proximate consequences of fraud, § 1165.
person to whom false representations are made, representations need not be made to plaintiff, § 1170.
release, execution by or to one of several claiming or liable, effect, § 257.
reorganization, interest, allowance of interest on account, § 349.
sales, evidence of value of property, breach of contract by seller, § 654.
salvage services, requisites, parties liable, § 715.
slander and libel, damages, aggravation of damages, wealth and rank of parties, §§ 1210, 1211.
exemplary damages, § 1216.
reputation, accusations actionable per se, injuries to business, § 1212.
stock, assignment, payment, application, debtor's right to direct application, § 235.
attachment bonds, damages recoverable, § 512.
brokers, liability, § 786.
evidence of value, §§ 445, 448.
failure to exchange, malicious prosecution, damages, elements, expenses, § 1238.
forged transfer of stock, liability, measure of damages, § 1171.
fraudulent increase, consequential damages for torts, § 16n.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
payment, application by debtor, § 235.
pledges, sales, breach of contract, non-delivery of property contracted for, damages, purchase price paid, highest intermediate value, vendee's duty to lessen damages, § 656.
proof of value, valuation for taxes, § 1089.
releases, extrinsic evidence and construction, § 255n.
replevin, damages for detention, measure of damages, § 1144.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
agents, disregard of orders, purchase, shipment and sale of goods, § 773.

Corporations—continued.
stock—continued.
right to reimbursement, effect of mode of doing business, § 792.
bills and notes, consideration, parol evidence to show defect of consideration, § 552.
breach of contract
action by purchaser against seller, consequential damages, § 663.
non-delivery of stock, damages, § 657.
payment in specific articles, value, damages, §§ 659-661.
proof of value of property, § 654.
purchase price paid, damages, § 656.
action by seller against purchaser, § 647.
consequential damages, proximate consequences of breach, illustrations, § 46.
recoverable only when contemplated by parties, § 46.
sale of good will, compensation, certainty of proof, § 658.
contracts for services, compensation, computation of profits or commissions, § 684.
fraud, consequential damages, § 1173.
measure of damages, difference in value, § 1171.
difference between real value and amount paid, § 1172.
remote, conjectural and contingent damages, §§ 1175, 1176.
person to whom false representations are made, representations need not be made to plaintiff, § 1170.
guaranty, measure of guarantor's liability, § 729.
injunction bonds, damages from restraint of injunction, § 528n.
interest, necessity of demand, § 351.
stockholders' statutory liability, § 343.
warranties of title, existence, § 668.
subscription to stock
interest, allowance from time when money ought to be paid, § 329.
as compensation, § 320n.
necessity of demand, § 351.
transfer of shares, act complained of must be efficient cause of damage, § 29.
cause of action not divisible, § 106.
consequential damages, act or omission as proximate cause of injury, § 29.
refusal to register, breach of contract, measure of damages, losses as elements of damage, § 79.
elements of damage losses, § 79.
rule of damages, § 657.
trover and conversion, allowance of interest, amount, § 1115.
evidence of value, § 1113.
measure of damages, § 1135.
liability of purchaser, effect of wilfulness, § 1110.
property of fluctuating value, §§ 1118, 1119.
English, Canadian and Australian cases, § 1123.
Pennsylvania rule, § 1121.
property without market value, § 1117.
mitigation of damages, § 1138.
wilful taking or refusal to surrender, § 1140.
pleading, sufficiency of allegations, right to damages, § 413.
time of conversion, § 1112.
value of property, proof of value, § 1113.
value of property, evidence, actual sales, offers for property, market quotations, §§ 445-448.

Corporations—continued.
stockbrokers, see Stockbrokers.
stockholders, agreement not to sell stock, breach of contract, compensation for gains, profits and losses sustained, § 78.
attachment bonds, exemplary damages, recovery, § 513.
defense of circuity of action, stockholder's liability, § 143.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
injunction bonds, defenses, what may be shown as defense, § 530.
inspection of books, consequential damages, certainty, recovery for successive consequences of act or omission, § 58n.
interest, allowance from time when money ought to be paid, § 329.
allowance on judgments, § 334.
payment unreasonably and vexatiously delayed, § 323.
stockholders' statutory liability, § 343.
liquidated damages, certainty, contracts for payment of money, § 287.
loan to stockholders, interest, allowance on money loaned, § 325.
payment for services, who may make payments, § 230.
personal liability, circuity of action, defenses of, § 143.
release, execution by or to one or several claiming or liable, effect, § 257.
torts
exemplary damages, parties liable, master's liability for acts of servant, § 410.
penal offenses, § 402.
joint and several liability for, § 142.
slander and libel, liability of corporations, § 1205.
trade-marks, infringement, parties defendant, § 1200.
trust funds, interest, allowance against agents, trustees and officers, § 353.
ultra vires acts, rent, actions to recover, abandonment of lease, § 844.
right to damages, illegal transactions, § 5.
usury, who may take advantage of usury, § 314.
vessels, salvage service, requisites, parties liable, § 715.
wealth of defendant, exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.

Corpses
see Dead Bodies.

Correspondence Schools
breach of contract, compensation as measure of damages, § 678.

Costs
ad damnum, limit of recovery, erroneous claim of damage, § 417.
agency, implied warranty of authority, agent's liability, general rule, § 797.
insurance, neglect by agent of duty or agreement concerning insurance, § 772.
appeal, interest and damages awarded on appeal, § 538.
appeal and supersedeas bonds, instances of liability, specific condition, § 536.
liability in state courts if judgment is in part for money or in rem, §§ 534, 535.
liability of sureties, § 531.
arbitration bonds, liability of sureties, measure of damages, § 539c.
attachment bonds, damages recoverable, § 512.
costs and expenses of defending against attachment, § 516.

Costs—continued.
attachment bonds—continued.
forthcoming bonds, measure of damages, failure to deliver property, § 518.
attorney's fees
agent's liability to third persons, recovery of money from agent, § 799.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
interest and damages, award on appeal, § 539.
liability in state courts if judgment is in part for money or in rem, § 535.
attachment bonds, costs and expenses of defending against attachment, § 516.
exemplary damages, recovery, § 513.
breach of contract, damages recoverable by vendor against purchaser, measure of damages, § 570.
breach of covenant against incumbrances, amount paid to remove incumbrance as damage, § 623.
damages where incumbrance is permanent, § 627.
liability of remote covenantor, § 629.
rule of damages, payment of incumbrances, damages if not paid, § 623.
breach of covenants of warranty and quiet enjoyment, damages, expenses, costs and attorney's fees as damages, §§ 617-619.
measure of damages, conflict of laws, what law controls, § 605.
extinguishment of adverse title by covenantee, § 610.
parties, notice of suit to covenantor, § 615.
consequential damages, certainty, recovery for successive consequences of act or omission, § 578.
recovery of items of damages which are certain, § 55.
unsuccessful suit to recover assessment, consequential damages, recovery for successive consequences, § 58.
distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
eminent domain, injury to property not taken, expenditures to lessen loss, § 1072.
exemplary damages, enhancement and mitigation of exemplary damages, § 404.
fraud, expenses of litigation, recovery in addition to actual damages, § 1177.
indemnity, express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
injunction bonds, damages, costs and expenses, attorney's fees, §§ 524, 525.
damages from restraint of injunction, suspension of owner's control of property, § 528.
defenses, § 530.
recovery of costs and expenses, attorney's fees, § 525.
insurance, fire, damages recoverable in case of loss, general rules, § 821.
neglect by agent of duty or agreement concerning insurance, § 772.
interest, allowance of interest on judgments, § 333.
award on appeal, § 539.
liquidated damages, contracts for payment of money, interest as damages, § 286.
malicious prosecution, damages, elements, expenses, § 1238.
mandamus, refusal to obey, mitigation of damages, officer making modification of rule, § 161.
neglect of clerk to index mortgage, damages, losses, attorney's fees in defending suit, § 83n.

Costs—continued.
attorney's fees—continued.
officers, neglect of duty, measure of damages, nominal damages, §§ 491, 492.
patents, infringements, attorney's fees as damages, § 1188.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
parties, action for injury to child, § 1252.
personal torts, elements of damage, § 93.
receiver's bonds, liability of sureties, § 539a.
replevin, bonds, damages recoverable, § 505.
consequential damages, damages arising naturally and proximately from wrong, § 1146.
defendant's rights, special and consequential damages, § 1158.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
sales, breach of contract, non-delivery of property contracted for, property obtainable in open market, damages, § 651.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 671.
salvage service, § 719.
interest, conflict of laws, § 719.
statutory bonds and undertaking to pay damages and costs, damages recoverable, § 85.
suretyship, express indemnity, damages recoverable, § 762.
judgment against co-sureties, conclusiveness, § 760.
liability of principal for surety's costs, § 752.
surety's liability, measure of damages, § 723n.
surety's remedies for indemnity, liability of principal for surety's costs, § 752.
tender, amount, sufficiency, § 266.
usury, recovery under usury statute, § 317.
vendor and purchaser, damages recoverable by purchaser against vendor of land, elements of damages, mitigation, § 584.
suits for specific performance, § 590.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bills and notes, stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
breach of contract, damages recoverable by purchaser against vendor of land, measure of damages, nominal damages, elements of damages, § 582.
breach of covenant, title, measure of damages, costs of eviction, expenses, § 593.
warranty and quiet enjoyment, measure of damages, § 605.
expenses, costs and attorney's fees as damages, §§ 617-619.
partial breach, § 609.
parties, notice of suit to covenantor, § 615.
property as consideration, § 606.
suit against remote covenantor, § 614.
consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
certainty, recovery for successive consequences of act or omission, § 58n.
recovery for successive consequences, § 58.
contracts for work, measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
damnum absque injuria, prosecution of groundless action, § 3.

Costs—continued.
elements of damages, losses, bonds and undertakings, damages and costs, § 85.
eminent domain, element of costs as compensation, § 1063.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1069.
exemplary damages, enhancement and mitigation of exemplary damages, § 404.
fire insurance, losses, mitigation of liability, what jury may consider, § 824.
fraud, expenses of litigation, recovery in addition to actual damages, § 1177.
false representations, measure of damages, elements, costs of suit, § 1173.
parties, plaintiffs and defendants, § 1179.
guaranty, contracts not to be extended by construction, illustrations, § 726.
distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
guaranty of collectibility, liability for costs, diligence, § 733.
indemnity, express indemnities, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
liability for losses and expenses, proximate result of act complained of, § 84.
necessity of notice to indemnitor to fix liability, § 87.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
damages from restraint of injunction, suspension of owner's control of property, § 528.
power of court of equity, § 521.
scope and effect of obligation, § 520.
insurance, fire insurance, damages recoverable in case of loss, general rule, § 821.
interest, allowance of interest on judgments, § 333.
award on appeal, § 539.
judgments, § 333.
suspension of interest, tender stopping interest, time of making tender, § 386.
verdict before judgment, § 388.
judgment, certainty, necessity that judgment be certain, § 467.
effect, assessment of damages, § 465.
verdicts, excessive or insufficient verdicts, power of court, remittitur, § 460.
leases, covenants, special and consequential damages for breach of various covenants, § 865.
repairs, covenants for repairs by lessee, measure of liability for not making repairs, actions for damages, § 857.
liquidated damages, certainty, contracts for payment of money, § 286.
losses as elements of damage, money paid to third persons, § 82.
mesne profits, costs of ejectment suit as damages, § 993.
mitigation of damages, payment, § 167.
nominal damages, addition to finding of jury, § 11.
right to nominal damages, amount, § 9.
object of law of damages, award of compensation, § 12.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
payment to plaintiff after suit, effect, § 436.
penalties, bonds, limit of recovery, interest, § 478.
pleading, ad damnum as limiting amount of recovery, § 417.
probate bonds, guardian's bond, sureties' liabilities, § 496.
replevin
bond to retain property, breach, measure of damages, § 509.
bonds, actions, damages recoverable, § 505.

Costs—continued.
replevin—continued.
when sureties are not liable for judgment in replevin suit, § 503.
part of property found for each party, rights of parties, § 1162.
sales, breach of warranty of title, damage, § 669.
warranties of title, existence, § 668.
set-off of judgments, when granted, § 199.
suretyship
contribution between co-sureties, basis of contribution, liability for torts, § 756.
conclusiveness of judgment, § 760.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
liability of principal for surety's costs, § 752.
taxes, non-payment, covenants, incumbrances, what are incumbrances, 620n.
tender, paying money into court, § 278.
sufficiency, amount, § 266.
trespass to personal property, special and consequential damages, remote damages, § 1100.
trover, attorney's fees, § 1130.
mitigation of damages, § 1139.
vendor and purchaser, breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
measure of damages, nominal damages, § 582.
verdict, interest on verdict before judgment, § 388.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Cotton
carriers of goods, delay in transportation, loss of market value, § 908n.
fire insurance, losses and damages, recovery in special cases, § 827.
machinery repaired, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
sales, breach of contract by seller, delay in delivery, evidence of rental value, § 665.
factor's rights, reimbursement by sales, § 790.
non-delivery of property contracted for, consequential damages, illustration, § 663.
storage of goods, consequential damages, breach of contract, proximate consequences of breach, § 45n.
value, evidence, admissibility, § 445.
vessel wrecked, salvage services, amount recoverable, interest, conflict of laws, § 719.

Counterclaim
see Set-off, Counterclaim and Recoupment.

Counterfeiting
payment, counterfeit money, diligence in return, § 223.
medium of payment, §§ 223-224.

Counties
agent's possession of property as possession of principal, accounting, duty of agent, § 769.
appropriation for road labor, interest, allowance against government, § 332.
bonds
interest, allowance, against government, § 332.
money loaned, § 325.

Counties—continued.
bonds—continued.
payment, place of making payment, § 214.
eminent domain, deduction for benefits, special benefits, § 1087.
highways and streets, duty to keep in safe condition, § 26.
interest, allowance, against government, § 332.
taxes on, § 337.
mobs and riots, allowance of interest, statutory liability for riots, § 330.
officers, fees withheld, interest, allowance against government, § 332.
payment, place of making payment, § 214.
removal of county seat, damnum absque injuria, § 3.
treasurer
bonds, absolute liability for money received, § 479n.
adjustment of liability between sets of sureties, § 480.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.

Coupons
interest, compound interest, separate agreements for interest, § 376.

Courts
see Trial.
banks and banking, payments, application by court, § 241.
officers, compensation, quantum meruit, recovery for services rendered, § 679.
tender
paying money into court, § 278.
effect of, § 276.
necessity of paying money into court, § 274.

Covenants
actions on covenants, breach, damages recoverable by vendor against purchaser, measure of damages, § 570.
covenant not to sue, effect, release, § 259.
liquidated damages, mode of liquidating, computation of time, § 281n.
parties plaintiff, person in whom legal interest is vested, § 130.
bonds for performance, impossible conditions, effect, § 476.
breach of bond, debt, action of, time of bringing, default, § 474.
breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
breach of covenants, accord and satisfaction, rescission or exoneration before breach, § 252a.
assignment, § 472.
attorneys' fees and costs, consequential damages, recovery of successive consequences, § 58.
bills and notes, consideration, partial failure of consideration, defense as resting on principle of rescission of contract, § 548.
causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
certainty of damages, violation of contract to lease, § 65.
circuity of action, damages must be equal, § 146.
contract of surety not to be extended by construction, illustrations, § 727.
eviction of lessee as preventing recovery of rent, what constitutes eviction, § 848.
presumptions, vendor and purchaser, action for purchase money, defenses and counterclaims, Pennsylvania rule, § 639.
recoupment, between vendor and purchaser, § 184.

Covenants—continued.
breach of covenants—continued.
cross-claims between landlord and tenant, § 182.
definition and history of, § 169.
election of defendant to file cross-claim or sue upon his demand, § 187.
rent, recovery of rent payable in specific articles or taxes, § 846.
sale of business, consequential damages, recovery only when contemplated by parties, § 45, n 25.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses under the code, § 640.
damages recoverable by purchaser against vendor, adjustment of counter demands on rescission, § 587.
measure of damages, conflict of American decision, what law governs, § 579.
when English rule does not apply, § 581.
damages recoverable by vendor against purchaser, assailability of invalidity of contract, § 574.
conveyance in consideration of non-pecuniary covenants, § 576.
measure of damages, § 569.
recovery when contract does not fix price, § 575.
verdict, general verdict on several counts, § 462.
building restrictions, covenants against incumbrances, definition, what are incumbrances, § 620n.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
contracts for work, severable contracts, recovery on part performance, action of contractor against employer, § 708.
deeds, covenants, what are unusual covenants of deed, § 591.
defenses
actions for purchase money, defenses and cross-claims against, §§ 632-639.
defenses in equity, § 641.
defenses under the code, § 640.
election of remedies, recoupment and counterclaim, election to file cross-claim or sue on demand, § 187.
farm leases, recovery for damages to business of lessee, § 870.
incumbrances
breach of covenant, connection with covenant for quiet enjoyment, § 630.
consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
damages where incumbrance is permanent, §§ 627-628.
English and Canadian rule of damages, § 624.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
knowledge of incumbrance, right to recover damages, § 620.
liability of remote covenantor, § 629.
opinion evidence, instances of rejection and admission of opinions, § 443.
rule of damages, criticism, § 626.
payment of incumbrance, damages if not paid, § 623.
remote losses, § 622.
breach of special contract to pay damages, failure to remove vendor's lien, § 631.
covenant against incumbrances as covenant in presenti, § 621.
covenant against incumbrances as covenant running with the land, § 625.
covenant to pay incumbrances, nature and form, breach, damages, § 631.

Covenants—continued.
incumbrances—continued.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
payment, damages if not paid, § 623.
pleading, special damages, necessity of alleging, § 420.
seizin, similarity to covenant of seizin, § 625.
special warranty, effect as limiting covenant against incumbrances, § 620n.
what are incumbrances, § 620.
indemnity, express contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 766.
injunctions, liquidated damages, effect of stipulation on right of action, § 298.
interest, agreement to pay money with interest, construction, § 305n.
landlord and tenant, cause of action, severance, contract to do several things successively, or one thing continuously, § 110n.
covenant not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
exemplary damages for breach of various covenants, § 866.
fixtures, repairs by lessee, right to remove fixtures, § 875.
injuries to property, apportionment of damages between landlord and tenant, § 1033.
insurance, covenants to insure, damages for breach, § 862.
mitigation of damages by lessee, § 871.
quiet enjoyment, breach of covenant, see *post*, this title, warranty and quiet enjoyment.
recoupment by either lessor or lessee, § 876.
special and consequential damages for breach of various covenants, § 865.
purchase money, defenses and cross-claims in actions for purchase money, see *ante* this title, subhead, Defenses.
quality, warranty of, damages recoverable by purchaser against vendor of land, suits for specific performance, § 590.
quantity, breach of contract by vendor, damages, suits for specific performance, § 590.
release, covenant not to sue as release, § 258.
who may execute, § 256.
rent, amount of rent recoverable, as affected by subsequent facts, income from premises, arbitration, § 845.
apportionment of rent, § 849.
repairs, assignee's liability for repairs, leases, § 859.
causes of action, advantage of successive actions, § 127.
entirety, continuous breach of contract or infraction of right, § 125.
splitting, necessity and advantage of successive actions, § 127.
covenant for repairs by lessee, § 855.
measure of liability for not making repairs, §§ 856-858.
covenant for repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
lessee's duty, recovery by lessee for making repairs, § 873.
measure of liability, §§ 856; 858; 872.
covenant of purchaser to keep property in repair, sale of railroad and canal, effect, § 860.
running with land, damages recoverable by vendor of land against purchaser, § 576.
incumbrances, breach of covenant against English and Canadian rule of damages, § 624.
covenant against incumbrances as covenant in presenti, § 621.
covenant against incumbrances as covenant running with the land, § 625.
similarity to covenants of seizin, § 625.

Covenants—continued.
running with land—continued.
title, breach of covenant, recovery of nominal damages, actual loss not shown, § 597.
covenant for title as covenant running with the land, breach, § 592.
when covenants run with land, § 600.
warranty and quiet enjoyment, breach of covenants, against whom recovery may be had, § 613.
scope, similarity, § 603.
specific performance, vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
support and maintenance, cause of action, splitting, necessity and advantage of successive actions, § 127.
title, seizin and right to convey.
breach, damages, § 595.
effect of recovery on total breach, § 596.
inferior estate, § 591.
injury to premises, § 601.
joinder of married women in deed, parties liable on covenant of seizin, § 593.
life estates conveyed, value, use of life tables, § 601.
measure of damages, conflict of laws, § 593.
consideration paid and interest, § 593.
consideration, presumption as to consideration, admissibility of evidence, § 594.
conveyances, measure of damages, § 599.
costs of eviction, expenses, § 593.
difference in value between fee-simple and copyhold estates, § 601.
nominal damages, actual loss not shown, reconveyances, § 599.
covenants running with land, § 600.
mortgage foreclosure, § 602.
recovery when actual loss is not shown, § 597-599.
personal covenants connected with covenants of warranty, nominal damages, § 598.
reconveyances, measure of damages, § 599.
recovery of proportion of consideration, part of title lost, § 602.
set-off for mesne profits, § 601.
title remedied by grantee, recovery of expenses, § 598.
what constitutes breach, covenant for title as covenant for indemnity, § 592.
specific instances, existence of easements, § 592.
when broken, §§ 591, 592.
consequential damages, certainty, recovery for successive consequences of act or omission, § 58n.
construction of covenant of seizin, what constitutes breach, § 591.
covenant against incumbrances and covenant of seizin, similarity, § 625.
covenant for title as covenant in presenti, § 592.
covenant for title as covenant running with the land, breach, § 592.
diversity of forms of covenant in United States, § 591.
effect of statute, declaring words, "grant, bargain and sell," covenants of seizin, § 591.
interest, allowance of interest on unliquidated demands, § 348.
nature of covenants of seizin and of good right to convey, § 591.
object of covenants for title, §§ 591, 592.
personal covenants connected with covenants of warranty, recovery of nominal damages, § 598.
tender, requisites, in what money tender must be made, § 263.

Covenants—continued.
title—continued.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, § 641.
warranty and quiet enjoyment
breach of covenants, elements of damage, indemnity, liability for losses and expenses, § 84.
existence of dower right, §§ 612, 618.
interest and taxes as items of damage, § 616.
manner of claiming interest in pleading, § 387.
quantum meruit claim to interest between vendor and purchaser, § 328.
measure of compensation, conflict of laws, § 605.
consideration as measure of recovery, rule in England and Canada, § 607.
existence of lien, satisfaction, § 609.
expenses, costs and attorney's fees as damages, §§ 617-619.
extinguishment of adverse title by covenantee, § 610.
property as consideration, § 606.
remote losses, § 605.
suit against remote convenantor, § 614.
value of land at time of loss as measure of damages, § 608.
mitigation of damages, § 611.
notice of suit to covenantor, expenses, costs and counsel fees as damages, § 618.
notice to indemnitor to fix liability, necessity, § 87.
partial breach, measure of damages, § 609.
parties, against whom recovery may be had, plaintiff, § 613.
notice of suit to covenantor, § 615.
pleading, § 604.
special damages, necessity of alleging, § 420.
remedy, § 603.
right of action, parties, § 603.
what constitutes breach, § 604.
consequential damages, certainty, recovery for successive consequences of act or omission, § 58n.
consideration, want or failure of consideration, §§ 542, 545, 548.
covenant against incumbrance, connection with covenant for quiet enjoyment, § 630.
covenant of warranty, connection with covenant for quiet enjoyment, § 630.
fraud, false representations, measure of damages, elements, costs of suit, § 1173.
improvements, recovery under statute, effect on right to recover in action for breach of warranty, § 608.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
necessity of notice to indemnitor to fix liability, § 87.
interest, pleading, how interest claimed in pleading, § 387.
leases, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
eviction of lessee, recovery of rent barred, § 848.
recoupment of damages by tenant, § 182.
what constitutes breach, § 863.
recoupment and counterclaim between vendor and purchaser, § 184.
scope of covenants of warranty and quiet enjoyment, similarity, § 603.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, §§ 633-641.
damages recoverable by purchaser against vendor of land, measure of damages, conflict of laws, § 580.

Credit
see, also, Business.
injury to credit, attachment bonds, damages recoverable, § 512.
pleading, special damages, necessity of alleging, § 421.
loss of, attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
mutual credits, compensation by mutual demand, § 148.

Creditors
bills and notes, creditor's right to make application of payments, § 239.
estates of decedents, execution of probate bonds, manner, recoveries which may be had, § 494.
probate bonds, conditions of administration bonds, history, § 493.
usury, who may take advantage of usury, § 314.

Creditors' Suit
penalties, bonds, limit of recovery, interest, § 478.

Criminal Conversation
amount of damages, discretion of jury, exemplary damages, health of defendant, § 1285.
defenses, use of force, condonation, divorce, § 1285.
evidence of marriage, necessity, § 1185.
extent of injury, damages, § 1285.
mental suffering, elements of damage, § 95.
loss of services, § 1285.
necessity that anguish proceed from act causing physical injury, § 95.
recovery of damages for mental suffering, § 979.
mitigation of damages, character and feelings, injuries to, § 163.
character of woman, other evidence of misconduct, § 1285.
conduct or character of plaintiff diminishing injury, § 163.
relation between husband wife, divorce, § 1285.

Criminal Law
assault, mitigation of damages, effect of criminal prosecution and fine of offender, § 151.
carriers, criminal act of agent, liability of carrier, § 931.
compromise and settlement of criminal prosecution, bills and notes, consideration fraudulent or illegal in part, § 550.
exemplary damages for penal offenses, § 402.
fraud, exemplary damages, right to recovery in addition to compensatory damages, interest, § 1178.

Cripple Injured
carriers of passengers, damages recoverable by injured passenger, verdicts excessive, § 953n.
infant trespassing on train, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.

Crops
breach of contract, liability for non-performance, consequential losses, § 702.
breach of contract to harvest oats, consequential damages recoverable only when contemplated by parties, illustrations, § 46.
contracts for services, compensation, mode of compensating, profits, § 684.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
conversion, mitigation of damages, measures of prevention, § 157.
corn changed into whiskey, elements of damage, property sued for improved by wrong-doer, § 103.

Crops—continued.
covenant against incumbrance, damages for breach, permanent incumbrance, § 628.
cultivation enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
delay in harvesting, contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
eminent domain, compensation, injuries to various interests, damages in favor of tenants, § 1081.
evidence of value, actual sales, § 447.
farm leases, covenants, special and consequential damages for breach of various covenants, § 865.
cultivation of land, failure to cultivate, liability for depreciation, § 860.
rent payable in specific articles, recovery, § 846.
rent recoverable as affected by subsequent facts, income from premises, arbitration, § 845.
repairs, covenants by lessee for repairs, measure of liability for not making repairs, § 858.
lessor's liability for special and consequential damages, § 874.
injuries to crops
animals, trespass, consequential damages, tendency of act or omission to cause damages, injury need not be foreseen, § 28.
attachment bonds, damages recoverable, § 512.
breach of contract of sale of fertilizer, certainty of damages, anticipated profits, § 60n.
breach of contract to supply water, consequential losses, contractor's liability, § 702.
breach of warranty, certainty of damages, § 61.
causes of action, entirety, damage to real property, § 116.
prospective damages, § 120.
severance, contract to do several things successively, or one thing continuously, § 110n.
certainty of damages, anticipated profits, prospective growth of orchard, § 62.
compensatory damages, breach of contract, motive as affecting damages, § 99.
consequential damages, breach of contract, proximate consequences of breach, § 45n.
certainty, recovery of items of damages, which are certain, § 55.
illustrations, § 46.
liability, illustrations, § 19.
consequential damages under fence statutes, scope of statutes, § 20.
elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.
enticement of servant, consequential damages, act or omission as proximate cause of damages, § 31.
evidence of value, § 445.
opinions, § 446.
opinions on subjects of common experience and observation, admissibility, § 443.
injunction bonds, damages from restraint of injunction, § 527.
interest, actions for torts, § 355.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
repairs, lessor's liability for special and consequential damages, § 874.

Crops—continued.
injuries to crops—continued.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
machinery delayed in delivery, consequential damages, certainty, recovery for successive consequences of act or omission, § 56.
nuisance, injury to crops and trees, damages, § 1049.
remote consequences, liability, § 1050.
opinion evidence, instances of rejection and admission of opinions, § 443.
parties, joint right or liability, determination, principles, § 137.
parties, torts, entirety of causes of action as to parties injured, § 138.
joint liability for tort, determination, § 137.
pleading, special damages, necessity for alleging, § 420.
poison, sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
sales, breach of contract by seller, delay in delivery, mitigation of liability, § 666.
special damages, necessity of alleging, § 420.
trespass, additional injury to land, liability, § 1021.
cause of action, entirety, successive actions for damage to real property, § 115n.
consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
damages, crops injured or destroyed, § 1023.
destruction of fences, damages, § 1024.
mitigation of damages, § 1027.
special and consequential damages, § 1100.
water supply, contract for particular work, breach, liability for profits lost and expenses incurred, § 698.
wrongful destruction, allowance of interest in actions for torts, § 355.
levy wrongful, measure of damages, value of property, § 1237.
market value of property, evidence, admissibility, § 445.
marketing, contract apportioning legal interests not joint, § 131.
non-expert testimony, opinions upon subjects of common experience and observation, § 442.
nuisance, damage recoverable, value of crops, § 1049.
interest on value of crops, § 1049.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
removal, covenants against incumbrances, breach, measure of damages, remote losses, § 622.
replevin, recovery for increase in value of property, § 1150.
sales
breach of contract, evidence of loss, § 653.
non-delivery of property contracted for, consequential damages, illustrations, § 663.
non-delivery of property not in market, recovery of lost profits, § 652.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, §§ 672, 673.
delay in delivering of property, mitigation of vendor's liability to vendee, § 666.
liquidated damages, payment of fixed sum for partial or total breach of contract, § 294.
seeds, sale, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
shares, contracts for services, measure of damages, modes of compensation for services, § 684.

Crops—continued.
threshing, evidence, opinions on subjects of common experience and observation, § 442.
trespass, additional injury to land beyond taking away timber and minerals, liability, § 1021.
animals, taking, compensatory damages, § 1011.
consequential damages, for torts, liability, illustration, § 18.
damages exceeding compensation, exemplary damages, § 1092.
diversion of water, damages, § 1022.
fences, destruction of fences, injuries, damages, § 1024.
injury to growing crops, damages, § 1023.
market value of property, damages recoverable, § 1098.
mitigation of damages, §§ 1027, 1104.
parties injured, entirety of tortious act, § 138.
permanent injury, estimate of damages, § 1017.
remediable injuries, estimate of damages, § 1018.
special and consequential damages, remote damages, § 1100.
trees, measure of damages for cutting and carrying away trees, value of property, § 1020.
trover, damages, general rule, exception as to place of conversion, § 1109.
value of property enhanced by defendant, § 1127.
value of destroyed crop, opinion evidence as to, § 446.
vendor and purchaser, breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
wrongful taking of negro hired to make crop, consequential damages, only items which are certain are recoverable, § 55.

Cross-Actions
see, also, Set-off, Counterclaim and Recoupment.
bills and notes
partial failure of consideration, § 545.
nature of defense, cross-action, § 546.

Cross-Bill
see Equity.

Crossings
breach of contract to construct, liability for nonperformance, consequential losses, § 702.
consequential damages, proximate cause, person struck by dead body, § 35.
driver of vehicles injured, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.
obstruction, animals injured, consequential damages for torts, liability, illustrations, § 19.

Cruelty to Animals
see Animals.

Currency
see Money.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
duty of agent to adhere to instructions, liability for exceeding commission, § 774.
assessment of damages without jury, § 428.
bills and notes, payment in money only, § 559.
value, § 565.
carriers of goods, delay in transportation, loss of market value, § 909.
collections, measure of agent's liability under various circumstances, § 774.

Currency—continued.
depreciation, consideration, partial failure of, availability of defense, § 545.
measure of agent's liability, § 776.
evidence of value, property without market value, § 448.
payment, mode of making payment, § 215.
sales, breach of contract by seller, payment in specific articles, value, damages, § 659.
suretyship
remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
tender, amount, sufficiency, § 267.
requisites, in what money tender must be made, § 263.
waiver and omission of tender, sufficiency of excuse, § 273.
value of bills and notes, solvent parties, measure of damages, § 565.
vendor and purchaser, damages recoverable by purchaser against vendor of land, adjustment of counter equities in specific performance, § 589.

Custodia Legis
funds, injunction bonds, damages from restraint of injunction, § 526.

Custodians
public money, suretyship, right of subrogation, availability, § 736.

Customs and Usages
advancements, interest as between partners, § 342.
agency, duty of agent to adhere to instructions, liability for exceeding commission, § 774.
particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 770.
bills and notes, interest as damages to be paid by maker or acceptor, § 557.
re-exchange and damages, when not recoverable, § 562.
breach of contract, non-delivery of property contracted for, property not in market, effect of loss, § 652.
brokers, compensation, amount of compensation, usual and customary rate, no special contract, § 683.
necessity of completing sale, effect of custom or usage, § 683.
right to recover commissions, performance of services, § 683.
carriers, freight charges, amount of charges in absence of express agreement, § 884.
compensation by mutual demand, § 148.
contracts for services, compensation for driving logs, effect of custom or usage as to amount of compensation, § 678.
evidence of value, § 680.
contracts for works, accident preventing performance, liability, § 700.
evidence of value, opinion, § 446.
factors, sales, liability for making sale on unauthorized terms, § 782.
guaranty, contracts not to be extended by construction illustrations, § 726.
insurance policies, how construed, ascertainment of extent of injury, § 804.
interest, agreements for interest, rate fixed by law or custom, § 306.
allowance, money loaned, § 325.
money paid, § 327.
compensation, tacit agreement to pay interest on accounts, § 322.
right to interest between partners, § 342.
leases, covenant for repairs, by lessor, duty of lessor, breach of covenant, measure of liability, § 872.
eviction of lessee, recovery of rent barred, § 848.

Customs and Usages—continued.
marine insurance, ascertainment of injury, manner, extent, § 804.
loss in excess of sum fixed in policy, § 815.
money paid, allowance or interest on money paid, § 327.
opinion evidence as to value of property, § 446.
payment by note, bill or check, § 225.
sales
breach of contract by seller, evidence of loss, § 653.
payment in specific articles, value, damages, § 661.
suretyship, contract not to be extended by construction, § 726.
tender, place of making, § 269.

Customs Duties
carriers, duty of carrier, goods lost or injured, damages, rebate on customs duties, effect, § 918.
collection, measure of damages against officers for neglect of duty, nominal damages, § 492.
instructions, brokers, liability, disregard of instructions, § 786.
interest on customs duties, § 337.

Cypher
telegrams, transmission, neglect to transmit or deliver, liability where message is in cypher or company is not informed of its importance, §§ 959, 960.

Cystitis
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

D

Daguerreotype
carriers of goods, injury to or loss of non-marketable property, damages, § 919.

Damages
definition of damages, § 2.
object of law of damages, award of compensation, § 12.

Damnum Absque Injuria
adjoining owners, lateral support, removal, buildings threatened, damnum absque injuria, § 3.
fire, prevention, destruction of property as damnum absque injuria, § 3.
motive as affecting right to damages, § 3.
personal injuries, mental anguish, recovery for, § 1243.
slanderous statements, matters of public interest, § 3.
waters and water courses, diversion of surface waters, damnum absque injuria, § 3.

Dams
consequential damages, intervening cause, flood caused by dam, § 38.
construction, consequential damages, certainty, liability for principal loss extending to details and incidents, § 54n.
contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
contract to supply water, cause of action, entirety, continuing obligations, § 112.
eminent domain, deduction for benefits, special benefits, § 1085.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1068.
compensation, § 1065.
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.
nuisance, continuance of liability of person who causes nuisance, § 1040.

Dams—continued.
nuisance—continued.
damages recoverable, first action, § 1039.
joint and several liability, private and public nuisance, § 1059.
pleading, allegations of damages, § 1060.
remote consequences, liability, § 1050.
successive actions, continuity of nuisance, damages recoverable in first action, § 1039.
obstruction, parties, joint and several liability for torts, § 141.
trespass, aggravation, special damages, § 1028.
destruction of property, damages, compensation, § 1015.
mitigation of damages, § 1027.
vessel injured, consequential damages for torts, liability, illustrations, § 19.

De Minimis Non Curat Lex
nominal damages, right to, § 11.
trespass to personal property, certainty of damages, § 1093.
verdicts, excessive or insufficient verdicts, § 459n.

Dead Bodies
carriers of goods, breach of contract, physical and mental suffering as elements of damage, § 915.
recovery for mental suffering independent of other injury, § 943.
consequential damages, proximate cause, person struck by dead body, § 35.
right to recover for mental suffering, § 24.
embalming, breach of contract to embalm body of child, consequential damages, § 705.
consequential damages, breach of contract, proximate consequences of breach, § 45n.
mutilation, elements of damage, mental suffering, §§ 95, 979.
right of widow to recover damages for mutilation of body of husband, § 2n.
pine box substituted for coffin, breach of contract, damages as including other than pecuniary elements, § 92.
removal of dead bodies, trespass, recovery for injury to feelings, § 1029.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
violating sepulchre, exemplary damages, malice in law and malice in fact, § 394.

Death
bills and notes, consideration, parol, evidence to show defect of consideration, different agreement, § 552.
bonds, impossible conditions, effect, § 476.
breach of contract, contractors' liability, general rule, liability for profits lost and expenses incurred, § 698.
non-performance of agreement, assignment, assessment of damages and costs, statutes of 8 and 9 William III, § 472.
causes of action, entirety, effect of release by or death of one of several entitled to entire damages, § 133.
contracts for services, express contract, necessity of full performance, inability to perform, §§ 687, 689.
covenant for title, breach of covenants, mitigation or prevention of damages, § 601.
dower, extinguishment of dower right, § 1004.
Federal Employers' Liability Act, beneficiaries, § 1332.
interest, demand, necessity to secure allowance of interest, § 351.
miscellaneous case of suspension of interest, § 380.
parties, joinder of defendants, effect of non-joinder and misjoinder, death, § 135.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.

Death by Wrongful Act
Ch. XXXVII, §§ 1259-1280.
accord and satisfaction, compromise of disputed claim, § 251.
action, nature of statutory action, § 1260.
right of action at common law, § 1259.
right of action under statutes, measure of damages, § 1259.
aliens, rights of non-resident aliens, statutes as to death by wrongful act, § 1261.
annuity and life tables, admissibility in evidence, § 455.
beneficiaries under statute, diversity of, § 1261.
carriers of passengers
alighting at wrong place, damages peculiar to passenger, § 939.
damages recoverable, inconvenience, sickness, death, § 939.
character as affecting damages for personal injuries, § 94.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
consequential damages, extension of liability by statutes, § 16.
collateral kindred, damages, recovery by, § 1276.
conflict of laws, injury inflicted in another state, § 1280.
consequential damages, imputed negligence, § 27.
intervening cause, sale of poison to intoxicated person, death as result, § 38.
contractual exemptions from liability for damages, § 6.
damages, determination, evidence, facts and circumstances to be considered, §§ 1268-1271.
restriction to pecuniary losses, rule in England and Canada, § 1262.
rule in United States, § 1263.
ejection from train, consequential damages, death of passenger struck by train as proximate consequences of ejection, § 36.
estates of decedents, damages, pecuniary loss to estate, § 1277.
evidence, photographs as evidence of damages, § 454.
exemplary damages, § 1263.
allowance, rule of United States Supreme Court, § 392.
compensation and punishment, who may recover, § 401.
husband and wife
recovery by husband, elements of damages, § 1266.
loss of services, right of action at common law, § 1259.
second marriage, no mitigation of damages when benefit not derived from defendant, § 158.
recovery by widow, children, evidence, § 1265.
civil damage law, medical attendance and funeral expenses, § 1265.
marriage of widow, right to maintain action for death of husband, § 1265.
mitigation of damages, extent of life of deceased, § 1265.
imputed negligence, recovery for death of child by mother, § 27.
infants, loss from death of parents, § 1267.
recovery for death, consequential damages for torts, liability, illustration, § 18.
damages, discretion of jury, § 1275.
effect of desertion by father, § 1273.
effect of receipt of insurance money, § 1273.
loss of support, §§ 1273, 1274.
probable life of beneficiary, § 1273.
right to recover damages, §§ 1272-1275.
evidence of injury, photographs, § 454.
nominal damages, § 9, n 1.
illustration of right to, § 10.

Death by Wrongful Act—continued.
insurance money received by widow, effect, § 1265.
interest, actions for torts, § 355.
addition to damages, § 1263.
intoxicating liquors sold, consequential damages, proximate cause, act of third person as cause, § 40.
mental suffering, liability of telegraph companies, § 97.
restriction to pecuniary losses, § 1263.
nominal damages, recovery, § 1264.
parent and child, damages, determination, evidence, facts and circumstances to be considered, §§ 1269, 1270.
parties plaintiff, action under statutes, § 1291.
pension money received by widow, effect as to damages, recoverable to death, § 1265.
personal injuries, action by husband, wife or parent, § 1252.
damages, elements, § 1241.
pleading, damages in actions to recover for death, § 426.
release, requisites, what will operate as release, § 258.
remittitur, propriety of remittitur, excessive damages, § 459.
right to damages, injuries to unborn child, § 8.
special damages, § 1278.
stage coach falling into canal, consequential damages, proximate cause, act of third person as cause, § 42.
telegraphs and telephones, delay in delivering messages, damages recoverable, physical pain, loss of life, § 965.
tower falling, consequential damages for torts, liability, illustration, § 18.
verdicts, excessive or insufficient verdicts, § 459n.

Debt, Action of
bonds, default, when action of debt will lie, § 474.
penalty as limit of recovery, exception as to interest, § 478n.
time of bringing action, § 474.
vendor and purchaser, breach of contract by purchaser, measure of damages, §§ 569, 570.

Debtors
escape, officer's neglect of duty, measure of damages, nominal damages, § 489.

Deceit
see Fraud.

Declaration
see Admissions; Complaint.

Dedication
breach of covenants against incumbrance, liability of remote convenantor, § 629.

Deeds
see also Covenants.
acknowledgment defective, breach of covenant of warranty and quiet enjoyment, damages, expenses, costs and counsel fees as damages, § 619.
agency, authority, agent acting without or in disregard of authority, damages, § 787n.
bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
bills and notes, consideration, parol evidence to show defect of consideration, § 552.

Deeds—continued.
breach of covenants, assignment, § 472.
certainty in nature and cause of damages required, § 53.
cancellation, appeal and supersedeas bonds, instances of liability, specific conditions, § 537n.
description, covenants, breach, defenses and cross-claims against purchase money, § 637.
evidence of payment, deed acknowledging receipt of consideration, § 233.
elements of damages, liability for losses and expenses, covenant in deed overlooked, § 84.
fraud, deed executed rather than mortgage, measure of damages, § 1171.
goods frozen, false deeds to land taken, inability to provide cellar, necessity that damage result from injury, proximate cause, § 29.
grantee, nuisance, parties liable for, § 1035.
metes and bounds, breach of covenant against incumbrances, right to recover damages, knowledge of incumbrances, § 620.
officers, non-performance of official duties, right of action, § 484.
official bond, private injuries covered by official bonds, § 487.
payment, evidence of payment, § 233.
release of payment, who may execute, mortgage, § 256.
replevin, consequential damages, damages arising naturally and proximately from wrong, § 1146.
support of grantor, profits of special contract, certainty of damage, § 63.
tender, conditions, tender must be unconditional, § 270.
trover, deeds, bonds to convey land, conversion, measure of damages, § 1134.

Default
assessment of damages, admission of damages by default, § 429.
cause of action, right to controvert, § 431.
jury, assessment of damages without jury, § 428.
jury tam quam, § 432.
writ of inquiry, § 427.
bills and notes, amount recoverable by holder of note, determination, § 540.
guaranty of collection, liability for costs, diligence, § 733.
interest as damages to be paid by maker or acceptor, § 557.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
debt, action of, breach of bond, time of bringing default, § 474.
penalties, condition of defeasance of bonds, payment before or pending suit, statute 4 and 5 Anne, § 473.
carriers, negligent delay in transportation, liability for loss of market value of property, quantity or quality, § 906.
compensation for services, remoteness of stipulated compensation, § 684.
time of making payment of compensation, § 684.
conflict of laws, re-exchange, law governing liabilities on bills and notes, § 563.
contract for particular work, contractor's liability for damages for delay, rental value, expenses, § 703.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 709.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
necessity of full performance, inability to perform, § 690.
damages, limitation, nature of right and mode of act, § 75.
evidence, adaptation of evidence to damages claimed, § 437.
fire insurance, general rule of damages, § 821.

Default—continued.
guaranty, distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
guaranty of collectibility, liability for costs, diligence, § 733.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
power of court of equity, § 521.
interest, allowance from time when money ought to be paid, § 329.
bills and notes, § 556.
compensation, right to interest, § 321n.
miscellaneous cases of suspension of interest, § 380.
rate applicable after debt is due, § 309.
tender stopping interest, § 383.
unliquidated damages, § 384.
judgments, indemnity, express indemnity, effect of judgment, § 767.
liquidated damages, alternative contracts, § 282.
amount, large sum to secure payment of small sum, § 288.
master and servant, servant's violation of contract, recoupment of damages, consequential losses, § 695.
penalties, limit of liability, penal bond, § 478.
pleading, interest, manner of claiming interest in pleading, § 387.
public officers as trustees, bonds, liability of public officers, adjustment of liability between sets of sureties, § 481.
replevin bonds, judgment, what may be shown in defense or in mitigation, § 507.
when sureties are not liable for judgment in replevin suit, § 503.
sales, breach of contract by seller, evidence of loss, § 653.
part of stipulated quantity received, recovery by seller, §§ 645, 646.
suretyship, express indemnity against judgments, effect of judgment, § 767.
surety's liability, measure of damages, § 723.
remedies for indemnity, liability of principal for surety's costs, § 752.
tender, waiver and omission of tender on sufficient excuse, § 273.
vendor and purchaser
breach by vendee, rights of vendor against purchaser, interest on purchase money, § 577.
measure of damages, § 570.
right of seller to recover purchase price and interest, abatement of price, § 567.
breach by vendor, defaulting vendee's rights, §§ 585, 586.
elements of damage, mitigation, § 584.
measure of damages, when English rule does not apply, § 581.
rescission, adjustment of counter demands, § 587.
specific performance, adjustment of counter equities, § 588.
necessity that vendor convey perfect title, § 572.
verdict parties, verdict where there are several parties, § 463.

Defenses
see Circuity of Action; Set-off, Counterclaim and Recoupment.
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
bills and notes, partial failure of consideration, nature of defense, cross-action, § 546.
breach of marriage promise, amount of damages, consideration of nature of defenses set up, § 986.
consideration, partial failure of consideration, fraud, or illegality as defense, availability, § 549.
contracts, effect of fraud, necessity of rescission, § 549.
covenants, defenses under the code, counterclaim, actions for purchase money, § 640.

Defenses—continued.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
illegal transactions, right to damages, § 5.
injunction bonds, defenses, facts not available as defenses, § 529.
payment, effect, § 218.
quantum meruit recovery for services, evidence, defenses, § 679.
replevin, bond by defendant to retain property, damages, § 509.
bonds, judgment, what may be shown in defense or in mitigation, § 507.
suretyship, sureties, right to defend between principals, § 743.
right to set up recoupment, equitable offset of joint indebtedness, § 744.
usury, who may take advantage of usury, § 314.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, § 641.
defenses under the code, §§ 633-640.

Definitions
accord and satisfaction defined, §§ 214, 246.
baggage defined, § 954.
bail bonds in civil actions, penal bonds, distinction, § 539b.
bills and notes defined, sum certain payable in money, § 541.
bills of exchange defined, objects, § 560.
bonds defined, § 470.
cause of action, what constitutes entire demand, § 108.
compensatory damages defined, synonyms of actual damages, § 3n.
covenants of warranty and quiet enjoyment, similarity, § 603.
damages defined, § 2.
demurrage, definition, § 987.
distribution defined, § 191.
distribution of assets defined, § 191.
eviction, what constitutes, eviction of tenant as preventing recovery of rent, § 848.
exemplary damages, malice in law and malice in fact, § 394.
fire insurance defined, § 802.
freight charges, definition of freight, § 887.
general average defined, marine insurance, § 818.
good will defined, sale of good will, § 658.
incumbrances, what are incumbrances, § 620.
interest defined, § 300.
intervening cause, what constitutes, § 37.
judgment defined, § 465.
life insurance defined, § 831.
liquidated damages, distinction from penalty, § 283.
loss, admiralty torts, what constitutes total loss, § 1291.
total loss, construed, marine insurance policies, § 807.
malice defined, suits for malicious prosecution, § 1239.
marine insurance defined, § 802.
marshaling assets defined, § 191.
money defined, § 205.
nominal damages, what constitutes, § 9.
nuisance, definition, private nuisance, § 1035.
distinction between private and public nuisances, § 1059.
payment defined, § 214.
what is not payment, § 217.
penalties defined, bonds, condition of defeasance, § 470.
recoupment defined, §§ 168, 169.
release defined, §§ 214, 253.
salvors, definitions, § 718.
slander and libel, nature of wrong, § 1203.
tender defined, § 385.

Definitions—continued.
trespass defined, § 1010.
trespass quare clausum fregit, nature of action, § 1010.
warranty, what constitutes, sales, § 668.
waste defined, § 1033.
wrongful defined, attachment suit, § 510.

Del Credere Agency
see Factors.
compensation for services rendered by agents, amount of compensation, § 683.
factors, guaranteed commission, liability, § 783.

Delaware
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
evidence of physical examination of plaintiff, § 451.
seduction, mitigation of damages, evidence of plaintiff § 1284.
trespass to real property, trees and mining ores, liability, § 1019.

Delay
see Laches.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
appeal and supersedeas bonds, interest and damages award on appeal, § 538.
liability, damages, § 533.
liability in state courts if judgment is in part for money or in rem, § 534.
baggage lost or injured, measure of damages, § 955.
bills and notes, re-exchange and damages, when not recoverable, § 562.
breach of contract, damages recoverable by purchaser against vendor of land, measure of damages, conflict of American decision, what law governs, § 579.
building contracts, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
business injured, certainty of damages, tortious interference with business, § 70.
carriers of goods, delay in transportation, breach of contract, consequential damages, notice of special circumstances, § 52.
knowledge of, or notice to carrier that goods must not be delayed, §§ 913, 914.
limitation of liability by contract, interstate commerce, § 904.
loss of market value § 906.
basis of rule, § 908.
negligence, proximate cause, § 903.
refusal to carry, increased expenses, loss of customers, § 901.
refusal to receive property, damages, § 905.
carriers of passengers, passenger's indiscreet acts not grounds for damages, § 940.
recovery by passenger for special loss, § 947.
contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 709.
damages for delay, § 703.
liability of employer for delaying or stopping work, effect of not abandoning contract, § 714.
recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.

Delay—continued.
fire insurance, contracts to replace or rebuild, delay in making repairs, effect, § 830.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
interest, allowance, accounts, § 350.
award on appeal, § 538.
judgments pending review, § 389.
payment unreasonably and vexatiously delayed, § 323.
right to interest between partners, § 342.
liquidated damages, necessity of valid contract, § 280.
stipulation when damages are uncertain, § 290.
machinery, sold, breach of contracts, consequential damages, special circumstances, § 52n.
passenger of vessel delayed, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
pleading, interest, manner of claiming interest in pleading, § 387.
sales
breach of contract by seller, delay in delivery, § 664.
mitigation of vendor's liability to vendee, § 666.
non-delivery of property in market, damages recoverable by buyer, § 651.
non-delivery of property not in market, recovery of lost profits, § 652.
warranties of quality and quantity, breach, damages, § 670.
interest, expenses and special injuries, § 671.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
surety's right to call upon creditor to collect debt, damages, § 741.
suspension of interest, process, payment prevented by legal process, § 381.
vendor and purchaser, breach by vendor, measure of damages, conflict of American decisions, § 579.
interest on purchase money, § 577.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Delivery
see Sales.

Demand
bills and notes, interest as damages to be paid by maker or acceptor, § 557.
contracts for work, demands for extra work, basis for adjustment, § 707.
covenants against incumbrances, breach, § 621.
indemnity, necessity of notice to indemnitor to fix liability, § 86.
interest, allowance, accounts, § 349.
money had and received, § 352.
compensation, tacit agreement to pay interest on accounts, § 322.
necessity of demand, § 351.
right to interest as affected by marital relation, § 341.
payment, evidence of payment, § 233.
pleading, interest, manner of claiming interest in pleading, § 387.
replevin, who may sue, § 1143.
sales, acceptance of goods, liability for not accepting remedies of seller, § 647.
breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.

Demand—continued.
tender, amount, sufficiency, § 266.
conditions, tender must be unconditional, § 270.
requisites, tender must be kept good, § 272.
unliquidated demands, allowance, of interest on unliquidated demands, §§ 347, 348.

Dementia
pleading, special damages, necessity of alleging, § 421.

Demurrage
see Carriers of Goods.
admiralty torts, partial loss, elements of damages, § 1292.

Demurrer
ad damnum, limit of recovery, erroneous claim of damages, § 417.
assessment of damages, admission of damages by demurrer, § 429.
bills and notes, consideration, parol evidence to show defect of consideration, different agreement, § 552.
covenants, actions, defenses and crossclaims against purchase money, New York rule, § 633.
evidence, adaptation of evidence to damages claimed, § 437.
injunction bond, right of action, when it arises, parties who may sue, § 522.
necessity of stating case which entitles plaintiff to damages, § 413.

Dentists
breach of contract to form partnership, losses as elements of damage, labor and expenditures, § 80n.
sale of business, bills and notes, partial failure of consideration, § 547.
tools, what constitutes baggage, § 954.

Depositaries
bonds, absolute liability for money received, § 479.
interest, allowance on money had and received, § 352.
rate applicable after debt is due, § 308.

Deposits
see Banks and Banking.
guaranty, measure of guarantor's liability, § 729.
interest, allowance, of interest on money had and received, § 352.
quantum meruit claims between vendor and purchaser, § 328.
landlord and tenant, breach of covenant for quiet enjoyment, general rule of damages, § 864.
liquidated damages, manner of liquidating, computation of time, § 281.
payment of fixed sum for partial or total breach of contract, § 295.
stipulation for payment of fixed sum for partial or total breach, § 295.
tender, necessity of keeping tender good, § 272.
vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
breach by vendor, adjustment of counter equities in specific performance, § 588.
defaulting vendee's rights, § 585.
measure of damages, nominal damages, elements of damages, § 582.
oral contract, § 583.

Depots
see Carriers of Passengers; Platforms and Depots.

Depreciation
attachment bonds, damages recoverable, § 512.
carriers of goods, delay in transportation, loss of market value, § 906.
injury to or loss of goods, having market value, damages, § 918.
refusal to carry, increased expenses, loss of customers, § 901.
cattle, trespass to real property, aggravation and special damages, § 1028.
covenant against incumbrances, breach, liability of remote covenantor, § 629.
definition, what are incumbrances, § 620.
covenant to pay incumbrances, breach, damages, § 631.
currency, measure of agent's liability, defaults in regard to bills and notes, § 776.
eminent domain, property not taken, injury, ascertainment, § 1066.
injunction bonds, damages from restraint of injunction, §§ 527, 528.
land, appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 534.
nuisance, depreciation in value as damages, § 1047.
elements of damages, rental value, § 1048.
injury to crops and trees, damages, § 1049.
interference with business, element of damage, § 1054.
replevin, suit on bond, non-liability of sureties for judgment in replevin suit, § 503.
sales
acceptance of goods, liability for not accepting, remedies of seller, § 647.
refusal to accept property produced according to order, damages, remote losses, § 649.
trover, damages, place of conversion, liability of purchaser, effect of wilfulness, § 1110.
special and consequential damages, § 1129.

Derailment of Train
see Carriers of Passengers; Railroads.
car falling on building, consequential damages, nervous shock, § 24.
consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
distinction between liability and tort and on contract, § 49.

Derelicts
salvage service, amount recoverable, derelict property, § 720.

Derricks
sales, breach of warranty as to quality or quantity, damages, interest, expenses, and special injuries, § 672.

Desertion
death by wrongful act, recovery for death of child, effect of desertion by father, § 1273.
militia, consequential damages, injury through third person, desertion of alternate hired to perform military service, § 33.

Destruction of Property
see Property.

Detectives
mitigation of damages, absence of malice, shadowing person, § 150.

Detinue
see Replevin.

Devise
see Wills.

Dikes
erection of barriers, damnum absque injuria, § 3.

Diminution of Value
see Value.

Direct Damages
see Consequential Damages; Proximate Result; Remote Damages.
breach of contract, consequential damages recoverable only when contemplated by parties, illustrations, § 46.
right to recover, § 45.
civil damage laws, statutes extending liability for damages, direct damages, § 16.
limitation of damages to natural and proximate consequences of injury, § 13.
what direct damages include, § 14.

Disappointment
breach of contract, damages as including other than pecuniary elements, § 92.

Discontinuance, Dismissal and Non-suit
breach of contract to discontinue action, elements of damage, losses, § 79.
counterclaim, remedy by, effect, § 173.
injunction bonds, damages, costs and expenses, attorneys' fees, § 524.
facts not available as defenses, § 529.
right of action, when it arises, parties who may sue, § 522.
malicious prosecution, unauthorized suit or appeal, liability for damages, § 1236.
release, construction, extrinsic evidence, § 255.
execution by or to one of several claiming or liable, effect, § 257.
replevin
bonds, actions, damages recoverable, § 505.
effect in change of statute, § 508.
effect of judgment in replevin suit, § 506.
judgment, what may be shown in defense or in mitigation, § 507.
recovery when plaintiff recovers as special owner, effect of change in statute, § 508.
defendant's rights, mitigation of damages, § 1159.
plaintiff obtaining possession and failing in suit as wrongdoer, § 1156.
tender, money paid into court, § 278.

Discrimination
freight charges, see Carriers of Goods.

Disease
see Illness.
breach of marriage promise, excuse for breach of contract, disease, § 989.
lack of chastity, seduction, disease, § 990.
mitigation of damages, evidence disclosing fact reducing injury, § 159.
seduction, aggravation of damages, § 985.
carriers of passengers, disease, passenger infected with smallpox from ticket agent, recovery for special loss, § 947.
negligence or breach of duty, mitigation of damages, disease aggravating injury, § 949.

Disease—continued.
communication, consequential damages, breach of statutory duties, § 32.
consequential damages, extraordinary circumstances, liability of carriers, § 36.
nervous shock without impact, right to recover damages, § 24.
proximate cause, wrongful act as proximate cause of damage, § 38.
contracts for services, necessity of full performance, inability to perform, § 688.
depot not heated, consequential damages, liability of carriers, extraordinary circumstances, § 36.
hospitals, leasing premises for hospitals, contagious diseases, damages, decrease in value, § 1034.
injured parts, exhibition of means of injury, § 452.
landlord and tenant, destruction of demised premises, effect as to rent, § 852.
eviction of lessee, recovery of rent barred, § 848n.
improper use of premises, liability, § 861.
location of pest house, consequential damages, § 32.
mitigation of damages, res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
negligence, infection carried to patients, recoupment, breach of warranty, etc., § 180.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, etc., § 1244.
future damages, § 123.
rags sold, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
recoupment for negligence in transmitting disease, § 180.
sciatic nerve injured, pleading special damages, necessity of alleging, § 421.
sheep
breach of contract to cure sheep, employee's liability for violation of contract, § 695.
measure of damages, § 79.
trespass to real property, aggravation, special damages, § 1028.
slander and libel, accusations actionable per se, § 1213.

Disfigurement
carriers of passengers, compensation, physical and mental suffering of passenger, injury to character, § 942.
dead bodies, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
elements of damage, personal torts, § 93.
personal injuries, discretion of jury as to damages, instructions, § 1256.
elements, § 1241.
pain and suffering, recovery for mental suffering, aggravated wrong, § 1243.
parties, action for injury to child, § 1252.
prospective damages, number of actions maintainable, § 1251.
personal torts, elements of damage, § 93.
pleading, special damages, necessity of alleging, § 420.

Disgrace
see, also, Annoyance; Humiliation.
pleading, special damages, necessity of alleging, § 420.

Dismissal
see Discontinuance, Dismissal and Nonsuit.

Distress
see Mental Anguish.

Distribution
see Marshaling and Distribution.
definition, § 191.

District of Columbia
bills and notes, stipulations for costs and attorneys' fees, § 564.
trespass to real property, occupation of land by railroads, damages, § 1016.
usury, recovery under usury statute, § 317.

Divorce
see Alimony.
attorney's compensation, value of services rendered, admissibility of evidence, § 682n.
debt due from wife to husband, payment, effect, § 218.
fraud of attorney, exemplary damages, allowance, in what actions recoverable, § 392.
interest on judgments for alimony, allowance, § 334.

Dogs
evidence of value, § 449.
exemplary damages, malice in law and malice in fact, dog frightening horse, § 394n.
personal injuries, expenses for physical and medical aid, recovery, § 1250.
mental anguish, recovery for, § 1243.
pleading, necessity of alleging special damages, § 421.
shooting at fox, dog injured, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
trespass to personal property, mitigation of damages, dog injured, § 1104.
trespass to real property, aggravation and special damages, § 1029.

Dollars
sales, breach of contract by seller, payment in specific articles, value, damages, § 659.
tender, amount, sufficiency, §267n.

Double Damages
see exemplary damages.
amount, police power of state, § 2n.
contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
elements of damage, motive, tort actions, § 100.
interest and damages awarded on appeal, § 539.
mesne profits, action for, damages recoverable, consequential and punitive damages, § 994.
prospective damages, personal injuries, ascertainment, § 123.
statutory damages, necessity of specially claiming or alleging, § 425.
trespass to real property, destruction of and injury to growing crops, damages, § 1023.
verdict, statutory, double and treble damages, power of court or jury, § 464.

Dower
alienation of land by husband, right to dower, § 1002.
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 535.
assessment of damages, right to call new jury, § 433.
assignment, valuation, § 1002.
children, action for rents and profits, dower not demanded, § 1003.

Dower—continued.
covenant against incumbrances, breach, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
damages where incumbrance is permanent, §§ 627, 628.
payment of incumbrances, damages if not paid, § 623.
remote losses, § 622.
what are incumbrances, § 620n.
covenant against incumbrances as covenant running with land, § 625.
covenants of seizin and good right to convey, nature of covenant, breach, § 592.
what constitutes breach, § 592.
covenants of warranty and quiet enjoyment, breach, existence of dower right, damages, expenses, costs and counsel fees as damages, § 618.
detention of dower, damages, § 1003.
expulsion of widow, actual damages, injury to health, pain and suffering, § 1029.
trespass to real property, aggravation and special damages, § 1029.
extinguishment of dower right, § 1004.
husband and wife, covenants of seizin and good right to convey, damages for breach of covenants, § 593.
interest, allowments of interest, annuities and legacies, § 344.
instalments of dower, § 1003.
quantum meruit claims between vendor and purchaser, § 328.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
limitation, husband's equitable interest, § 1006.
incumbrances, dower right subject to incumbrances, § 1007.
priority, liens or incumbrances, § 1006.
nature, right of dower, existence, § 1001.
nominal damages, covenant against incumbrances, damages for breach, permanent incumbrance, § 627.
payment, time of payment, § 1002.
purpose, history, § 1003.
reprisals at common law, deduction from dower, § 1005.

Drafts
see Bills and Notes.

Drains and Drainage
bonds, surety's liability, measure of damages, § 723n.
causes of action, entirety, damage to real property, § 114.
child falling into culvert, consequential damages for torts, liability, illustration, § 18.
construction, liquidated damages, alternative contracts, § 282.
officers, neglect of duty, measure of damages, nominal damages, § 492.
contractor's bond
suretyship, discharge or reduction of surety, act of creditor, § 735n.
measure of surety's liability, § 723n.
covenants against incumbrances, definition, what are incumbrances, § 620n.
culvert, child drowned, consequential damages, § 18.
negligent construction of culvert, cause of action, entirety, damage to real property, § 116.
eminent domain, cause of action, entirety, successive actions for damage to real property, § 116.
compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
deduction for benefits, special benefits, § 1085.
injury to property not taken, ascertainment, § 1067.

Drains and Drainage—continued.
leases, mitigation of damages, extent of duty to lessen or prevent damages, § 90.
liquidated damages, alternative contracts, § 282.
mines, contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
drainage of percolating waters, damnum absque injuria, § 3.
nuisance, continuity, when nuisance is not continuous wrong, §§ 1042-1044.
elements of damages, § 1048.
interference with business, element of damage as distinct injury affecting premises, § 1054.
mitigation of damages, deduction for benefits, § 1056.
remote consequences, liability, §§ 1050, 1051.
obstruction, eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1070.
officers, measure of damages against officers for neglect of duty, nominal damages, § 492.
pipes sold, breach of contract by seller, consequential damages, § 662.
pleading, allegation of damage, nuisance, § 1060.
trespass to real property, remediable injury, damages, § 1018.

Dredges
drainage contract, suretyship, measure of surety's liability, § 723n.

Driver of Vehicle
collision of vehicles, injury to pedestrian, consequential damages, liability, § 19.
horse injured by negligent driving, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
imputed negligence, § 27.
railroad crossings, driver of vehicle injured, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.

Drowning
stage coach falling into canal, consequential damages, proximate cause, act of third person as cause, § 42.

Drugs and Druggists
bonds of druggists, liquidated damages, evidence and effect of intention to liquidate, § 284.
child killed, negligence in selling drugs, nominal damages, right to recovery, statutes as to death by wrongful act, § 10.
consequential damages, anticipation of injury to person, proximate cause of injury, § 25.
intervening cause, sale of chloroform to intoxicated person, § 38.
poison labeled as harmless, anticipation of injury as to persons, illustrations, § 25.
wilful or malicious injuries, consequential damages, § 44.
sales, husband and wife, sale to wife, right to damages, § 2, n2.
warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Duress
breach of contract, mitigation of damages, extent of duty to lessen or prevent damages, § 90.
contracts for services, implied contracts, duty to pay for services rendered, § 679.
payment, application by creditor, § 238.
restitution after reversal of judgment, how made, § 468.

Dust
eminent domain, injury to property not taken, ascertainment, § 1066.
consequential injury, § 1062.

Dyes
goods injured, compensation by mutual demand, § 148.

E

Ear Injured
excessive or inadequate verdicts, discretion of jury as to damages, instructions, § 1256.
pleading, special damages, necessity of alleging, § 421.

Earnest Money
sales, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
vendor and purchaser, breach of contract by vendor, defaulting vendee's right, § 586.

Earning Capacity
annuity and life tables, admissibility, § 455.
arm injured, impairment of ability, special damages, necessity of alleging, § 421.
carriers of passengers, negligence or breach of duty, damages recoverable, nature of injury, § 942.
loss of business, earning capacity, § 945.
proof of damage, § 946.
recovery for special loss, loss of employment or in business, § 947.
verdicts excessive, § 953n.
character as affecting damages for personal injuries, § 94.
death by wrongful act, children's loss from death of parent, § 1267.
determination of damages, facts and circumstances to be considered, § 1268.
pecuniary loss to estate, § 1277.
pleading of damages, § 426.
recovery by husband, elements of damages, § 1266.
widow, damages recoverable by widow, § 1265.
discharge of agent, certainty of damages, anticipated profits, § 60.
evidence of injury, annuity and life tables, § 455.
opinions on common experience and observation, admissibility, § 443.
nominal damages, illustration of right to, § 10.
opinion evidence, instances of rejection and admission of opinions, § 443.
personal injuries, action by husband, wife or parent, § 1252.
actions under civil damage laws, parties, § 1252.
element of damages, §§ 1241, 1246.
evidence, § 1248.
measure of recovery, § 1249.
pain and suffering, physical and mental pain, § 1242.
parties, action for injury to child, § 1252.
pleading, § 1247.
prospective damages, number of actions maintainable, § 1251.
recovery for mental suffering, aggravated wrong, § 1243.
salary of injured person not stopped, no mitigation of damages, § 158.
verdicts, excessive or inadequate verdicts, § 1242n.
personal torts, elements of damage, § 93.
pleading, special damages, necessity of alleging, § 421.
prospective damages, personal injuries, ascertainment, § 123.
value of services, opinion evidence as to value of property, § 446.
verdicts, excessive or insufficient verdicts, § 459n.

Earning Capacity—continued.
vessel, sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
voice, loss of, special damages, necessity of alleging, § 421.

Easements
abandonment, eminent domain, injury to property not taken, ascertainment, § 1070.
contracts for works for particular purpose, liability for non-performance, consequential losses, § 702.
definition, what are incumbrances, § 620.
covenant to repair, causes of action, advantage of successive actions, § 127.
covenants against incumbrance, breach, damages where incumbrance is permanent, § 627.
liability of remote covenantor, § 629.
payment of incumbrances, damages if not paid, § 623.
covenants for title, breach of covenants, what constitutes breach, § 592.
nature of covenant, breach, § 592.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and counsel fees as damages, § 619.
connection of covenant of warranty, with covenant for quiet enjoyment, § 630.
measure of damages, partial breach, § 609.
egress cut off, losses as elements of damages, what losses consist of, § 79.
eminent domain, compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
compensation for injury to property, elevated railroads and subways, § 1080.
nominal damages, § 1063.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1066.
expenditures to lessen loss, § 1073.
payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
land taken for road, cause of action, entirety, contract apportioning legal interests, § 131.
mitigation of damages, consent of plaintiff to act complained of, § 162.
private way obstructed, consequential damages, intervening cause, § 38.
vendor and purchaser, conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.

Ejection of Passengers
assault, consequential damages, nervous shock without impact, right to recover damages, § 24.
character as affecting damages for personal injuries, § 94n.
condition of health of passenger, § 935.
consequential damages
carrier's liability, distinction between liability in tort and on contract, § 49.
extraordinary circumstances, § 36.
nervous shock, proximate consequences of act or omission, § 36.
death of passenger struck by train as proximate consequences of ejection, § 36.
destination, necessity that ejected passenger attempt to reach destination, § 36.
distinction between liability in tort and on contract, § 49.
drunken man ejected, nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.

Ejection of Passengers—continued.
enhancement of damages, negro trainman assisting in making ejection, § 938.
exemplary damages, § 937.
allowance, grounds upon which allowed, § 393n.
enhancement and mitigation, § 404.
wealth of defendant, scope of inquiry, § 405.
injury, damages for ejection without physical injury, excessive verdicts, § 953n.
mental anguish independent of other injury, § 942.
mental suffering, elements of damage, § 95.
mitigation of damages, fraudulent or objectionable conduct on part of plaintiff, evidence, § 949.
nervous shock without impact, consequential damages, § 21, n15.
pain and suffering, past and prospective damages, § 944.
passenger's indiscreet acts not grounds for damages, § 940.
physical and mental suffering, injuries to character, § 942.
place, removal of passenger at wrong place, damages peculiar to passenger, intervening cause, § 939.
inconvenience, sickness, death, § 939.
injury sustained on track, § 939.
loss of time and expense, consequences of exposure, § 938.
negligence of hotel proprietor, liability of carrier, § 939.
separation from baggage, § 939.
refusal to carry, damages, § 945.
refusal to pay fare, right to recover, damages, § 940.
remedies, action in tort, breach of contract, § 934.
tender of fare, amount, sufficiency, § 267n.
threats, damages for threatened ejection, excessive verdicts, § 953n.
exemplary damages, § 937.
mental suffering independent of other injury, § 943.
threat to push passenger from platform, jumping, damages recoverable, § 942.
verdicts excessive, damages recoverable, by passenger, § 593n.
wilful or malicious injuries, consequential damages, § 44.

Ejectment
Ch. XXIV, §§ 991-1007.
see Mesne Profits.
action for recovery of land as bar to action for recovery of mesne profits, § 991.
adequate relief for violation of rights, § 1.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
liability if judgment is in part for money or for rem, § 533.
liability, rents and profits, § 533.
assessment of damages without jury, § 428.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
business injured, certainty of damages, anticipated profits, § 60.
conspiracy, fraud, false representations, remote, conjectural and contingent damages, § 1175.
covenant against incumbrances, breach, rule of damages, payment of incumbrances, damages if not paid, § 623.
covenant for title as covenants in presenti, § 592.
covenants of title, seizin and good right to convey, measure of damages for breach of covenants, consideration paid and interest, § 593n.
mitigation or prevention of damages, § 601.
recovery of nominal damages, actual loss not shown, §§ 597, 598.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and counsel fees as damages, §§ 617, 618.

Ejectment—continued.
covenants of warranty and quiet enjoyment—continued.
measure of damages, conflict of laws, § 605.
consideration as measure of recovery, rule in England and Canada, § 607.
existence of lien, satisfaction, § 609.
extinguishment of adverse title by covenantee, § 610.
interest and taxes as items of damages, § 616.
partial breach, § 609.
property as consideration, § 606.
suit against remote covenantor, § 614.
value of land at time of loss as measure of damages, § 608.
mitigation of damages, § 611.
parties, notice of suit to covenantor, § 615.
eviction of animals, necessity of alleging special damages, illustrations, § 420.
interest as between landlord and tenant, § 339.
landlord and tenant, business, recovery for damages to business of lessee, § 868.
covenant for quiet enjoyment, breach, general rule of damages, § 864.
what constitutes breach, § 863.
eviction of lessee as preventing recovery of rent, what constitutes eviction, § 848.
exemplary damages for breach of various covenants, § 866.
mitigation of damages by lessee, § 871.
recoupment by either lessor or lessee, § 876.
repairs, covenants for repairs by lessee, § 855.
measure of liability for not making, § 858.
termination of lease by lessor, effect as to rent, § 847.
malicious prosecution, damages, elements, expenses, § 1238.
mesne profits, costs of ejectment suit as damages, § 993.
remedy under the code, § 1000.
mill property, improvement, nominal damages, § 10.
pleading, special damages, necessity of alleging, § 420.
profits, required certainty of anticipated profits, § 59.
public amusement, exclusion of person, consequential damages, injury to public, § 32.
special damages, necessity of alleging, § 420.
vendor and purchaser, action for purchase money, defenses and counterclaims, §§ 633-639.
damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.
defaulting vendee's right, § 586.
measure of damages, § 570.
oral contract, § 583.

Election of Remedies
agent's violation of duty, remedies, § 768.
appeal and supersedeas bonds, remedies of judgment creditors, § 531.
covenants for title, breach of covenant, conveyances, measure of damages, § 599.
nominal damages recoverable if actual loss not shown, § 597.
creditor's right to make application of payment, § 238.
fraud, false representations, remedies by purchaser of property, rescission, action for damages, § 1174.
liquidated damages, effect of stipulation on right of action, § 298.
master and servant, wrongful discharge of employees, measure of damages, remedies, § 692.
penalties in affirmative agreements, breach, remedies, § 471.
set-off, counterclaim and recoupment, cross-claim used in defense cannot be sued upon, § 189.

Election of Remedies—continued.
set-off—continued.
election to file crossclaim or sue on demand, § 187.
replevin bonds, damages when plaintiff recovers as special owner, effect of change in statute, § 508.
vendor and purchaser, damages recoverable by purchaser against vendor of land, adjustment of counter equities in specific performance, § 588.

Elections
certainty of damages, defeat of candidate for office because of slander, § 71.
returns, official bonds, measure of damages against sureties, § 488.

Electric Railways
employees of, application of Federal Employers' Liability Act to, § 1316.

Electricity
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1066.
fire, liability of municipality for consequential damages, § 16, n19.

Elements of Damage
breach of contract, pecuniary elements, other elements, § 92.
character as affecting damages for personal injuries and in action for death, § 94.
distinctions in matter of proof, § 104.
elementary limitation of damages, § 75.
gains and losses, liability for, § 78.
instructions erroneous, verdicts, excessive or insufficient verdict, setting aside, § 459.
loans, failure to loan money, § 76.
greater damage than interest for failure to loan money, § 77.
losses, § 79.
bonds and undertakings, damages and costs, § 85.
covenants of indemnity, § 82.
damage by relying on performance, § 81.
expenses incurred to prevent or lessen damages, § 88.
employer may finish work at contractor's expense, § 91.
extent of duty, § 90.
vendor and vendee, § 89.
indemnity, liability for losses and expenses, § 84.
indemnity to municipality, counsel fees, § 83.
labor and expenditures, § 80.
elements of damages, losses, expenses incurred to prevent or lessen damages, § 88.
notice to indemnitor to fix liability, necessity, §§ 86, 87.
mental suffering, §§ 95, 96.
liability of telegraph companies, § 97.
motive, confusion of goods, how motive affects consequences of, § 101.
distinction made for bad motive, contract, § 99.
right to compensation not affected by motive, § 98.
tort actions, § 100.
nonpayment of money, § 76.
greater damage than interest, § 77.
property sued for improved by wrongdoer, §§ 102, 103.
torts, personal torts, elements of damage, pecuniary elements, other elements, § 93.
value of property, § 105.

Elevated Railroads
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.

Elevated Railroads—continued.
noise, smoke, and cinders as damnum absque injuria, elevation of railroad tracks, § 3.
trespass, railroads, occupation of land by railroads, liability for damages, rental value, § 1016.

Elevators
landlord and tenant, repairs, lessor's covenant to repair, breach, measure of liability, § 872.
power to operate elevators sold, breach of contract by seller, delay in delivery, evidence of rental value, § 665.
shaft, customer in store falling through shaft, consequential damages, injury not foreseen, § 28, n28.

Embezzlement
cashier, suretyship, contract not to be extended by construction, § 726.
official bonds, private injuries covered by official bonds, § 487.
salvage service, forfeiture of right to compensation, § 721.

Eminent Domain
Ch. XXVI, §§ 1061-1091.
amount of damages, opinions of witnesses, admissibility, §§ 443, 444.
assessment of damages and benefits, deduction for benefits, special benefits, § 1087.
interest, allowance of interest on judgments, § 333n.
lands to be considered in estimating damages and benefits, § 1088.
mitigation of liability by act of third party, § 1083.
time of, § 1083.
breach of contract, damages recoverable by vendor against purchaser, necessity that seller convey perfect title, effect of condemnation proceedings, § 572.
cause of action, entirety, successive actions for damage to real property, § 116.
compensation, ascertainment of amount, statutes, § 1061.
basis for estimating value of land, § 1074.
value of condemnor's purpose, § 1075.
constitutional right to compensation, § 1061.
costs, elements as compensation, § 1063.
damnum absque injuria, § 3, n11.
elevated railroads, measure of damages for injuries to abutting property, § 1080.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
improvements by wrongdoers, entry with or without consent of owner, § 1076.
injury to property not taken, § 1065.
ascertainment of damages, facts which may be considered, §§ 1066-1070.
compensation, § 1065.
consequential injury, § 1062.
expenditures to lessen loss, §§ 1072, 1073.
remote damages, § 1071.
measure of compensation, market value of property, § 1064.
nominal damages, § 1063.
payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
purpose of use, effect on compensation, § 1077.
railroad property taken for railroad uses, § 1078.
railroad property taken for street and telegraph uses, effect on compensation, proof of value, § 1077.
right to compensation, § 1061.

Eminent Domain—continued.
compensation—continued.
subways, measure of damages for injuries to property, § 1080.
title and nature of interest condemned, effect on compensation, § 1077.
injuries to various interests, damages in favor of tenants, § 1081.
to whom compensation should be paid, § 1082.
what is just compensation, § 1063.
consequential injury to property not taken, § 1062.
constitutional right to compensation, § 1061.
covenants for title, breach of covenant, what constitutes breach, § 592.
covenants of warranty and quiet enjoyment, breach, measure of damages, partial breach, § 609.
property as consideration, condemnation of railroad land, § 606n.
damages, limitation, nature of right and mode of act, § 75.
deduction for benefits, special benefits, §§ 1084-1087.
fire insurance, damages, insurance by mortgagee, § 829.
interest in condemnation proceedings, allowance, §§ 336, 1091.
pleading, how interest claimed in pleading, § 387.
judgments, effect of judgment for compensation, abandonment of proceedings, § 1090.
landlord and tenant, rent, duty to pay, effect of taking premises for public use, § 853.
lateral support, property not taken, injury, compensation, § 1065.
market value, eminent domain, measure of compensation, § 1064.
property not taken, injury, compensation, § 1065.
mitigation of damages, official neglect, § 160.
nominal damages, compensation, what is just compensation, § 1063.
opinion evidence, instances of rejection and admission of opinions, § 443.
pleading, interest, manner of claiming interest in pleading, § 387.
special damages, necessity of alleging, § 419.
power of eminent domain, nature, extent, § 1061.
proof of value and damages, § 1089.
property which may be taken, 1061.
public use, what constitutes, § 1061.
sale of property, value, evidence, actual sales, offers for property, market quotations, § 447.
stipulations to lessen damage, injury to property not taken, ascertainment, § 1066.
taking, valuation, time of taking as fixing value, § 1083.
what constitutes, § 1061.
what property may be taken for public use, § 1061.
trespass, railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
trover, eminent domain, recovery of value of property condemned for street, § 1116.
vendor and purchaser, damages recoverable by vendor against purchaser, necessity that seller convey perfect title, effect of condemnation proceedings, § 572.
waiver, constitutional right to compensation, § 1061.

Employees
see Master and Servant.

Employers' Liability Act
federal, see Federal Employers' Liability Act.
right to compensation, contractual exemption from liability for damages, § 6.

Engineer
contracts for work, certificate of architect, engineer, etc., necessity, effect, upon whom binding, § 712.

Engineer—continued.
malicious arrest, consequential damages for torts, liability, illustrations, § 19.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Engines
delay in delivery, contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
landlord and tenant, repairs, breach of covenant to repair, measure of liability, § 858.
sales, breach of contract by seller, consequential damages, § 663.
delay in delivery, evidence of rental value, § 665.
guaranty, measure of garantor's liability, § 729.
warranty of quality, damages for breach, interest, expenses and special injuries, §§ 671, 672, 675.

England
agent's liability to third persons, measure of damages, action without authority, § 798.
bills and notes, acceptance, effect, liability for re-exchange, § 561.
consideration fraudulent or illegal in part, § 549.
interest as damages, liability of drawer or indorser, § 558.
partial failure of consideration, §§ 544, 548.
re-exchange and damages on bills dishonored, § 561.
carriers of goods, demurrage, detention of goods, § 897.
injury to or loss of goods having market value, damages, § 918.
damages less than value of goods at destination, § 923.
recoupment against freight, § 896.
chancery act, damages recoverable by purchaser against vendor of land, suits for specific performance, § 590.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
contract for service of attorney, evidence of value, § 682.
contracts for services, express contracts, necessity of full performance of entire contract, § 686.
conveyances, damages recoverable by purchaser against vendor of land, measure of damages in England, § 578.
copyright, infringement, compensatory and penal recoveries, § 1199.
covenants against incumbrances, breach, amount of incumbrances as measure of damages, English and Canadian rule, § 624.
covenants of seizin and good right to convey, nature of covenant, breach, §§ 591, 592.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
measure of damages, consideration as measure of recovery, rule in England and Canada, §§ 606, 607.
death by wrongful act, compensation for pecuniary losses, § 1262.
facts to be considered in estimating damages, § 1268.
recovery of nominal damages, § 1264.
restriction to pecuniary losses, rule in England and Canada, § 1262.
eminent domain, effect of judgment for compensation, abandonment of proceedings, § 1090.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
fraud, defendant's belief in representations, necessity, § 1169.
measure of damages, § 1172.
insurance, accident policies, scope of recovery, conflict between English and American decisions, § 836.
character of contract, life insurance as contract of indemnity, § 832.
total loss, what constitutes, § 807.

England—continued.
interest, allowance against government, § 332.
allowance on annuities and legacies, § 344.
suspension, tender stopping interest, when tender may be made, § 385.
leases, assignment or subletting, breach of covenant not to assign, damages, § 861.
breach of covenant for quiet enjoyment, general rule of damages, § 864.
lessee's right to damages for injury to business, § 869.
malicious prosecution, false petition to wind up trading companies, § 1235.
mitigation, evidence, § 1240.
marine insurance, losses, general average, § 819.
loss in excess of sum fixed in policy, § 815.
mesne profits, elements of damages, costs of ejectment suit, § 993.
limitation of damages to value of use, consequential and punitive damages, § 994.
nuisance, interference with business, element of damage, § 1054.
permanent injury, estoppel from recovery of future damages, § 1046.
personal injury, actions, parent's action, § 1252.
excessive or insufficient verdicts, power of court over verdicts, § 460.
replevin, bonds, condition for return of property, English statutes, § 500.
damages, defendant's rights, § 1155.
increase in value by defendant, § 1154.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by seller, non-delivery of stock, § 657.
warranties of title, existence, § 668.
seduction, gist of action, proof of service, § 1281.
slander and libel, aggravation of damages, wealth and rank of parties, § 1210.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 765.
remedy for indemnity, payment giving right to reimbursement, § 750.
telegraphs and telephones, actions, form, parties, § 972.
trespass to personal property, damages for taking or destroying property, interest, § 1096.
mitigation of damages, application of property to owner's benefit, § 1105.
trespass to real property, destruction of trees and mining ores, value as affected by defendants' acts, § 1020.
exemplary and statutory damages, § 1031.
trover, damages, general rule, exception as to place of conversion, § 1109.
interest and value of use of property, § 1115.
mitigation of damages, § 1140.
property of fluctuating value, § 1118.
English, Canadian and Australian cases, § 1123.
special and consequential damages, § 1129.
value of property, enhanced by defendant, § 1128.
vendor and purchaser, damages recoverable by purchaser against vendor of land, adjustment of counter equities in specific performance, § 588.
defaulting vendee's rights, § 585.

England—continued.
vendor and purchaser—continued.
measure of damages, § 578.
when English rule does not apply, § 581.
verdicts, excessive or insufficient verdict, power of court, remittitur, § 460.
impeachment by affidavits, § 456.
vessels, carriers of goods, delay in transportation, loss of market value, § 909.

Engravings
baggage, what constitutes baggage, § 954.

Enhancement of Damages
attachment bonds, wrongful attachment, damages recoverable, § 512.
contracts for works, liability of employer for delaying or stopping work, effect of not abandoning contract, performance stopped by law, certainty of proof of profits, collateral contract, § 714.
sales, liability of factors for failure to sell at certain time, § 781.

Enticing
certainty of proof of future damages, action for enticing away apprentice, servant or son, or procuring discharge of servant, § 122.

Entirety of Causes of Action and Damages
Ch. IV, §§ 106-142.

Epilepsy
pleading, special damages, necessity of alleging, § 421.

Equity
accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
appeal and supersedeas bonds in federal supreme court, § 532.
bills and notes, re-exchange and damages on bills dishonored, § 561.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bills of exchange, doctrine of re-exchange, foundation on equitable principles, § 561.
bonds, avoidance of penalties, American statutes and practice, § 474.
obligation, effect of failure to perform at law and in equity, § 470.
measure of damages against officers for neglect of duty, nominal damages, § 489.
penalty as limit of recovery, exception as to interest, § 477.
cause of action, entirety, continuance of wrong not presumed, § 126.
recovery by party in whom legal interest is vested, § 130.
compensation, object of law of damages, § 12.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
defenses and crossclaims against purchase money, § 635.
covenants for title, seizin and good right to convey, measure of damages for breach of covenants, consideration paid and interest, § 593n.
mitigation or prevention of damages, § 601.
presumption of consideration, admissibility of evidence, § 594n.
cross-bill, pleading, special damages, necessity of alleging, § 419.
dower, extinguishment of dower right, § 1004.
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
indemnity bond, penalties, amount of damages, recovery, power of court of equity, § 474.
injunction bonds, damages, mode of assessing, § 523.
damages from restraint of injunction, § 527.
power of court of equity, § 521.

Equity—continued.
interest, agreements for interest, rate applicable after debt due, § 308.
agreements for more than legal rate before maturity, usury, effect, § 313.
bills and notes, § 556.
judgments, allowance of interest on, § 334.
on judgments pending review, § 389.
patents, interest on damages for infringing patents, § 340.
pleading, how interest claimed in pleading, § 387.
quantum meruit claim to interest between vendor and purchaser, § 328.
rate applicable after debt is due, § 308.
suspension, payment prevented by legal process, § 381.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
liquidated damages, certainty, contracts for payment of money, § 286.
effect of stipulation upon right of action, § 298.
validity of contract, § 279.
waiver of right, § 299.
marshaling and distribution, rights of creditors where funds belong to two depositors, § 196.
multiplicity of suits, parties, joint right or liability, determination, principles, § 137.
mutual credits, compensation by mutual demand, § 148.
nuisance, successive actions, continuity of nuisance, requiring successive action, § 1038.
object of law of damages, award of compensation, § 12.
parties, joint and several liability for torts, § 140.
patent infringement
compensation in equity, computation of profits, §§ 1190, 1191.
computation, to what time made, § 1192.
interest on profits, § 1197.
right to recovery, exemplary damages, § 1188.
theory on which allowed, § 1189.
payments
application, by court, § 241.
general payment applied to oldest debt, § 243.
pro rata application, § 242.
pleading, interest, manner of claiming interest in pleading, § 387.
recoupment, election of defendant to file crossclaim or sue upon his demand, § 187.
nature of defense, § 170.
relief from forfeitures, contracts for services, express contract, necessity of full performance, inability to perform, §§ 687-689.
restitution after reversal of judgment, how made, § 468.
sale of business, bills and notes, consideration, partial failure of consideration, admissibility of evidence, § 547.
sales, breach of contract, damages, right of seller to recover purchase price and interest, abatement of price, § 567.
set-off of judgments, power of court to direct set-off, § 198.
suretyship, creditor's duty to realize on securities, refusal of payment, application of deposit to indebtedness, § 737.
discharge or reduction of surety's responsibility by act of creditor, § 735.
release of one or more of several parties, effect, § 742.
remedies for indemnity, action against principal for money paid, § 745.
contribution between co-sureties, § 754.
insolvency of co-surety, firm as one surety, § 757.
who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
measure of recovery, § 748.

Equity—continued.
suretyship—continued.
who is principal, § 746.
right of subrogation, when and to whom available, § 736.
right of surety to compel debtor to pay, § 749.
right to set up recoupment, equitable offset of joint indebtedness, § 744.
tender, effect of plea of tender, § 275.
necessity of keeping tender good, § 272.
requisites, tender must be kept good, § 272.
trade-marks, infringement, damages, measure of damages in equity, §§ 1201, 1202.
usury, recovery under usury statutes, § 316.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, §§ 632, 641.
breach of contract by vendor, defaulting vendee's right, § 586.
necessity that seller convey perfect title, effect of condemnation proceedings, § 572.
oral contract, § 583.
rescission, adjustment of counter demands, § 587.
suits for specific performance, § 590.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Escape
animals, consequential damages, injury not foreseen, § 28.
carrier's duty, recovery by shipper for expenses and labor in lessening loss, § 921.
trespass to real property, aggravation, special damages, § 1028.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
debtor's escape, officer's neglect of duty, measure of damages, nominal damages, § 489.
rape by escaped convict, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Escrow
breach of covenant against incumbrances, rule of damages, payment of incumbrances, damages if not paid, § 623.

Estates
see Remainders and Reversions.
covenant for title
breach, inferior estate, § 591.
life estates conveyed, ascertainment of value, use of life tables, § 601.
measure of damages for breach of covenants, consideration paid and interest, § 593n.
difference in value between fee-simple and copyhold estates, § 601.
recovery of nominal damages, actual loss not shown, § 598.
covenants for title as covenants in presenti, § 592.
parties, joint right or liability for tort, determination, § 137.
trespass to real property, tenants, damages in suit by tenants, § 1012.
value, breach of covenants, measure of damages, existence of dower right, § 612.

Estates of Decedents
see Executors and Administrators.

Estoppel
agent's duty to render accounts, effect of misrepresentations, § 784.

Estoppel—continued.
appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
carriers, duty, goods lost or injured, conduct of shipper as affecting damages, § 925.
compensation of laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
contracts for particular work, demand for extra work, basis for adjustment, § 707.
contracts for services, compensation of laborers fixed by statute effect, § 678.
implied contracts, duty to pay for services rendered, § 679n.
contractual exemptions from liability for damages, § 6.
covenants against incumbrance, breach, amount paid to remove incumbrance as damage, § 623.
covenants for title, breach, recovery of nominal damages, actual loss not shown, §§ 597, 598.
factors, accounts, duty of factor to render, effect of misrepresentation, § 784.
interest, recovery, interest as compensation, § 321n.
leases, repairs, covenants for repairs by lessee, § 855.
payment, what is not payment, § 217.
public officers, bonds, neglect of duty by other officers, effect, § 482.
receiver's bonds, liability of sureties, § 539a.
release, covenant not to sue as release, § 258.
what constitutes, § 259.
replevin bonds, actions, defenses, mitigation of damages, § 507.
effect of judgment in replevin suit, § 506.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 671.
sureties, actions on bond, liability for executor's debt to estate, § 495.
trespass to real property, suit by executors, damages, § 1013.
trover, evidence of value, § 1113.

"Et al."
attachment bonds, parties who may sue, § 511.

Eviction
see Landlord and Tenant.

Evidence
adaptation of evidence to damages claimed, § 437.
agency, commercial and insurance, certainty of damages, § 69.
amount of damages, necessity of proof, § 2.
opinions, admissibility, § 444.
animals injured, admissibility of evidence, necessity of alleging special damage, § 420.
annuity and life tables, admissibility in evidence, § 455.
attorneys, actions for compensation, value of services rendered, admissibility of evidence, § 682.
bills and notes, consideration, parol evidence to show defect of consideration, §§ 551, 554.
breach of marriage promise, excuse for breach of contract, § 989.
burden of proof
payment, § 232.
application, debtor's right to direct application, evidence, § 237.
carriers, duty of carrier, goods lost or injured, proof of value, § 933.
carriers of passengers, negligence or breach of duty, proof of damages, §§ 945, 946.

Evidence—continued.
certainty of proof of future damage, action for enticing away apprentice, servant or son, or procuring discharge of servant, § 122.
conflict of laws, interest, pleading and proof of foreign law, § 367.
contracts for services, evidence of value of services, § 680.
oral agreements, right to prove, implied contract, § 679.
quantum meruit recovery, defenses, § 679.
covenants for title, breach of, measure of damages, consideration, presumption of consideration, admissibility of evidence, § 594.
covenants of warranty and quiet enjoyment
breach, consideration as measure of damages, English rule, § 607.
measure of damages, value of land at time of loss, § 608.
what constitutes breach, § 604.
death by wrongful act, children, right to recover for death of child, damages, § 1272.
elements of damage, distinctions in matter of proof, § 104.
eminent domain, proof of value of property and damages, § 1089.
exemplary damages, enhancement and mitigation of exemplary damages, § 404.
exhibits injured parts, exhibition of means of injury, § 452.
Federal Employers' Liability Act, actions under, § 1354.
fire insurance, proof of damages, § 825.
fraud, pleading and evidence, necessary allegations, § 1180.
hearsay evidence, dogs, proof of value of dogs, § 449.
value, evidence, admissibility, § 445.
impeachment of contract, marine insurance, liability of insurer, under valued policies, admiralty and fire policies, § 806.
injunction, damages recoverable for restraint of injunction, admissibility of evidence, § 526.
intendments against defendant for holding back evidence, § 439.
intendments against plaintiff for holding back evidence, § 440.
liquidated damages, intention to liquidate, evidence, effect of, § 284.
mesne profits, rental value, proof of, § 995.
nervous prostration, pleading, necessity of alleging special damages, § 421.
opinions upon subjects of common experience and observation, § 442.
parol evidence, bills and notes, parol evidence to show defect of consideration, admissibility, § 551.
contracts for services, compensation, statute of frauds, § 684.
payment, § 233.
application, debtor's right to direct application, §§ 235, 237.
pecuniary items of damage, necessity of proof by plaintiff, opinions, § 441.
personal injuries, earning capacity diminished, evidence, § 1248.
expression, conduct and religious belief of sufferer as evidence of damages, § 453.
physical examination of plaintiff, discretion of court, § 451.
prospective damages, number of actions maintainable, § 1251.
photographs as evidence of damages, § 454.
pleading, allegation of damage, nuisance, § 1060.
general allegation of damage, proof under, § 418.
presumptions, cause of action, entirety, continuance of wrong not presumed, § 126.
evidence of payment, § 233.
prospective damages, certainty of proof, § 121.
quantum meruit recovery for services, evidence, defenses, § 679.
release, extrinsic evidence, § 255.
requisites, what will operate as release, § 258.
replevin bonds, evidence of value of property, § 504.
res gestæ, exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.

Evidence—continued.
sales
breach of contract by seller, evidence of loss, § 653.
proof of value of property, § 654.
sale of good will, compensation, certainty of proof, § 658.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
mitigation of damages, evidence, chastity, § 1284.
suretyship, creditor's duty to realize on securities, refusal of payment, application of deposits to indebtedness, § 737.
use and occupation, measure of recovery, continuance of terms of lease, conduct of parties, evidence, §§ 842, 843.
value, evidence, § 445.
actual sales, offers for property, market quotations, § 447.
dogs, proof of value of dogs, § 449.
elements of value, § 448.
opinions, § 446.
value at particular place, evidence, admissibility, § 445.
verdicts
excessive or insufficient, irrelevant evidence, power of court to order remittitur, § 460.
lack of evidence to sustain, remittitur, § 459.
wealth of defendant
exemplary damages, enhancement and mitigation of exemplary damages, § 404.
joint liability for, § 407.
scope of inquiry, § 405.
written instruments, landlord and tenant, actions for use and occupation, lease as evidence of value, § 841.

Excavations
see Adjoining Landowners.
animals injured, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
cause of action, entirety, successive actions for damage to real property, § 114.
eminent domain, payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
flooding land, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
highways and streets, consequential damages in highway cases, § 26.
nuisance, lateral support, removal, right to damages, § 1053.
trespass quare clausum fregit, nature of action, § 1010.
wilful or malicious injuries, consequential damages, § 44.

Exchange
bills and notes
re-exchange and damages on bills dishonored, § 561.
when not recoverable, § 562.

Exchange of Property
breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
broker's compensation, amount, basis for computation, § 683.
effect of misconduct, § 683.
right to recover commissions, performance of services, § 683.
fraud, expressions of opinion, effect, § 1166.
false representation of agent, liability for damages, exchange of property effected, § 1174.
false representations, measure of damages, difference between value and amount paid, §§ 1171, 1172.

Exchange of Property—continued.
interest, allowance from time when money ought to be paid, § 329.
liquidated damages, contracts for payment of money, interest as damages, § 287.
stipulations when damages are uncertain, §§ 290, 293.
payment by note, bill or check, § 225.
recoupment and counterclaim, connection between cause of action and cross-claim, § 183.
recoupment for fraud, breach of warranty, negligence, etc., § 179.
telegraphs and telephones, message not delivered, damages recoverable, § 961.
negligence in transmitting message, liability when object of sender is known, § 961.
vendor and purchaser, breach of contract by vendor, measure of damages, English rule, application, § 581.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
recovery when contract does not fix price, § 575.

Executions
abuse of process, trespass to personal property, trespass from beginning, damages, § 1107.
attachment, forthcoming bonds, § 517.
bond to stay, execution, suretyship, measure of surety's liability, § 723n.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
measure of damages against sureties on official bonds, § 488.
breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
breach of contract not to issue, execution, elements of damage, losses, § 79.
capias, release, what constitutes release, § 258.
collection enjoined
injunction bonds, defenses, facts not available as defenses, § 529.
what may be shown as defense, § 530.
collection, mitigation of damages, official negligence, § 160.
disposal of goods seized under process, cause of action, entirety, what is not a double remedy, § 119.
exempt property sold, official bonds, measure of damages against sureties, § 488.
failure to levy, mitigation of damages, official neglect, § 160.
failure to return, penalties, no interest on penalties, § 330.
false return, officers, neglect of duty, measure of damages, nominal damages, § 491.
indemnity bond, penalties, amount of damages, recovery, power of court of equity, § 474.
injunction bonds, damages recoverable, collection of judgment enjoined, § 528.
damages from restraint of injunction, §§ 527, 528.
facts not defenses, § 529.
interest, allowance, judgments, § 333.
judgment pending review, § 389.
suspension, tender stopping interest, when tender may be made, § 386.
issuance, parties, joint liability, extinguishment or severance, § 136.
judgments, certainty, necessity that judgment be certain, § 467.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
levy
consequential damages, act of injured party, fraud and exposure to peril, § 39.

Executions—continued.
levy—continued.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
creditor's right to make application of payments, § 238.
mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
parties, general and special owners, § 139.
joinder of parties, general and special owners, § 139.
payment, mode of making payment, § 216.
trespass to personal property, special and consequential damages, remote damages, § 1102.
trespass to real property, mitigation of damages, § 1027.
wrongful levy, measure of damages, § 1144.
lien, tender, effect of tender on collateral securities, § 277.
mesne profits, who may recover, § 992.
officers, bonds, liability of public officers, adjustment of liability between sets of sureties, § 481.
measure of damages against officers for neglect of duty, nominal damages, § 490.
measure of damages against sureties on official bonds, § 488.
private injuries covered by official bonds, § 487.
payment to plaintiff after suit, effect, § 436.
payment, to whom payment may be made, § 231.
rent, attachment bonds, wrongful attachment, damages recoverable, § 513.
closing rented premises, measure of damages against sureties on official bonds, § 488.
replevin, recovery for intermediate injury and depreciation of property, § 1151.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
return, failure to return, interest, allowance on statutory penalties, § 330.
sale
injunction bonds, damages, defenses, § 530.
damages from restraint of injunction, § 527.
measure of damages against officers for neglect of duty, nominal damages, § 491.
officers, neglect of duty, measure of damages, nominal damages, § 491.
payment, to whom payment may be made, § 231.
stay, bonds, conditions, § 536.
suretyship, creditor's duty to acquire liens, necessity of notice of reliance, § 739.
surety's remedies for indemnity, contribution between co-sureties, who are co-sureties, § 755.
liability of principal for surety's costs, § 752.
telegrams, delay in transmission or delivery, loss of claim, attachment of property by other creditors, § 965.
trespass, exemplary damages, ratification of unauthorized acts of officers, § 1031.
trover, mitigation of damages, § 1141.

Executors and Administrators
accounting, interest, allowance of interest against agents, trustees and officers, § 353.
actions, recoupment, parties, § 175.
ad damnum, limit of recovery, erroneous claim of damages, § 417.

Executors and Administrators—continued.
appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 535.
application of profits of property, mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.
appointment of executor, release, what constitutes release, § 258.
bills and notes, want or failure of consideration, § 542.
bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
appeal and supersedeas bonds, conditions, § 531.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
guardian's bond, mitigation of damages, § 497.
interest, necessity of demand, § 351.
probate bonds, conditions of administration bonds, history, § 493.
suretyship, creditor's duty to acquire liens, necessity of notice of reliance, § 739.
measure of surety's liability, § 723n.
remedies for indemnity, contribution between co-sureties, § 754.
accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
payment giving right to reimbursement, § 750.
child injured, imputed negligence, § 27.
claims
interest, allowance from time when money ought to be paid, § 329.
allowance of, on judgments, § 333n.
damages incident to debt, § 372.
judgments pending review, § 389.
money had and received, § 352.
pleading, how interest claimed in, § 387.
compensation, quantum meruit, recovery for services rendered, § 679.
contracts for services, implied contracts, right to recover for services rendered, § 679.
contracts of deceased, recoupment and counterclaim, parties, § 175.
covenants of warranty and quiet enjoyment, right of action, parties, § 603.
death by wrongful act, damages, pecuniary loss to estate, § 1277.
distribution of estate, consequential damages, intervening cause, money deposited in bank lost, measure of damages, § 37.
dividends, consequential damages, injury to third person, forged note decreasing dividends of estate, § 333.
executors de son tort, factor's rights, reimbursement by sales, § 790.
exemplary damages as compensation and punishment, who may recover, § 401.
liability of estates for exemplary damages, § 412.
Federal Employers' Liability Act, power to compromise, § 1344.
husband and wife, trespass to real property, gist of action, who may sue, § 1009.
interest, allowance against agents, trustees and officers, § 353.
contracts for services, implied contracts, right to recover for services rendered, interest on compensation, § 679.
suspension, miscellaneous cases, § 380.
master and servant, breach of contract, compensation as measure of damages, § 678.
mitigation of damages, measures of prevention of damage, return of property, § 156.
money paid, allowance of interest on money paid, § 327.
payment, application, debtor's right to direct application, § 235.
application of general payment to debt least secured, § 245.
persons to whom payment may be made, § 231.
retaining money by executors, § 222.

Executors and Administrators—continued.
personal injuries, expenses for physical and surgical aid, recovery, § 1250.
plea of plene administravit, retainer, evidence, § 222.
pleading, erroneous claim of damage, effect, § 417.
probate bonds, actions on bond, liability for executor's debt to estate, § 495.
bonds for administration, § 493.
conditions in general, § 493.
execution of probate bonds, manner, recoveries which may be had, § 494.
guardian's bond, mitigation of damages, § 497.
liability as between sets of sureties, § 498.
mitigation of damages, § 497.
promise to pay for services, contracts for services, implied contracts, right to recover for services rendered, § 679.
public administrators, actions on bond as to sureties, liability for executor's debt to estate, § 495.
recoupment and counterclaim, parties, § 175.
release, requisites, what will operate as release, § 258.
rent, apportionment of rent, § 849.
sales, allowance of interest against agents, trustees and officers, § 353.
breach of contract, damages recoverable by vendor against purchaser, measure of damages, § 570.
direct damages, what constitutes direct damages, § 14.
liquidated damages, payment of fixed sum for partial or total breach of contract, § 294.
warranties of title, existence, § 668.
implied warranty, § 668.
set-off of judgments, interest of real parties considered, § 200.
settlements, bonds, liability as between sets of sureties, § 498.
tender, persons by whom tender may be made, § 264.
persons to whom tender should be made, § 265.
trespass to real property, executors and administrators, damages in suit by executor, personal representative or trustee, § 1013.
trover, mitigation of damages, § 1141.
usury, who may take advantage of usury, § 314.

Exemplary Damages
Ch. IX, §§ 390-412.
actual damages, exemplary damages based on actual damages, nominal damages, § 406.
ad damnum, limit of recovery, erroneous claim of damages, § 417n.
admiralty, torts, exemplary damages, § 1286.
agent's disregard of orders, purchase, shipment and sale of goods, § 773.
aggravation, enhancement and mitigation of exemplary damages, wealth of defendant, scope of inquiry, § 405.
malice in law and malice in fact, § 394.
alienation of affections, action by wife, damages recoverable, evidence, § 1285.
amount, § 2.
assault and battery, grounds authorizing allowance of exemplary damages, § 393.
mitigation of damages, effect of criminal prosecution and fine of offender, § 151.
associations and societies, liability of, § 412.
attachment
bonds, damages recoverable, § 512.
exemplary damages, recovery, § 513.
restriction or denial, rule in Washington, § 400.

Exemplary Damages—continued.
attorneys
advice of, exemplary damages, enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
mitigation of damages, absence of malice, § 150.
negligence, consequential damages for torts, right to damages, § 16.
baggage, sleeping car companies, liability, § 956.
basis of exemplary damages on actual damages, nominal damages, § 406.
breach of marriage promise, right to recover exemplary damages, § 987.
carriers of goods, delay, transportation of dead bodies, physical and mental suffering as elements of damage, § 915.
duty of carrier, goods lost or injured, exemplary damages, § 930.
carriers of passengers, assault by servant, damages for physical and mental suffering, § 942.
ejection, § 937.
enhancement of damages, negro trainman assisting in making ejection, § 939.
injury, damages for ejection without physical injury, excessive verdicts, § 953n.
negligence or breach of duty, exemplary damages, §§ 950, 951.
refusal to carry, damages, § 935.
seats, wrongfully placing white passenger in coach for colored people, § 948.
threat of ejection, liability of carrier for, exemplary damages, § 937.
causes of action, entirety, double remedies, § 119.
compensation, exemplary damages as compensation and punishment, who may recover, § 401.
conflict of laws as to allowance of exemplary damages, § 392.
contracts for services, measure of damages, recovery under statutes for unpaid wages, § 678.
damages affected by object of action, distinction in pursuit of property, detinue and replevin, § 1146.
death by wrongful act, exemplary damages, § 1263.
elements of damage, mental suffering, §§ 95, 96.
value of property, § 105.
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.
escape of debtor, officers, neglect of duty, measure of damages, § 489.
estates of decedents, liability of, § 412.
false imprisonment, § 1258.
pleading, special damages, punitive damages, § 1257.
fraud, exemplary damages, right to recovery in addition to compensatory damages, interest, § 1178.
grounds authorizing allowance of exemplary damages, § 393.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
scope and effect of obligation, § 520.
interest, allowance of interest in actions for torts, § 355.
interest as compensation, § 320.
invasion of rights, presumptions of injury, right to damages, § 2.
joinder of actions, parties, joint and several liability for torts, § 140.
joint liability, exemplary damages, basis of exemplary damages on actual damages, nominal damages, § 407.
leases, covenants, exemplary damages for breach of various covenants, § 866.
malice in law and malice in fact, § 394.
malicious prosecution, elements of damage, § 1238.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.

Exemplary Damages—continued.
Mental anguish—continued.
nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
mesne profits, recovery in action for, § 994.
mitigation, § 154.
enhancement and mitigation of exemplary damages, § 404.
wealth of defendant, scope of inquiry, § 405.
motive, allowance of exemplary damages, difference of views, §§ 391, 392.
compensation for wrongs done with bad motives, violation of contract, § 390.
municipal corporations, liability of, § 412.
nuisance, recovery of exemplary damages, continuance of nuisance, waiver of damages, § 1052.
officers and public employees, liability of, § 412.
measure of damages against officers for neglect of duty, nominal damages, § 489.
measure of damages against sureties on official bonds, § 488.
parties, bonds, wrongful attachment, parties who may sue, § 511.
parties liable, liability of master for acts of servants, §§ 408-411.
penal offenses, exemplary damages for penal offenses, § 402.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
damages, discretion of jury as to damages, instructions, § 1256.
mitigation of damages, admissibility of evidence, § 1255.
parties, action for injury to child, § 1252.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
punishment, exemplary damages as compensation and punishment, who may recover, § 401.
remittitur, propriety of remittitur, excessive damages, § 459.
replevin, bonds, assessment of damages in suit on bond, § 502.
exemplary damages, right to recovery, aggravating circumstances, § 1145.
restriction or denial, Colorado rule, § 400.
Connecticut rule, § 400.
Massachusetts rule, § 397.
Michigan rule, § 399.
Nebraska rule, § 398.
New Hampshire rule, § 396.
Washington rule, § 400.
West Virginia rule, § 400.
right, exemplary damages as matter of right, power of court over verdict, § 403.
rule as to compensatory damages, § 395.
seduction, damages recoverable, compensatory and exemplary damages, § 1283.
set-off, counterclaim and recoupment, burden of proof, § 188.
slander and libel, right to recover exemplary damages, § 1216.
sureties, liability of, § 412.
measure of surety's liability, § 723.
telegraphs and telephones, exemplary damages, negligence in transmitting messages, § 974.
refusal to accept message, exemplary damages, § 974.
telephone services, refusal to furnish, exemplary damages, § 974.
trespass quare clausum fregit, nature of action, § 1010.
trespass to personal property, aggravation increasing damages, injuries to feelings, exemplary damages, § 1095.
damages exceeding compensation, exemplary damages, § 1092.
trespass to real property, definition, scope of remedy, § 1010.
exemplary damages, circumstances of outrage, insult, destruction of personal property, § 1031.

Exemplary Damages—continued.
trespass to real property—continued.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
trover, exemplary damages, wilful and malicious tort, § 1131.
vendor and purchaser, breach of contract, damages recoverable by purchaser, measure of, what law governs, § 579.
verdicts, excessive or insufficient verdicts, § 459.
discretion of jury as to damages, instructions, § 1256.
exemplary damages, allowance in verdict by court or jury, § 464.
including compensatory and exemplary damages, cure by remittitur, § 459.
setting aside, § 459.
when English rule does not apply, § 581.
wilful or malicious injuries, consequential damages, § 43.

Exemptions
attachment, bonds, recovery of costs and expenses of attachment suit, § 516.
contracts, limitation of common law liability, Carmack Amendment to Interstate Commerce Act, § 904.
interest, allowance of interest on judgments, § 333n.
levy on exempt property, attachment bonds, damages recoverable, costs and expenses of defending against attachment, § 516.
officers, neglect of duty, measure of damages, nominal damages, § 490.
payment, application, general payment applied to oldest debt, § 243.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
validity of claim essential, § 174.
sales of property, measure of damages against sureties on official bonds, § 488.
set-off of judgments, when granted, § 199.
unlawful seizure, set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
wilful levy on exempt property, trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.

Exhibits
personal injuries, exhibition of injured parts, means of injury, § 452.

Expenses
agency, duty of agent, liability, disregard of instructions, § 774.
indemnity, agent's right to indemnity for losses or damages, § 793.
measure of agent's liability, defaults in regard to bills and notes, § 776.
measure of agent's liability under various circumstances, § 774.
particular duties and liabilities of agents, principal's right to indemnity, § 771.
reimbursement of expenditures, agent's rights, § 789.
mode of doing business, § 792.
animals injured, consequential damages, tendency of act or omission to cause damages, injury need not be foreseen, § 28.
pleading, special damages, necessity of alleging, § 420.
appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
arrest, injunction bonds, recovery of costs and expenses, attorney's fees, § 525.
attachment bonds, damages recoverable, § 512.
recovery of costs and expenses of attachment suit, § 516.
baggage lost or injured, measure of damages, § 955.

Expenses—continued.
bond of indemnity, agent's liability to third persons, implied warranty of authority, § 797.
damages recoverable, mental and physical suffering, liability for original trespass, § 763.
breach of contract, consequential damages, market value, § 52.
contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
carriers of goods, charges and expenses, delivery hindered or prevented, § 894.
delay, liability for expense of further transportation, § 912.
liability where facts are known, § 913.
negligence, proximate cause, § 903.
delivery, liability for time and expenses of obtaining property, § 911.
goods lost or injured, extent of liability of carrier, § 918.
recovery by shipper for expenses and labor in lessening loss, § 921.
refusal to carry, increased expenses, loss of customers, § 901.
carriers of passengers, alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
boarding wrong train, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
breach of contract to carry, recovery for cost of other means of transportation, § 936.
compensation, physical and mental suffering of passenger, injury to character, § 942.
consequential damages, distinction between liability in tort and on contract, § 49.
husband carried beyond destination, loss of service of wife, expenses, § 36.
ejection, place, removal of passengers at wrong place, loss of time and expense, consequences of exposure, § 938.
negligence or breach of duty, damages recoverable, nature of injury, § 942.
recovery by passenger for special loss, § 947.
refusal to carry, damages, loss of time, expense, exposure and humiliation, § 936.
cause of action, entirety, continuing obligations, § 112.
civil damage laws, consequential damages, extension of liability by statutes, § 16.
compensation for services, remoteness of stipulated compensation, § 684.
consequential damages, certainty, recovery for successive consequences of act or omission, § 58n.
recovery of items, of damages which are certain, § 55.
contract for particular work
breach, contractor's liability, § 697.
actual loss, § 704.
rental value, expenses, § 703.
consequential losses, § 702.
defects to be remedied, liability for expenses and consequential losses, § 699.
demands for extra work, basis for adjustment, § 707.
employer's liability for delaying or stopping work, consequential losses, mitigation of damages, § 713.
liability for profits lost and expenses incurred, § 698.
part performance of entire contract, allowance of recovery on quantum meruit, § 711.
contracts for services, profits of business as compensation, evidence, breach of contract, § 684.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.

Expenses—continued.
contracts for services—continued.
measure of damages, liability for expenses and lost commissions, § 694.
covenant against incumbrance, damages for breach of permanent incumbrance, § 628.
rule of damages, remote losses, § 622.
covenants for title
breach, measure of damages, costs of eviction, expenses, § 593.
mitigation or prevention of damages, § 601.
remedies by guarantee, recovery of expenses, § 598.
covenants of warranty and quiet enjoyment
measure of damages, conflict of laws, § 605.
consideration as measure of recovery, rule in England and Canada, § 607.
expenses, costs and counsel fees as damages, § 617.
extinguishment of adverse title by covenantee, § 610.
damnum absque injuria, prosecution of groundless action in good faith, § 3.
death by wrongful act, damages, children's loss from death of parent, § 1267.
pleading of damages, § 426.
elements of damages
expenses incurred to prevent or lessen damages, § 88.
employer may finish work at contractor's expense, § 91.
extent of duty, § 90.
vendor and vendee, § 89.
indemnity, liability for losses and expenses, § 84.
labor and expenditure, § 80.
personal torts, § 93.
eminent domain, injury to property not taken, ascertainment, § 1067.
of acts which may be considered, § 1069.
expenditures to lessen loss, §§ 1072, 1073.
evidence, proof of pecuniary items by plaintiff, § 441.
expenses to prevent or lessen damages between vendor and vendee, § 89.
express indemnities
damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
mental and physical suffering, liability for original trespass, § 763.
false imprisonment, damages, elements, securing release from restraint, § 1257.
fraud, false representations, measure of damages, difference between value and amount paid, § 1172.
measure of damages, expenditures, loss of time, § 1171.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
injunction bonds, damages, costs and expenses, attorney's fees, §§ 524, 525.
damages from restraint of injunction, §§ 526, 528.
landlord and tenant
covenants, breach, exemplary damages, § 866.
special and consequential damages, § 865.
lessee's right to damages for injury to business, § 867.
repairs, breach of covenant to repair, measure of liability, § 858.
lessee's duty, recovery for making, § 873.
lessor's liability for special and consequential damages, § 874.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
labor and expenditures, § 80.
money paid to third persons, § 82.

Expenses—continued.
losses as elements of damages—continued.
relying on performance, § 81.
what losses consist of, § 79.
malicious prosecution, damages, elements, aggravation of damages, wrongful imprisonment, expenses, §§ 1237, 1238.
master and servant
wrongful discharge of servant, liability for expenses and lost commissions, § 694.
presumption of subsequent employment, duty to mitigate damages, § 693.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
measures of prevention of damage, return of property, § 156.
neglect of clerk to index mortgage, damages, losses, attorney's fees in defending suit, § 83n.
nuisance, damages, future expenses, § 1041.
elements of damages, § 1048.
payment by note, bill or check, § 226.
personal injuries, prospective damages, number of actions maintainable, § 1251.
wife, injuries to, parties, joint right or liability for tort, determination, § 137.
personal torts, elements of damages, § 93.
pleading, itemization of damages, demands unliquidated, § 424.
special damages, necessity of alleging, § 420.
replevin, bonds, actions, damages recoverable, § 505.
consequential damages, damages arising naturally and proximately from wrong, § 1146.
defendant's rights, special and consequential damages, § 1158.
detention of property, expenses, § 1144.
measure of damages, § 1144.
special and consequential damages, § 1146.
rescission of sale, consequential damages, anticipation of injury, proximate cause, § 25.
right of way, breach of covenant against incumbrances, rule of damages, payment of incumbrances, damages if not paid, § 623.
sales
acceptance of goods, buyer's right to return property, § 650.
liability for not accepting remedies of seller, § 647.
breach of contract by seller, delay in delivery, damages, § 664.
non-delivery of property in market, damages recoverable by buyer, § 651.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, §§ 671, 675.
delay in delivering property, damages, action by purchaser against seller, § 664.
warranties of title, existence, § 668.
warranty of quality or quantity, damages for breach, interest, expenses and special injuries, §§ 671, 675.
suretyship, contract not to be extended by construction, § 726.
contribution between co-sureties, § 754.
express indemnity, damages recoverable, § 762.
indemnity of surety by principal, adjustment of right of co-sureties, § 758.
remedies for indemnity, indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
telegraphs and telephones, message not delivered, damages recoverable, liability for expenses, § 966.
negligence in transmitting message, liability when object of sender is known, § 964.
time, loss of, attachment bonds, defenses, mitigation of damages, § 515.

Expenses—continued.
trespass to personal property, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
expenses to recover, restore, and protect property, damages, § 1103.
mitigation of damages, § 1104.
special and consequential damages, § 1101.
trespass to real property, destruction of fences, damages, § 1024.
mitigation of damages, § 1027.
permanent wrong, damages, § 1017.
trover, special and consequential damages, § 1129.
vendor and purchaser
breach by purchaser, measure of damages, § 570.
recovery by vendor when contract does not fix price, evidence, § 575.
breach by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
defaulting vendee's rights, conflict of American cases, § 586.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, conflict of American decisions, § 580.
nominal damages, § 582.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.

Expert and Opinion Evidence
amount of damages, opinions, admissibility, § 444.
automobiles, repairs, instances of rejection and admission of opinions, § 443.
carriers, duty of carrier, goods lost or injured, proof of value, § 933.
dealers, value of property, evidence, actual sales, offers for property, market quotations, § 447.
dogs, proof of value of dogs, § 449.
eminent domain, proof of value of property and damages, § 1089.
estimate of damages, items, admissibility of opinions of witnesses as to items of damages, § 444.
geological expert, opinion evidence as to value of property, § 446.
ground of opinion, value, questions which may be asked witnesses as to grounds of opinion, § 450.
injured parts, exhibition of, exhibition of means of injury, § 452.
market value, opinion evidence as to value of property, admissibility, § 446.
non-expert testimony, instances of rejection and admission of opinions, § 443.
opinions upon subjects of common experience and observation, § 442.
pecuniary items, necessity of proof by plaintiff, opinions, § 441.
personal injuries, earning capacity diminished, evidence, § 1248.
mitigation of damages, admissibility of evidence, § 1255.
physical examination of plaintiff, discretion of court, § 451.
rental value, proof of § 995.
sales, breach of contract, action by purchaser against seller, proof of value of property, § 654.
value, attorney's services, evidence of value, judicial notice, § 680.
contracts for services, evidence of value of services, § 680.
value of property, elements, evidence, §§ 445, 448.
verdict, deliberations of jury, amount of damages, § 456.

Explosion
blasting, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
derailment of train, consequential damages for torts, liability, illustration, § 18.

Explosion—continued.
fire caused by explosion, carrier's negligence as proximate cause of injury, empty car marked as containing explosives, property destroyed by fire, § 36.
consequential damages, act complained of must be efficient cause of damage, § 29.
anticipation of injury of persons, proximate cause of injury, § 25.
gas escaping, consequential damages, § 18.
gunpowder, anticipation of injury as to persons, illustrations, § 25.
infant injured, consequential damages for torts, liability, illustrations, § 19.
sale of dangerous articles, anticipation of injury to person, illustration, § 25.
sale of oil, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.
sale to children, consequential damages, § 19.
sewer constructed, gas escaping, consequential damages, § 18.
storage of gunpowder, explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.
transportation of explosives by carriers, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.
trespass, scope of remedy, § 1010.
destruction of property, damages, compensation, § 1015.
weapons, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.

Exposure
carriers of goods, read bodies, recovery for mental suffering, independent of other injury, § 943.
carriers of passengers
alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
consequential damage, distinction between liability in tort and on contract, § 48.
damages recoverable by passenger, verdicts excessive, § 953n.
ejection at wrong place, loss of time and expense, consequences of exposure, § 938.
injury sustained on track, § 939.
negligence or breach of duty, exposure of passenger, damages recoverable, § 936.
refusal to carry, damages, passenger's indiscreet acts, § 940.
wrong destination, consequential damages, recovery for successive consequences, illustrations, § 57.
distinction between consequential liability in tort and on contract, § 48.
consequential damages, breach of statutory duty, illness of passenger, § 32.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
contracts for services, wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
leases, covenants, exemplary damages for breach of various covenants, § 866.
machinery sold, breach of contract by seller, delay in delivery, mitigation of liability, § 666.
pain and suffering, exposure, allegations to show mental anguish, § 1029.
telegraphs and telephones, negligence in transmission of message, damages, § 965.
trespass to real property, aggravation and special damages, § 1029.

Express Companies
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
limitation of liability, contracts, limitation of common law liability, Carmack Amendment to Interstate Commerce Act, § 904.

Extortion
interest, allowance of interest on money obtained by extortion or fraud, or wrongfully withheld or disposed of, § 354.
railroads, bonds, penalty as limit of recovery, exception as to interest, § 478n.

Extra Work
contracts for particular work, demand for extra work, basis for adjustment, § 707.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, 713.
suretyship, express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.

Extraordinary Circumstances
consequential damages, liability as affected by extraordinary circumstances, §§ 34, 35.

Eye Injured
evidence, physical examination of plaintiff, § 451.
dilating pupils by drugs, discretions of court, § 451.
exhibition of injured parts, means of injury, § 452.
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256.
pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
pleading, special damages, necessity of alleging, § 421.
squib thrown, consequential damages, proximate cause, act of third person as cause, § 40.

F

Factors
advances, factor's rights, reimbursement by sales, § 790.
carriers, delay in transportation of goods, liability of carriers, § 905.
delivery of goods by carrier to wrong person, liability of carrier, § 931.
duty of carrier, care of property, liability for goods injured or lost, liability of shipper for freight charges, § 918.
collections, right of agent to charge for exchange and interest, § 791.
compensation by mutual demand, § 148.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
creditor's right to make application of payments, § 240.
duties, accounts, duty of factor to render, effect of misrepresentation, § 784.
remitting funds, effect of failure to obey orders, § 785.
reports, agent's duty to inform principal, § 769.
sale of goods, duties, neglect to care for goods, § 777.
liability, failure to sell at certain time, §§ 780, 781.
making sale on unauthorized terms, § 782.
measure of, for selling at unauthorized price, §§ 778, 779
fire insurance, commission goods, § 828.
funds, remitting, consequences of failure to obey orders, § 785.

Factors—continued.
guaranteed commission, recovery against factor whose commission is guaranteed, § 783.
instructions
sale of goods, duties, neglect to care for goods, § 777.
liability for failure to sell at certain time, § 780.
measure of liability for selling at unauthorized price, §§ 778, 779.
insurance, neglect by agent of duty or agreement concerning insurance, § 772.
interest, allowance on money paid, § 326.
judgment, necessity of certainty, § 467.
liens, right of factors to general liens, extent, § 782.
mistake in shipping goods, liability for direct damages, § 14.
negligence, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
payment
application, creditor, § 240.
debtor's right to direct application, § 236.
profits, certainty of damages, anticipated profits, § 60.
reimbursement, right of factor to reimburse himself by sales, § 790.
sale of goods, direct damages, what constitutes direct damages, § 14.
telegrams, negligence in transmitting message, liability when object of sender is known, § 961.
trover, measure of damages, property of fluctuating value, §§ 1120, 1122.
mitigation of damages, § 1138.
undisclosed principal, right of factor to do business in his own name, § 782.

Faculties Impaired
see Earning Capacity.
elements of damage, personal torts, § 93.

Falling from Train
conductor injured, consequential damage for torts, liability, illustration, § 18.

Falling from Wagon
defect in highway, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.

Falling Into Cattle Guard
passenger alighting at wrong place, consequential damages, liability of carriers, extraordinary circumstances, § 36.

Falling Into Well
consequential damages for torts, liability, illustrations, § 18.

Falling Objects
blasting, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
consequential damages for torts, liability, illustrations, § 19.
proximate cause, person struck by dead body, § 35.
death, consequential damages, liability, § 18.
derailment of train, car falling on building, consequential damages, nervous shock, § 24.

Falling on Street
civil damage laws, consequential damages for tort, wife injured while following husband, § 19.

False Imprisonment
actual damages, necessity of proving actual injury, § 75.

False Imprisonment—continued.
agents, liability for acts, exemplary damages, parties liable, liability of master for acts of servants, § 408.
assessment of damages, cause of action, right to controvert, § 431.
carriers of passengers, duty of carrier, protection of passenger, § 941.
consequential damages, acts of third person, § 40.
damages, elements, § 1257.
mental suffering, § 95.
securing release from restraint, § 1257.
exemplary damages, § 1258.
allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
enhancement and mitigation of exemplary damages, § 404.
evidence of wealth of defendant, § 1258.
malice in law and malice in fact, § 394.
mitigation, § 1258.
parties liable, master's liability for acts of servants, § 408.
husband imprisoned, wife injured, nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
malice, necessity of proof, § 1257.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
recovery of damages for mental suffering, § 979.
miscarriage, consequential damages for torts, liability, illustrations, § 19.
mitigation of damages, § 154.
absence of malice, § 150.
motive, evidence in mitigation of damages, § 1257.
nominal damages, illustration of right to, § 10.
officers, measure of damages against sureties on official bonds, § 488.
pleading, necessity of alleging special damages, § 421.
punitive damages, § 1257.
probable cause, evidence in mitigation of damages, § 1257.
provocation, exemplary damages, mitigation, § 1258.
verdicts, excessive verdicts, new trial and remittitur, § 1257.
where there are several parties, § 463n.

False Pretenses
agent's liability to third persons, implied warranty of authority, § 797.
consequential damages, act complained of must be efficient cause of damages, § 31.
corporations, exemplary damages for penal offenses, § 402.

False Representations
see Fraud.

Farm Leases
see. also. Landlord and Tenant.
breach of covenant for quiet enjoyment, general rule of damages, § 864.
certainty of damages, breach of contract to lease premises, § 65.
profits of special contracts, § 63.
covenants of landlord, breach, special and consequential damages, § 865.
injunction bonds, damages from restraint of injunction, § 527.
lessee's right to damages for injury to business, § 870.
mitigation of damages by lessee, § 871.
extent of duty to lessen or prevent damages, § 90.
parties, joint right or liability for tort, determination, § 137.
repairs, lessor's covenant to repair, breach, measure of liability, § 872.
liability for special and consequential damages, § 874.
sale of crops, liquidated damages, payment of fixed sum for partial or total breach of contract, § 294.

Farm Machinery
evidence of value, suit on replevin bond, § 504.

Federal Courts
appeal and supersedeas bonds, federal supreme court, § 532.
instances of liability, specific conditions, § 536.
interest and damages, award on appeal, § 538.
bills and notes, principal sum, certainty, § 541.
stipulations for costs and attorneys' fees, § 564.
carriers, duty of carrier, goods lost or injured, liability for partial loss when value is limited, § 927.
clerk, official bonds, private injuries, covered by official bonds, § 487.
death by wrongful act, children's loss, death of parent, § 1267.
eminent domain, basis for estimating value of land, value for condemnor's purpose, § 1075.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
evidence of physical examination of plaintiff, § 451.
exemplary damages, allowance of exemplary damages, rule of United States Supreme Court, § 392.
factor's duties, sale, measure of liability, sale at unauthorized price, § 778.
fraud, false representations, measure of damages, § 1172.
guaranty, endorsement of negotiable paper, effect, § 730.
injunction bonds, damages, costs and expenses, attorneys' fees, § 524.
power of court of equity, § 521.
recovery of costs and expenses, attorney's fees, § 524.
right of action, when it arises, who may sue, § 522.
interest, actions for torts, § 355.
award on appeal, § 538.
judgments pending review, § 389.
verdict before judgment, § 388.
leases, insurance, breach of covenant to insure property, damages, § 862.
life and accident insurance, character of contract, § 832.
malicious prosecution, mitigation, evidence, § 1239.
master and servant, wrongful discharge of employees, measure of damages, remedies, § 692.
official bond, private injuries covered by official bonds, § 487.
personal injuries, loss of capacity for enjoyment as damages, § 1243.
replevin bonds, actions, defenses, mitigation of damages, § 507n.
judgment, failure to render alternative judgment, what may be shown in defense or in mitigation, § 507.
suit on bond, assessment of damages, § 502.
rules, interest on judgment pending review, § 389.
slander and libel, aggravation of damages, § 1208.
suretyship, express indemnity, damages recoverable, § 762.
telegrams
negligence in transmitting, liability when object of sender is known, § 961.
mental suffering, authorities denying recovery of damages for mental suffering, § 977.
repetition of message, limitation of liability, § 958.
trover, damages, place of conversion, liability of purchaser, effect of wilfulness, § 1110.
property of fluctuating value, § 1119.
value of property enhanced by defendant, § 1127.
vendor and purchaser, breach of contract by vendor, measure of damages, conflict of American decisions, § 580.
verdicts. excessive or insufficient verdict, power of court, remittitur, § 460.

Federal Employers' Liability Act
appeal and error in actions under, § 1358.
assumption of risk under, § 1323.
boats, application of act to, § 1305.
compromise
by decedent as affecting action for death, § 1342.
power of representative, § 1344.
contributory negligence
burden of proof, § 1328.
distinguished from assumption of risk, § 1325.
effect under, § 1324.
violation of federal statutes, § 1329.
employee's negligence as sole cause of injury, § 1326.
instructions on, § 1330.
what constitutes, § 1327.
damages, personal injuries, § 1331.
death, abandonment of wife as affecting recovery, § 1335.
apportionment of damages, § 1338.
beneficiaries, § 1332.
adopted children or foster parents as, § 1332.
illegitimate children as, § 1332.
right of subordinate class to recover where preferred class not dependent, § 1332.
compromise or release by decedent as affecting action for, § 1342.
damages for, § 1337.
dependents, § 1332.
distribution of amount recovered, § 1339.
existence of beneficiaries of preferred class as excluding recovery in behalf of beneficiaries in other classes, § 1332.
extraneous circumstances as affecting recovery, § 1335.
former adjudication or recovery, effect of, § 1345.
instructions, § 1337.
joinder of actions for pain and suffering and pecuniary loss, § 1335.
measure and elements of damages, § 1333.
recovery for pain and suffering of decedent, § 1333.
release by beneficiary, effect of, § 1343.
remarriage as affecting recovery, § 1335.
who are next of kin, § 1332.
effect on state regulations, § 1302.
employees within the act, §§ 1306-1321.
employers within the act, § 1305.
evidence in actions under, § 1354.
ferry boats, application of act to, § 1305.
history of enactment, § 1248.
Hours of Service Act, effect of violation of, § 1322.
instructions, in actions under, § 1355.
interurban railroads, when within, § 1305.
limitation of actions under, § 1346.
logging roads, when not within, § 1305.
negligence under, § 1322.
parties in actions under, § 1352.
pleading, actions for death, § 1349.
alternative allegation setting up both state and federal law, § 1350.
amendments, § 1348.
requisites and sufficiency under, § 1347.
practice under, § 1351.
questions for jury in actions under, § 1357.
release, application of provisions affecting, § 1340.
by decedent, affecting action for death, § 1342.
effect of by beneficiary, § 1343.
validity of provisions affecting, § 1340.

Federal Employers' Liability Act—continued.
release-continued.
validity, where executed subsequent to injury, § 1341.
removal of causes, § 1353.
Safety Appliance Act, effect of violation of, § 1322.
scope, § 1299.
special interrogatories in actions under, § 1356.
street railroads, when within, § 1305.
tug boats, application of act to, § 1305.
validity, § 1301.
wharves, application of act to, § 1305.
Workmen's Compensation Acts, acceptance of compensation as barring recovery under, § 1341.
effect of federal act on, § 1303.

Fences
animal escaping, consequential damages, § 18.
trespass to real property, aggravation, special damages, § 1028.
animals injured, consequential damages for torts, liability, illustrations, § 19.
consequential damages, intervening cause, private way obstructed by fence, § 38.
fence statutes, § 20.
contracts to maintain gate, liability for non-performance, consequential losses, § 702.
covenant against incumbrances, damages for breach, permanent incumbrance, § 628.
definition, what are incumbrances, § 620n.
covenants for title, breach of covenants, what constitutes breach, § 592.
crops injured, cause of action, entirety, successive actions for damage to real property, § 115n.
destruction of property, damages, compensation, § 1015.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
division fence, increase in height, elements of damage, mental suffering, § 95.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
eminent domain, deduction for benefits, special benefits, § 1085.
injury to property not taken, ascertainment, §§ 1068, 1069.
expenditures to lessen loss, §§ 1072, 1073.
farm leases, repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
highways and streets, duty to keep in safe condition, § 26.
injunction bonds, damages from restraint of injunction, § 527.
injuries by animals, mitigation of damages, evidence disclosing fact reducing injury, § 159.
injuries to fences, special damages, necessity of alleging, § 420.
landlord and tenant
repairs, breach of covenant, measure of liability, § 856.
lessor's liability for special and consequential damages, § 874.
mortgages, releases, extrinsic evidence and construction, § 255.
nuisance, injury to crops and trees, damages, § 1049.
pleading, special damages, necessity of alleging, fence injured, § 420.
railroads, consequential damages, breach of contract, proximate consequences of breach, § 45n.
removal, consequential damages, injury not foreseen, § 28.
repairs, consequential damages for torts, liability, illustrations, § 18.
contract for particular work, breach, consequential losses, contractor's liability, § 702.
failure to repair, elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.

Fences—continued.
replevin, action for fences or material composing it, damages, § 1114.
right of erection, breach of covenants against incumbrance, damages where incumbrance is permanent, § 628.
spite fence, right to damages, § 3.
trespass to real property, exemplary damages, mitigation, § 1032.
mitigation of damages, § 1027.
remediable injury, damages, § 1018.
use of property, damnum absque injuria, § 3.

Ferries
animals frightened, consequential damages, intervening cause, § 38.
application of Federal Employers' Liability Act to, see Federal Employers' Act.
breach of right to maintain, certainty of damages, anticipated profits, § 59n.
consequential damages, intervening cause, horses on boat frightened by whistle, falling into water, § 38.
contract for particular work, employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713n.
eminent domain, injury to property not taken, acertainment of damages, facts which may be considered, § 1068.
ferryboat striking slip, injury to passenger, intervening of proximate cause, § 37.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
horse drowned, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
infringement of ferry franchise, elements of damage, losses, § 79.
lease, breach of contract, consequential damages, certainty, recovery or items of damages which are certain, § 55.
mesne profits, action for, ascertainment of profits, what property withheld, § 996.
nuisance, remote consequences of nuisance, liability for, § 1051.
passenger injured, delay in transportation, consequential damages for torts, intervening cause, § 37.
runaway, flat taken wrongfully, certainty of damages required, § 53.

Fertilizer
sales, breach of contract, certainty of damages, anticipated profits, § 60n.
non-delivery of property contracted for, consequential damages, illustration, § 663.

Fertilizer Factory
nuisance, injury to crops and trees, damages, § 1049.

Figures
judgment, certainty, necessity that judgment be certain, § 467.

Fines
mitigation of damages, payment of fine, assault, § 151.
penalties, no interest on penalties, § 330.
usury, when contracts not void for usury, § 315.

Fingers Injured
personal injuries, amount to be allowed for pain and suffering, verdicts, § 1242n.
telegraphs and telephones, delay in delivery of message, damages, physical pain, § 965.

Fire
act or omission as proximate cause of injury, consequential damages, § 30n.
attachment, bonds, damages recoverable, § 512.
forthcoming bonds, failure to deliver property, damages, § 517.
building destroyed, consequential damages for torts, liability, illustration, § 18.
consequential damages recoverable only when contemplated by parties, § 45, n25.
damnum absque injuria, § 3.
mitigation of damages, § 154.
carriers
delay in transportation, consequential damages for torts, intervening cause, property burned, § 37.
liability for negligence, proximate cause, § 903.
negligence as proximate cause of injury, empty car marked as containing explosives, property destroyed by fire, § 36.
child burned by fire, consequential damages for torts, liability, illustration, § 18.
consequential damages, § 18.
breach of contract, proximate consequences of breach, illustrations, § 46.
intervening cause, § 37.
liability, illustrations, § 19.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
acts or omission as proximate cause of damage, § 29.
wrongful act as proximate cause of damage, § 38.
right to recover, § 16, n23.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
demand for part performance of entire contract, recovery by contractor on quantum merait, § 709.
derailment of train, consequential damage for torts, liability, illustration, § 18.
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1066.
explosion, consequential damages, extraordinary circumstances, liability of carriers, § 36.
fire caused by explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.
fire insurance, general rule of damages, § 821.
total loss, what constitutes, § 807.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
destruction of demised premised, effect as to rent, § 852.
insurance, covenants to insure, damages for breach, § 862.
partial destruction of demised property, effect as to rent, § 851.
repairs, covenants by lessee for repairs, § 855.
measure of liability for not making repairs, § 858.
covenant by lessor to repair, breach of covenant, measure of liability, § 872.
termination of lease by lessor, effect, recovery of rent, § 847.
marine insurance, cause of damage, must be proximate, § 803.
damages in case of partial loss, § 816.
mill burned, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
parties, joint liability for tort, determination, § 137.

Fire—continued.
negligence, consequential damages, § 19.
mitigation of damages, pleading, necessity of pleading facts in mitigation, § 166.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
nuisance, joint and several liability, private and public nuisance, § 1059.
person burned, consequential damages, breach of contract, proximate consequences of breach, § 45n.
protection of property, consequential damages, act of injured party, fraud and exposure to peril, § 39.
destruction of property as damnum absque injuria, § 3.
railroads, mitigation of damages, insurance money, statutes, § 1027.
removal of burning property, consequential damages, acts or omission as proximate cause of damage, § 29.
sale of inflammable substance, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
salvage services, nature of peril, duty of claimant, persons who may be salvors, §§ 716, 717.
storage of gunpowder, explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.
storage of oil, consequential damages, act complained of must be efficient cause of damage, § 29.
timber destroyed, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
trespass, additional injury to land beyond taking away timber and minerals, liability, § 1021.
crops, destruction of and injury to growing crops, damages, § 1023.
destruction of property, damages, compensation, § 1015.
party walls, injuries, damages recoverable, § 1025.
vessels, breach of contract to furnish goods for shipment, mitigation of loss, duty of carrier, § 880.
deviation from course, agent's particular duties and liabilities, principal's right to indemnity, § 770.
freight charges, when due and earned, prepayment, § 887.
wood sold, recoupment and counterclaim, acts which may be basis of recoupment, § 181.

Fire Department
interference with fire department, consequential damages, anticipation of injury to persons, proximate cause, § 25.

Fire Insurance
see Insurance.

Fireman Injured
certainty of damages, chances of promotion, § 71.
fire caused by explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.

Fish
access to fishing ground, eminent domain, injury to property not taken, ascertainment, § 1070.
admiralty, torts, proximate loss, limitation of liability to proximate loss, § 1289.
contracts for services, wrongful discharge of employees, measure of damages, remedies, § 692.
contract to furnish boat, damages for delay, § 703.
net injured, trespass to personal property, special and consequential damages, § 1100.
nominal damages, right to nominal damages, trespass, § 10.
preventing person from fishing, certainty of damages, tortious interference, § 70.

Fish—continued.
trespass to personal property, special and consequential damages, remote damages, § 1100.
trespass to real property, destruction of property, damages, § 1015.
trover, whales, value of property, proof of value, § 1113.

Fits
assault, special damages, necessity of alleging, § 421.

Fixtures
breach of covenants for title, what constitutes breach, § 592.
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
mitigation of damages, § 611.
eminent domain, injury to property not taken, ascertainment, § 1067.
gas fixtures, destruction of property, damages, compensation, § 1015.
injunction bonds, damages from restraint of injunction, § 528.
leases, conversion, measure of damages, removal of fixtures, § 1134.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
repairs by lessee, right to remove fixtures, § 875.
removal of fixtures, mitigation of damages, reduction of loss or benefit, § 164.
trespass to personal property, damages, ascertainment of value of nonmarketable property, § 1099.
remedy, comprehensiveness of remedy, § 1094.
trespass to real property, remediable injury, damages, § 1018.
trover, evidence of value, fixtures, § 1114.

Flax
sales, breach of contract by seller, evidence of loss, § 653.

Floods
animals injured, remote consequences of nuisance, liability for, § 1051.
bridges not repaired, consequential damages, act or omission as proximate cause of injury, § 29.
causes of action, entirety, damage to real property, § 114.
confusion of goods, compensatory damages, motive as affecting damages, tort actions, § 101.
consequential damages for torts, intervening cause, § 37.
flood caused by dam, § 38.
liability, illustrations, § 19.
covenants for title, breach of covenants, what constitutes breach, § 592.
crops injured, evidence, opinions on subjects of common experience and observation, admissibility, § 443.
destruction of property as damnum absque injuria, § 3.
diversion of surface waters, parties, joint and several liability for torts, § 141.
elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
eminent domain, cause of action, entirety, successive actions for damage to real property, § 116.
property not taken, injury, compensation, § 1065.
excavation, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
landlord and tenant, covenants for repairs, § 855.
destruction of demised premises, effect as to rent, § 852.
partial destruction of demised property, effect as to rent, § 851.
repairs, covenants for repairs by lessee, § 855.
mitigation of damages, benefit not derived from defendant, § 158.
evidence disclosing fact reducing injury, § 159.
extent of duty to lessen or prevent damages, § 90.

Floods—continued.
mitigation of damages—continued.
res gestæ, fuller proof res gestæ in trespass, negligence, etc., § 159.
nuisance, continuing liability of person causing nuisance, § 1040.
nuisance, damages recoverable, first action, § 1039.
injury to crops and trees, damages, § 1049.
remote consequences, liability, § 1051.
parties, joint and several liability for torts, § 141.
railroads, eminent domain, right to compensation, § 1061.
trespass to real property, aggravation, special damages, § 1028.
consequential damages for torts, liability, illustration, § 18.
permanent wrong, damages, § 1017.
vessel wrecked, consequential damages, intervening cause, canal boat delayed and wrecked by flood, § 37.
wilful or malicious injuries, consequential damages, § 44.
wool destroyed, carriers of goods, liability for consequential damages, intervening cause, § 37.

Florida
agent's liability to third persons, measure of damages, action without authority, § 798.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
covenants, breach, defenses and crossclaims, against purchase money, § 636.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
probate bonds, liability as between sets of sureties, § 498.
sales, seed, warranty of quality, damages for breach, interest, expenses and special injuries, § 674.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
mental anguish, damages, evidence, § 975.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, damages, property of fluctuating value, § 1118.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.

Flour
carriers of goods, loss or injury to property, recovery for expenses and labor in lessening loss, § 921.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.

Flowers
greenhouse injured, certainty of damages, anticipated profits, § 62.
sales, breach of warranty as to quantity or quality, damages, general rule, § 670.

Food
deprivation of food, elements of damages, expenses to prevent or lessen damages, § 88.
sales
breach of contract by seller, consequential damages, § 663.
non-delivery of property contracted for, consequential damages. illustration, § 663.
consequential damages, proximate consequences of act or omission. wilful or malicious injuries, § 44.
warranties of quality, existence, § 667.
wilful or malicious injuries, consequential damages, § 44

Foot Injured
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
exhibition of injured parts, means of injury, § 452.
personal injuries, damages, discretion of jury as to damages, instruction, excessive or inadequate verdicts, § 1256.

Forcible Entry and Unlawful Detainer
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
covenant for quiet enjoyment, what constitutes breach, § 863.
covenants, breach, exemplary damages, § 866.
recoupment of damages by tenant, § 182.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
trespass, railroads, occupation of land by railroad, liability for damages, rental value, § 1016.

Foreign Corporations
see Corporations.
collection of license fees, interest as compensation, right to interest, § 321n.
license not paid, allowance of interest from time when money ought to be paid, § 329.

Foreign Market
sales, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.

Forfeitures
see Penalties and Forfeitures.

Forgery
bills and notes, liability of drawer and endorser for principal sum, § 555.
check forged, sale, warranties of title, existence, § 668.
consequential damages, injury to third person, forged note decreasing dividends of estate, § 33.
evidence, photographs as evidence of damages, § 454.
interest, quantum meruit claim to interest, money paid by bank, § 324.
official bond, private injuries covered by official bonds, § 487.
payment of check bearing forged endorsement, quantum meruit claim to interest, § 324.
suretyship, creditor's duty to realize on securities, limitation of release to injury sustained by surety, § 738.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 964.

Former Adjudication
Federal Employers' Liability Act, effect under, § 1340.

Former Jeopardy
exemplary damages for penal offenses, § 402.

Fractures
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256n.

Franchises
eminent domain, compensation for injury to franchises, ascertainment of value, § 1079.
infringement
breach of contract, compensation for gains, profits and losses sustained, § 78.
measure of damages, losses as elements of damage, § 79.
water companies, liquidated damages, intention to liquidate, evidence and effect of, § 284.

Fraternal Benefit Societies
assessments, payment, mode of, § 215.
what is not payment, § 217.
contract, character, amount recoverable in case of death, § 833.
termination of contract, liability, § 838.
expulsion of member, consequential damages, recovery for successive consequences, illustrations, § 57.
elements of damage, losses, § 79.

Fraud
Ch. XXX, §§ 1163-1180.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775n.
implied warranty of authority, agent's liability, general rule, § 797.
liability to third persons, § 796.
acts in excess of or without authority, measure of damages, § 798.
exemplary damages, parties liable, liability of master for acts of servants, § 408.
recovery of money from agent, § 799.
possession of property as possession of principal accounting, duty of agent, § 769.
remedies of principal against agent, § 768.
right of agent to reimbursement, effect of mode of doing business, § 792.
violation of duty, remedies, § 768.
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
attachment bonds, wrongful attachment, damages recoverable, § 512.
attorneys, compensation, action by attorney, value of services rendered, admissibility of evidence, § 682.
fraud of attorney, exemplary damages, allowance, in what actions recoverable, § 392.
bills and notes, bona fide holder, amount recoverable by holder of bill or note, defenses, § 542.
consideration fraudulent or illegal in part, §§ 549, 550.
liability of drawer and indorser for principal sum, § 555.
partial failure of consideration, § 544.
availability of defense, § 545.
defense as resting on principle of rescission of contract, § 548.
principal sum, certainty, § 541.
want or failure of consideration, § 542.
bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
bonds of employees, contract not to be extended by construction, § 725.
breach of contract, compensatory damages, motive as affecting damages, § 99.
recovery on quantum meruit, § 679.
breach of marriage promise, excuse for breach of contract, impotency, insanity, § 989.

Fraud—continued.
carriers of goods, freight charges as affected by value of property, § 885.
loss or injury, shipper's conduct as effecting damages, § 925.
negligent delay in transportation, liability for loss of market value of property, quantity or quality, § 906.
carrier of passengers, negligence or breach of duty, exemplary damages, § 950.
cause of action, severance, contract to do several things successively, or one thing continuously, § 110.
coffin, pine box substituted for coffin, breach of contract, damages as including other than pecuniary elements, § 92.
compensation of trustees, contract for services, implied contracts, right to recover for services rendered, § 679.
consequential damages, act of injured party, fraud and exposure to peril, § 39.
contract to do several things successively or one thing continuously, §§ 110, n42.
contracts, effect of fraud, necessity of rescission, § 549.
contracts for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
demand for extra work, basis for adjustment, § 707.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
contracts for services, compensation, quantum meruit recovery, § 679.
implied contracts, duty to pay for services rendered, § 679.
measure of damages, compensation to be determined by employer, effect of determination, § 678.
covenants, breach, defenses and crossclaims against purchase money, §§ 634, 635.
covenants for title, object, indemnity if title fails, § 591.
covenants of warranty and quiet enjoyment, measure of damages for breach, § 605.
damage to property, no mitigation when benefit not derived from defendant, § 158.
elements of damage, mental suffering, § 95.
motive, how motive affects consequence of confusion of goods, § 101.
tort actions, § 100.
pecuniary elements, other elements, § 92.
escape of debtor, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, allowance, difference of views, § 391.
compensation for wrongs done with bad motive, violation of contract, § 390.
in what actions recoverable, § 392.
parties liable, master's liability for acts of servant, § 408.
right to recover in addition to compensatory damages, interest, § 1178.
rule of United States Supreme Court, § 392.
expenses of litigation, recovery in addition to actual damages, § 1177.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
factors, accounts, duty of factor to render, effect of misrepresentation, § 784.
false representations, § 1166.
belief of defendant in representations, § 1169.
bills and notes, sale, false representations, measure of damages, § 1171.
bonds, false representations as to title of real estate, measure of damages, § 1171.

Fraud—continued.
false representations—continued.
carriers, false representations as to safety of road, damages to livestock, § 1173.
loss of time of passengers, damages, § 1173.
cause of action, benefit from deceit, effect of § 1166.
college, false representations of authority to confer degrees, measure of damages, § 1171.
concealment of material fact, § 1169.
consequential damages, § 1171.
anticipation of injury to persons, proximate cause, § 25.
corporate stock, purchase of, measure of damages, § 1171.
deed executed rather than mortgage, measure of damages, § 1171.
exchange of property effected, false representation of agent, liability for damages, § 1174.
expressions of opinion, effect, § 1166.
judgments, sale induced by fraud, damages, § 1171.
labor performed because of representations, damages, § 1173.
leasehold interest sold, measure of damages, § 1171.
marriage induced, false representations as to property owned, measure of damages, § 1171.
materiality of representations, § 1167.
measure of damages, confidential relation between parties, § 1171.
difference between real value and amount paid, § 1172.
interest, § 1171.
other elements of damages, costs, § 1173.
release procured by fraud, § 1171.
removing goods purchased at auction sale, § 1173.
seller defrauded, § 1171.
mitigation of damages, § 1171.
mortgaged lands conveyed, damages recoverable, § 1174.
mortgages, sale induced by fraud, damages, § 1171.
natural and proximate consequences of fraud, § 1165.
note of insolvent, purchase induced by false representations, measure of damages, § 1171.
person to whom representations are made, representations need not be made to plaintiff, § 1170.
reliance on representations, negligence of injured parties, § 1168.
remedies by purchaser of property, rescission, action for damages, § 1174.
remote, conjectural and contingent damages, §§ 1175, 1176.
sale of automobile, misrepresentations as to ability to pay, damages, § 1174.
sale of land pursuant to judgment, liability for value of land and interest, § 1174.
sale of stock, consequential damages, § 1173.
sale of trust property not authorized, fraud, damages, § 1174.
sales, cost of putting property in good condition, recovery, § 1173.
recovery of purchase money and interest, failure of title, § 1174.
representations as to credit of insolvent person, recovery of value of goods sold, § 1174.
settlement induced, false representations as to other settlements, suits in assumpsit, § 1174.
time for rescission of sale of worthless horse, § 1173.
validity of warehouse receipts, taken as security for loans, damages, § 1173.
vendor and purchaser, false representations, effecting sale, damages, § 1171.
impeachment of contract, marine insurance, liability of insurer under valued policies, admiralty and fire policies, § 806.

Fraud—continued.
interest
allowance, agents, trustees, and officers, allowance against, § 353.
judgments, § 333.
money had and received, § 352.
money loaned, § 325.
money obtained by extortion or fraud, or wrongfully withheld or disposed of, § 354.
pleading, how interest claimed in pleading, § 387.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
recoupment by either lessor or lessee, § 876.
liquidated damages, intention to liquidate, evidence and effect of, § 284.
necessity of valid contract, § 280.
stipulated sum where damages otherwise certain are uncertain, §§ 285, 293.
marine insurance, valued policies, admiralty and fire, § 806.
marriage to pregnant woman, right to recover damages, § 2n.
master and servant, breach of contract, recovery on quantum meruit, § 679.
measure of damages, expenditures, loss of time, § 1171.
general rule, § 1171.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
nature of tort, necessity of actual injury, § 1163.
nominal damages, illustrations of right to, § 10.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.
official bonds, measure of damages against sureties, § 488.
parties, joint and several liability for torts, § 140.
plaintiffs and defendants, § 1179.
payment, application by creditors, § 238.
what is not payment, setting aside, § 217.
pleading, false representations, § 1166.
interest, manner of claiming interest in pleading, § 387.
necessary allegations, § 1180.
proximate consequences of fraud, scope, §§ 1163-1165.
quantum meruit, recovery for services rendered, § 679.
recoupment and counterclaim, connection between cause of action and crossclaim, § 183.
liquidated and unliquidated damages, § 185.
parties, § 175.
recoupment for fraud, breach of warranty, negligence, etc., §§ 179, 180.
recoupment, liquidated and unliquidated damages, § 185.
release, definition, validity, § 253.
who may execute, § 256.
renewal notes, consideration fraudulent or illegal in part, effect on promissory note, § 549.
rescission, consequential damages, anticipation of injury proximate cause, § 25.
liquidated damages, stipulations when damages are uncertain, § 293.
sales, allowance of interest against agents, trustees and officers, § 353.
breach of contract by seller, evidence of loss, § 653.
goodwill sold, certainty of proof, § 658.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 675.
consequential damages, proximate cause, act of third person as cause, § 42.
evidence of value, § 445n.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 653.
implied or express warranty of quality, § 667.

Fraud—continued.
sales—continued.
price to be fixed by third party, effect of agreement, § 643.
recoupment and counterclaim, nature of defense, § 170.
warranty of quality, damages for breach, interest, expenses and special injuries, § 671.
existence, § 667.
warranty of title, breach, measure of damages, § 669.
existence, § 668n.
salvage service, forfeitures of right to compensation, § 721.
slander and libel, injury to public, consequential damages, injury through third person, § 33.
stock, fraudulent increase, consequential damages for torts, § 16n.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
discharge or reduction of surety's responsibility by act of creditor, § 735.
release by creditors of one or more parties, effect, § 742.
telegraphs and telephones, fraudulent act of agent, inducing bank to pay money to third person, damages recoverable, § 966.
tender, waiver and omission of tender on sufficient excuse, § 273.
trade-marks, infringement, measure of damages, in equity and at law, § 1201.
trespass, permanent injury, estimate of damages, § 1017.
trover, measure of damages, property fluctuating in value, rule in different states, § 1111.
undue influence, natural and proximate consequences of fraud, § 1163.
vendor and purchaser, action for purchase money, defenses and counterclaims, § 639.
damages recoverable by purchaser against vendor, adjustment of counter demands on rescission, § 587.
elements of damage, mitigation, § 584.
measure of damages, conflict of American decision, what law governs, §§ 579, 580.
English rule, application, § 581.
oral contract, § 583.
damages recoverable by vendor against purchaser, measure of damages, § 570.
wilful or malicious injuries, consequential damages, § 44.

Frauds, Statute of
bills and notes, parol evidence to show defect of consideration, admissibility, § 551.
contracts for services, validity, statute of frauds, § 684.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
creditor's right to make application of payments, § 239.
elements of damage, losses, damage by relying on performance, § 81.
landlord and tenant, actions for use and occupation, lease as evidence of value, § 841.
liquidated damages, necessity of valid contract, § 280.
losses as elements of damage, damages by relying on performance, § 81.
payment, application by creditor, § 239.
application by debtor, § 236.
suretyship, surety's right to defend between principals, § 743.
vendor and purchaser, breach of contract by vendor, recovery on parol contract, § 583.
damages recoverable by vendor against purchaser assailability of invalidity of contract, § 574.

Fraudulent Conveyances
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.

Fraudulent Conveyances—continued.
collusion with insolvent defendant, liability to other creditors, § 1174.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
defenses, facts not available as defenses, § 529.

Free Pass
see Tickets.

Freight Train
see Carriers of Passengers; Railroads.
conductor allowing persons to ride on freight train contrary to rules, agent's particular duties and liabilities, principal's right to indemnity, § 771.

Fright
see Mental Anguish; Nervous Shock.
automobile frightening mule, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.
carriers of passengers, compensation, physical and mental suffering of passenger, injury to character, § 942.
damages recoverable by passenger, verdicts excessive, § 953n.
check dishonored, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
consequential damages, nervous shock, right to recover for injury to health, § 23a.
nervous shock as physical injury, right to recovery for nervous shock, § 22.
nervous shock without impact, right to recover damages, § 24.
depots, consequential damages, assault on woman in station, child frightened and killed by train, liability, § 35.
elements of damage, mental suffering, § 96.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
rule where negligence only is alleged and where wrong was wilful, § 1245.
miscarriage, consequential damages, nervous shock without impact, right to recover damages, § 24.
pleading, special damages, necessity of alleging, § 421.
trespass, liability for fright, entering dwelling in nighttime, § 1029.

Frivolous Appeal
see Appeal and Error.
interest and damages awarded on appeal, § 539.

Frost
consequential damages, proximate cause, wrongful act as proximate cause of damage, § 38.

Fruit
contract apportioning legal interests not joint, § 131.
sale of shares, warranties of title, existence, § 668n.

Funds
custodia legis, injunction bonds, damages from restraint of injunction, § 526.
factors, remitting funds, consequence of failure to obey orders, § 785.
marshaling and distribution, rights where one creditor may resort to two funds and another to only one, § 145.
rights of creditors where funds belong to two depositors, § 196.
payments, application, by court, § 241.
general payments applied to debt least secured, § 245.
pro rata application, § 242.

Funds—continued.
surety ship, creditor's duty to realize on securities, refusal of payment, application of deposits to indebtedness, § 737.
right of subrogation, when and to whom available, § 736.
tender, sufficiency, amount, § 266.

Funeral Expenses
contract for particular work, breach, liability for profits lost and expenses incurred, § 698.
death by wrongful act, damages, children's loss from death of parent, § 1267.
loss of services, recovery by husband, elements of damage, § 1266.
pleading of damages, § 426.
right to recover for death of child, damages, § 1272.
special damages, § 1278.
widow, damages recoverable by widow, § 1265.
parties plaintiff, action under statutes, § 129n.

Furnace
breach of contract to furnish, landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
sales, breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, §§ 671n, 672.
trespass to personal property, special and consequential damages, remote damages, furnace destroyed, § 1100.

Furniture
attachment bonds, defenses or mitigation of damages, what may be shown, injuries to furniture, § 515.
carriers of goods, injury to or loss of non-marketable property, damages, § 919.
fire insurance, general rule of damages, § 821.
gas escaping, explosion, furniture injured, consequential damages for torts, liability, illustration, § 18.
replevin, recovery for intermediate injury and depreciation of property, § 1151.
sales, breach of contract by seller, consequential damages, § 663.
non-delivery of property contracted for, consequential damages, illustration, § 663.
trespass to personal property, aggravation increasing damages, injuries to feelings, exemplary damages, § 1095.
special and consequential damages, remote damages, § 1100.
trover, damages, place of conversion, liability of purchaser, effect of wilfulness, § 1110.
value of property, proof of value, fixtures, § 1114.
value of property, evidence, actual sales, offers for property, market quotations, § 447.

Future Damages
see Remote Damages.

Future Earnings
present cash value, when measure of recovery under Federal Employers' Liability Act, § 1333.

G

Gambling
deposit with stakeholder, cause of action, entirety, implied assumpsit following consideration, § 132.
interest, allowance on money had and received, § 352.
illegal transactions, right of action, damages not recoverable, § 5.

Gambling—continued.
insurance, life and accident insurance, character of contract, effect of rule as to wagering contracts, § 832.
profits, certainty of damages, anticipated profits, § 59n.
speculating in futures, illegal transactions, right to damages, § 5.

Gangrene
pleading, special damages, necessity of alleging, § 421.

Gardens
amount of damages, opinion evidence, § 444.

Garnishment
bills and notes, stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
interest as damages incident to debt, § 372.
suspension of interest, payment prevented by legal process, § 381.
malicious prosecution, damages, elements, expenses, § 1238.
payment, to whom payment may be made, § 231.
right of action, damnum absque injuria, § 3.
trover, recovery of damages, limitation of recovery to plaintiff's interest in property, § 1136.

Gas
breach of contract, failure to supply gas, consequential damages, liability, illustration, § 18.
consequential losses, contractor's liability, § 702.
defective work, § 705n.
cylinder for storing, anticipation of injury to persons, illustrations, § 25.
eminent domain, compensation, basis for estimating value of land, § 1074.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1070.
explosion, defective pipes, consequential damages, § 18.
fixtures, destruction of property, damages, compensation, § 1015.
nuisance, injury to crops and trees, damages, § 1049.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
sales, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
consequential damages, anticipation of injury of person, proximate cause of injury, § 25.
warranty of quality, damages for breach, interest, expenses and special injuries, § 675.
trespass, laying pipes, suretyship, consequential damages, non-liability of principal, § 753.
trespass to personal property, market value of property, damages recoverable, § 1098.
watercourse obstructed, consequential damages, certainty, recovery of items of damages, which are certain, § 55.

Gas Wells
contract for particular work, contractor's liability, consequential damages for defective work, § 705n.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 709n.

General Average
see Insurance.

General Damages
pleading, special damages, necessity of alleging, § 419.

Generative Organs Injured
excessive or inadequate verdicts, damages, discretion of jury as to damages, instructions, § 1256n.

Geology
opinion evidence as to value of property, § 446.

Georgia
apportionment of damages, verdicts, where there are several parties, § 463.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
carriers of goods, qualification of carrier's liability by notice, interstate commerce, § 926.
carriers of passengers, liability for exemplary damages, § 951.
contract for particular work, performance prevented, contractor's rights, certainty of proof of profits, § 714.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants, of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
expenses, costs and counsel fees as damages, § 618.
death by wrongful act, damages recoverable, facts and circumstances to be considered in estimating damages, § 1269.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
evidence of value and damages, § 1089.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
evidence of injury, annuity and life tables, § 455.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
interest, allowance, stockholders' statutory liabilities, § 343.
compound interest, interest on instalments of interest, § 375.
landlord and tenant, lessee's right to damages for injury to business, § 867.
malicious prosecution, mitigation, evidence, § 1240.
mesne profits, claims for improvements, taxes, § 999.
nuisance, interference with business, element of damage, § 1054.
mitigation of damages, deduction for benefits, § 1056.
permanent injury, estoppel from recovery of future damages, § 1046.
remote consequences, liability, § 1051.
personal injuries
verdicts, excessive or inadequate verdicts, § 1256n.
power of court over, § 460.
railroads, animals injured, interest, actions for torts, § 355.
sales, seed, warranty of quality, damages for breach, interest, expenses and special injuries, § 674.
warranty of title, breach, measure of damages, § 669.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
trespass to real property, occupation of land by railroads, damages, § 1016.
party wall injured, damages, § 1025.
trover, conversion of money securities, § 1132.
damages, attorney's fees, § 1130.
interest and value of use of property, § 1115.
property of fluctuating value, § 1118.

Georgia—continued.
trover—continued.
rule in particular states, § 1111.
value of property enhanced by defendant, § 1126.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.

Gifts
bills and notes, effect of gift, want or failure of consideration, § 542.
covenants, warranty and quiet enjoyment, scope, remedy for breach, § 603.
inter vivos, payment by gift inter vivos, § 221.
quantum meruit, recovery for services, presumptions where family relation exists, § 679.

Glass
sale of beverage containing broken glass, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Glass Factory
contract to furnish gas, contract for particular work, breach, consequential losses, contractor's liability, § 702.

Gold
carriers of goods, duty to care for property, § 916.
evidence of value, property without market value, § 448.
injunction bonds, damages from restraint of injunction, § 528n.

Gold Coin
payment, mode of making payment, § 215.
tender, amount, sufficiency, § 267n.
in what money tender may be made, § 263.

Gold Dust
tender, amount, sufficiency, § 267n.

Goldsmith
suretyship, contract not to be extended by construction, § 726.

Good Faith
agents, liability to third persons, § 796.
violation of duty, secret profits, § 768.
appeal and supersedeas bonds, interest and damages, award on appeal, § 539.
broker's compensation for services, measure of compensation, § 683.
carriers' action for freight charges, § 884.
contract for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
measure of agent's liability under various circumstances, § 774.
mesne profits, claims for improvements, taxes, § 999.
limitation of damages, to value of use, consequential and punitive damages, § 994.
officers, neglect of duty, measure of damages, nominal damages, § 490.
salvage service, forfeitures of right to compensation, § 721.

Good Faith—continued.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
suretyship, express indemnity against judgments, effect of judgment, § 767.
vendor and purchaser, damages recoverable by purchaser against vendor, defaulting vendee's rights, conflict of American cases, §§ 579, 586.
elements of damage, loss of bargain, mitigation, § 584.
English rule, §§ 578, 581.

Goodwill
sales, see also, Business.
breach of contract, compensation, certainty of proof, § 658.
stipulations when damages are uncertain, § 291.
value of property, elements, evidence, § 448.

Government
see States; United States.
interest, allowance against government, § 332.

Grain
carriers of goods
breach of contract, remote consequences, § 902.
refusal to carry, cost of transportation, § 899.
delay in transportation, negligence, proximate cause, § 903.
freight charges, time when freight is due and earned, § 887.
elements of damage, expense incurred to prevent or lessen damage, extent of duty, grain injured, § 90.
harvesting, contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
master and servant, servant's violation of contract, grain injured, recoupment of damages, consequential losses, § 695.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
shipment, measure of agent's liability under various circumstances, § 774.
trespass to real property, destruction of property, damages, § 1015.

Granite
sales, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.

Grapes
compensatory damages, property sued for improved by wrongdoer, § 102.

Grass Injured
evidence, opinions on, subjects of, common experience and observation, admissibility, § 443.
nuisance, injury to crops and trees, damages, § 1049.
trespass to real property, crops injured or destroyed, damages, § 1023.
suit by tenant, possessor or licensee, damages, § 1012.

Gravel Sold
acceptance of goods, liability for not accepting, remedies of seller, § 647.

Greenhouse
injury to greenhouse, certainty of damage, prospective growth of plants, § 62.
sale of heating apparatus, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Gross Negligence
see Negligence.

Guana
sales, breach of contract by seller, consequential damages, § 663.

Guaranty
see Suretyship.
bills and notes, distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
endorsement of negotiable paper, effect, § 730.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
collateral, guarantor's liability where collateral is given, § 734.
collections, guaranty of collectibility, liability for costs, diligence, § 733.
compensation for services rendered by agents, amount of compensation, § 683.
contract not to be extended by construction, illustrations, §§ 726, 727.
discharge or reduction of surety's responsibility by act of creditor, § 735.
factors, guaranteed commission, recovery against factor whose commission is guaranteed, § 783.
interest, agreement to pay money with interest, construction, § 305n.
demand, necessity to secure allowance of interest, § 351.
interpretation of surety's contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
contracts not to be extended by construction, rule as to bonds of surety companies, § 725.
liquidated damages, stipulation for payment of fixed sum for partial or total breach, § 295.
measure of guarantor's liability, lost profits, remote damages, § 729.
nature, distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
payment, application, debtor's right to direct application, evidence, § 237.
payments, application, general payments applied to debt least secured, § 245.
application of general payment to debt least secured, § 245.
effect, § 218.
measure of liability of guarantor of payment, § 732.
remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
right of subrogation, when and to whom available, § 736.
usury, who may take advantage of usury, § 314.

Guardian and Ward
account, guardian's bond, liability of sureties, § 496.
bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
contribution between co-sureties, who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
discharge or reduction of surety's responsibility by act of creditor, § 735n.
liability as between sets of sureties, § 498.
measure of surety's liability, §§ 488, 496, 723n.
mitigation of damages, § 497.
compensation of guardian, implied contracts, right to recover for services rendered, § 679.
interest, allowance against agents, trustees and officers, § 353.
release, who may execute, § 256.

Guardian and Ward—continued.
removal of guardian, bond, liability of sureties, § 496.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
parties, plaintiff, who may maintain action, § 1283.
settlement with guardian, release, who may execute, § 256.
timber cut and removed, mitigation of damages, measures of prevention, § 157.
unauthorized acts, mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.

Gunpowder
storage of gunpowder, explosion, consequential damages, anticipation of injury of persons, proximate cause of injury, § 25.

H

Habeas Corpus
appeal and supersedeas bonds, liability in state court, judgment party for money or in rem, § 535.

Habits
evidence of injury, annuity and life tables, § 455.

Hand Injured
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256.
prospective damages, number of actions maintainable, § 1251.

Harbors
light extinguished, vessel injured, consequential damages for torts, liability, illustrations, § 19.
officers, bonds, penalty as limit of recovery, exception as to interest, § 478n.
vessel delayed, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
vessel removed from wharf, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Harness Defective
horse frightened, highways and streets, consequential damages in highway cases, § 26.

Hats Injured
dyes, compensation by mutual demand, § 148.

Hay
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
trespass to real property, suit by tenant, possessor or licensee, damages, § 1012.

Hay Press
sales, warranty of title, breach, measure of damages, § 669.

Hay-Stack Falling
consequential damages for torts, liability, illustration, § 18.

Head Injured
carriers of passengers, injury to passenger, proof of damage, § 945.

Head Injured—continued.
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256n.
pleading, necessity of alleging special damages, § 421.

Health
see Illness; Mental Anguish; Nervous Shock.
breach of marriage promise, damages, injury to feelings or health, § 986.
carriers of passengers
damages recoverable where passenger sustains personal injuries, condition of health of passenger, § 935.
proof of damage, § 946.
verdicts excessive, § 953n.
ejection, place, removal of passengers at wrong place, loss of time and expense, consequences of exposure, § 938.
refusal to carry, damages, § 935.
causes of action, entirety, damage to property and injury to persons by same act, § 118n.
consequential damages, nervous shock, right to recover for injury to health, § 23.
contracts for services, necessity of full performance, inability to perform, § 689.
wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
criminal conversation, damages, amount, discretion of jury, exemplary damages, health of defendant, § 1285.
death by wrongful act, children, right to recover for death of child, damages, § 1272.
children's loss from death of parent, § 1267.
damages, determination, facts and circumstances to be considered, § 1268.
dower, expulsion of widow, actual damages, injury to health, pain and suffering, § 1029.
evidence of injury, annuity and life tables, § 455.
opinions on subjects of common experience and observation, admissibility, § 443.
landlord and tenant
covenants, breach, exemplary damages, health injured, § 866.
special and consequential damages, § 865.
nuisance, eviction of lessee, recovery of rent barred, § 848n.
remote consequences of nuisance, liability for, § 1051.
opinion evidence, instances of rejection and admission of opinions, § 443.
personal injuries, damages, elements, § 1241.
circumstances of parties, effect, § 1254.
pleading, special damages, necessity of alleging, § 421.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
trespass, elements of damage, insults, § 1029.

Heart Injured
pleading, necessity of alleging special damages, § 421.

Heat
breach of contract to furnish, consequential damages, § 705.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
mitigation of damages by lessee, § 871.
consequential damages, proximate cause, wrongful act as proximate cause of damage, § 38.

Heat—continued.
greenhouse injured, heating apparatus defective, certainty of damages, anticipated profits, § 62.
landlord and tenant, repairs, lessor's covenant to repair, breach, measure of liability, § 872.
opinion evidence, amount of damages, opinions of witnesses admissibility, § 444.
sales, heating apparatus, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Hedges
breach of contract to plant, bills and notes, partial failure of consideration, § 548.

Hemorrhage
telegraphs and telephones, delay in delivery of message, damages, physical pain, § 965.

Highways and Streets
abandonment, destruction of property as damnum absque injuria, § 3.
abutting owners, circuity of action, principle operating in favor of plaintiff, § 145.
parties, joint and several liability for torts, § 141.
access, eminent domain, injury to property not taken, ascertainment, § 1066.
alighting from street car, injuries, parties, joint and several liability for torts, § 141.
appropriation for road labor, interest, allowance against government, § 332.
animals frightened, structure in street, consequential damages, § 26.
assessments, landlord and tenant, rent payable in specific articles, recovery, § 846.
tender, effect of tender on collateral securities, § 277.
breach of contract, damages, right of seller of land to recover purchase price and interest, abatement of price, § 567.
change of grade, cause of action, entirety, § 110, n42.
cause of action, severance, contract to do several things successively or one thing continuously, § 110n.
destruction of property as damnum absque injuria, § 3.
eminent domain, compensation, injuries to various interests, damages in favor of tenants, § 1081.
injury to property not taken, § 1065.
ascertainment of damages, facts which may be considered, §§ 1066, 1070.
expenditures to lessen loss, §§ 1072, 1073.
remote damages, § 1071.
interest, condemnation proceedings, § 336.
trespass to real property, definition, scope of remedy, § 1010.
child falling into culvert, consequential damages for torts, liability, illustration, § 18.
consequential damages, § 26.
liabilities of municipalities, § 26.
construction
contract, breach, contractor's liability, § 697.
benefit of contract to employer, cost and inconvenience, § 697.
demands for part performance of entire contract, recovery on quantum meruit, § 711.
severable contracts, recovery on part performance, action by contractor against employer, § 708.
eminent domain, injury to property not taken, ascertainment, § 1066.
inconvenience, damnum absque injuria, § 3.

Highways and Streets—continued.
construction—continued.
independent contractor, acts of, joint and several liability for torts, § 141.
covenants against incumbrances, definition, what are incumbrances, § 620n.
liability of remote covenantor, breach of covenant, § 629.
what are incumbrances, § 620n.
culvert near street, child drowned, consequential damages, § 18.
dangerous machinery in street, infant injured, consequential damages, § 19.
defects, circuity of action, principle operating in favor of plaintiff, § 145.
consequential damages, §§ 26, 39.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
evidence of injury, photographs, § 454.
horse and vehicle injured, consequential damages, recovery for successive consequences, illustrations, § 57.
personal injuries, pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
right to damages, injuries to unborn child, § 8.
elements of damage, losses, indemnity to municipality, counsel fees, § 83.
eminent domain, assessments of damages and benefits, lands to be considered, § 1088.
cause of action, entirety, successive actions for damage to real property, § 116.
compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
compensation, basis for estimating value of land, value for condemnor's purpose, § 1075.
injury to property, elevated railroads and subways, § 1080.
what is just compensation, § 1063.
consequential injury to property not taken, § 1062.
deduction for benefits, special benefits, § 1085.
effect of judgment for compensation, abandonment of proceedings, § 1090.
injury to property not taken, §§ 1065, 1068.
ascertainment of damages, facts which may be considered, § 1068.
consequential injury, § 1062.
interest on compensation, § 1091.
measure of damages against officers for neglect of duty, nominal damages, § 492.
payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
railroad property taken for street and telegraph uses, effect on compensation, proof of value, § 1077.
time of assessment of damages and benefits, § 1083.
encroachments and obstructions, consequential damages, intervening cause, private way obstructed by fence, § 38.
covenants against incumbrances, definition, what are incumbrances, § 620n.
covenants for title, breach of covenant, what constitutes breach, § 592.
covenants of seizin and good right to convey, nature of covenant, breach, § 592.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, §§ 1066, 1070.

Highways and Streets—continued.
encroachments and obstructions—continued.
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
liquidated damages, mode of liquidating, computation of time, § 281n.
nuisance, mitigation of damages, deduction for benefits, § 1056.
pedestrian injured, consequential damages, § 26.
pleading, special damages, necessity of alleging, § 420.
evidence, photographs as evidence of damages, § 454.
excavation in highways, animals frightened, consequential damages, § 26.
consequential damages in highway cases, § 26.
lateral support injured, consequential damages, § 18.
trespass to real property, definition, scope of remedy, § 1010.
improvement, cause of action, entirety, damage to real property, § 116.
infant injured, lumber piled negligently near street, § 19.
injunction, right of egress, closing street, § 4.
injuries to road, interest, allowance of interest, in actions for torts, § 355.
laying out, certainty of damages, anticipated profits, § 60.
market value of property, opinion evidence as to value of property, § 446.
nuisance, interference with business, element of damage as distinct injury affecting premises, § 1054.
mitigation of damages, deduction for benefits, § 1056.
remote consequences of nuisance, liability for, § 1051.
opening of street, breach of covenants of warranty and quiet enjoyment, measure of damages, partial breach, § 609.
parties, joint and several liabilities for torts, § 140n.
private roads
breach of covenants against incumbrance, damages where incumbrance is permanent, § 627.
definition, what are incumbrances, § 620.
covenants of title, breach of covenant, what constitutes breach, § 592.
nuisances, pleading, allegations of damage, § 1060.
remote consequences of injury, private way obstructed, § 1050.
railroads, occupation of land by railroads, liability for damages, rental value, § 1016.
trespass to real property, permanent injury, estimate of damages, § 1017.
repair, right of indemnity of municipality, parties contracting to repair, § 83.
trespass, railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
remediable injuries, estimate of damages, § 1018.
vacation, damnum absque injuria, § 3.
eminent domain, compensation, injury to property not taken, § 165.
public wrongs, right of action, remedies available, § 4.
vehicles unattended in street, injuries to pedestrians, consequential damages, § 19.

Hip Injured
exhibition of injured parts, means of injury, § 452.
pleading, special damages, necessity of alleging, § 421.

Hogs Sold
telegraphs and telephones, knowledge of sender's purpose, details, § 969.

Homesteads
eminent domain, compensation, injuries to various interests, damages in favor of tenants, § 1081.

Homesteads—continued.
eminent domain—continued.
measure of compensation, market value of property, § 1064.
payment, application of general payment to debt least secured, § 245.
removal of cloud upon title, measure of damages against sureties on official bonds, § 488.
sales, measure of damages against sureties on official bonds, § 488.
use for immoral purposes, elements of damage, character as affecting damages for personal injuries and in actions for death, § 94.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.

Homicide
intoxication, civil damage laws, damages recoverable where husband commits murder, § 16.

Hoops
replevin, damages, increase in value by defendant, § 1154.

Hops
carriers of goods, delay in transportation, loss of market value, § 908.
sales, executed sales, recovery by seller of full value, payment by bill or note, §644.

Horses
attachment bonds, damages recoverable, § 512.
breeding, guaranty, measure of guarantor's liability, § 729.
carriers of goods
injury to, or loss of, market value, damages, § 918.
proof of value, § 933.
recovery for expenses and labor in lessening loss, § 921.
child, horse kicking, trespass, consequential damages, act or omission as proximate cause of damage, § 31.
cruelty to animals, consequential damages, breach of statutory duty, person injured, unlawful beating of horse, § 32.
dead horse on railroad track, nuisance, remote consequences, liability, § 1051.
death of horses, contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
dogs, proof of value of dogs, § 449.
escape of horse, child killed, consequential damages, anticipation of injury, proximate cause, § 25.
evidence of value, opinion, § 446.
fright
consequential damages, illustrations, § 17.
intervening cause, horses on boat frightened by whistle, falling into water, § 38.
proximate cause, act of third person as cause, § 40.
acts of injured party, fraud and exposure to peril, § 39.
dog frightening horse, exemplary damages, malice in law and malice in fact, § 394n.
evidence, opinions on subject of common experience and observation, admissibility, § 443.
highways and streets, consequential damages, § 26.
militia drill, horse frightened, consequential damages, § 17.
injuries to horses, amount of damages, opinion evidence, § 444.
consequential damages, certainty, recovery for successive consequences of act or omission, highways defective, § 57.
proximate cause, act of third person as cause, § 40.
drowning of horse, consequential damages, certainty, proximate result of act or omission, § 53.
mare killed, consequential damages, § 15.

Horses—continued.
injuries to horses—continued.
pleading, special damages, necessity of alleging, § 420.
sale of oats containing castor beans, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
train killing horse, cause of action, severance, § 110n.
trespass, consequential damages, act or omission as proximate cause of damages, § 31.
trespass to personal property, damages for taking or destroying property, interest, § 1096.
special and consequential damages, § 1100.
weather conditions, consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
wharf not repaired, consequential damages, § 18.
intoxicated person placed in charge of horse, consequential damages, § 16.
races, certainty of damages, loss of profits, inaccurate transmission of message preventing horse from being entered in race, § 71.
entry, evidence of value, § 445.
reinstatement, maliciously suspended horse, indemnity, liability for losses and expenses, proximate result of act complained of, §84.
replevin, special and consequential damages, § 1146.
runaway horse, amount of damages, opinion evidence, § 444.
consequential damages, § 17.
sales of horses, market value, evidence of value, § 448.
recoupment and counterclaim, connection between cause of action and crossclaim, § 183.
warranties of quality and quantity, breach, damages, § 670n.
existence, remedies on breach, § 668.
interest, expenses and special injuries, §§ 671, 675.
warranty of title, breach, measure of damages, § 669n.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 961.
trespass, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
unattended horse and cart, consequential damages, § 19.
child injured, act or omission as proximate cause of damages, § 31n.
proximate cause, act of third person as cause, § 40.
value, evidence, admissibility, §§ 445, 448.

Hospitals
see also Medical Service.
leasing premises for hospitals, contagious diseases, damages, decrease in value, § 1034.

Hotchpot
see Wills.

Hotels
carriers of passengers, ejection of passenger at wrong place, negligence of hotel proprietor, liability of carrier, § 939.
ejectment from hotel, consequential damages, act complained of must be efficient cause of damage, § 30.
invasion of room of female guest, elements of damage, mental suffering, § 96.
landlord and tenant, business, recovery for damages to business of lessee, § 868.
covenants, special and consequential damages for breach of various covenants, § 865.
destruction of demised premises, effect as to rent, § 852.
lessee's right to damages for injury to business, § 868.

Hotels—continued.
landlord and tenant—continued.
repairs, lessor's covenant to repair, breach, measure of liability, § 872.
lessor's liability for special and consequential damages, § 874.
sale, breach of contract, pleading, special damages, necessity of alleging, § 420.
liquidated damages, stipulations when damages are uncertain, § 293.

Hours of Service Act
violation of
when not actionable, § 1322.

Hours of Work
compensation of laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
contracts for services, statutes limiting hours of work, effect, recovery for services rendered, § 681.

Household Goods
baggage, what constitutes baggage, § 954.

Humiliation
see Mental Anguish.
breach of contract, damages as including other than pecuniary elements, § 92.
carriers of goods, dead bodies, recovery for mental suffering independent of other injury, § 943.
carriers of passengers, abusive language to female passengers, acts of agents, liability of carrier, § 943.
compensation, physical and mental suffering of passenger, injury to character, § 942.
check dishonored, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
damages recoverable by passenger, verdicts excessive, § 953n.
refusal to carry, damages, loss of time, expense, exposure and humiliation, § 936.
refusal to furnish berth, damages, § 956.
seats, wrongfully placing white passenger in coach for colored people, § 948.
elements of damage, mental suffering, § 95.
landlord and tenant, covenants of landlord, breach, eviction, special and consequential damages, § 865.
mitigation of damages, conduct or character of plaintiff diminishing injury, § 163.
seduction, evidence for plaintiff, damages recoverable, § 1283.
sleeping car companies, liability, § 956.
telephones, removal of telephone, damages, annoyance, inconvenience and humiliation, § 965.
trespass, search for intoxicating liquors, damages for humiliation, mental anguish, § 1029.
trespass to real property, mitigation of damages, § 1027.

Husband and Wife
see also Alienation of Affections; Criminal Conversation.
abandonment as affecting recovery of damages for death under Federal Employers' Liability Act, § 1335.
accommodation paper, interest, conflict of laws, general rule as to contracts, § 357n.
antenuptial agreements, interest, allowance on annuities and legacies, § 344.

Husband and Wife—continued.
attachment, trespass to personal property, special and consequential damages, remote damages, § 1100.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
breach of contract, wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
carriers of goods, breach of contract, physical and mental suffering as elements of damage, § 915.
delay, transportation of dead bodies, physical and mental suffering as elements of damage, § 915.
carriers of passengers, consequential damages, husband carried beyond destination, loss of service of wife, expenses, § 36.
negligence or breach of duty, injury to wife, child or servant, actions, § 952.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
consequential damages for tort, wife injured while following husband, § 19.
community property, consequential damages, imputed negligence, § 27.
release, execution by or to one of several claiming or liable, effect, § 257.
contracts of married woman, bills and notes, want or failure of consideration, § 542.
covenants of title, seizin and good right to convey, damages for breach of covenants, consideration paid and interest, § 593.
joinder of married woman in deed, parties liable on covenant of seizin, § 593.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and counsel fees as damages, § 619.
parties against whom recovery may be had, parties plaintiff, § 613.
copyright, infringement, compensatory and penal recoveries, § 1199.
death by wrongful act, beneficiaries under statute, diversity, § 1261.
damages, elements, loss of services, loss of society, § 1263.
recovery by husband, elements of damages, § 1266.
recovery by widow, elements, § 1266.
restriction to pecuniary losses, rule in England and Canada, § 1262.
estates of decedents, damages, pecuniary loss to estate, § 1277.
pleading in actions to recover for death, § 426.
right of action at common law, § 1259.
debt due from wife to husband, payment, effect, § 218.
exemplary damages, joint liability for, § 407.
false imprisonment of husband, consequential damages, nervous shock without impact, right to recover damages, § 24.
fire insurance, damages, insurance by mortgagee, § 829.
injunction bonds, recovery of costs and expenses, attorney's fees, § 525.
insurance, paid up policy, refusal to issue, measure of damages, § 839.
judgments, bail bonds in civil actions, measure of damages, § 539b.
nuisance, estates, damages affected by interest in estate, § 1057.
payment, to whom payment may be made, § 231.
personal injury to wife
consequential damages, doctrine of imputed negligence, § 27.
joking with wife about accident to husband, nervous shock without impact, right to recover damages, § 24.
circumstances of parties, effect, § 1254.
earning capacity diminished, § 1246.
evidence, proof of pecuniary items by plaintiff, § 441n.
value, opinions, § 446.
exemplary damages as compensation and punishment, who may recover, § 401.
expenses for physical and surgical aid, recovery, § 1250.
husband's action for injuries to wife, § 1252.

Husband and Wife—continued.
personal injury to wife—continued.
joint injury, entirety of causes of action, damages to parties jointly, § 128.
loss of services, assault, nervous shock without impact, consequential damages, § 21.
carriers, refusal to carry, recovery for loss of services of wife of passenger, § 935.
consequential damages, extraordinary circumstances, liability of carriers, § 36.
drugs sold to wife, right to damages, § 2, n 2.
earning capacity, recovery for loss of time or decreased capacity, § 1249.
opinion evidence as to value, § 446.
special damages, necessity of alleging, § 421.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
mitigation of damages, benefit not derived from defendant, § 158.
pain and suffering, physical and mental pain, § 1242.
parties, joint right or liability for tort, determination, § 137.
parties plaintiff, damages to parties jointly injured, § 128.
pregnant woman injured, assault on husband, consequential damages, nervous shock without impact, right to recover, § 24.
prospective damages, number of actions maintainable, § 1251.
remarriage as affecting recovery of damages for death under Federal Employers' Liability Act, § 1335.
special damages, necessity of alleging, § 420.
seduction of husband, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
separate property of wife, right to interest as affected by marital relation, § 341.
suretyship, right of surety to defend between principals, § 743n.
threats to arrest husband, consequential damages, nervous shock without impact, right to recover damages, § 24.
torts
joint and several liability for torts, § 140n.
determination, principles, § 137.
torts of wife, exemplary damages, joint liability for, § 407.
trespass to real property, definition, scope of remedy, § 1010.
gist of action, who may sue, § 1009.
unmarried woman injured, special damages, necessity of alleging, § 420.
vendor and purchaser, damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.
adjustment of counter equities in specific performance, § 588.
measure of damages, when English rule does not apply, § 581.

Hydrophobia
personal injuries, mental anguish, recovery for, § 1243.
expenses for physical and medical aid, recovery, § 1250.

I

Ice and Snow
animals injured, transportation by carriers, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
breach of contract to flood ponds, contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
breach of contract to supply ice to butcher, liability under special circumstances, contemplation of parties, § 50.
easement, refusal of, losses as elements of damages, expenses to prevent or lessen damages, § 881.

Ice and Snow—continued.
eminent domain, deduction for benefits, special benefits. § 1085.
replevin, defendant's rights, special and consequential damages, § 1158.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647n.
contract to deliver ice, liquidated damages, stipulation when damages are uncertain, illustrations, § 293.
trespass, damage for destruction of carrying away of ice, § 1022.
trover, damages, place of conversion, liability of purchaser, effect of wilfulness, § 1110.
mitigation of damages, duty of plaintiff to mitigate damages, § 1142.
waters obstructed, elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.

Idaho
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
breach of contract to supply water, consequential losses, contractor's liability, § 702.
death by wrongful act, recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, value for condemnor's purpose, § 1075.
trespass to real property, occupation of land by railroads, damages, § 1016.

Identification
elements of damage, property sued for improved by wrongdoer, § 103.

Illegality
attorney's compensation, actions for compensation, value of services rendered, admissibility of evidence, § 682.
bills and notes, consideration fraudulent or illegal in part, §§ 549, 550.
liability of drawer and indorsers for principal sum, § 555.
want or failure of consideration, § 542.
breach of contract, recovery on quantum meruit, § 679.
right to damages, § 5.
sales, breach of contract by seller, delivery impossible, damages, § 655.

Illinois
assessment of damages, default or demurrer as admission, § 429.
attachment bonds, parties who may sue, § 511.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
interest, § 556.
stipulations for costs and attorneys' fees, § 564.
bonds of public officers, construction, § 485.
brokers, liability, § 786.
carriers of goods, limitation of liability by contract, interstate commerce, § 904.
qualification of carrier's liability by notice, interstate commerce, § 926.
contract for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
covenants, actions, defenses and crossclaims against purchase money, § 636.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
covenant running with the land, damages recoverable for breach, rule in some states, § 625.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 619.

Illinois—continued.
covenants of seizin and good right to convey, nature of covenant, breach, § 591.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, § 1074.
value for condemnor's purpose, § 1075.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
deduction for benefits, special benefits, § 1086.
evidence of value and damages, § 1089.
property not taken, consequential injury, § 1062.
railroad property condemned for railroad uses, compensation, § 1078.
evidence of injury, annuity and life tables, § 455.
physical examination of plaintiff, § 451.
exemplary damages, allowance, difference of views, § 391.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
parties liable, master's liability for acts of servant, § 410.
fraud, false representations, defendant's belief in representations, necessity, § 1169.
reliance on representations, § 1168.
injunction bonds, damages, costs and expense, attorneys' fees, § 525.
facts not defenses, injunction dissolved, § 529.
interest, agreement for more than legal rate after maturity, penalty, relief of debtor in Illinois, § 319.
judgment pending review, § 389.
stockholders statutory liabilities, § 343.
intoxicating liquors, death by wrongful act, children's loss, death of parent, § 1267.
judgment enjoined, damages from restraint of injunction, § 528.
landlord and tenant, destruction of demised premises, effect as to rent, § 852.
repairs, lessor's liability for special and consequential damages, § 874.
nuisance, continuity, when nuisance is not continuous wrong, § 1045.
permanent injury, estoppel from recovery of future damages, § 1046.
personal injuries, actions maintainable, prospective damages, § 1251n.
civil damage laws, exemplary damages, § 1253.
compensatory damages, pecuniary and other circumstances of parties, § 1254.
expenses for physical and medical aid, recovery, § 1250.
railroads, animals injured, interest, actions for torts, § 355.
replevin
bonds, actions, damages recoverable, § 505.
defenses, mitigation of damages, § 507n.
non-liability of sureties for judgment in replevin suit, § 503.
damages, intermediate injury and appreciation, § 1152.
defendant's rights, damages, mitigation, § 1159.
seduction, mitigation of damages, evidence of plaintiff, § 1284.
slander and libel, defenses, failure of plea of justification, § 1224.
exemplary damages, § 1216.
telegraphs and telephones, negligence in transmission of message, knowledge of sender's purpose, details, § 971.
trespass to personal property, damages, mental suffering, § 1095.
trespass to real property, crops injured or destroyed, damages, § 1023.
destruction of trees and mining ores, value as affected by defendant's acts, §§ 1019, 1020.
ice injured, diversion of water, § 1022.

Illinois—continued.
trespass to real property—continued.
occupation of land by railroads, damages, § 1016.
usury, effect, contracts not void for usury, § 315n.
recovery under usury statute, §§ 316, 317.
vendor and purchaser, action for purchase money, defenses and counter claims, rule in various states, § 636.
necessity that vendor convey perfect title, effect of condemnation proceedings, § 572.
verdicts, impeachment by affidavits, § 456.

Illness
see Disease.
breach of contract, consequential damages, recovery for successive consequences, § 58.
damages as including other than pecuniary elements, § 92.
carriers of passengers, alighting at wrong place, damages peculiar to passenger, § 939.
boarding wrong train, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
car unheated, illness of passenger as proximate consequence of failure to notify passenger of destination, § 36.
compensation, physical and mental suffering of passenger, injury to character, § 942.
consequential damages, distinction between liability in tort and on contract, § 49.
injured passenger rendered susceptible to disease, § 36.
damages recoverable, nature of injury, § 942.
verdicts excessive, § 953n.
ejection from train, consequential damages, death of passenger struck by train as proximate consequence of ejection, § 36.
removal of passenger at wrong place, damages recoverable, inconvenience, sickness, death, § 939.
exposure of passenger, consequential damages, breach of statutory duty, illness of passenger, § 32.
refusal to carry, damages, passenger's indiscreet acts, § 940.
exemplary damages, § 937.
civil damage laws, consequential damages, extension of liability by statutes, § 16.
consequential damages, nervous shock without impact, right to recover damages, § 24.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
necessity of full performance, inability to perform, §§ 687, 688.
stipulation for notice where servant quits employ, § 690.
wrongful discharge, measure of damages liability for expenses and lost commissions, § 694.
dead horse on railroad track, nuisance, remote consequences, liability, § 1051.
elements of damage
mental suffering, § 96.
liability of telegraph companies, § 97.
pecuniary elements, other elements, § 92.
evidence, opinions on common experience and observation, admissibility, § 443.
injunction bonds, recovery of costs and expenses, attorney's fees, § 525.
landlord and tenant, eviction, covenants of landlord, breach, special and consequential damages, § 865.
repairs, lessor's liability for special and consequential damages, § 874.
malicious prosecution
elements of damage, § 1237.

Illinois—continued.
malicious prosecution—continued.
vexation, illness, § 1238.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
nuisance, pleading, special damages, necessity of alleging, § 420.
remote consequences of nuisance, liability for, § 1051.
paupers, consequential damages, injury through third person, § 33.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, § 1244.
parties, action for injury to child, § 1252.
slander and libel, special damages, words not actionable per se, § 1218.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 961.
removal of telephone, damages, annoyance, inconvenience and humiliation, § 965.
trespass to real property, aggravation and special damages, § 1029.
vessels, neglect to keep supply of medicine, consequential damages, anticipation of injury to persons, proximate cause, § 25.
passenger delayed, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.

Imminent Peril
consequential damages, nervous shock as physical injury, right to recover for nervous shock, § 22.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
salvage services
amount recoverable, agreement, § 716.
derelict property, § 720.
interest, conflict of laws, § 719.
forfeitures of right to compensation, § 721.
nature of peril, duty of claimant, persons who may be salvors, § 717.
necessity of saving property, § 718.
requisites, parties liable, § 715.

Impotency
breach of marriage promise, excuse for breach of contract, § 989.

Improvements
see Building and Construction Contracts.
agent as trustee, right to recover for improvements, § 768.
contract for particular work, delay in performance, damages recoverable, interest, § 703.
covenants of seizin and good right to convey, breach, elements of damages, improvements, § 593.
covenants of warranty and quiet enjoyment, breach, damages, location of improvements, consideration of, § 609.
right of vendee to recover for improvements, § 605.
eminent domain, change of grade of street, determination of damages, § 1062.
injuries to various interests, damages in favor of tenants, § 1081.
injury to property not taken, consideration of value of improvements, § 1067.
Indians, indemnity acts, ascertainment of value of improvements, § 1015.
mesne profits, action for, claims for improvements, § 999.
consideration of value of improvements in ascertaining mesne profits, § 996.
property sued improved by wrongdoer, torts, §§ 102, 103.

Improvements—continued.
streets, improvements by abutting owners, damnum absque injuria, § 3.
torts, property sued for improved by wrongdoer, effect of motive of taking, §§ 102, 103.
trespass to real property, allowance for permanent improvements by trespasser, mitigation of damages, § 1027.
damages for destruction of improvement, § 1015.
vendor and purchaser, improvements by vendee, parol contract, refusal of vendor to perform, § 583.
rescission of contract in equity, improvements by vendee, allowance for, § 589.

Imputed Negligence
see Negligence.
doctrine in general, § 27.

Inadequate Verdicts
see Verdicts.

Incapacity
see Earning Capacity.

Incompatibility
breach of marriage promise, excuse for breach of contract, § 989.

Inconvenience
see Annoyance; Humiliation.
abutting owners, improvements of streets, damnum absque injuria, § 3.
carriage, breach of contract to supply carriage for wedding party, inconvenience as ground of damage, § 92.
carriers of passengers, breach of contract to carry, liability for inconvenience, §§ 49, 57, 936.
damages for physical and mental suffering, inconvenience, § 942.
passenger compelled to alight before reaching destination, inconvenience as element of damage, § 92.
removal of passenger at wrong place, inconvenience as element of damage, §§ 48, 938, 939.
verdicts excessive
damages for being ejected without physical injury, § 953n.
damages for failure to make connections, § 953n.
contracts to secure exemption from annoyance, breach, liability for inconvenience, § 96.
elements of damage, losses, breach of contract to forebear bringing suit, § 78.
eminent domain, injury to property not taken, inconvenience as element of damage, § 1066.
injunction bonds, damages, recovery of costs, expenses, and attorney's fees, §§ 524, 525.
master and servant, exposure of seamen to perils of war, recovery for services lost and inconvenience, § 686.
nuisance, liability for remote consequences, cellar flooded, § 1050.
liability of wrongdoer for nominal damages, obstruction of stream, § 1037.
property, inconvenience as element of damage, deprivation of use of property, § 95.
railroad crossing, breach of contract to construct, inconvenience as ground of damage, § 92.
streets, improvement by abutting owners, damnum absque injuria, § 3.

Inconvenience—continued.
telegraphs and telephones, negligence in transmission or delivery of messages, inconvenience as element of damage, § 965.
trespass, damages where injury is remediable, § 1018.
expense of obtaining restoration of property, recovery, § 156.
water supply discontinued, breach of contract, inconvenience as element of damage, § 92.

Incumbrances
see Covenants.
marshalling and distribution, sale of incumbered property, parcels sold to different purchasers, § 192.
sale subject to incumbrance, § 193.

Indemnity
actions, contracts varying from indemnity, accrual of cause of action, measure of recovery, §§ 765, 766.
agent's right to indemnity, losses or damages sustained in directing business of agency, § 792.
no indemnity for unlawful act, § 794.
bills and notes, consideration fraudulent or illegal in part, note as indemnity, § 550.
parol evidence, admissibility, note given for indemnity, § 551.
bond to partnership, construction of contract of suretyship, effect of admission of new partner, § 725.
bonds, penalty as limit of recovery, exception as to interest, § 477.
contract, damages as gist of, § 761.
damages recoverable, costs, expenses and attorney's fees, § 762.
remote and consequential losses, § 762.
contracts varying from indemnity, accrual of cause of action, measure of recovery, §§ 765, 766.
contribution or indemnity between wrongdoers, basis upon which made, § 764.
costs and expenses of defending former suit, right to, conflict of decisions, § 82.
damage accruing subsequent to action, inclusion in recovery, § 117.
express indemnities, §§ 761-767.
costs, expenses and attorney's fees, damages recoverable, § 762.
damages as gist of action, § 761.
mental and physical suffering, liability for original trespass, § 763.
obligation to reimburse, expenses and losses, § 84.
remote and consequential losses, § 762.
fire insurance, damages, general rule, § 821.
injunction bonds, parties who may sue, § 522.
insurance, adjustment of losses, principle of indemnity, § 817.
rule of construction, § 840b.
judgment, effect of judgment, § 767.
libel and slander, object of action, § 1209.
municipal corporations, notice to person to defend, effect when judgment is rendered, § 83.
right to indemnity, failure of contractors to repair public ways, § 83.
notice to indemnitor to fix liability, necessity, §§ 86, 87.
suretyship, indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
title insurance, nature of contract, § 840a.
torts, contribution or indemnity between wrongdoers, basis upon which made, § 764.

Independent Contractor
see Master and Servant.

Independent Contractor—continued.
Federal Employer's Liability Act, employees within act, existence of relation of master and servant, § 1308.

Indiana
appeal and supersedeas bonds, liability of sureties, § 537.
assault and battery, words as provocation for assault, mitigation of damages, § 151.
attachment, recovery of attorney's fees, § 516.
bills and notes, defenses, obtaining note fraudulently or without consideration, § 541.
payment by bills, notes and checks, presumption, § 255.
re-exchange and damages on bills dishonored, by what law liabilities are governed, statutes, § 563n.
stipulation for attorney's fees and costs, § 564.
bonds, penalty as limit of recovery, exception as to interest, § 477.
conflict of laws, interest, law of place governing, § 366.
consequential damages, wilful or malicious injuries, liability for exemplary damages, § 43.
contracts for particular works, delay or stopping of work, presumption where contractor continues with contract, § 714.
corporations, liability for exemplary damages, § 411.
covenant against incumbrances as covenant running with land, § 625.
crops, conversion, liability of wrongdoer for highest market price, § 1127.
death by wrongful act, survivorship of action, beneficiary, § 1332.
eminent domain, compensation for cattle guards and sign boards at crossing, laying out new street, § 1077.
deduction for benefits, § 1087.
time of assessment of damages and benefits, § 1083.
evidence, physical examination of plaintiff, power of court, § 451.
exemplary damages, liability of corporations, § 411.
imputed negligence, statement of doctrine, § 27.
injunction bonds, facts which may be shown as defenses, § 530.
interest, agreements for more than legal rate of interest before maturity, contracts not void for usury, § 315.
rate of interest as damages, law of place governing, § 366.
recoveries under usury statutes, § 316.
torts, interest in actions for torts, § 355.
usury, law governing where usury is involved, § 364.
interest, rate applicable after debt is due, § 309.
intoxicating liquors, civil damage laws, exemplary damages, § 1253.
joint obligations, method of extinguishment or severance, § 136.
nuisance, permanency of nuisance, estoppel from recovery of future damages, § 1046.
official bonds, measure of damages against sureties, § 489.
private injuries recovered by official bonds, § 487.
payment by bills, notes and checks, presumption, § 225.
payment by note of third person, presumption, necessity of surrender of debtor's note, § 225.
personal injuries, damages for mental suffering, loss of enjoyment, § 1243.
pleading, personal injuries, necessity of alleging aggravation of existing condition, § 421.
probate bonds, guardian's bond, liability of sureties, § 496.
liability as between sets of sureties, § 498.
replevin bonds, recovery of attorney's fees, § 505.
sheriffs, liability of sureties on official bond, measure of damages, § 489.
statutes, death by wrongful act, survivorship of action, beneficiary, § 1332.

Indiana—continued.
streets, opening, compensation under law of eminent domain for cattle guards and signboards at crossing, § 1077.
suretyship, appeal and supersedeas bonds, liability of sureties, § 537.
guarantor's duty to realize on securities, application of deposit by bank to payment of demand, § 737.
telegraphs and telephones, liability for negligence in transmission or delivery of messages, damages for mental suffering, grounds upon which denied, §§ 975, 978.
necessity of notice of importance of message, § 97.
trespass to real property, destruction of trees, measure of damages, § 1019.
trover and conversion, crops, liability of wrongdoer for highest market price, § 1127.
increase in value of stock, limit, § 1119.
interest and value of use of property, § 1115.

Indians
indemnity acts, ascertainment of value of improvements, § 1015.
replevin, Indian scrip, right to recover damages, § 1147.

Indorsement
see Bills and Notes.

Infants
see Parent and Child.
assault on woman in railroad station, child frightened and killed by train, consequential damages, § 35.
bills and notes, sale, equitable set-off, § 1139.
compromise, acceptance of sum of money in full satisfaction of claim, bar of action for damages, § 251.
contracts for services, implied contract of infant, § 679.
necessity of full performance of entire contract, ratification, § 690.
dead bodies, breach of contract to embalm, mental suffering as element of damages, § 705.
removal from burial lot, right to recover for mental anguish, § 95.
death, consequential damages, assault on woman in railroad station, child frightened and killed by train, § 35.
death by wrongful act, right of unborn child to recover for death of father, § 8.
dower, damages for detention of dower, action by children to recover damages from estate of father, § 1003.
employment, contract to accept benefit of relief fund, binding effect on infant if benefited, § 6.
injury to infant
carriers of passengers, excessive verdicts, damages for physical injury to child, § 953n.
injury to wife, child or servant, recovery of damages, § 952.
earning capacity injured, damages recoverable, § 1251.
evidence, admissibility, effect of fact that earnings belong to father, § 1248.
right to recover damages for loss of, § 1246.
right to recover for diminished earning capacity after minor attains majority, § 1249.
evidence in mitigation, § 1255.
evidence that minor was obedient to parents, admissibility, § 1248.
expenses for surgical and medical aid, right to recover for same though plaintiff is an infant and not liable for such expenses, § 1250.

Infants—continued.
injury to infant—continued.
explosives, liability of dealer selling explosives to children, § 19.
horse and cart unattended in public street, children injured, liability for damages, § 19.
horse kicking child while trespassing, consequential damage of trespass, § 31.
hot iron casting left on street, liability for injury to child, § 19.
loss of time, right to recover for, § 1249.
street railway, children permitted to ride on platform, child pushed off by another child, consequential damages, § 41.
telegraphs and telephones, negligence in transmission or delivery of message, mitigation of damages, § 973.
trespass, boy forcibly put on a freight train, consequential damages, § 39.
turntable cases, child injured by table revolved by other children, consequential damages, § 40.
weapons, liability of owner of loaded gun given to child, § 19.
interest, infant's liability for interest, bonds, accounts, § 338.
legacies, allowance of interest on, § 344.
intoxicating liquors, civil damage laws, expenses for medical services, recovery, § 1250.
right of unborn child to recover for loss of support, sale of liquor to father, § 8.
mental suffering, allowance of damages for, abduction of infant, § 1245.
pleading, personal injuries, recovery for impairment of ability, necessity of alleging special damages, § 421.
unborn children, right to recover damages for injuries to unborn child, § 8.

Infringements
see Copyrights; Patents; Trademarks.

Inheritance
see Remainders and Reversions.
dower, right of dower at common law, § 1001.
injuries, rights of parties not in possession, §§ 1033, 1034.

Injunction
appeal and supersedeas bonds, liability of sureties, judgment partly for money or in rem, § 535.
bonds
accrual of right of action, § 522.
attorney's fees, recovery, § 524.
costs and expenses, recovery, §§ 524, 525.
damages from restraint of injunction, recovery, §§ 526-528.
damages, mode of assessing damages, § 523.
scope of obligation, § 520.
defenses, facts which are not defenses, § 529.
facts which may be shown as defenses, § 530.
expenses, recovery of costs, expenses, and attorney's fees, § 524.
Federal courts, accrual of right of action on bond, § 522.
power of court of equity to impose terms, etc., § 521.
recovery of costs, expenses, and attorney's fees, § 524.
parties, who may sue, § 522.
power of court of equity, § 521.
right of action, when it arises, § 522.
scope of obligation, § 520.
statutes, power of court of equity, § 521.
bonds to stay injunction, § 530a.

Injunction—continued.
contract for particular work, liability of employer for delaying or stopping work, § 713.
costs, recovery of costs and attorney's fees, actions ex contractu, § 58.
defenses, cross-claim as defense by way of recoupment, judgment as bar to another action or recoupment, § 189.
dismissal, accrual of right of action on bond, § 522.
injunction obtained without probable cause, liability for malicious prosecution, § 1235.
dissolution, damages, mode of assessing damages, § 523.
defenses, facts which are not defenses, § 529.
facts which may be shown as defenses, § 530.
nuisance, elements of damage, obstruction of mill-dam, § 1048.
recoupment for damages caused by trespass, § 184.
street closed, special damage to owner deprived of right of egress, right to injunction, § 4.
temporary injunction, accrual of right of action on bond, § 522.

Injuria Sine Damno
§ 3.

Injury
actionable injury, right to damages, nominal damages, § 9.
compensation, equality of compensation to injury, § 12.
consequential damages, injury through third persons, § 33.
particular injury need not be foreseen, § 28.
mitigation of damages, injury increased by plaintiff, § 155.
prevention of injury, duty of person injured, § 88.
right to damages, ascertainment of amount, § 2.
damnum absque injuria, § 3.

Injury to Real Property
Ch. XXV, §§ 1008-1060.
see Nuisance; Trespass to Real Property.

Injury to the Person
see Personal Injuries.

Inns
see Hotels.

Inquiry of Damages
see Assessment of Damages; Writ of Inquiry.

Insane Persons
breach of marriage promise, excuse for breach of contract, § 989.
carriers, passenger rendered insane by accident, consequential damages, § 36.
compensatory damages, liability for, § 16.
contracts for services, implied contract of insane person, § 679.
recovery on quantum meruit, presumption where family relation exists, § 679.
evidence, instances of rejection and admission of opinion evidence, § 443.
exemplary damages, liability for, § 394.
intoxicating liquors, right of action for insanity as result of intoxication, consequential damages, § 16.
libel and slander, defenses, insanity of defendant, § 152.
evidence in mitigation, insanity, § 1231.
injuries to business, actionable words, charge of insanity, § 1213.

Insane Persons—continued.
personal injuries, insanity as result of injury, excessive verdicts, § 1256n.
recovery for mental suffering, apprehension of insanity, § 1243.
telegraphs and telephones, negligence in transmission or delivery of messages, damages for mental anguish, § 982.
torts, duty of insane person to make recompense for torts, § 16.

Insolvency
agents, measure of liability for defaults in regard to commercial paper, § 775.
attorney's negligence, measure of damages where debt is lost, § 776
bills and notes, defect of consideration shown by parol evidence, payee insolvent, failure of payee to convey land, § 554.
broker employed by receiver, right to compensation, § 683.
collusion with insolvent debtor by creditor, liability to other creditors, § 1174.
dower, damages for detention of dower, action by children to recover damages from estate of father, § 1003.
express company, duties and liabilities, drawer's loss on draft, § 776.
insurance, policy issued by insolvent foreign insurance company, liability of agent, measure of damages, § 798.
interest, corporations, stockholders' statutory liability, allowance of interest on, § 343.
demand, necessity of demand, allowance of interest, § 351.
pleading, manner of claiming interest in pleading, § 387.
judgments, insolvency of judgment debtor, liability of surety on appeal bond, § 536.
restitution after reversal of judgment, manner of making, § 468.
satisfaction, agreement of creditor to accept less than is due, § 214.
landlord and tenant, insolvency of lessee, exemption from balance of rent, § 845.
libel and slander, injuries to business, actionable words, charge of insolvency, § 1213.
official bonds, insolvency of sureties, liability of officers, § 491.
payment by bills of broken banks, effect, § 224.
probate bonds, actions as to sureties, liability for executor's debt for estate, § 495.
insolvency of guardian, liability of sureties, § 496.
presumption as to misappropriation of money, insolvency of guardian, § 498.
sales, contracts to pay in specific articles, presumed value of notes, § 659.
stock, sale induced by false representations as to insolvency of bank, liability of directors, § 1165.
suretyship, insolvency of co-surety, effect, § 757.
trover and conversion, insolvency of maker as ground for mitigation of damages, § 1132.
insolvency of partnership, recovery of property, § 1136.
recovery by insolvent of damages, injury to commercial standing, § 1129.

Inspection
sales, recovery by seller against buyer, right of seller to reject property, § 650.
warranties of quality, executed sale, fraudulent prevention of inspection of goods, § 667.

Instructions
death by wrongful act, instructions as to duty of jurors, propriety, § 1266.

Instructions—continued.
Federal Employers' Liability Act, contributory negligence, instructions on, § 1330.
damages, instructions harmless in view of verdict, § 1337.
death, measure of damages, correctness of instructions, § 1337.
earning capacity, correctness of instructions, § 1331.
form, submission of instructions to jury, § 1355.
future damages, propriety and correctness of instructions, § 1331.
mental suffering, instructions held correct, § 1331.
mitigation of damages, instructions on contributory negligence, § 1330.
propriety of refusal of instruction not supported by evidence, § 1357.
future damages, propriety and correctness of instructions, § 1331.
personal injuries, earning capacity of person injured, instruction held erroneous, § 1251.
instructions as to damages, province of jury, § 1256.
requested instructions ignoring power of injured person to acquire capacity to do profitable work, propriety of refusing, § 1246.
verdicts, excessive or insufficient verdicts, power of appellate court, § 459.
rendition, instructions to re-consider verdict, § 458.

Instructions to Agents
see Agents.

Insults
see Abusive Language.
carriers of goods, liability for exemplary damages, refusal to carry, § 930.
carriers of passengers, damages for assault on passenger, excessive verdicts, § 953n.
damages for ejection where physical injury follows, excessive verdicts, § 953n.
damages for insult to passenger, § 953n.
exemplary damages, liability, § 950.
mental suffering, following personal injury, allegation of special damages, § 421.
personal injuries, evidence of financial circumstances of parties, § 1254.
replevin, allowance of exemplary damages, § 1145.

Insurance
accident policies, § 835.
collateral security, life insurance as collateral security, violation of condition by insured, § 835.
damages, re-statement of measure and elements of damage, § 837.
recovery, scope of recovery, difference between English and American decisions, § 836.
adjustment of losses, principle of indemnity, § 817.
agency, breach of contract giving general agency, certainty of proof of damages, § 69.
breach of contract, liability of insurance company for expenses and lost commissions, § 694.
commissions, computation for purpose of awarding damages, breach of contract, § 694.
duties and liability, adjustment of claim, § 774.
neglect of duty or agreement concerning insurance, § 772.
negligence as proximate cause of principal loss, failure to cancel policy, § 771.

Insurance—continued.
agency—continued.
policy issued by insolvent foreign insurance company, liability of agent, measure of damages, § 798.
trover to recover policy, duty of agent, § 769.
wrongful discharge, measure of damages, action by agent, § 60.
assessments, payment, deposit of money in mail, § 217.
building being constructed, rights of contractor in insurance, § 706.
carriers of goods, freight, right to freight when cargo is insured, § 892.
liability not mitigated by insurance, § 929.
carriers of passengers, mitigation of damages, § 949.
commission goods, measure of damages, fire insurance on commission goods, § 828.
contracts
fire insurance, nature, manner of making, § 820.
growth and importance of insurance contracts, § 801.
interpretation of contract, § 805.
life insurance, character of contract §§ 832, 833.
methods for ascertainment of damages, § 808.
partial loss, damages, § 816.
proof of loss, manner and time of making, waiver, § 810.
pleading, § 812.
contracts to replace or rebuild, fire insurance, § 830.
contribution, more than one policy of fire insurance, § 822.
death by wrongful act, damages recoverable by widow, effect of receipt of insurance money, § 1265.
definition of life insurance, § 831.
evidence of damages, fire insurance, § 825.
fire insurance
abandonment, no right of abandonment as in marine insurance, § 824.
adjustment, several policies, § 830.
commission goods, measure of damages, fire insurance on commission goods, § 828.
contract of fire insurance, nature, manner of making, § 820.
contracts to replace or rebuild, § 830.
contribution, more than one policy, § 822.
damages, general rule, § 821.
definition, § 802.
general average in fire insurance, § 826.
indemnity, contract of fire insurance as contract of indemnity, § 820.
interpretation of contract, §§ 805, 820.
kinds of insurance, § 802.
liquidated damages, modes of liquidating damages, computation of time, § 281.
loss, determination, what jury may consider, § 824.
mitigation of liability, § 823.
mortgages, fire insurance by mortgagee, § 829.
partial loss, damages, § 816.
proof of damages, § 825.
proximate consequences, insurer not liable for remote consequences, § 821.
recoveries in special cases, § 827.
total loss, what constitutes, property wholly destroyed in law of fire insurance, § 807.
value, evidence of value in estimating loss, §§ 821, 825.
valued policies, admiralty and fire, § 806.
general average, definition, adjustment, §§ 818, 819.
fire insurance, § 826.
indemnity insurance, rule of construction, § 840b.

Insurance—continued.
insolvency, policy issued by insolvent foreign insurance company, liability of agent, measure of damages, § 798.
interest, money due on policy of insurance, allowance of interest, § 346.
kinds of insurance, § 802.
landlord and tenant, covenant to insure, damages for breach, § 862.
life insurance
character of contract, §§ 832, 833.
collateral security, life insurance as collateral security, violation of condition by insured, § 834.
damages, re-statement of measure and elements of damage, § 837.
definition, §§ 802, 831.
interpretation of contract, § 805.
kinds of insurance, § 802.
paid up policy, refusal to issue, § 839.
re-insurance, liability of re-insurer, § 840.
termination of contract, insurer's liability, recovery of premiums on unaccepted policy, expense of procuring other policy, § 838.
loss caused by third person, right of insurer to recover, § 33.
marine insurance, adjustment of losses, principle of indemnity, § 817.
cause of damage, must be proximate, § 803.
contracts, methods for ascertainment of damages, § 808.
definition, § 802.
extent of injury, manner of ascertainment, § 804.
general average in fire insurance, § 826.
interest, allowance of interest, money due on insurance policy, premiums, § 346.
interpretation of contract, § 805.
kinds of insurance, § 802.
loss, determination, what jury may consider, § 824.
loss in excess of sum fixed in policy, § 815.
open policies, adjustment of losses, principle of indemnity, § 817.
general average, definition, adjustment, §§ 818, 819.
rule of damages, §§ 813, 814.
partial loss, damages, § 816.
premium note, consideration, admission of parol evidence, § 551.
proof of loss, manner and time of making, waiver, § 810.
necessity, condition precedent, § 809.
pleading, § 812.
preliminary proof for information only, § 811.
total loss, constructive total loss, § 807.
property wholly destroyed in law of fire insurance, what constitutes total loss, § 807.
what constitutes, § 807.
valued policies, admiralty and fire, § 806.
mitigation of damages, effect of receipt of money, insurance policies, §§ 157, 158, 159, 929, 949, 1055, 1056, 1265, 1267.
money due on policy of insurance, allowance of interest, § 346.
mortgages, fire insurance by mortgagee, § 829.
mutual benefit insurance, accident policies, § 835.
assessments, application of money exacted from member to payment of assessments, § 215.
termination of contract, insurer's liability, recovery of premiums on unaccepted policy, expense of procuring other policy, § 838.
negligence, mitigation of damages, consideration of payment of insurance money to injured party, § 157.
partial loss, damages, § 816.
loss in excess of sum fixed in policy, § 815.

Insurance—continued.
pleading, proof of loss, § 812.
preliminary proof for information only, § 811.
premiums, agents, right of agent to recover premiums paid, insurance for principal, § 789.
allowance of interest on, § 346.
application of dividends to payment of premiums, § 215.
confession of judgment, what constitutes payment, § 217.
consideration of premium note, impeachment, § 545.
fire insurance, mitigation of liability, § 823.
payment, application of money owing insured employee, § 217.
tender within reasonable time, what constitutes payment, § 217.
termination of contract, insurer's liability, recovery of premiums on unaccepted policy, expense of procuring other policy, § 838.
proof of loss, manner and time of making, waiver, § 810.
necessity, condition precedent, § 809.
pleading, § 812.
preliminary proof for information only, § 811.
sales, bills and notes, parol evidence to show defect of consideration, part of consideration withheld, § 552.
warranty of quality or quantity, breach, damages, recovery of cost of insurance, § 675.
surety insurance, rule of construction, § 840b.
title insurance, nature of contract, § 840a.
trover and conversion, insurance policies, § 1133.
waiver, proof of loss, manner and time of making, waiver, § 810.

Interest
see Usury.
absence of creditor, rate of interest, maturity of debt, effect of equitable circumstances, § 309.
accounts, allowance of interest on accounts, §§ 349, 350.
change in law of place of contract, effect, §§ 368-370.
demand, necessity of demand, allowance of interest, § 351.
infants, liability for interest, bonds, accounts, § 338.
partnership, interest as between partners, § 342.
payments, computation, application and effect of partial payments, compound interest, §§ 378, 379.
pleading, manner of claiming interest in pleading, § 387.
tacit agreements to pay interest on accounts, § 322.
admiralty, appeal, interest and damages awarded on appeal, § 538.
judgments, interest on judgments pending review, § 389.
advancements, allowance of interest on, § 345.
breach of contract, greater damages than interest for failure to advance money, § 77.
money paid, allowance of interest, §§ 326, 327.
agents, allowance of interest against, § 353.
collections, right of agent to charge for exchange and interest, § 791.
agreements for interest, validity, enforcement, § 304.
aliens, suspension of interest, war preventing payment, § 382.
allowance, failure to pay given sum in currency or in coin, measure of damages, interest, § 214.
allowance of interest from time when money ought to be paid, § 329.
America, interest at common law in America, § 303.
annuities, allowance of interest on, § 344.
suspension of interest, miscellaneous cases, § 380.
appeal and supersedeas bonds, liability for interest, § 536.
appeal, interest and damages awarded on appeal, §§ 538, 539.
judgments, interest on judgments pending review, § 389.

Interest—continued.
assessment of damages, addition of interest to amount found in favor of plaintiff prior to inquiry, § 430.
assessments, allowance of interest on special assessments, § 337.
bail, demand, necessity of demand, allowance of interest, § 351.
bills and notes, allowance of interest on, § 556.
greater damages than interest for failure to pay or loan money, § 77.
interest as damages, liability of drawer or indorser, § 558.
interest as damages to be paid by maker or acceptor, § 557.
law governing as to place and time, § 358.
rate of interest as damages, law of place governing, § 366.
separate agreements for interest, compound interest, § 376.
suspension of interest, miscellaneous cases, § 380.
payment prevented by legal process, § 381.
tender stopping interest, § 383.
time when tender may be made, §§ 385, 386.
usury, law governing where usury is involved, § 364.
bonds, infants, liability for interest, bonds, accounts, § 338.
judgments, allowance of interest on judgments, § 333.
interest on judgments pending review, § 389.
maturity of debt, periodical interest after maturity, compound interest, § 377.
penalties, allowance of interest on penalties of bonds, § 331.
penalty as limit of recovery, exception as to interest, §§ 477, 478.
statute of 4 and 5 Anne, effect, § 473.
suspension of interest, miscellaneous cases, § 380.
was preventing payment, § 382.
to the United States, law governing as to interest, § 359.
brokers, conversion of stock held on margin, recoupment of interest, § 180.
carriers of goods, demurrage, allowance of interest on amount due as demurrage, § 897.
interest on damages, § 920.
loss of shipper's profits, liability, § 900.
common law, interest at common law in America, § 303.
right to interest at early common law, § 301.
compensation, interest as compensation, §§ 320-355.
accounts, allowance of interest on accounts, §§ 349, 350.
tacit agreements to pay interest on accounts, § 322..
advancements, allowance of interest on, § 345.
agents, trustees and officers, allowance of interest against, § 353.
allowance of interest from time when money ought to be paid, § 329.
annuities, allowance of interest on, § 344.
assessments, allowance of interest on special assessments, § 337.
bills and notes, interest as damages, liability of drawer or indorser, § 558.
interest as damages to be paid by maker or acceptor, § 557.
condemnation proceedings, allowance of interest, § 336.
corporations, stockholders' statutory liability, allowance of interest on, § 343.
customs duties, allowance of interest, § 337.
damages, interest as damages accessory to principal, § 372.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
demands, liquidation, interest not allowed on unliquidated demands, §§ 347, 348.
necessity of demand, allowance of interest, § 351.
government, allowance of interest against government, § 332.
infants, liability for interest, bonds, accounts, § 338.

Interest—continued.
compensation—continued.
insurance, allowance of interest, money due on policy of insurance, premiums, § 346.
judgments, allowance of interest on judgments, §§ 333, 334.
revival of judgment by scire facias, allowance of interest, denial, § 335.
landlord and tenant, allowance of interest between, § 339.
legacies, allowance of interest on, § 344.
license fees, allowance of interest, § 337.
marriage, right to interest as affected by marital relations, § 341.
money had and received, allowance of interest on, § 352.
money loaned, allowance of interest, § 325.
money obtained by extortion or fraud, or wrongfully held or disposed of, allowance of interest on, § 354.
money paid, allowance of interest, §§ 326, 327.
partnership, interest as between partners, § 342.
patents, interest on damages for infringement of patents, § 340.
penalties, allowance of interest denied, § 330.
allowance of interest on penalties of bonds, § 331.
quantum meruit claim to interest, § 324.
vendor and purchaser, § 328.
rate of interest as damages, law of place governing, § 366.
right not absolute, discretion of jury or court, § 321.
statutes, liability for mobs and riots, allowance of interest, § 330.
suspension of interest, miscellaneous cases, § 380.
taxes, allowance of interest, § 337.
torts, interest in actions for torts, § 355.
compound interest, definition, § 373.
computation, application and effect of partial payments, compound interest, §§ 378, 379.
commencement of action, computation down to verdict, § 113.
payment before debt is due, application, allowance of interest, § 219.
conflict of laws, §§ 356-370.
bills and notes, law governing as to place and time, § 358.
bonds to the United States, law governing as to interest, § 359.
change in law of place of contract, effect, §§ 368-370.
contract, law of place and time governing general rule, § 357.
evidence of foreign law, § 367.
importance of subject, § 356.
parties in different states, contracts, law governing, §§ 360, 361.
pleading of foreign law, § 367.
rate of interest as damages, law of place governing, § 366.
usury, law governing where usury is involved, §§ 362-365.
construction, agreement to pay money, "with interest," § 305.
rate, legal or stipulated rate, application from date, § 307.
contracts, accounts, tacit agreements to pay interest on accounts, § 322.
agreements for different rate of interest, after debt is due, §§ 311, 312.
agreements for interest from date until debt is paid, § 310.
agreements for more than legal rate after maturity
effect as penalty, usury, § 318.
relief of debtor in Illinois, § 319.
agreements for more than legal rate of interest before maturity, contracts not void for usury, § 315.
effect of usury, § 313.
persons who may take advantage of usury, § 314.
recoveries under usury statutes, §§ 316, 317.
change in law of place of contract, effect, §§ 368-370.
compound interest, definition, § 373.

Interest—continued.
Contracts—continued.
debt, interest due by agreement as debt, § 371.
law of place and time governing, general rule, § 357.
maturity of debt, application of same rate of interest after debt is due, §§ 308, 309.
parties in different states, contracts, law governing, §§ 360, 361.
pleading, manner of claiming interest in pleading, § 387.
quantum meruit claim to interest, § 324.
rate, legal or stipulated rate, application from date, § 307.
separate agreements for interest, compound interest, § 376.
special obligation to pay money, greater damages than interest for failure to pay, § 77.
usury, law governing where usury is involved, §§ 362-365.
contracts for particular work, damages for delay, recovery of interest, §§ 704, 793.
demand for part performance of entire contract, allowance of interest prior to substantial performance of contract, § 711.
right of contractor, interest, § 706.
contracts for payment of money, sum greater than interest for paying debt at early time or at different place, § 287.
corporations, stockholders' statutory liability, allowance of interest on, § 343.
costs, verdict, interest on verdict before judgment, § 388.
coupons, separate agreements for interest, compound interest, § 376.
covenants of seizin and good right to convey, breach, right of covenantee to recover interest, § 601.
covenants of warranty and quiet enjoyment, breach, interest and taxes as items of damage, § 616.
covenants, pleading, manner of claiming interest in pleading, § 387.
customs, accounts, tacit agreement to pay interest on accounts, § 322.
damages, interest as damages accessory to principal, § 372.
interest as incident to principal demand, § 300.
death by wrongful act, allowance of interest, § 1263.
debt, interest due by agreement as debt, § 371.
defenses, agreements for more legal rate of interest before maturity, contracts not void for usury, § 315.
persons who may take advantage of usury, § 314.
definition of interest, § 300.
compound interest, definition, § 373.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
insurance, allowance of interest, money due on insurance policy, premiums, § 346.
judgments, interest on judgments pending review, § 389.
partnership, interest as between partners, § 342.
quantum meruit, claim to interest, vendor and purchaser, § 328.
suspension of interest, payment prevented by legal process, § 381.
demands, accounts, allowance of interest on accounts, §§ 349, 350.
bills and notes, interest as damages, liability of drawer or indorser, § 558.
interest as damages to be paid by maker or acceptor § 557.
liquidation, interest not allowed on unliquidated demands, §§ 347, 348.
necessity of demand, allowance of interest, § 351.
payments, computation, application and effect of partial payments, compound interest, §§ 378, 379.
rate of interest, maturity of debt, effect of equitable circumstances, § 309.
deposits, money had and received, allowance of interest on, § 352.
devastavit, recovery of interest by administrator de bonis non, § 494.

Interest—continued.
dower, damages for detention of dower, recovery of interest, § 1003.
eminent domain allowance of interest, §§ 336, 1091.
pleading, manner of claiming interest in pleading, § 387.
England, interest in England legalized by statute, § 302.
equity, pleading, manner of claiming interest in pleading, § 387.
evidence of foreign law, § 367.
execution sale, judgments, interest on judgments pending review, § 389.
executors, allowance of interest against, § 353.
extortion, money obtained by extortion or fraud, or wrongfully held or disposed of, allowance of interest on, § 354.
federal courts, appeal, interest and damages awarded on appeal, § 538.
torts, interest in actions for torts, § 355.
fire insurance, damages, general rule, § 821.
foreign judgments, allowance of interest on judgments, § 333.
forfeiture, agreements for more than legal rate before maturity, recoveries under usury statutes, §§ 316, 317.
fraud, exemplary damages, allowance of interest as punishment, § 1178.
money obtained by extortion or fraud, or wrongfully held or disposed of, allowance of interest on, § 354.
pleading, manner of claiming interest in pleading, § 387.
garnishment, suspension of interest, payment prevented by legal process, § 381.
government, allowance of interest against government, § 332.
guaranty of payment, liability of guarantor for interest, § 728.
guardians, allowance of interest against, § 353.
husband and wife, marriage, right to interest as affected by marital relation, § 341.
infants, legacies, allowance of interest on, § 344.
liability for interest, bonds, accounts, § 338.
injunction, bonds, damages from restraint of injunction, recovery, §§ 526, 528.
installments, interest on installments of interest, § 375.
maturity of debt, periodical interest after maturity, compound interest, § 377.
suspension of interest, miscellaneous cases, § 380.
insurance, allowance of interest, money due on policy of insurance, premiums, § 346.
interest upon interest, §§ 373-379.
compound interest, definition, § 373.
installments, interest on installments of interest, § 375.
instances of interest upon interest, § 374.
maturity of debt, periodical interest after maturity, compound interest, § 377.
partnership, interest as between partners, § 342.
payments, computation, application and effect of partial payments, compound interest, §§ 378, 379.
separate agreements for interest, compound interest, § 376.
judgments, allowance of interest on judgments, §§ 333, 334.
appeal, judgments, pending review, interest on, § 389.
certainty, necessity that judgment be certain, § 467.
payments, computation, application and effect of partial payments, compound interest, §§ 378, 379.
penalties, allowance of interest denied, § 330.
revival of judgment by scire facias, allowance of interest, denial, § 335.
statutory provisions, rule that judgments shall bear the same rate of interest as contract, § 309.
verdicts, necessity that judgment follow verdict, § 466.
judicial notice, evidence of foreign law, § 367.

Interest—continued.
laches, right not absolute, discretion of jury or court, § 321.
landlord and tenant, allowance of interest between, § 339.
covenant of lessee to pay taxes, breach, lessee's liability, § 846.
measure of liability for not making repairs, interest on cost of repair, § 858.
legacies, allowance of interest on, § 344.
license fees, allowance of interest, § 337.
life insurance, paid up policy, refusal to issue, § 839.
liquidated damages
agreement to fix rate of interest, after debt is due, § 309.
agreements for more than legal rate after maturity, effect as penalty, usury, § 318.
agreements for different rate of interest after debt is due, §§ 311, 312.
bills and notes, interest on, § 556.
demands, liquidation, interest not allowed on unliquidated demands, § 347, 348.
suspension of interest, tender not allowed for unliquidated damages, § 384.
marriage, right to interest as affected by marital relation, § 341.
master and servant, recovery for services and interest, mode of compensating for services, § 684.
wrongful dismissal of employee, measure of damages, recovery of interest, § 692.
maturity of debt
agreement for more than legal rate before maturity, effect of usury, § 313.
agreements for different rate of interest after debt is due, §§ 311, 312.
bills and notes, interest as damages, liability of drawer or indorser, § 558.
periodical interest after maturity, compound interest, § 377.
mesne profits, recovery of interest, § 997.
money had and received, allowance of interest on, § 352.
money loaned, allowance of interest, § 325.
demand, necessity of demand, allowance of interest, § 351.
greater damages than interest for failure to loan money, § 77.
partnership, interest as between partners, § 342.
suspension of interest, war preventing payment, § 382.
money obtained by extortion or fraud, or wrongfully held or disposed of, allowance of interest on, § 354.
money paid, allowance of interest, §§ 326, 327.
municipal corporations, condemnation proceedings, allowance of interest, § 336.
government, allowance of interest against government, § 332.
judgments, allowance of interest on judgments, § 333.
statutes, liability for mobs and riots, allowance of interest, § 330.
nuisance, injuries to crops, allowance of interest, § 1049.
officers, allowance of interest against, § 353.
judgments, interest on judgments pending review, § 389.
parties, agreements for more than legal rate before maturity, persons who may take advantage of usury, § 314.
parties in different states, contracts, law governing, §§ 360, 361.
partnership, interest as between partners, § 342.
patents, infringement, computation of profits, allowance of interest as part of cost, § 1191.
interest in equity, § 1197.
interest on damages for infringement of patents, § 340.
payment, application of general payment to debt bearing interest and to interest first, § 244.
application of general payment to debt least secured, § 245.

Interest—continued.
payment—continued.
computation, application and effect of partial payments, compound interest, §§ 378, 379.
damages, interest as damages accessory to principal, § 372.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
interest as measure of damages for delay of payment, § 286.
person to whom payment may be made, § 231.
suspension of interest, payment prevented by legal process, § 381.
penalties, agreements for more than legal rate after maturity, effect as penalty, usury, § 318.
allowance of interest denied, § 330.
allowance of interest on penalties of bonds, § 331.
personal injuries, damages for pain and suffering, allowance of interest, § 1245.
pleading, change in law of place of contract, effect, §§ 368-370.
foreign law, § 367.
manner of claiming interest in pleading, § 387.
necessity of specially alleging contract, § 300.
sufficiency of allegations, interest as damages, § 300.
presumptions, agreements for interest, existence, § 304.
principal, damages, interest as damages accessory to principal, § 372.
debt, interest due by agreement as debt, § 371.
instances of interest upon interest, § 374.
process, suspension of interest, payment prevented by legal process, § 381.
promise to pay money "with interest," rule of construction, § 305.
quantum meruit claim to interest, vendor and purchaser, § 328.
rate of interest
agreements for different rate of interest after debt is due, §§ 311, 312.
agreements for interest from date until debt is paid, § 310.
agreements for more than legal rate after maturity, effect as penalty, usury, § 318.
relief of debtor in Illinois, § 319.
agreements for more than legal rate of interest before maturity, contracts not void for usury, § 315.
effect of usury, § 313.
persons who may take advantage of usury, § 314.
recoveries under usury statutes, §§ 316, 317.
appeal and supersedeas bonds, liability for interest, § 536.
bills and notes, allowance of interest on, § 556.
interest as damages to be paid by maker or acceptor, § 557.
construction of general promise to pay money "with interest," § 305.
damages, law of place governing, § 366.
determination, law or custom fixing rate, § 306.
increased rate after maturity as damages, § 286.
legal or stipulated rate, application from date, § 307.
liquidated damages, agreement to fix rate of interest after debt is due, § 309.
maturity of debt, application of same rate of interest after debt is due, §§ 308, 309.
effect of equitable circumstances, § 309.
statutory provisions, rule that judgments shall bear same rate of interest as contract, § 309.
replevin bonds, damages recoverable, interest on money value of goods, § 505.
measure of damages, allowance of interest, § 1144.
sales, warranty as quality or quantity, breach, damages, interest, expenses and special injuries, §§ 671-675.

Interest—continued.
states, government, allowance of interest against government, § 332.
statutes as to interest
agreement for more than legal rate before maturity, effect of usury, § 313.
agreements for more than legal rate after maturity, relief of debtor in Illinois, § 319.
recoveries under usury statutes, §§ 316, 317.
allowance of interest from time when money ought to be paid, § 329.
appeal, interest and damages awarded on appeal, § 538.
bills and notes, interest on, § 556.
change in law of place of contract, effect, §§ 368-370.
construction of general promise to pay money "with interest," § 305.
corporations, stockholders' statutory liability, allowance of interest on, § 343.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
evidence of foreign law, § 367.
government, allowance of interest against government, § 332.
judgments, allowance of interest on judgments, §§ 333, 334.
rule that judgments shall bear same rate of interest as contract, § 309.
mobs and riots, liability for, allowance of interest, § 330.
penalties, allowance of interest denied, § 330.
pleading, manner of claiming interest in pleading, § 387.
rate, law or custom fixing rate, § 306.
legal or stipulated rate, application from date, § 307.
suretyship, construction of promise to pay money "with interest," § 305.
measure of recovery in action by surety, § 748.
suspension of interest, §§ 380-386.
miscellaneous cases, § 380.
payment prevented by legal process, § 381.
tender not allowed for unliquidated damages, § 384.
tender stopping interest, § 383.
time when tender may be made, §§ 385, 386.
war preventing payment, § 382.
taxes, allowance of interest, § 337.
tender, effect of tender before debt is due, § 300.
necessity of pleading and paying money into court, § 274.
rate of interest, maturity of debt, effect of equitable circumstances, § 309.
suspension of interest, tender not allowed for unliquidated damages, § 384.
tender stopping interest, § 383.
time when tender may be made, §§ 385, 386.
time, allowance of interest from time when money ought to be paid, § 329.
suspension of interest, tender, time when tender may be made, §§ 385, 386.
torts, interest in actions for torts, § 355.
judgments, allowance of interest on judgments, § 333.
trademarks, infringements, interest on accrued profits, § 1202.
trespass to personal property, damages for taking or destroying property, interest, § 1096.
trespass to real property, interest on damages, § 1026.
occupation of land by railroads, recovery of attorney's fees and interest, § 1016.
trover and conversion, allowance of interest, § 1132.
damages, property without market value, § 1117.

Interest—continued.
trover and conversion—continued.
insurance policies, § 1133.
interest and value of use of property, § 1115.
trustees, allowance of interest against, § 353.
usury (see, also, title Usury)
bills and notes, interest on, § 556.
change in law of place of contract, effect, § 368-370.
law governing where usury is involved, §§ 362-365.
vendor and purchaser, damages recoverable by purchaser against vendor, interest, §§ 582-584.
recovery by vendor of interest on purchase money, § 577.
right of vendor to recover purchase price and interest, § 567.
specific performance, allowance of interest intermediate a decree, § 588.
election to pay interest on purchase price and take rents and profits, § 488.
verdict, interest improperly included in verdict, correction of error by court, § 460.
interest on verdict before judgment, § 388.
war, rate of interest, maturity of debt, effect of equitable circumstances, § 309.
suspension of interest, war preventing payment, § 382.
waste, allowance of interest on damages, appeal and supersedeas bonds, § 534.

Internal Injuries
pleading, personal injuries, necessity of alleging, special damages, § 421.

Interrogatories
see Verdicts.
Federal Employers' Liability Act, special interrogatories, § 1356.
verdicts, power of court to interrogate jury, § 458.

Interstate Commerce
burden of proof, Federal Employers' Liability Act, employees within act, § 1306.
carriers, Federal Employers' Liability Act, employers within act, § 1305.
carriers of goods, damages where there are successive carriers, effect of Carmack Amendment to Interstate Commerce Act, § 932.
limitation of liability by contract, effect of Carmack Amendment to Interstate Commerce Act, § 904.
limitation of liability, mental anguish, § 915.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
rates, unlawful discrimination, pleading, § 898.
shipper's conduct as affecting damages, effect of Interstate Commerce Act, § 925.
employees, Federal Employers' Liability Act, necessity for direct and substantial relation to interstate commerce, § 1309.
Federal Employers' Liability Act, appeal and error, question of federal rights, § 1358.
employees within act, necessity of employment in interstate commerce, § 1306.
employees engaged in construction work, § 1317.
existence of relation of master and servant, § 1308.
interstate character of traffic, § 1311.
miscellaneous employees, § 1321.
movement of cars, switching, coupling, etc., § 1319.
necessity for direct and substantial relation to interstate commerce, § 1309.

Interstate Commerce—continued.
Federal Employers' Liability Act—continued.
tests, § 1307.
train operated between intrastate termini, § 1312.
transportation by water, § 1320.
employers within act, § 1305.
injury to employees not actively employed, § 1313.
instructions on contributory negligence, § 1330.
instrumentalities or employees engaged in both classes of commerce, § 1310.
instrumentalities, preparation of instrumentalities for use, § 1315.
negligence of fellow-servant, necessity of being engaged in interstate commerce, § 1314.
miners, employees within Federal Employers' Liability Act, necessity for direct and substantial relation to interstate commerce, § 1309.
street railroads, Federal Employers' Liability Act, employees of electric railways, § 1316.
employers within act, § 1305.
turntables, Federal Employers' Liability Act, employers within act, § 1305.

Interurban Railroads
Federal Employers' Liability Act, employers within act, § 1305.

Intervening Cause
see Proximate Cause.
consequential damages for torts, intervening cause, §§ 37, 38.

Intoxicating Liquors
amusement places, sale of liquor to patrons, liability for assault committed by intoxicated person, § 40.
bond of liquor dealer, sureties' liability, damages, § 1252.
civil damage laws
evidence in mitigation, sale of liquor to minor, § 1255.
exemplary damages, allowance, § 1253.
matter of right, power of court over verdict, § 403.
wilful or wanton act as authorizing exemplary damages, § 394.
expenses for medical services, recovery, § 1250.
infants, right of unborn child to recover for loss of support, sale of liquor to father, § 8.
joint and several liability for damages, § 142.
mental suffering, allowance of damages for, accusations of infidelity, and assault by intoxicated husband, § 1245.
mitigation of damages, previous intoxication as evidence in mitigation, § 163.
suit against other parties for illegal sales, § 1252.
shame and disgrace, right of wife to recover for, intoxication of husband, § 96.
support, loss of, amount recoverable, effect of time of continuance of intoxication, § 1249.
evidence of financial condition of husband, § 1254.
injury to plaintiff because of overwork, after disability of husband, right to recover, § 1263.
recovery by wife, definition of "Means of Support," § 1252.
right of action for loss of support, consequential damages, § 16.
right of parent to recover for loss of support, § 16.
wife's recovery, amount, § 1252.
death of intoxicated person, intervening cause, § 38.
proximate or intervening cause of death, sale of liquors, § 41.

Intoxicating Liquors—continued.
horse injured, by intoxicated son, right of mother to recover damages, § 16.
injury through third persons, consequential damages for torts, § 33.
injury to intoxicated person, consequential damages, intoxicated person injured by train, § 19.
insanity, right of action for insanity as result of intoxication, consequential damages, § 16.
invitation to drink, liability where person invited assaults third person, consequential damages, § 19.
libel and slander, intoxication of defendant as defense, § 152.
murder committed by husband, right of wife to recover damages, § 16.
parent and child, right of parent to recover for loss of support contributed by son, § 16.
robbery of husband while intoxicated, right of wife to sue, § 16.
sale, damage from unlawful sale, recovery by personal representative, § 1252.
exemplary damages, joint liability for, § 407.
sale of chloroform to intoxicated person, intervening cause, § 38.
statutes, liability of vendor of intoxicants for damages, right of action unknown at common law, § 16.
trespass to real property, aggravation and special damages, § 1029.

Invasion of Privacy
eminent domain, condemnation of property for elevated railroad, damages recoverable, § 1070.
hotels, invasion of room of female guest, right to recover for injured feelings, § 96.
libel and slander, recovery of damages for mental suffering, application of rule as to invasion of privacy, § 1214.
photographs, right to recover for mental anguish, § 96.
search for stolen goods, right of action for damages, § 1235.
trespass to real property, aggravation and special damages, § 1029.

Inventions
master and servant, wrongful dismissal of employee, increase of damages, evidence that servant invented new device appropriated by master, § 692.

Iowa
attachment, bonds, allegations in actions on attachment bond, § 510.
effect of advice of attorneys, § 514.
recovery of exemplary damages, § 514.
bills and notes, defenses, obtaining note fraudulently or without consideration, § 541.
re-exchange and damages on bills dishonored, by what law liabilities are governed, statutes, § 563n.
stipulation for attorney's fees and costs, § 564.
bonds, interpretation of surety's contract, bonds of cashier, § 724.
breach of marriage promise, damages, consideration of wealth of defendant, § 988.
contracts for particular work, damages for delay, rental value, § 703.
covenant against incumbrances, breach, effect of incumbrances on executory contract, § 621.
covenants of warranty and quiet enjoyment, breach, damages where covenantee sues remote covenantor, § 614.
eminent domain, basis for estimating value of land, number of lots in acre, § 1074.
deduction for benefits, § 1087.
evidence of value and damages, § 1089.
opinion of witnesses, § 1089.
time of assessment of damages and benefits, § 1083.

Iowa—continued.
eminent domain—continued.
what is just compensation, nominal damages, § 1062.
evidence, personal injuries, annuities and life tables as evidence, § 455.
exchange of property, failure of consideration, conveyance in consideration of non-pecuniary covenants, § 576.
exemplary damages, basis on actual damages, § 406.
civil damage laws, exemplary damages for mental suffering, allowance, § 1253.
false representations, relief in equity, defendant's belief in representations, § 1169.
indemnity, express indemnity, damages recoverable, compensatory damages, attorney's fees, § 762.
interest
agreements for more legal rate of interest before maturity, contracts not void for usury, § 315n.
recoveries under usury statutes, § 317.
installments, interest on installments of interest, § 375.
usury, law governing where usury is involved, §§ 362, 363, 365.
intoxicating liquors, civil damage laws, exemplary damages as matter of right, power of court over verdict, § 403.
wilful or wanton act as authorizing exemplary damages, § 394.
joint and several liability, § 142.
landlord and tenant, recovery for damage to business, action by tenant against landlord, § 870.
libel and slander, desertion of husband as consequence of slander, § 1215.
nuisance, damages, amount recoverable in first action, § 1039.
permanency of injury, measure of damages, § 1043.
payment, person to whom payment may be made, § 231.
personal injuries, permanent disability, evidence of financial and other circumstances of parties, § 1254.
evidence that plaintiff has no other means of support, admissibility, § 1248.
replevin, bond, recovery of value of property when taken on writ of restitution, § 1152.
sales, action by buyer against seller, buyer's duty to lessen damages, § 656.
telegraphs and telephones, negligence in transmission or delivery of messages, damages for mental suffering, §§ 97, 975.
knowledge of object of sender, liability for negligence in sending messages, § 961.
torts, joint and several liability for torts, actual and exemplary damages, § 140.
trespass to real property, action against city, injury to abutting property, § 1009.
damages where injury is remediable, § 1018.
destruction of and injury to growing crops, damages, § 1023.
destruction of trees, measure of damages, § 1019.
occupation of land by railroads, recovery of attorney's fees and interest, § 1016.
persons who may sue, right of action by servant, § 1009.
wilful trespass, crops injured, § 1011.
trover and conversion, commercial securities pledged as collateral rights of pledgors, § 1119.
vendor and purchaser, damages recoverable by purchaser against vendor, compensation, application of English rule, § 581.
verdicts, impeachment by affidavit of jurors, § 456.

Ireland
bonds, penalty as limit of recovery, exception as to interest, § 477.
infants, unborn children, right to recover damages for injuries to unborn child, § 8.

Iron
sale of iron, breach of contract to furnish pig-iron, consequential damages, § 46.

Irrigation
breach of contract to supply water, consequential damages, loss of fruit trees, § 52.
damages, net value of crops, § 702.

J

Jails
see Prisons
convict escaping and committing rape, liability of custodians of jail, consequential damages, § 35.
false imprisonment, necessity of alleging special damages, § 421.

Jewelry
trover and conversion, damages, property of fluctuating value, § 1118.

Joint Obligations or Liability
appeal and supersedeas bonds, liability of sureties, § 537.
contract apportioning legal interests, separate injury in case of breach, § 131.
covenant not to sue as release, effect, § 259.
exemplary damages, joint liability for, § 407.
extinguishment or severance of joint liability, § 136.
intoxicating liquors, civil damage statutes, joint and several liability, § 142.
judgments, release, taking of judgment against one of several jointly bound, release of others, § 258.
nuisance, joint and several liability, distinction between private and public nuisance, § 1059.
parties, general and special owner, § 139.
joinder of defendants, effect of non-joinder and misjoinder, § 135.
partnership, joint and several liability for torts, acts of members of partnership, § 142.
patents, infringement, profits as damages, recovery by joint owner, § 1185.
sales, warranty of title, sale of judgment against joint defendants, effect of release of one of defendants, § 668.
tender, person to whom tender should be made, § 265.
torts, joint and several liability for torts, § 140.
parties, extinguishment or severance of liability, § 136.
principles on which joint right of liability is determined, § 137.
verdict and judgment where there are several parties, § 463.

Judgments
ad damnum as limiting amount of recovery, § 417.
agents, duties and liabilities, failure to record instrument, liability of agent, § 771.
judgment recovered by third person against agent, measure of recovery against principal, § 795.
appeal, interest and damages awarded on appeal, §§ 538, 539.
appeal and supersedeas bonds, conditions, liability of sureties, § 531.
judgments partly for money or in rem, liability, § 533.
liability in state courts, §§ 534, 535.
assignment, note given for judgment assigned, collection of part of judgment as defense to note, § 181.
sales, warranty of title, sale of judgment against joint defendants, effect of release of one of defendants, § 668.
warranty of title by assignee, § 668.

Judgments—continued.
attachment, bonds, conditions to pay judgment, § 519.
bonds and penal obligations, statute of 8 and 9 William III, effect, § 472.
breach of contract not to enter judgment, consequential damages, § 46.
certainty, necessity that judgment be certain, § 467.
confession of judgments, assessment of damages, authority of court to make, § 429.
correction of error, assessment of damages, correction after judgment, § 434.
costs, necessity that judgment be certain, § 467.
covenants of warranty and quiet enjoyment, breach, notice of suit to covenantor, effect as to judgment, § 615.
damages from restraint of injunction, recovery, § 526.
default, right to enter final judgments, § 465.
definition, § 465.
double, treble and exemplary damages, § 464.
eminent domain, effect of judgment for compensation, abandonment of proceedings, § 1090.
Federal courts, appeal and supersedeas bonds, liability for interest, § 536.
guaranty of collection, necessity of judgment against principal debtor as condition to suit, § 733.
indemnity, judgment, effect of judgment, § 767.
injunction bonds, defenses, facts which are not defenses, § 529.
interest on judgments, §§ 333, 334.
agreement for more than legal rate before maturity, effect of usury, § 313.
appeal and supersedeas bonds, liability for interest, § 536.
certainty, necessity that judgment be certain, § 467.
judgments pending review, § 389.
payments, computation, application and effect of partial payments, compound interest, §§ 378, 379.
penalties, allowance of interest denied, § 330.
revival of judgment by scire facias, allowance of interest, denial, § 335.
libel and slander, evidence in mitigation, recovery of judgment against another party for same libel, § 1233.
official bonds, mode of redress for official dereliction, § 486.
payment, appeal, interest and damages awarded on appeal, § 539.
person to whom payment may be made, § 231.
personal judgments, insolvency of judgment debtor, liability of surety on appeal bond, § 536.
probate bonds, liability of sureties, necessity of hearing of sureties, § 495.
record, liability of officers for neglect of duty, refusal to place amount upon tax roll, § 492.
neglect to record judgment, loss of priority of lien, measure of damages against sureties, § 488.
release, taking a judgment against one of several jointly bound, release of others, § 258.
replevin, bonds, defenses, what may be shown in defense or in mitigation, § 507.
effect of judgment in replevin suit, § 506.
liability of sureties for judgment in replevin suit, § 503.
res adjudicata, entirety of cause of action, illustrations, § 106.
restitution after reversal of judgment, liability of third parties, compensation for loss of use, § 469.
manner of making, § 468.
satisfaction, failure to enter satisfaction of judgment, recovery for money paid, § 132.
insolvency, agreement to accept less than is due, § 214.

Judgments—continued.
satisfaction—continued.
joint obligations, method of extinguishment or severance, § 136.
scire facias, judgments, revival of judgment by scire facias, allowance of interest, denial, § 335.
set-off of judgments, appeal, suspension of right to set-off, § 199.
courts, inherent power to direct set-off, § 198.
foreign judgments, § 203.
interest of real parties, consideration of, § 200.
liens of attorneys, priority, § 204.
right to set-off, nature of action, materiality, § 203.
necessity that assignee make absolute purchase, § 202.
when granted, § 199.
suretyship, guarantor's duty to acquire liens, necessity of notice of reliance, § 739.
payment of judgment giving right to reimbursement, § 750.
persons who are co-sureties, § 755.
surety's remedies for indemnity, conclusiveness of judgments, § 760.
verdict, interest on verdict before judgment, § 388.
necessity that judgment follow verdict, § 466.

Judicial Notice
bills and notes, interest, § 556.
death by wrongful act, damages to deceased's estate, § 1277.
interest, conflict of laws, pleading and proof of foreign law, § 367.
interest on bills and notes, rate, § 556.
statutory damages, necessity of specially claiming or alleging, § 425.

Judicial Sales
agency, right of agent to compensation, duties, secret profits, § 768.
breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
caveat emptor, warranties of title, existence, § 668.
chattel mortgages, sale illegal, officers, neglect of duty, measure of damages, nominal damages, § 491.
eminent domain, proof of value of property and damages, § 1089.
evidence of value, § 445.
injunction bonds, damages from restraint of injunction, § 528.
interest, allowance from time when money ought to be paid, § 329n.
judgment pending review, § 389.
judgments, allowance of interest on, § 333.
judgment, restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
liquidated damages, contracts, validity, § 279.
market value of property, evidence, admissibility, § 445.
marshaling and distribution, sale of encumbered property in parcels to different persons, § 192.
sale subject to encumbrances, § 193.
notice
sale without notice, mitigation of damages, measures of prevention, § 157.
return of property, discharge of plaintiff's debt, § 156.
officers, bonds
liability of public officers, adjustment of liability between sets of sureties, § 481.
private injuries covered by, § 487.
neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.
vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
recovery by vendor when contract does not fix price evidence, § 575.

Judicial Sales—continued.
vendor and purchaser—continued.
void deed, damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.

Jumping from Train
see Alighting from Train.
consequential damages, passenger injured by jumping from train, failing to stop, § 36.

Jurisdiction
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
injunction bonds, damages, facts not defenses, § 529.
recoupment, validity of claim essential, § 174.
replevin bonds, actions, effect of judgment in replevin suit, § 506.

Jury
amount of damages, discretion of jury, § 2.
wilful or malicious injuries, consequential damages, § 44.
assessment of damages, admission of damages by default or demurrer, § 429.
jury, assessment of damages without jury, § 428.
when new trial may be called, § 433.
jury tam quam, § 432.
death by wrongful act, recovery for death of child, discretion of jury, elements of damages, § 1275.
discretion, exemplary damages as matter of right, power of court over verdict, § 403.
interest, allowance of interest on unliquidated demands, § 347.
compensation, right to interest, § 321.
money obtained by extortion or wrongfully withheld or disposed of, unliquidated damages, § 354.
judgment, effect, assessment of damages, § 465.
personal injuries, damages, discretion of jury as to damages, instruction, § 1256.
sheriff's jury, assessment of damages, right to controvert cause of action, § 431.
slander and libel, damages, discretion of jury, § 1217.
trustee of jury fund, bonds, absolute liability for money received, § 479.
verdict, damages, exemplary damages, allowance in verdict by court or jury, § 464.
deliberation of jury, § 456.
rendition of, § 457.

Justice of the Peace
appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
attachment, forthcoming bonds, conditions, breach, § 517.
bastardy, bail bonds in civil actions, measure of damages, § 539b.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
exemplary damages, allowance, grounds upon which allowed, § 393n.
mandamus, officers, neglect of duty, measure of damages, nominal damages, § 492.
ministerial duties, measure of damages against sureties on official bonds, § 488.
neglect, measure of damages against officers for neglect of duty, nominal damages, § 492.

K

Kansas
attorney's fees, appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
replevin bonds, actions, damages recoverable, § 505.
baggage lost or injured, measure of damages, § 955.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
carriers of goods, delay, liability where facts are known, §§ 913, 914.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 617.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, § 1074.
injury to property not taken, ascertainment, § 1068.
evidence, physical examination of plaintiff, § 451.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
fraud, damages, expenses of litigation, § 1177.
interest, allowance, stockholders' statutory liabilities, § 343.
personal injuries, interest, actions for torts, § 355.
railroads, animals injured, interest, actions for torts, § 355.
replevin, damages, property not returned, § 1148.
suit on bond, assessment of damages, § 502.
seduction, gist of action, proof of service, § 1281.
trespass to real property, crops injured or destroyed, damages, § 1023.
occupation of land by railroads, damages, § 1016.
trees and mining ores, liability, § 1019.
trover, damages, interest and value of use of property, § 1115.
vendor and purchaser, necessity that vendor convey perfect title, effect of condemnation proceedings, § 572.
verdicts, impeachment by affidavits, § 456.

Kentucky
appeal and supersedeas bonds, instances of liability, specific conditions, §§ 536, 537.
liability in state court, judgment partly for money or in rem, § 534.
apportionment of damages, verdicts, where there are several parties, § 463.
attachment bonds, accrual of cause of action, § 510.
attorney's fees, replevin bonds, actions, damages recoverable, § 505.
auctions, vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
bills and notes, compound interest, interest on instalments of interest, § 375.
partial failure of consideration, § 545.
stipulations for costs and attorneys' fees, § 564.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
value, § 565.
bonds, statutory bonds, liability of sureties, § 475.
carriers of goods, delay, liability where facts are known, § 913.
qualification of carrier's liability by notice, interstate commerce, § 926.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 942.
covenants, breach, defenses and crossclaims against purchase money, § 638.
covenants of seizin and good right to convey, nature of covenant, breach, § 592.
covenants of warranty and quiet enjoyment, breach, action by covenantee against remote covenantor, § 614.
expenses, costs and counsel fees as damages, § 618.

Kentucky—continued.
covenants of warranty and quiet enjoyment—continued.
measure of damages for breach, property as consideration, § 606.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
damages to deceased's estate, § 1277.
facts to be considered in estimating damages, § 1268.
nature of statutory action, § 1260.
dower, damages for detention of dower, § 1003.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, value for condemnor's purpose, § 1075.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
deduction for benefits, special benefits, § 1087.
evidence of value and damages, § 1089.
measure of compensation, § 1064.
property not taken, consequential injury, § 1062.
exemplary damages
allowance, difference of views, § 391.
in what actions recoverable, § 392.
compensation and punishment, who may recover, § 401.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
parties liable, master's liability for acts of servant, § 410.
right to exemplary damages, power of court over verdict, § 403.
interest, suspension, tender stopping interest, when tender may be made, § 385.
landlord and tenant, rent, lessee's liability for interest, § 854.
mesne profits, elements of damages, costs of ejectment suit, § 993.
remedy under code, § 1000.
nuisance, continuity, when nuisance is not continuous wrong, § 1044.
damages recoverable, first action, § 1039.
permanent injury, estoppel from recovery of future damages, § 1046.
personal injuries, excessive or insufficient verdicts, power of court over verdicts, § 460.
replevin, damages, increase in value by defendant, § 1154.
intermediate injury and depreciation, § 1151.
sales, breach of contract by seller, consequential damages, § 662.
warranty of title, breach, measure of damages, § 669.
slander and libel, exemplary damages, § 1216.
suretyship, express indemnity, damages recoverable, § 762.
remedy for indemnity, who is principal, § 746.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
negligence, mitigation of damages by injured party, § 973.
trespass to personal property, special and consequential damages, § 1102.
trespass to real property, occupation of land by railroads, damages, § 1016.
trees and mining ores, liability, § 1019.
trover, damages, interest and value of use of property, § 1115.
mitigation of damages, § 1138.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, Kentucky rule, § 638.
breach of contract by vendor, elements of damage, loss of bargain, mitigation, § 584.
recission, adjustment of counter demands, § 587.
verdicts, excessive or insufficient verdicts, power of court, § 460.

Kidney Injured
exhibition of injured parts, means of injury, § 452.
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256n.

Kinds of Damages
Ch. I, §§ 1-8.

L

Labels
sale of varnishing machine, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
sales, breach of contract by seller, goodwill sold, certainty of proof, § 658.
non-delivery of property not in market, recovery of lost profits, § 652.

Labor
see Contracts for Services; Master and Servant.
certainty of damages, profits of labor, § 66.
compensation of laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
contracts for services, statutes as to hours of work, § 681.
elements of damage, losses, labor and expenditures, § 80.
evidence of value, suit on replevin bond, § 504.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by seller, delay in delivery, evidence of rental value, § 665.
non-delivery of property contracted for, property not in market, recovery of lost profits, § 652.
breach of warranty as to quantity or quality, damages, general rule, § 670.
interest, expenses and special injuries, § 672.

Labor Unions
see Trade Unions.

Laborer Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Lace
baggage lost or injured, measure of damages, § 955.

Laches
see Delay.
breach of covenants, of warranty and quiet enjoyment, damages, expenses, costs and attorney's fees as damages, § 617.
evidence of payment, § 233.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
recovery of costs and expenses, attorney's fees, § 524.
interest, allowance on money had and received, § 352.
compensation, right to interest, § 321.
quantum meruit claims between vendor and purchaser, § 328.
public officers, bonds, neglect of duty by other officers, effect, § 482.
vendor and purchaser, breach of contract by vendor, adjustment of counter equities in specific performance, § 588.

Ladder Falling
consequential damages, intervening cause, ladder on sidewalk striking pedestrian, § 37.

Lamp Exploding
tower falling, consequential damage for torts, liability, illustration, § 18.

Landlord and Tenant
Ch. XX, §§ 841-876.
see also Farm Leases; Mesne Profits.
actions against tenants, appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 535.
agency, liability of agent to third persons, acts in excess of or without authority, measure of damages, § 798.
breach of contract to furnish tenant with fertilizer, consequential damages recoverable only when contemplated by parties, § 46.
brokers, agency, duties, liability, disregard of instructions, § 786.
distress for rent, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
replevin, bonds, original conditions, § 499.
defendant's rights, set-off, counterclaim and recoupment, § 1161.
tender, effect, collateral securities, § 277.
trespass to personal property, mitigation of damages, application of property or money to owner's benefit, § 1106.
trespass from beginning, damages, § 1107.
trover, mitigation of damages, § 1141.
destruction of demised premises, effect as to rent, § 852.
partial destruction, effect as to rent, § 851.
duty of tenant, elements of damage, expense incurred to prevent or lessen damages, extent of duty, § 90.
eminent domain
compensation for injury to property, elevated railroads and subways, § 1080.
injuries to various interests, damages in favor of tenant, § 1081.
title to property, to whom compensation should be paid, § 1082.
effect of condemnation as to lease, § 853.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1069.
proof of value of property and damages, § 1089.
eviction, action for use and occupation, measure of recovery, § 843.
actions on covenants of lease, recoupment, § 876.
breach of covenants
measure of damages, consideration as measure of recovery, rule in England and Canada, § 607.
suit against remote covenantor, § 614.
consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
covenants, breach, exemplary damages, § 866.
covenants for repairs, § 855.
elements of damage, losses, indemnity, liability for losses and expenses, § 84.
mental suffering, §§ 95, 1029.
exemplary damages, allowance, grounds upon which allowed, § 393.
interest, quantum meruit claim to interest between vendor and purchaser, § 328.
lessee's right to damages for injury to business, § 870n.
liquidated damages, waiver of right to liquidate damages, § 299.
loss of profits, mental suffering, § 1029.

Landlord and Tenant—continued.
eviction—continued.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
pleading, special damages, necessity of alleging, § 420.
resistance to eviction, indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
termination of lease by lessor, effect, recovery of rent, § 847.
recovery of rent barred, § 848.
violation of contract to lease, certainty of damages, § 65.
wilful or malicious injuries, consequential damages, § 44.
evidence, landlord's action for use and occupation, nature, lease as evidence of value, § 841.
measure of recovery, § 842.
farm leases, see also title Farm Leases.
business, recovery for damages to business of lessee, §§ 869, 870.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
covenants, exemplary damages for breach of various covenants, § 866.
special and consequential damages for breach of various covenants, § 865.
cultivation of land, failure to cultivate, liability for depreciation, § 860.
fraud, natural and proximate consequences of fraud, § 1166.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
mitigation of damages by lessee, § 871.
repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
fire insurance
damages, insurance by mortagee, § 829.
mitigation of liability of insurer, § 823.
fraud, actions on covenants of lease, recoupment, § 876.
false representations, remote, conjectural and contingent damages, § 1175.
improvements, fixtures, right to removal, § 875.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
injuries to property, apportionment of damages between landlord and tenant, § 1033.
interest as between landlord and tenant, § 339.
interest on rent, lessee's liability for interest, § 854.
leases, abandonment, damages, § 844.
action by attorney for compensation, value of services rendered, admissibility of evidence, § 682.
action on lease, defendants, joinder, effect of non-joinder and misjoinder, § 135.
assignment or subletting, breach of covenant not to assign, damages, § 861.
contract for particular work, breach, consequential losses, contractor's liability, § 702n.
damages recoverable by purchaser against vendor of land, adjustment of counter demands on rescission, § 587.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
rent, apportionment, § 850.
breach of contract, consequential damages, certainty, recovery of items of damages which are certain, § 55.
breach of contract to accept leases, damages, § 844.

Landlord and Tenant—continued.
leases—continued.
business, recovery for damages to business of lessee, §§ 867-870.
canals, injury to vessels, act or omission as proximate cause of injury, consequential damages, § 30.
cause of action, entirety, continuing obligations, § 112.
damages accruing subsequent to action, § 113.
severance, contract to do several things successively, or one thing continuously, § 110.
certainty of damages, anticipated profits, prospective growth of orchard, § 62.
breach of contract to lease premises, § 65.
condemnation, effect of taking premises for public use, § 853.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
covenant for repairs by lessor, duty of lessor, breach of covenant, measure of liability, § 872.
covenants, exemplary damages for breach of various covenants, § 866.
recoupment by either lessor or lessee, § 876.
special and consequential damages for breach of various covenants, § 865.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
permanent incumbrance, § 628.
right to recover damages, knowledge of incumbrance, § 620.
covenants for quiet enjoyment, breach, general rule of damages, § 864.
partial breach, § 609.
what constitutes breach, § 863.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
deposit as security, liquidated damages, payment of fixed sum for partial or total breach of contract, § 295.
expenses and losses of lessee, express indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
ferry, lease of, consequential damages, only items which are certain are recoverable, § 55.
fixtures, repairs by lessee, right to remove fixtures, § 875.
fraud, false representations, leasehold interest sold, measure of damages, § 1171.
hospitals, leasing premises for hospitals, contagious diseases, damages, decrease in value, § 1034.
improper use of premises, liability, § 861.
injunction bonds, damages from restraint of injunction, § 526.
insurance, covenants to insure, damages for breach, § 862.
interest at common law in America, § 303n.
landlord wrongfully placing property on tenant's land, action for cost of removal, § 864.
liquidated damages, amount, large sum to secure payment of small sum, § 288.
stipulation for payment of fixed sum for partial or total breach, § 294.
loss of lease, damages recoverable by purchaser against vendor of land, elements of damage, mitigation, § 584.
losses as elements of damages, what losses consist of, § 79.
malicious prosecution, damages, elements, expenses, § 1238.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
lessee's duty, § 871.
reduction of loss or benefit, § 164.

Landlord and Tenant—continued.
leases—continued.
obstruction of light and air, liability of lessor, § 864.
partial destruction of demised property, effect, abandonment of premises, § 851.
parties, joinder of defendants, effect of non-joinder and misjoinder, § 135.
renewal, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
repairs, assignee's liability for repairs, § 859.
breach of contract, liability of lessor for special and consequential damages, § 874.
covenant to repair by lessor, rights of lessee, § 872.
covenants for repairs by lessee, § 855.
measure of liability for not making repairs, alterations, §§ 856-858.
duty of landlord, § 872.
plumbing fixtures, water freezing in pipes, § 872.
lessee's duty, recovery by lessee for making repairs, § 873.
liability for not making repairs, special cases, § 860.
rent, amount as affected by subsequent facts, § 845.
sale of lease, acceptance of goods, liability for not accepting remedies of seller, § 647.
action by seller against purchaser, breach of contract, § 647.
suretyship, contract not to be extended by construction, § 727.
express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
measure of surety's liability, § 723n.
termination of lease, condemnation of premises, effect as to lease, § 853.
lease by life tenant, § 853.
trespass, injuries to rights of parties not in possession of property, compensation, § 1033.
value of lease, opinion evidence as to value of property, § 446.
evidence, admissibility, §§ 445, 448.
liquidated damages, stipulation when damages are uncertain, § 291.
illustrations, § 293.
mitigation of damages, lessee's duty, §§ 90, 871.
repairs, lessor's covenant to repair, breach, measure of liability, § 872.
notice, repairs, lessee's duty, recovery for making, § 873.
nuisance, estates, damages affected by interest in estate, § 1057.
eviction of lessee, recovery of rent barred, § 848.
joint and several liability, § 1059.
parties liable for nuisance, creation, continuance, § 1035.
permanent injury, depreciation and market value as damages, § 1047.
plumbing, repairs, lessor's covenant to repair, breach, measure of liability, § 872.
procuring tenant, manner of performance of duty, effect of misconduct, § 683.
removal of building enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
rent, actions to recover, abandonment of lease, § 844.
amount as affected by subsequent facts, § 845.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
liability, damages, § 533.
rents and profits, § 533.
liability in state courts if judgment is in part for money or in rem, § 535.

Landlord and Tenant—continued.
rent—continued.
apportionment, §§ 849, 850.
partial destruction of demised property, effect as to rent, § 851.
repairs, breach of covenant to repair, measure of liability, § 858.
attorney's compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, §§ 536, 537.
collection enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
condemnation, effect of taking premises for public use, § 853.
contract for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
contracts for services, mode of compensating, § 684.
contracts for services of attorney, evidence of value, § 682.
contracts to pay rent, causes of action, splitting, damages accruing subsequent to action, § 113.
covenants, recoupment by either lessor or lessee, § 876.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
payment of incumbrances, damages if not paid, § 623.
covenants for quiet enjoyment, breach, general rule of damages, § 864.
mitigation of damages, § 611.
covenants for title, breach of covenant, reconveyances, measure of damages, § 599.
destruction of demised premises, effect, § 852.
effect of partial destruction, liability under statutes, § 851.
eviction of lessee as preventing recovery of rent, what constitutes eviction, § 848.
fire insurance, damages, contracts to replace or rebuild, delay in making repairs, effect, § 830.
covenants to insure, damages for breach, § 862.
mitigation of liability, § 823.
fraud, false representations, measure of damages, confidential relation between parties, § 1171.
guaranty, contract of surety, not to be extended by construction, illustrations, § 727.
injunction bonds, damages from restraint of injunction, § 527.
interest, allowance of interest on unliquidated demands, § 347.
as between landlord and tenant, § 339.
lessee's liability for interest, § 854.
judgment, restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
lien for rent, tender, effect of tender on collateral securities, § 277.
loss of rental value, amount of damages, opinions of witnesses, admissibility, § 444.
attachment bonds, damages recoverable, costs and expenses of defending against attachment, § 516.
defenses or mitigation of damages, what may be shown, § 515.
carrier's delay, liability of carrier, knowledge of or notice to carrier that goods must not be delayed, § 913.
contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
nuisance, elements of damages, § 1048.
special damages, necessity of alleging, § 420.

Landlord and Tenant—continued.
rent—continued.
mesne profits, action for, damages recoverable, consequential and punitive damages, § 994.
mitigation of damages, reduction of loss or benefit, § 164.
payment, evidence of payment, § 233.
non-payment of rent, liquidated damages, waiver of right, § 299.
recovery of rent payable in specific articles or taxes, § 846.
penalties, bonds, limit of recovery, interest, § 478.
receipts, evidence of payment, § 233.
recoupment, actions on covenants of lease, § 876.
definition and history of, § 169.
maturity of claim or demand, statute of limitations, § 177.
repairs, covenants for repairs by lessee, measure of liability for not making repairs, § 856.
lessor's covenant to repair, breach, measure of liability, § 872.
replevin, defendant's rights, mitigation of damages, § 1159.
sale of property, value, evidence, actual sales, offers for property, market quotations, § 447.
suretyship, right of surety to defend between principals, § 743.
termination of lease by lessor, effect as to rent, § 847.
time, computation of time, § 281.
trespass to personal property, special and consequential damages, remote damages, §§ 1100, 1102.
trover, special or consequential damages, § 1129.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, nominal damages, elements of damages, § 582.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
interest on purchase money, action by vendor against purchaser, § 577.
measure of damages, § 570.
repairs, breach of covenant to repair, measure of liability, § 856.
circuity of action, operation of principle, favor of plaintiff, § 145.
lessee's duty, recovery for making, § 873.
lessor's covenant to repair, breach, measure of liability, §§ 856, 872.
lessor's liability for special and consequential damages, § 874.
liability for not making repairs, special cases, § 860.
mitigation of damages, § 154.
partial destruction of demised property, effect as to rent, § 851.
set-off, counterclaim and recoupment, crossclaims between landlord and tenant, § 182.
sale of lease, bills and notes, consideration, parol evidence to show defect of consideration, § 552.
sales, delay in delivering property, loss of rental value, evidence, action by purchaser against seller, § 665.
set-off, counterclaim, and recoupment, actions on covenants of lease, recoupment, § 876.
crossclaims between landlord and tenant, § 182.
election of defendant to file crossclaim or sue upon his demand, § 187.
repairs, lessee's duty, recovery for making, § 873.
lessor's covenant to repair, breach, measure of liability, § 872.

Landlord and Tenant—continued.
special damages, repairs, lessor's liability for special and consequential damages, § 874.
statutes, repairs, lessor's covenant to repair, breach, measure of liability, § 872.
suretyship, right of surety to defend between principals, § 743.
surrender, eviction of lessee, recovery of rent barred, § 848.
termination of lease by lessor, effect, recovery of rent, § 847.
trespass, aggravation, special damages, § 1028.
consequential damages, right to recover for mental suffering, § 24.
crops, destruction of and injury to growing crops, damages, § 1023.
party walls, injuries, damages recoverable, § 1025.
tenants, damages in suit by tenants, § 1012.
trover and conversion, actions on covenants of lease, recoupment, § 876.
damages, limitation of recovery to plaintiff's interest in property, § 1137.
removal of fixtures, § 1134.
liability of purchaser, effect of wilfulness, § 1110.
value of property, proof of value, fixtures, § 1114.
use and occupation, action for use and occupation, nature of, lease as evidence of value, § 841.
eviction of lessee as preventing recovery of rent, what constitutes eviction, § 848.
measure of recovery, continuance of terms of lease, conduct of parties, evidence, §§ 842, 843.
use of property prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
violation of contract to lease, certainty of damages, § 65.
water, repairs, lessor's covenant to repair, breach, measure of liability, § 872.

Landslide
derailment of train, consequential damages for torts, liability, illustration, § 18.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 961.

Language
abusive language, see title Abusive Language.
judgment, certainty, necessity that judgment be certain, § 467.
telegraphs and telephones, cipher messages, use of foreign language, § 959.

Larceny
cashier, suretyship, contract not to be extended by construction, § 726.
trespass to real property, aggravation, taking and carrying away personal property, § 1030.

Lateral Support
see Adjoining Land Owners; Party Walls.

Laudanum
sales, breach of contract by seller, consequential damages, § 663.

Leg Injured
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
collision of vehicles, injury to pedestrian, consequential damages, liability, § 19.
consequential damages, nervous shock without impact, right to recover damages, § 24.
evidence of injury, photographs, § 454.

Leg Injured—continued.
exhibition of injured parts, means of injury, § 452.
passenger jumping from coach, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.
personal injuries, actions maintainable, prospective damages, § 1251n.
amount to be allowed for pain and suffering, verdicts, § 1242n.
recovery for mental suffering, aggravated wrong, § 1243n.
verdicts, excessive or inadequate, § 1242n.
discretion of jury as to damages, instruction, § 1256.
pleading, necessity of alleging special damages, § 421.

Legacy
devise or legacy, payment by, § 220.
interest, allowance, annuities and legacies, § 344.
allowance from time when money ought to be paid, § 329.

Legal Liquidations and Reductions
Ch. V, §§ 143, 204.

Legal Tender
see also Currency; Money.
bills and notes, necessity that bills and notes be payable only in money, § 559.

Letters
payment, application by debtor, evidence, § 237.

Libel and Slander
see Slander and Libel.

Licenses
building destroyed, consequential damages to licensee, § 16, n20.
business injured, certainty of damages, tortious interference with business, § 70.
eminent domain, compensation, wrongdoer's improvements, entry with or without consent of owner, § 1076.
fees, bonds of public officers, construction, § 485.
interest on license fees, § 337.
patents, infringement, damages recoverable at law, license fees, §§ 1183, 1184.
liquidated damages, stipulations when damages are uncertain, § 293.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
highways and streets, repair, right of indemnity of municipality, parties contracting to repair, § 83.
mesne profits, who may recover, § 992.
patents, infringement, profits, recovery, license fees not established, § 1196.
real estate, consequential damages for torts, § 16n.
mitigation of damages, § 154.
sales, breach of warranty of title, damages, § 669.
revocation, damnum absque injuria, § 3.
eminent domain, injury to property not taken, ascertainment § 1067.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
timber, warranty of title, breach, measure of damages, § 669.
trespass to real property, license, damages where person in possession under license sues, § 1012.
mitigation of damages, § 1027.

Liens
see also Mechanic's Liens.
attachment, forthcoming bonds, failure to deliver property, damages, §§ 517, 518.
bond to prevent, contracts for work, measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
breach of contract to settle, contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
cause of action not divisible, § 106.
compensation by mutual demand, § 148.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
definition, what are incumbrances, § 620.
rule of damages, remote losses, § 622.
covenants to pay incumbrances, nature and form, breach, damages, § 631.
covenants of warranty and quiet enjoyment, breach, measure of damages, existence of lien, satisfaction, § 609.
creditor's right to make application of payments, § 238.
discharge, breach of contract to pay money, special obligations, measure of damages, § 77.
dower
limitations, dower right subject to incumbrances, § 1007.
priority, liens or incumbrances, § 1006.
eminent domain, deduction for benefits, special benefits, § 1084.
enforcement, contracts for work, measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
factors, right of factors to general liens, extent, § 782.
false claim, consequential damages, proximate cause, act of third person as cause, § 42.
foreclosure, covenants, actions for purchase money, defenses in equity, § 641.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, § 641.
damages recoverable by purchaser against vendor of land, elements of damage, mitigation, § 584.
fraud, false representations, measure of damages, difference between real value and amount paid, § 1172.
remote, conjectural and contingent damages, § 1176.
loss of liens, officers, neglect of duty, measure of damages, nominal damages, § 490.
official bonds, measure of damages against sureties, § 488.
marshaling and distribution, principal on which priority determined, § 197.
rights of creditors where funds belong to two depositors, § 196.
payment, application by creditor, § 238.
general payment applied to oldest debt, § 243.
pleading, special damages, necessity of alleging, § 419.
release, indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
replevin bonds, damages when plaintiff recovers as special owner, § 508.
sales, breach of warranty of title, damages, § 669.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.
suretyship, construction of contract, § 724.
creditor's duty to acquire liens, necessity of notice of reliance, § 739.

Liens—continued.
suretyship—continued.
creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
limitations of release to injury sustained by surety, § 738.
refusal of payment, application of deposit to indebtedness, § 737.
discharge of surety by creditors, release limited to injuries sustained by surety, § 738.
measure of surety's liability, § 723n.
tender, effect, collateral securities, § 277.
necessity of pleading and paying money into court, § 274.
trespass to personal property, title or interest of plaintiff to property, amount of damages recoverable, § 1097.
trover, measure of damages, liability of purchaser, effect of wilfulness, § 1110.
recovery of damages, limitation of recovery to plaintiff's interest in property, § 1136.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, § 589.
elements of damage, loss of bargain, mitigation, § 584.
rescission, adjustment of counter demands, § 587.
fraud, false representations, remote, conjectural and contingent damages, § 1176.
recovery by vendor when contract does not fix price, evidence, § 575.

Life Estates
see Remainders and Reversions.

Life Expectancy
annuity and life tables, admissibility, § 455.

Life Insurance
see Insurance.

Light
eminent domain, injury to property not taken, ascertainment, § 1070.

Lightning
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.

Limitation of Actions
arresting statute, payment, who may make payments, § 230.
carriers, delay in delivery of account, statute of limitations operating to bar account, liability of carrier, § 914.
contractual exemptions from liability for damages, § 6.
covenants for title, breach, conveyances, measure of damages, § 599.
nominal damages, actual loss not shown, § 598.
covenants of warranty and quiet enjoyment, breach, parties against whom recovery may be had, parties plaintiff, § 613.
covenants to pay incumbrances, breach, measure of damages, § 631.
creditor's right to make application of payments, § 238.
Federal Employers' Liability Act, limitations under, § 1346.
injunction bonds, damages, costs and expenses, attorney's fees, § 524.
interest, agreements for interest, rate applicable after debt due, § 309.
joint obligations, payment, who may make payment, § 230.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.

Limitation of Actions—continued.
payment, application by creditor, § 238.
application of general payment to oldest debt, § 243.
personal injuries, expenses for physical and surgical aid, recovery, § 1250.
recoupment, maturity of claim or demand, statute of limitations, § 177.
suretyship
remedies of surety for indemnity, action against principal when right of action accrues, § 747.
contribution between co-sureties, § 754.
accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
tender, effect of plea of tender, § 275.
vehicle injured, cause of action, entirety, damage to property and personal injury, § 118.

Limitation of Liability
see Carriers; Telegraphs and Telephones.
arbitration and award, limit of liability, bonds, § 526n.
contractual exemption from liability for damages, § 6.

Limitations, Statute of
see Limitation of Actions.

Liquidated Damages
alternative contracts, § 282.
amount, large sum to secure payment of small sum, § 288.
intention to liquidate, evidence and effect of, § 284.
stipulation for payment of fixed sum for partial or total breach, §§ 294, 295.
stipulation where damages are uncertain, § 290.
arbitration bonds, § 539c.
liability of sureties, measure of damages, § 539c.
liquidated damages, in lieu of performance, § 297n.
assessment of damages, writ of inquiry, § 427.
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
breach of contract, damages recoverable by purchaser against vendor of land, measure of damages, conflict of American decision, what law governs, § 580.
liquidated damages distinguished from penalty, § 283.
stipulation when damages are uncertain, § 291.
building contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697n.
business, sale of good will, liquidated damages, stipulation when damages are uncertain, § 291.
certainty, contracts for payment of money, §§ 286, 287.
stipulation when damages are uncertain, §§ 290, 291.
stipulations where damages are certain and easily proved, § 289.
illustrations, § 293.
contract for particular work, breach, contractor's liability, § 697n.
contracts, necessity of valid contract, § 280.
validity, § 279.
covenant to pay incumbrances, breach, damages, § 631.
defenses, circuity of action, equality of damages, necessity, § 146.
intention to liquidate, evidence, effect of, § 284.
interest, agreements for different rate after debt due, §§ 311, 312.
allowance against government, § 332.
allowance on stipulated damages, § 330.
partners, interest as between partners, § 342.

Liquidated Damages—continued.
interest—continued.
patents, interest on damages for infringing patents, § 340.
rate applicable after debt due, § 309.
rate fixed by law or custom, § 306.
manner of liquidating damages, computation of time, § 281.
mesne profits, interest, § 997.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
part performance, acceptance where damages liquidated, effect, § 296.
penalty, liquidated damages distinguished from penalty, § 283.
performance, liquidated damages in lieu of performance, § 297.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
items, necessity of itemizing damages in pleadings, § 424.
recoupment, liquidated and unliquidated damages, § 185.
right of action, effect of stipulation, § 298.
sales, breach of contract, payment in specific articles, presumed value of notes, etc., § 660.
executed sales, recovery by seller against buyer, § 642.
stipulated sum where damages otherwise certain or uncertain, § 285.
unliquidated damages, ad damnum as limiting amount of recovery, § 417.
bills and notes, consideration, partial failure of consideration, availability of defense, §§ 544, 545.
interest, allowance of interest on money obtained by extortion or fraud, or wrongfully withheld or disposed of, § 354.
allowance of, on unliquidated demands, §§ 347, 348.
on bills and notes, § 556.
judgment, effect, assessment of damages, § 465.
surety's right to set up recoupment, equitable offset of joint indebtedness, § 744.
tender, right to make, demands, § 261.
verdicts, excessive or insufficient verdict, setting aside, § 459.
waiver of right to stipulated damages, § 299.

Lis Pendens
breach of covenants of warranty and quiet enjoyment, what constitutes breach, § 604.

Live Stock
see Cattle.

Livery Stable
good-will sold, breach of contract by seller, certainty of proof, § 658.
negligent driving of horse, consequential damages, recovery for successive consequences, illustrations, § 57.

Loans
see Money Loaned.

Lobby
attorney's compensation, actions by attorney, value of services rendered, admissibility of evidence, § 682.

Local Improvements
see Public Improvements.

Locomotive Emitting Sparks
child burned by fire, consequential damages for torts, liability, illustration, § 18.

Logging Roads
Federal Employers' Liability Act, when not employers within, § 1305.

Logs and Logging
compensatory damages, property sued for improved by wrongdoer, § 102.
construction of dam, consequential damages, certainty, liability for principal loss extending to details and incidents, § 54n.
contract for particular work, performance prevented, contractor's rights, certainty of proof of profits, § 714.
contract for services, compensation for driving logs, effect of custom or usage as to amount of compensation, § 678.
implied contracts, right to recovery for services rendered, § 679.
contract to advance money, breach of contract to pay money, special obligations, measure of damages, § 77.
fraud, false representations, labor performed because of representations, damages, § 1173.
leases, covenants, exemplary damages for breach of various covenants, § 866.
repairs, lessor's liability for special and consequential damages, § 874.
losses as elements of damage, labor and expenditures, § 80n.
nuisance, mitigation of damages, § 1055.
special elements of damages, delay, § 1048.
obstruction of stream, consequential damages, liability extending to details and incidents, § 54.
part performance of contract, entire demand may be severed, § 109.
payment, duty of agent to adhere to instructions, liability for exceeding commission, § 774.
replevin, measure of damages, increase in value of property by defendant, § 1154.
sales, breach of contract by seller, delay in delivery, evidence of rental value, § 665.
breach of warranty of title, damages, § 669.
cause of action, severance of entire demand, § 109.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 653.
trespass to real property, remediable injuries, estimate of damages, § 1018.
trees, liability for destroying trees or timber, § 1019.
trover, damages, value of property, enhanced by defendant, § 1126.
time of conversion, § 1112.

Lord Campbell's Act
see Death by Wrongful Act.

Loss of Profits
see Profits.

Loss of Services
see also Criminal Conversation; Husband and Wife.
consequential damages, husband carried beyond destination, loss of service of wife, expenses, § 36.
death by wrongful act, damages, recovery by husband, elements of damage, § 1266.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.

Loss of Society
death by wrongful act, children, right to recover for death of child, § 1272.
elements of damages, mental suffering, § 95.

Losses
see also Earning Capacity; Expenses; Profits; Time.
admiralty torts
total loss, elements of damage, § 1290.
what constitutes, § 1291.
agency, sales, disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
breach of contracts, compensation for gains, profits and losses sustained, § 78.
measure of damages, losses as elements of damage, § 79.
causes of action, entirety, prospective damages, § 120.
contracts for work, measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
elements of damage, § 79.
bonds and undertakings, damages and costs, § 85.
damage by relying on performance, § 81.
expenses incurred to prevent or lessen damages, § 88.
employer may finish work at contractor's expense, § 91.
extent of duty, § 90.
vendor and vendee, § 89.
gains and losses, liability for, § 78.
greater damage than interest for failure to pay or to loan money, § 77.
indemnity, liability for losses and expenses, § 84.
indemnity to municipality, counsel fees, § 83.
labor and expenditures, § 80.
liability to third person, covenants of indemnity, § 82.
notice to indemnitor to fix liability, necessity, §§ 86, 87.
what losses consist of, § 79.
express indemnities, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
impairment of faculties, elements of damage, personal torts, § 93.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
measures of prevention, return of property, discharge of plaintiff's debt, § 156.
reduction of loss or benefit, § 164.
prospective damages, certainty of proof, § 121.
replevin, recovery for intermediate injury and depreciation of property, § 1151.
sales, breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 672.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.

Lost Instruments
interest, miscellaneous case of suspension of interest, § 380.

Lost Property
contracts for services, implied contracts, right of finder of property to recover for services, § 679.

Louisiana
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
liability of drawer and indorsers for principal sum, § 555.
stipulations for costs and attorney's fees, § 564.
brokers, agent's liability to third persons, measure of damages, action without authority, § 798.
contract for particular work, performance stopped by law, contractor's rights, § 714.

Louisiana—continued.
covenants of seizin and good right to convey, nature of covenant, breach, § 592.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and counsel fees as damages, § 618.
measure of damages, value of land at time of loss, § 608.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
damages recoverable by collateral kindred, § 1276.
recovery for death of child, § 1273.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
injury to property not taken, ascertainment, § 1066.
railroad property condemned for railroad uses, compensation, § 1078.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
evidence, physical examination of plaintiff, § 451.
interest, allowance, stockholders' statutory liabilities, § 343.
landlord and tenant, condemnation of demised premises, effect as to lease, § 853.
malicious prosecution, mitigation, evidence, § 1239.
personal injuries, actions, parent's action, § 1252.
compensatory damages, pecuniary and other circumstances of parties, § 1254.
excessive or insufficient verdicts, power of court over verdicts, § 460.
physicians and surgeons, breach of contract, recovery on quantum meruit, § 679.
sales, breach of contract by seller, delay in delivery, mitigation of liability, § 666.
warranty of quality, existence, remedies on breach, § 668.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
trespass to personal property, special and consequential damages, § 1101.
trover, damages, property of fluctuating value, §§ 1118, 1119.
usury, recovery under usury statute, § 317.

Lumber
see also Logs and Logging; Timber, etc.
attachment bonds, damages recoverable, property injured, § 512.
contract for particular work, recovery by contractors, part performance of severable contract, § 708.
fire insurance, losses and damages, recovery in special cases, § 827.
infants injured, consequential damages for torts, liability, illustrations, § 19.
machinery sold, breach of contract by seller, delay in delivery, evidence of rental value, § 665.
piling, exemplary damages, parties liable, master's liability for acts of servant, § 408.
sales, bills and notes, consideration, parol evidence to show defect of consideration, § 553.
breach of contract, causes of action, entirety, prospective damages, § 120.
certainty of damages, anticipated profits, § 59n.
consequential damages, § 663.
evidence of loss, § 653n.
non-delivery of property contracted for, consequential damages, illustrations, § 663.
property not in market, recovery of lost profits, § 652.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
trover, damages, value of property enhanced by defendant, § 1126.

Lungs Injured
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256n.

M

Machinery
agents, contracts for services, wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
exclusive agency, evidence of value, § 445.
liability of agent to third persons, torts, § 800.
attachment bonds, damages recoverable, § 512.
capacity, breach of contract, liquidated damages, payment of fixed sum for partial or total breach of contract, § 294n.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
carriers of goods
delay in transportation, refusal to receive property, damages, § 905.
liability for negligence, proximate cause, § 903.
liability where facts are known, § 913.
certainty of damages, contract between agents and principals, § 69.
contract for particular work, breach, consequential losses, contractor's liability, § 702.
consequential damages for defective work, § 705.
damages for delay, § 703.
actual loss, § 704.
rental value, expenses, § 703.
defects, consequential damages, § 705.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
severable contracts, recovery on part performance, action by contractor against employer, § 708.
contracts for services, compensation, mode of compensating, profits, § 684.
covenants, breach of covenants for title, measure of damages, nominal damages, § 600.
covenants of warranty and quiet enjoyment, measure of damages for breach, § 605.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1068.
evidence of value, suit on replevin bond, § 504.
improvement, bills and notes, partial failure of consideration, § 544.
leases, covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
fixtures, right to removal, § 875.
rent, actions to recover, abandonment of lease, removal of machinery, § 844.
repairs, covenants by lessee for repairs, measure of liability for not making repairs, alterations, § 858.
manufacture, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
negligence, mitigation of damages, § 155.
patents, infringement, damages, whole article not patented, § 1193.
ascertainment of profits, § 1195.
repairs, contract, breach, defects to be remedied, liability for expenses and consequential losses, § 699.
contractor's liability, damages for delay, actual loss, § 704.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
recovery by contractors, part performance of severable contract, § 708.

Machinery—continued.
replevin, bonds, evidence of value of property, § 504.
consequential damages, damages arising naturally and proximately from wrong, § 1146.
defendant's rights, special and consequential damages, § 1158.
sale of defective chain, consequential damages, breach of contract, liability under special circumstances, § 51.
sales
acceptance of goods, buyer's right to return property, § 650n.
refusal to accept property produced according to order, damages, remote losses, § 649.
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
breach of contract, action by purchaser against seller, proof of value of property, § 654.
consequential damages, § 663.
special circumstances, § 52n.
delay in delivery, consequential damages, certainty, recovery for successive consequences of act or omission, § 56.
damages for delay, actual loss, § 704.
evidence of rental value, § 665.
liquidated damages, waiver of right to liquidate damages, § 299.
loss of property, rental value, expenses, effect of mutual fault, § 704.
loss of rental value, evidence, § 665.
mitigation of liability, §§ 584, 666.
oral contract, § 583.
proximate consequences of breach, illustrations, § 46.
non-delivery of property contracted for, consequential damages, illustrations, § 663.
property not in market, recovery of lost profits, § 652.
certainty of damages, contract between agents and principals, § 60.
contracts for services, compensation, computation of profits or commissions, § 684.
evidence of value of property, breach of contract by seller, § 654.
fraud, false representations, measure of damages, § 1171n.
liquidated damages, stipulations when damages are uncertain, § 291.
losses as elements of damage, money paid to third persons, machinery defective, § 82.
parties, joint right or liability for tort, determination, § 137.
value of exclusive agency, evidence, admissibility, § 445.
warranties of quality and quantity, breach, damages, § 670.
existence, § 667.
interest, expenses and special injuries, §§ 671, 672, 675.
remedies on breach, § 668n.
warranty of title, breach, measure of damages, § 669.
trespass by third person, machinery stopped, manufacture of goods prevented, consequential damages, § 33.
trespass to personal property, trespass from beginning, damages, § 1107.
trover, evidence of value, § 1113.
mitigation of damages, § 1139.
value of property, proof of value, § 1113.
vendor and purchaser, breach of contract by vendor, elements of damages, loss of bargain, mitigation, § 584.

Mail Carriers
see Postoffice.

Maine
assessment of damages, default or demurrer as admission, § 429.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
partial failure of consideration, § 545.
stipulations for costs and attorneys' fees, § 564.
breach of marriage promise, seduction as aggravation of damages, § 984.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
construction of covenant of seizin, what constitutes breach, § 591.
nature of covenant, breach, § 591.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, §§ 617, 618.
measure of damages, value of land at time of loss, § 608.
eminent domain
basis for estimating value of land, § 1074.
value for condemnor's purpose, § 1075.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
effect of judgment for compensation, abandonment of proceedings, § 1090.
evidence of value and damages, § 1089.
injury to franchise, ascertainment of value, § 1079.
exemplary damages, basis on actual damages, nominal damages, § 405.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
highways and streets, consequential damages in highway cases, § 26.
interest, allowance, stock-holders, statutory liabilities, § 343.
personal injuries, civil damage laws, exemplary damages, § 1253.
loss of capacity for enjoyment as damages, § 1243.
replevin, damages, intermediate injury and appreciation, § 1152.
suit on bond, assessment of damages, § 502.
non-liability of sureties for judgment in replevin suit, § 503.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
slander and libel, exemplary damages, § 1216.
telegraphs and telephones, negligence, mitigation of damages by injured party, § 973.
trade-marks, infringements, measure of damages in equity and at law, § 1201.
trover, damages, place of conversion, liability of purchaser, effect of wilfulness, § 1110.
usury, recovery under usury statute, § 317.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.

Malice
agency, liability for acts of agents, exemplary damages, parties liable, § 408.
assault and battery, exemplary damages, malice in law and malice in fact, § 394.
mitigation of damages, effect of criminal prosecution and fine of offender, § 151.
attachment bonds, damages recoverable, § 512.
exemplary damages, §§ 513, 514.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 943.
compensatory damages, breach of contract, motive as affecting damages, § 99.
consequential damages, § 43.

Malice—continued.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
definition of malice, § 1239.
escape of debtor, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, basis on actual damages, nominal damages, § 406.
compensation and punishment, who may recover, § 401.
enhancement and mitigation, wealth of defendant, scope of inquiry, § 405.
grounds authorizing allowance of exemplary damages, § 393.
malice in law and malice in fact, § 394.
penal offenses, § 402.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
restriction or denial of exemplary damages, §§ 397, 400.
rule in Washington, § 400.
illegal transactions, right of action, damages not recoverable, § 5.
injunction bonds, scope and effect of obligation, § 520.
leases, covenants, exemplary damages for breach of various covenants, § 866.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, absence of malice, § 150.
character of party assaulted, § 151.
nuisance, exemplary damages, § 1052.
remote consequences, liability, § 1051.
officers, measure of damages against officers for neglect of duty, nominal damages, § 489.
right of action against officers, § 484.
official bonds, measure of damages against sureties, § 488.
sales, breach of contract by seller, consequential damages, § 663.
goodwill sold, certainty of proof, § 658.
slander and libel, aggravation of damages, wealth and rank of parties, § 1210.
damages, mental suffering and physical incapacity, § 1214.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
damages exceeding compensation, exemplary damages, § 1092.
special and consequential damages, remote damages, § 1102.

Malicious Prosecution
Ch. XXXV, §§ 1234-1240.
agency, liability for acts of agents, exemplary damages, parties liable, § 408.
aggravation of damages, wrongful imprisonment, expenses, § 1237.
arrest of engineer on duty, consequential damages, § 19.
condition of jail, damages, elements, § 1237.
damages, elements of damage, § 1235.
damages to person's fame, person, property, special damages, §§ 1237, 1238.
damnum absque injuria, prosecution of groundless action in good faith, § 3.
discretion of jury, damages, elements, § 1238.
facts to be considered by jury, malice as gist of action, § 1238.
engineer arrested, consequential damages for torts, liability, illustrations, § 19.
exemplary damages, § 1237.
allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
injury to business, § 1237.
liability of partner, § 1237.

Malicious Prosecution—continued.
exemplary damages—continued.
parties liable, master's liability for acts of servant, § 408.
expenses, damages, elements, § 1238.
good faith, groundless action, damnum absque injuria, § 3.
husband and wife, action, joint injury, entirety of causes of action, damages to parties jointly, § 128.
injuries to property, trespass, damages, § 1235.
injury to credit, damages, elements, § 1237.
injury to reputation, damage, elements, § 1237.
loss of business, damage, elements, § 1237.
malice, definition of malice, § 1239.
presumptions, § 1239.
mental suffering, elements of damage, §§ 95, 979, 1237.
necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, § 154.
evidence in mitigation, §§ 1239, 1240.
evidence that plaintiff could have secured release on bail, § 1240.
reputation of plaintiff, § 1240.
motive in bringing suit, right to damages, § 3.
nature of wrong, §§ 1234, 1235.
pain and suffering, mental anguish, damages, § 1237.
parties liable, § 1235.
parties plaintiff, damages to parties jointly injured, § 128.
pleading, necessity of alleging special damages, § 421.
probable cause, complete defense, § 1240.
mitigation, evidence, § 1239.
what constitutes want of probable cause, § 1239.
unauthorized suit or appeal, liability for damages, § 1236.
vexation, illness, damages, elements, § 1238.

Malpractice
see Medicines and Surgery.

Mandamus
carriers of goods, damages, refusal to carry, cost of transportation, § 899.
exemplary damages, basis on actual damages, nominal damages, §§ 405, 406.
liability of public officers, § 412.
false return, measure of damages against officers for neglect of duty, nominal damages, § 491.
justice of the peace, neglect of duty, measure of damages, nominal damages, § 492.
mitigation of damages, official negligence, § 160.
refusal to obey mandamus, mitigation of damages, officer making modification of rule, § 161.
restitution after reversal of judgment, how made, § 468.

Manufacture
breach of contract to convey manufacturing plant, evidence of value, property without market value, § 448.
broker's compensation for services, measure of compensation, § 683.
carriers of goods, delay, liability where facts are known, § 913.
contract for particular work, breach, consequential losses, contractor's liability, § 702.
damages for delay, § 703.
loss of property, rental value, expenses, effect of mutual fault, § 704.
defects, consequential damages, § 705.

Manufacture—continued.
contract for particular work—continued.
liability of employer for delaying or stopping work, performance stopped by law, certainty of proof of profits, collateral contract, § 714.
recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713n.
contract for services, compensation, mode of compensating, profits, § 684.
contract to furnish steam, consequential damages for defective work, § 705.
cost of manufacturing, value of property, elements, evidence, § 448.
fertilizer, manufacture of, nuisance, injury to crops and trees, damages, § 1049.
landlord and tenant, covenants, breach, exemplary damages, § 866.
repairs, lessor's covenant to repair, breach, measure of liability, § 872.
machinery, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
machinery delayed, breach of contract, consequential damages, special circumstances, § 52n.
master and servant, servant's violation of contract, recoupment of damages, consequential losses, § 695.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by seller, consequential damages, § 663.
delay in delivery, evidence of rental value, § 665.
evidence of loss, § 653n.
non-delivery of property contracted for, property obtainable in open market, damages, § 651.
property not in market, recovery of lost profits, § 652.
production of property according to order, rule of damages, liability for remote loss, § 649.
evidence of value of property, breach of contract by seller, § 654.
executed sales, recovery by seller against buyer, § 642.
recovery by seller of full value, payment by bill or note, § 644.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
existence, remedies on breach, § 668n.
implied warranty, § 667.
trade-marks, infringement, measure of damages in equity and at law, § 1201.
trespass by third person, machinery stopped, manufacture of goods prevented, consequential damages, § 33.
trespass to real property, interruption of business, elements of damage, § 1029.
value of property, manufacturing plant, elements, evidence, § 448.

Marble
breach of contract to supply, certainty of damages, profits of special contract, § 64.

Margins
see Brokers; Stockbrokers.

Marine Insurance
see Insurance.

Maritime Law
see Admiralty.

Market Reports
evidence of value, admissibility, §§ 445, 447.
offers for property, market quotations, actual sales, § 447.

Market Reports—continued.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 842.
nuisance, continuance of liability of person who causes nuisance, § 1040.

Market Value
see Value.
acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
agency, measure of agent's liability under various circumstances, § 774.
sales, disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
stock received in violation of trust, liability of agent to principal, § 773.
attachment bonds, damages recoverable, wrongful attachment, actual damages, § 512.
attorney's compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
carriers of goods
delay, liability where facts are known, § 914.
loss of market value, § 906.
basis of rule, § 907.
notice of arrival, neglect to give notice of refusal to receive goods, § 910.
loss of or injury to goods, compensation on basis of market value, § 918.
damages less than value of goods at destination, § 922.
criticism of rule, § 923.
market value, damages, § 918.
non-marketable property, damages, § 919.
proof of value, § 933.
certainty of damages, anticipated profits, § 60.
city lots, evidence of value, § 445.
consequential damages, breach of contract, § 52.
contract for services, evidence of value, § 680.
covenant against incumbrances, breach, liability of remote covenantor, § 629.
rule of damages, criticism, § 626.
covenant to pay incumbrances, breach, damages, § 631.
covenants of warranty and quiet enjoyment, measure of damages where property is consideration, § 606.
value at time of loss as measure of damages, § 608.
damages, determination, what may be considered by jury, § 824.
dogs, proof of value of, § 449.
easements, breach of covenants, against incumbrance, liability of remote covenantor, § 629.
eminent domain
compensation, basis for estimating value of land, § 1074.
injury to property not taken, § 1065.
ascertainment of damages, facts which may be considered, §§ 1066, 1069.
expenditures to lessen loss, § 1072.
measure of compensation, market value of property, § 1064.
deduction for benefits, special benefits, § 1084.
proof of value of property and damages, § 1089.
value for condemnor's purpose, § 1075.
evidence of value, § 445.
actual sales, offers for property, market quotations, § 447.
dogs, § 449.
suit on replevin bond, § 504.
factor's duty, sale of goods, care, § 777.

Market Value—continued.
farm leases, cultivation of land, failure to cultivate, liability for depreciation, § 860.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
fraud, false representations, measure of damages, difference between value and amount paid, § 1172.
fire insurance, damages, general rule, total loss, value of property, § 821.
loss, mitigation of liability, what jury may consider, § 824.
interest, allowance, actions for torts, § 355.
unliquidated demands, § 347.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
repairs, lessor's liability for special and consequential damages, § 874.
liability for not making repairs, special cases, § 860.
liquidated damages, stipulations when damages are uncertain, § 290.
nuisance, permanent injury, depreciation and market value as damages, § 1047.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
instances of rejection and admission of opinions, § 443.
value of property, admissibility, § 446:
questions which may be asked witnesses as to grounds of opinion, § 450.
pleading, itemization of damages, demands unliquidated, § 424.
replevin
bonds, actions, damages recoverable, § 505.
evidence of value of property, § 504.
non-liability of sureties for judgment in replevin suit, § 503.
damages for detention, measure of damages, § 1144.
sales
acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
liability for not accepting, remedies of seller, § 647.
refusal to accept property produced according to order, damages, remote losses, § 649.
action by seller against purchaser, breach of contract, § 647.
executed sales, recovery by seller against buyer, § 642.
recovery by seller after rescission of contract, price fixed by third party, § 643.
part of stipulated quantity received, § 646.
breach of contract by seller, delay in delivery, damages, § 664.
evidence of loss, § 653.
value of property, § 654.
goodwill sold, certainty of proof, § 658.
mitigation of liability, § 666.
non-delivery of property contracted for, damages, § 656.
property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
non-delivery of stock, § 657.
payment in specific articles, value, damages, §§ 659, 660.
purchase price paid, damages, § 656.
consequential damages, breach of contract, sale of ammunition, liability under special circumstances, § 51.
profits, required certainty of anticipated profits, § 59.
telegrams, negligence in transmitting, liability when object of sender is known, § 961.
trespass
personal property, damages for taking or destroying property, market value, § 1098.
interest, value of use, § 1096.

Market Value—continued.
trespass—continued.
real property, aggravation and special damages, § 1028.
destruction of fences, damages, § 1024.
permanent wrong, damages, § 1017.
trover
measure of damages, § 1109.
property of fluctuating value, § 1118.
rule in different states, § 1111.
property without market value, § 1117.
mitigation of damages, § 1139.
value of property, proof of, § 1113.
fixtures, § 1114.
value of property, elements, evidence, § 448.
vendor and purchaser
breach of contract by vendor, defaulting vendee's right, § 586.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, nominal damages, § 582.
oral contract, § 583.
rescission, adjustment of counter demands, § 587.
suits for specific performance, § 590.
damages recoverable by vendor against purchaser, measure of damages, § 570.
wholesale price, value, evidence admissibility, § 445.
wool injured, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Marriage
see also Breach of Marriage Promise.
breach of contract to convey party to church, elements of damage, pecuniary elements, other elements, § 92.
cause of action, entirety, release or death of one or several parties entitled to damages, § 133.
contracts for services, implied contracts, duty to pay for services rendered, § 679.
death by wrongful act, marriage of widow, right to maintain action for death of husband, § 1265.
death of wife, second marriage, not mitigation of damages when benefit not derived from defendant, § 158.
debt due from wife to husband
payment, effect, § 218.
mode of, § 215.
debtor and creditor, release, what constitutes release, § 258.
fraud, false representations as to property owned, marriage induced, measure of damages, § 1171.
pregnant woman, right to recover damages, § 2, n 2.
interest, demand, necessity to secure allowance of interest, § 351.
right to interest as affected by marital relation, § 341.
payment, mode of making payment, § 215.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, § 1244.
postponement of marriage, pleadings, necessity of alleging special damages, § 421.
prospects of marriage injured, elements of damage, personal torts, § 93.
libel and slander, special damages, accusations not actionable per se, §§ 1218, 1219.
pleading, special damages, necessity of alleging, § 420.
release, requisites, what will operate as release, § 258.
seduction, parties plaintiff, who may maintain action, § 1282.
settlement, conflict of laws, law governing as to interest, parties in different states, § 361.

Marriage—continued.
stateroom for bride, failure to secure, elements of damage, pecuniary elements, other elements, § 92.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 964.
wedding trousseau, failure to furnish, elements of damage, pecuniary elements, other elements, § 92.

Marshaling and Distribution
covenants, actions for purchase money, defenses in equity, § 641.
definition, § 191.
distribution defined, § 191.
funds, right where one creditor may resort to two funds and another to only one, § 195.
payment, application, by court, § 241.
general payment applied to debt least secured, § 245.
priorities, principal on which priority determined, § 197.
release, effect of creditor releasing part, § 194.
sale of encumbered property in parcels to different persons, § 192.
sale subject to encumbrances, § 193.
vendor and purchaser, action for purchase money, defenses and counterclaims, defenses in equity, § 641.

Marshals
bonds, measure of damages against sureties on official bonds, § 488.
private injuries covered by official bonds, § 487.
replevin bonds, actions, defenses, mitigation of damages, § 507n.

Maryland
appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 534.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
bonds of public officers, construction, § 485.
contract for particular work, performance prevented, contractor's rights, certainty of proof of profits, § 714.
covenants of warranty and quiet enjoyment, breach, action by covenantee against remote covenantor, § 614.
expenses, costs and counsel fees as damages, § 618.
dower, damages for detention of dower, § 1003.
eminent domain, damages in favor of tenants, § 1081.
evidence of value and damages, § 1089.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
fraud, remote damages, § 1175.
highways, nuisance, remote consequences, liability, § 1051.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
insolvency, bail bonds, in civil actions, measure of damages, § 539b.
nuisance, injury to crops and trees, damages, § 1049.
personal injuries, compensatory damages, pecuniary and other circumstances of parties, § 1254.
damages where negligence only is alleged, mental anguish, § 1245.
slander and libel, special damages, § 1215.
telegraphs and telephones, negligence in transmission of message, knowledge of sender's purpose, details, § 971.
trespass to personal property, mitigation of damages, application of property to owner's benefit, § 1105.

Massachusetts
attachment bonds, damages recoverable, § 512.

Massachusetts—continued.
attorney's fees, replevin bonds, actions, damages recoverable, § 505.
baggage, disclosure of value, § 954.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
principal sum, certainty, § 541.
re-exchange and damages, when not recoverable, § 562.
stipulations for costs and attorneys' fees, § 564.
breach of contract, recovery on quantum meruit, § 679.
breach of marriage promise, excuses for breach, § 990.
carriers of goods, injury to or loss of non-marketable property, damages, § 919.
carriers of passengers, compensation, physical and mental suffering of passenger, injury to character, § 942.
injury to passenger, proof of damage, § 946.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
damages for breach, permanent incumbrance, § 627.
covenants of seizin and good right to convey, nature of covenant, breach, § 591.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
interest and taxes as items of damage, § 616.
measure of damages, value of land at time of loss, § 608.
eminent domain
basis for estimating value of land, § 1074.
value for condemnor's purpose, § 1075.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
wrongdoer's improvements, § 1076.
damages in favor of tenants, § 1081.
deduction for benefits, special benefits, § 1086.
evidence of value and damages, § 1089.
injury to property not taken, expenditures to lessen loss, § 1073.
remote damages, § 1071.
interest, element of compensation, § 1091.
railroad property condemned for railroad uses, compensation, § 1078.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
evidence, physical examination of plaintiff, § 451.
exemplary damages, restriction or denial, rule in Massachusetts, § 397.
highways and streets, consequential damages in highway cases, § 26.
factor's rights, reimbursement by sales, § 790.
fire insurance, commission goods, § 828.
general rule of damages, § 821.
mortgagee as insurer, § 829.
fraud, false representations, defendant's belief in representations, necessity, § 1169.
reliance on representations, § 1168.
insurance, total loss, what constitutes, § 807.
interest, suspension, tender stopping interest when tender may be made, § 385.
landlord and tenant, appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 535.
repairs, lessor's liability for special and consequential damages, § 874.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
malicious prosecution, mitigation, evidence, § 1240.

Massachusetts—continued.
marine insurance, losses, general average, § 819.
valued policies, admiralty and fire, § 806.
master and servant, wrongful discharge of employees, measure of damages, remedies, § 692.
mesne profits, interest, § 997.
compensation on recovery of term, § 998.
nuisance, continuity, when nuisance is not continuous wrong, § 1044.
mitigation of damages, deduction for benefits, § 1056.
permanent injury, estoppel from recovery of future damages, § 1046.
removal of lateral support, measure of damages, § 1053.
officers, neglect of duty, measure of damages, nominal damages, § 490.
personal injuries, damages where negligence only is alleged, mental anguish, § 1245.
earning capacity diminished, loss of time, evidence, § 1248.
expenses for physical and mental aid, recovery, § 1250.
quantum meruit, recovery for services rendered, § 679.
remainders and reversions, injuries to rights of parties not in possession, § 1034.
replevin
damages, increase in value by defendant, § 1154.
intermediate injury and depreciation, § 1152.
exemplary damages, § 1145.
parties, who may sue, § 1143.
successful plaintiff as wrongdoer, § 1156.
suit on bond, non-liability of sureties for judgment in replevin suit, § 503.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, §§ 671, 672.
sewers and drains, nuisance, remote consequences, liability, § 1051.
slander and libel, defenses, failure of plea of justification, § 1225.
mitigation, belief and truth of words, § 1229.
suretyship, consequential damages, non-liability of principal, § 753.
telegraphs and telephones, mental anguish, damages, grounds upon which liability is denied, § 978.
repetition of message, limitation of liability, § 958.
trespass to real property, ice injured, diversion of water, § 1022.
occupation of land by railroads, damages, § 1016.
trover, damages, attorney's fees, § 1130.
limit of recovery, plaintiff's interest in property, §§ 1136, 1137.
mitigation of damages, § 1138.
property of fluctuating value, measure of damages, Massachusetts rule, § 1122.
time of conversion, § 1112.
usury, recovery under usury statutes, §§ 316, 317.
vendor and purchaser, necessity that vendor convey perfect title, effect of condemnation proceedings, § 572.

Master and Servant
see also Independent Contractor.
acts of servants
injuries to third persons, consequential damages, acts of third person, § 42.
street railroads, employees permitting children to ride on platform, consequential damages, § 42.
negligence or breach of duty, exemplary damages, difference in rule in some states, § 951.
parties liable, master's liability for acts of servant, § 410.
joint and several liability for torts, § 140.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
trespass to real property, cutting trees, treble damages, § 1031.

Master and Servant—continued.
acts of servants—continued.
vehicle unattended in streets, injuries to pedestrians, consequential damages, § 19.
admiralty, torts, damages recoverable, contributory negligence, § 1288.
assault, exemplary damages, parties liable, master's liability for acts of servant, § 408.
bond or employee, contract not to be extended by construction, §§ 725, 727.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
guaranty, measure of guarantor's liability, § 729.
breach of contract, certainty of damages, profits of labor, § 66.
compensation as measure of damages, § 678.
employee quitting without notice, recoupment and counterclaim, § 180.
employees leaving service, consequential damages, breach of contract, proximate consequences of breach, § 45n.
liquidated damages, stipulations when damages are uncertain, § 292.
measure of damages, § 684.
recovery on quantum meruit, § 679.
breach of contract to employ, losses as elements of damage, labor and expenditures, § 80n.
certainty of damages, contract between agents and principals, § 69.
certainty of proof of future damages, action for enticing away apprentice, servant or son or procuring discharge of servant, § 122.
change of employment, fraud, false representations, measure of damages, § 1171n.
compensation of servant, § 684.
breach of contract, compensation as measure of damages, § 678.
loss of services, certainty of damages, anticipated profits, § 60.
remote and specific damages, § 684.
carriers of passengers, passenger alighting at wrong place, damages peculiar to passenger, wages lost, § 939.
cause of action, contract to do several things successively or one thing continuously, § 110.
certainty of damages, profits of labor, § 66.
contracts for services, continuation of original contract, § 685.
effect of express contract fixing compensation, § 678.
entire and apportionable contracts, § 691.
necessity of full performance, inability to perform, § 687.
statute of frauds, § 684.
default, time of making payment of compensation, § 684.
driving logs, effect of custom or usage as to amount of compensation, § 678.
evidence of payment, § 233.
evidence of value, opinion, § 446.
injunction bonds, damages from restraint of injunction, § 527.
interest, allowance of, necessity of demand, § 351.
quantum meruit claim to interest, § 324.
unliquidated demands, § 348.
laborer's compensation fixed by statute, effect, § 678.
mode of compensating for services, § 684.
mode of payment, § 214.
mutual credit, compensation by mutual demand, § 148.
payment, evidence of, § 233.
express contract, necessity of full performance, § 691.
mode of, § 214.
persons to whom payment may be made, § 231.
persons who may make payments, § 230.

Master and Servant—continued.
compensation of servant—continued.
personal injuries, earning capacity diminished, evidence, § 1248.
recovery for loss of time or decreased capacity, § 1249.
profits of business as compensation, breach of contract, evidence, § 684.
computation of profits, § 684.
quantum meruit recovery, § 679.
elements of damages, motive, distinction made for bad motive, contracts, § 99.
evidence, defenses, § 679.
matters of defense, § 679.
presumption where family relation exists, § 679.
recovery under statutes for unpaid wages, § 678.
remoteness of stipulated compensation, § 684.
sales
breach of contract by seller, delay in delivery, damages, § 664.
non-delivery of stock, § 657.
services included in contract, § 678.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
fraud, breach of warranty, etc., § 180.
negligence, § 180.
quantum meruit, recoupment, § 168.
statutes limiting hours of work, effect, recovery for services rendered, § 681.
telegraph messages, negligence in transmission of message, loss of employment and profits of business, damages, § 967.
value of services, interest, right to interest, § 300.
wrongful discharge of employees, measure of damages, remedies, § 692.
compensatory damages, value of property as measure of damages, § 105.
consequential damages, misconduct of servant, illustrations, § 17.
contracts for services, contract of hiring and contract employing agents distinguished, determination, insanity of employer, incorporation of employer's business, § 678.
entire and apportionable contracts, forfeiture of wages, compensation recoverable, § 691.
express contracts, necessity of full performance of entire contract, § 686.
entire and apportionable contract, § 691.
inability to perform, §§ 687-689.
stipulation for notice where servant quits employer, § 690.
termination, continuation of original contract, § 685.
injunction bonds, damages from restraint of injunction, § 527.
implied contract, abandonment on performance of services, effect, § 684.
duty to pay for services rendered, § 679.
principle excluding implied promise where there is express contract, § 686.
invalidity of contracts because of statute of fraud, recovery for services rendered, measure of damages, § 684.
limitation of liability, notice of employer that he wishes performance discontinued, § 690.
oral agreements, right to prove, implied contracts, § 679.
recovery on quantum meruit, analogy to salvage or making invention, § 679.
remoteness or uncertainty of stipulated compensation, effect, measure of damages, § 684.
severable contracts, recovery on part performance, action by contracts against employer, § 708.
corporations, interest, quantum meruit claim to interest, § 324.

Master and Servant—continued.
death of servant, bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
disability of servant, wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
discharge of servant, allowance of wages, deductions, § 686.
certainty of damages, chances for prizes and promotions, § 71.
compensation to be determined by employer, effect of determination, § 678.
presumption of continuance of obligation, § 678.
consequential damages, recovery only when contemplated by parties, § 45, n25.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
express contract, necessity of full performance, inability to perform, § 689.
incompetent employee, violation of duty, disobedience, § 686.
liquidated damages, stipulation when damages are uncertain, § 290.
losses, expenses incurred to prevent or lessen damage, § 88.
what losses consist of, § 79.
performance, necessity of full performance of contract, § 686.
profits, required certainty of anticipated profits, § 60.
wrongful discharge, cause of action, severance, contract to do several things successively or one thing continuously, § 110.
duty to mitigate damages, presumption of subsequent employment, § 693.
liability for expenses and lost commissions, § 694.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
measure of damages, remedies, actions, § 692.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mistake, elements of damage, mental suffering, § 95.
pleading, mitigation, § 165.
special damages, necessity of alleging, § 420.
prospective damages, certainty of proof, § 122.
duties and liabilities of agent, right of principal to indemnity, scope of agent's liability, § 771.
enticement of servant, consequential damages, act or omission as proximate cause of damages, § 31.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
evidence of value of services, § 680.
exemplary damages, joint liability for, § 407.
parties liable, liability of master for acts of servants, §§ 408-411.
existence of relation, necessity under Federal Employers' Liability Act, § 1308.
express contract, necessity of full performance of entire contract, inability to perform, § 688.
Federal Employers' Liability Act, see Federal Employers' Liability Act, § 1305.
fellow servants, contractual exemptions from liability for damages, § 6.
negligence under Federal Employers' Liability Act, § 1314.
fraud, false representations, labor performed because of representations, damages, § 1173.
what are false representations, § 1166.
guaranty of employee's contract, contract of surety not to be extended by construction, illustrations, § 727.
indemnity, necessity of notice to indemnitor to fix liability, § 86.
independent contractor, acts of, parties, joint and several liability for torts, § 141.

Master and Servant—continued.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
injuries to servant, carriers of passengers, negligence or breach of duty, actions for injury to wife, child or servant, § 952.
contractual exemptions from liability for damages, § 6.
damages, loss of wages or salary, § 1246.
earning capacity diminished, evidence, § 1248.
release, what constitutes release, § 258.
interest, allowance from time when money ought to be paid, § 329.
joint liability, exemplary damages, joint liability for, § 407.
loss of services, death, right of action at common law, § 1259.
seduction, gist of action, loss of services, § 1281.
machinery, agent's liability to third persons, torts, § 800.
mechanics leaving work, liquidated damages, stipulation when damages are uncertain, § 292.
medical services, agreement to furnish, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
mitigation of damages, benefit not derived from defendant, § 158.
wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
negligence, contractual exemptions from liability for damages, § 6.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
notice of termination of contract, contracts for services, necessity of full performance, inability to perform, § 690.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
liquidated damages, stipulation when damages are uncertain, § 292.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
wrongful discharge of employees, measure of damages, remedies, § 692.
performance, contracts for services, necessity of full performance of contract, § 686.
inability to perform, §§ 687, 688.
presumptions, wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
preventing employment, damages, § 678.
promotion, certainty of damages, chances for promotion, § 71.
recoupment, servant's violation of contract, recoupment of damages, consequential losses, § 695.
release, requisites, what will operate as release, § 258.
relief department, acceptance of benefits, accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
remedies, wrongful discharge of employees, measure of damages, remedies, § 692.
salvage service, agreements, right to fix specific amount as compensation for salvage service, § 716.
scope of authority, exemplary damages, parties liable, liability of master for acts of servants, § 408.
slander, loss of employment, consequential damages, act or omission as proximate cause of injury, § 29.
telegrams, delay in transmission or delivering of message, damages recoverable, loss of employment and profits of business, § 967.
trespass to real property, aggravation and special damages, servant deprived of shelter, § 1029.
wages, see, this title, subhead Compensation.

Masters in Chancery
assessment of damages without jury, § 428.
interest, on judgments pending review, § 389.

Material
see Building and Construction Contracts.

Measure of Damages
see specific topics, such as Carriers of Goods, etc.
agency, commercial paper, measure of liability of agents for defaults in regard to commercial paper, §§ 775, 776.
duty of agent to inform principal, reports, § 769.
insurance, neglect by agent of duty or agreement concerning insurance, § 772.
liability of agent to third persons, acts in excess of or without authority, measure of damages, § 798.
measure of recovery in action by agent against principal, recovery of judgment against agents, § 795.
sales, disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
stock received in violation of trust, liability of agent to principal, § 773.
arbitration bonds, liability of sureties, measure of damages, § 539c.
attachment, bond to satisfy judgment, conditions, § 519.
forthcoming bonds, measure of damages for failure to deliver property, § 518.
bills and notes, suretyship, assumption of contract, method, bills and notes, § 731.
value of bills and notes, solvent parties, measure of damages, § 565.
brokers, agency, duties, liability, disregard of instructions, § 786.
compensation, amount of compensation, reasonable amount where principal refuses to sell land, § 683.
building contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
carrier of goods, breach of contract to furnish goods for shipment, measure of damages, §§ 877, 878.
loss of or injury to goods, compensation on basis of market value, § 918.
goods having market value, damages, § 918.
refusal to carry, loss of shipper's profits, § 900.
collections, measure of agent's liability, defaults in regard to bills and notes, § 776.
conflict of laws, law governing liabilities on bills and notes, § 563.
contract for particular work
breach, contractor's liability, § 697.
liability for profits lost and expenses incurred, § 698.
contract price as measure of damages, action by contractor against employer, § 706.
delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
demand for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, § 710.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, § 713.
material not furnished, effect of not abandoning contract, contract's rights, § 714.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
consequential losses, non-performance, § 702.
contract for services, implied contract, abandonment on performance of services, effect, § 684.
invalidity of contracts because of statute of frauds, recovery for services rendered, measure of damages, § 684.

Measure of Damages—continued.
contract for services—continued.
measure of damages, modes of compensating for services, § 684.
conversion, agent's disregard of orders, purchase, shipment and sale of goods, § 773.
covenants against incumbrances
breach, §§ 622, 623.
English and Canadian rule, § 624.
payment of incumbrance, damages if not paid, § 623.
permanent incumbrance, § 627.
remote losses, § 622.
covenants of seizin and good right to convey
damages for breach of covenants, § 593.
consideration not measure of damages, § 595.
consideration paid and interest, § 593.
recovery of proportion of consideration, part of title lost, § 602.
covenants of warranty and quiet enjoyment
measure of damages for breach, § 605, 864.
conflict of laws, § 605.
partial breach, § 609.
property as consideration, § 606.
suit against remote covenantor, § 614.
evidence, intendments against plaintiff for holding back evidence, § 440.
factors, duties, sale, measure of liability, sale of unauthorized price, § 778.
liability for failure to sell at certain time, § 781.
guaranty, measure of guarantor's liability, lost profits remote damages, § 729.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
express indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 766.
insurance, injury, extent, measure of damages on open policies, §§ 813, 814.
paid up policy, refuse to issue, measure of damages, § 839.
termination of contract, insurer's liability, recovery of premium on unaccepted policy expense of procuring other policy, § 838.
invasion of rights, presumption of injury, right to damages, § 2.
laws governing, breach of contract and tort, § 7.
leases, business, recovery for damages to business of lessee, § 869.
covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
insurance, covenants to insure, damages for breach, § 862.
rent, actions to recover, abandonment of lease, § 844.
payment, recovery of rent payable in specific articles or taxes, § 846.
marine insurance, general average, method of ascertaining loss and value of property saved, § 819.
injury, extent, damages in case of partial loss, § 816.
liability of insurer under valued policies, admiralty and fire policies, § 806.
master and servant, wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
measure of damages, remedies, actions, § 692.
mesne profits, interest, § 997.
limitation of damages to value of use, consequential and punitive damages, § 994.
money, par of exchange, § 212.
nuisance, removal of lateral support, measure of damages, § 1053.

Measure of Damages—continued.
object of law of damages, award of compensation, § 12.
patents, infringement, damages recoverable at law, profits as damages, § 1185.
penalties in affirmative agreements, breach, remedies, § 471.
replevin, bond by defendant to retain property, damages, § 509.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by seller, consequential damages, § 662.
delay in delivery, damages, § 664.
non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
non-delivery of stock, § 657.
part of stipulated quantity received, recovery by seller, § 646.
warranties of quality and quantity, breach, damages, § 670n.
warranty of title, breach, measure of damages, § 669.
set-off, counterclaim and recoupment, burden of proof, § 188.
suretyship
express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 765.
damages recoverable, § 762.
measure of surety's liability, § 723.
surety's remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
payment giving right to reimbursement, § 750.
trade-marks, infringement, measure of damages in equity and at law, §§ 1201, 1202.
trespass to real property, crops injured or destroyed, damages, § 1023.
damages, measure of damages, benefit received, § 1014.
permanent wrong, damages, § 1017.
use and occupation, actions for, measure of recovery, continuance of terms of lease, conduct of parties, evidence, §§ 842, 843.
vendor and purchaser
action for purchase money, defenses and counterclaims, New York rule, § 633.
South Carolina and Virginia rule, § 637.
breach of contract by purchaser, measure of damages, §§ 569, 570.
conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.
notes given for price, assumption of mortgage, § 571.
breach of contract by vendor, damages, suits for specific performance, § 590.
measure of damages, § 578.
conflict of American decisions, § 579.
English rule application, § 581.
recovery on patrol contract, § 583.
suits for specific performance, § 590.
verdicts, excessive or insufficient verdict, § 459.

Meat Injured
breach of contract to furnish ice to butcher, liability under special circumstances, contemplation of parties, § 50.
carriers of goods, duty to care for property, § 916.
refrigerator defective, mitigation of damages, extent of duty to lessen or prevent damages, § 90.

Meat Sold
telegraphs and telephones, knowledge of sender's purpose, details, § 969.
warranties of quality, existence, § 667.

Mechanics
quantum meruit recovery for services, evidence, defenses, § 679.
tools, baggage, what constitutes baggage, § 954.

Mechanic's Liens
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
bond of indemnity, contract for particular work, breach, liability for expenses and consequential losses, § 699.
contract of surety not to be extended by construction, illustration, § 727.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
right of subrogation, availability, § 736n.
surety's liability, measure of damages, § 723n.
creditor's right to make application of payments, § 239.
interest
allowance, accounts, § 349n.
judgments pending review, § 389.
necessity of demand, § 351.
suspension, miscellaneous cases, § 380.
tender, effect on, collateral securities, § 277.
trover, limit of recovery, plaintiff's interest in property, § 1137.

Medical Service
civil damage laws, medical attendance and funeral expenses, recovery by widow, § 1265.
consequential damages, extension of liability by statutes, § 16.
death by wrongful act, damages, recovery by widow, § 1265.
failure to supply medical and hospital assistance, elements of damage, pecuniary elements, other elements, § 92.
gratuitous care and nursing, no mitigation of damages, § 158.
passenger boarding wrong train, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
pleading, items, necessity of itemizing damages in pleadings, § 424.
special damages, necessity of alleging, § 421.
statutory damages, necessity of specially claiming or alleging, § 425.
prospective damages, personal injuries, ascertainment, § 123.
refusal to call physician, evidence, intendments against plaintiff for holding back evidence, § 440.

Medicine and Surgery
advice of physician, malicious prosecution, mitigation, evidence, § 1240.
baggage, medicine, sleeping car companies, liability, § 956.
carriers
delay in transportation of medicine for sick person, consequential damages, § 36.
liability of carrier for physical and mental suffering, § 915.
compensation of physician, contracts for services, quantum meruit recovery, defenses, § 679.
pleading, itemization of damages, demands unliquidated, § 424.
recoupment for negligence in transmitting disease, § 180.
contract for services of physician, evidence of value, § 680.
implied contract, duty to pay for services rendered, § 679n.
quantum meruit recovery, determination of amount of charges, § 679.
duty to submit to surgical operation, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
fees of physician, telegraphs and telephones, negligent delay in transmission or delay in delivery of message, liability for loss of employment and profits of business, § 967.

Medicine and Surgery—continued.
malpractice, elements of damage, mental suffering, § 96.
evidence, physical examination of plaintiff, § 451.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
mistake of physician, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
mitigation of damages, extent of duty to lessen or prevent damages, surgical operation, § 90.
negligence of physician, infection carried to patients, recoupment, breach of warranty, etc., § 180.
negligence diagnosis, consequential damages, § 16, n23.
operations, personal injuries, mitigation of damages, admissibility of evidence, § 1255.
extent of duty to lessen or prevent damages, § 90.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
instances of rejection and admission of opinions, § 443.
patents, medicines, infringement, damages recoverable at law, § 1184.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, § 1244.
expressions, conduct and religious belief of sufferer as evidence of damages, § 453.
future damages, § 123.
medical and surgical aid, recovery of expenses, § 1250.
physical examination of plaintiff, discretion of court, § 451.
quantum meruit recovery for services of physician, evidence, defenses, § 679.
sale of good will and practice of physician, bills and notes consideration, partial failure of consideration, availability of defense, § 545.
breach of contract, compensation, certainty of proof, § 658.
sale of medicine, breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, §§ 672-675.
fraud, sale of inferior article, natural and proximate consequences of fraud, § 1165.
telegrams, delay in delivering messages, damages recoverable, physical pain, loss of life, § 965.
sick messages, duty to mitigate damages, procuring other physician, § 973.
vessels, neglect to keep supply of medicine, consequential damages, anticipation of injury to persons, proximate cause, § 25.

Mental Anguish
see also Annoyance; Humiliation; Nervous Shock; etc.
abusive language to sick person, consequential damages, acts or omission as proximate cause of damages, § 29.
alienation of affections, damages recoverable, mental anguish, § 1285.
assault, action by parent for assault of son, damages for injuries to feelings of parents, § 952.
consequential damages, nervous shock without impact, right to recover damages, § 24.
elements of damage, mental suffering, § 96.
attachment bond, consequential damages, certainty, recovery or items of damages which are certain, § 55.
damages recoverable, § 512.
defenses, mitigation of damages, § 515.
baggage, loss or injury to baggage, measure of damages, § 955.
breach of contract, damages as including other than pecuniary elements, § 92.
breach of marriage promise, aggravation, seduction, consequences, medical expenses, child-birth, or miscarriage, § 985.
damages which may be considered, § 986.

Mental Anguish—continued.
carriage not supplied, marriage prevented, breach of contract, damages as including other than pecuniary elements, § 92.
carriers of goods, breach of contract, physical and mental suffering, as elements of damage, § 915.
delay in transportation, dead bodies, physical and mental suffering as elements of damage, § 915.
medicine for sick person, consequential damages, § 36.
loss of property, liability of carrier for loss of museum, mental suffering, § 915.
carriers of passengers, assault by fellow passenger, damages recoverable, § 941.
assault by servant, damages for physical and mental suffering, § 942.
consequential damages, failure to notify passenger of destination, § 36.
damages recoverable by passenger, verdicts excessive, § 953n.
ejection of passenger who is Christian Scientist, damages recoverable, refusal to pay fare, control of feelings, § 940.
place, removal of passenger at wrong place, damages, separation from baggage, § 939.
exposure of passenger, damages recoverable, § 936.
mental suffering independent of other injury, § 943.
nature of injury, damages recoverable, § 942.
pain and suffering, past and prospective damages, § 944.
physical and mental suffering of passenger, injury to character, § 942.
refusal to carry, damages, loss of time, expense, exposure and humiliation, § 936.
refusal to furnish berth, damages, § 956.
consequential damages, act complained of must be efficient cause of damage, § 29.
breach of contract, proximate consequences of breach, § 45n.
proximate consequences of act or omission, wilful or malicious injuries, § 43.
recovery for secondary consequences, aggravation of disease, § 1244.
contract for particular work, contractor's liability, consequential damages for defective work, § 705.
contract for services, wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
dead bodies, breach of contract to embalm body of child, contract for work, defects, consequential damages, § 705.
removal of dead bodies from cemetery, trespass, recovery for injury to feelings, § 1029.
death by wrongful act, damages, mental anguish, restriction to pecuniary losses, § 1263.
rule in England and Canada, § 1262.
deprivation of food, losses as elements of damages, expenses to prevent or lessen damages, § 88.
elements of damage, §§ 95, 96, 1241.
character as affecting damages for personal injuries and in actions for death, § 94.
liability of telegraph companies, § 97.
losses, expenses incurred to prevent or lessen damage, § 88.
pecuniary elements, other elements, § 92.
personal torts, § 93.
evidence, adaptation to damages claimed, § 437.
expressions, conduct and religious belief of sufferer, § 453.
exemplary damages, basis on actual damages, nominal damages, §§ 405, 406.
denial or restriction of exemplary damages, reasons for rule, New Hampshire rule, § 396.

Mental Anguish—continued.
exemplary damages—continued.
rule as to compensatory damages, § 395.
rule in Massachusetts, § 397.
rule in Michigan, § 399.
enhancement and mitigation, § 404.
express indemnity, damages recoverable, mental and physical suffering, liability by original trespass, § 763.
expulsion from trade union, consequential damages, mental suffering, §§ 24, 44.
Federal Employers' Liability Act, § 1331.
fraud, false representations, remote, conjectural and contingent damages, § 1176.
illegal arrest, official bonds, measure of damages, against sureties, § 488.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
damages from restraint of injunction, § 526.
interest, actions for torts, § 355.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
malicious prosecution, elements of damage, § 1237.
mother separated from children on train, consequential damages, nervous shock without impact, right to recover damages, § 24.
nervous shock as physical injury, consequential damages, §§ 22-24.
nervous shock without impact, consequential damages, § 21.
nuisance, remote consequences, liability, § 1051.
officers, measure of damages against sureties on official bonds, § 488.
pain and suffering, exposure, allegations to show mental anguish, § 1029.
physical and mental pain, personal injuries, § 1242.
recovery for mental suffering, aggravated wrong, § 1243.
rule where negligence only is alleged and where wrong was wilful, § 1245.
personal injuries, action by husband, wife or parent, § 1252.
pleading, special damages, necessity of alleging, § 420, 421.
prospective damages, personal injuries, ascertainment, § 123.
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
searches, trespass, search for intoxicating liquors, damages for humiliation, mental anguish, § 1029.
slander and libel, damages, mental suffering and physical incapacity, § 1214.
special damages, accusations not actionable per se, injury to feelings, § 1221.
special damages, necessity of alleging, § 420.
suretyship, express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
telegraphs and telephones, see also title Telegraphs and Telephones.
consequential damages, right to recover for anxiety and mortification, § 24.
delay in delivery of message, damages, § 965.
delay in transmission of message forbidding marriage of daughter, damages for mental anguish, § 964.
effect of statute allowing recovery for mental anguish, messages sent out of state, § 972.
recovery for mental suffering independent of other injury, § 943.
sick and death messages, recovery for mental suffering, conflict of decisions, § 975.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
special and consequential damages, § 1101.
trespass to real property, aggravation and special damages, § 1029.
wilful or malicious injuries, consequential damages, §§ 43, 44.

Merger
compound interest, instances of interest on interest, § 374.
parties, joint liability, extinguishment or severance, § 136.
vendor and purchaser, contracts, obligation of purchaser, § 567.
right of seller of land to recover purchase price and interest, abatement of price, § 567.

Mesne Profits
see Ejectment.
action for recovery of land as bar to action for recovery of mesne profits, § 991.
ascertainment of profits, what property withheld, § 996.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
compensation upon recovery of term, § 998.
covenants for title, breach of covenants, set-off for mesne profits, § 601.
covenants of warranty and quiet enjoyment
breach, interest and taxes as items of damage, § 616.
measure of damages, conflict of laws, what law controls, § 605.
consideration as measure of recovery, rule in England and Canada, § 607.
mitigation of damages, § 611.
damages, consequential damages, § 994.
costs of ejectment suit as damages, § 993.
exemplary damages, § 994.
limit of recovery to value of use of land, § 994.
what may be allowed as damages, § 993.
defenses, claim for improvements, taxes, etc., § 999.
evidence, rental value, proof of, § 995.
ferries, ascertainment of profits, what property withheld, § 996.
improvements, ascertainment of profits, what property withheld, § 996.
interest, recovery of interest on mesne profits, § 997.
mitigation of damages, reduction of loss or benefit, § 164.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.
parties, who may recover mesne profits, § 992.
remedy, nature, § 992.
remedy under the code, § 1000.
vendor of land, damages recoverable by purchaser, adjustment of counter demands on rescission, § 587.

Mexican Money
bills and notes, necessity that bills and notes be payable in money, § 559.

Michigan
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
principal sum, certainty, § 541.
bonds, penalty as limit of recovery, exception as to interest, § 478.
breach of marriage promise, damages for loss of marriage, defendant's wealth, § 988.
injury to feelings, and other elements of damage, § 986.
contract for particular work, breach, consequential losses, contractor's liability, § 702.
covenants, breach, defenses and crosselaims against purchase money, § 636.
covenants against incumbrances as covenant running with the land, damages recoverable for breach, rule in some states, § 625.
covenants of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.

Michigan—continued.
death by wrongful act, children's loss, death of parent, § 1267.
compensation for pecuniary losses, exemplary damages, § 1263.
eminent domain, compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
injury to property not taken, ascertainment, § 1068.
railroad property condemned for railroad uses, compensation, § 1078.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, restriction or denial, rule in Michigan, § 399.
guaranty, liability where collateral is given, § 734.
interest, allowance, stockholders' statutory liabilities, § 343.
landlord and tenant, destruction of demised premises, effect as to rent, § 852.
eviction of lessee, recovery of rent barred, § 848.
repairs, lessee's duty, recovery for making, § 873.
master and servant, wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
personal injuries, actions, husband and wife, § 1252.
loss of capacity for enjoyment as damages, § 1243.
replevin, damages, increase in value by defendant, § 1154.
defendant's rights, damages, mitigation, § 1159.
successful plaintiff as wrongdoer, § 1156.
slander and libel, defenses, failure of plea of justification, §§ 1224, 1225.
exemplary damages, § 1216.
mitigation, retraction, § 1231.
suretyship, right of recoupment by surety, equitable off-set of joint indebtedness, § 744.
trespass to personal property, mitigation of damages, application of property to owner's benefit, § 1105.
special and consequential damages, §§ 1101, 1102.
trespass to real property, ice injured, diversion of water, § 1022.
trees and mining ores, liability, § 1019.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.

Middleman
see Agency, Brokers, etc.
broker's compensation, manner of performance of duty, effect of misconduct, § 683.

Militia
consequential damages, injury through third person, desertion of alternative hired to perform military service, § 33.
liability, illustrations, § 17.

Milk
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Mills
capacity, evidence, opinions on subjects of common experience and observation, admissibility, § 443.
carriers, delay in transportation of supplies, liability of carrier, knowledge of or notice to carrier that goods must not be delayed, § 913.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
construction, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.

Mills—continued.
construction of dams, consequential damages, certainty, liability for principal loss extending to details and incidents, § 54n.
construction of railroad, contract for particular work, breach, consequential losses, contractor's liability, § 702n.
covenants, breach of covenants for title, measure of damages, nominal damages, § 600.
disease, trespass to real property, aggravation, special damages, § 1028.
eminent domain
compensation, injury to property not taken, § 1065.
ascertainment, § 1067.
employee quitting work, liquidated damages, stipulations when damages are uncertain, § 292.
fire, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
parties, joint right of liability for tort, determination, § 137.
injury by flood, consequential damages for torts, liability, illustrations, § 19.
insurance, total loss, what constitutes, § 807.
lease of power, liquidated damages, stipulations when damages are uncertain, § 293.
leases, business, recovery for damages to business of lessee, § 867.
repairs, lessee's duty, recovery for making, § 873.
lessor's liability for special and consequential damages, § 874.
machinery, contracts for work, defects, consequential damages, § 705.
installment of machinery, damages for delay, § 703.
mesne profits, action for, ascertainment of profits, what property withheld, § 996.
mill stones dressed, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
nuisance, continuity, when nuisance is not continuous wrong, § 1042.
elements of damages, expenses, § 1048.
mitigation of damages, deduction for benefits, § 1056.
nominal damages, liability of wrongdoer of nominal damages, § 1037.
pleading, allegations of damage, § 1060.
special elements of damages, repairs, § 1048.
pleading, allegation of damage, nuisance, § 1060.
railroad construction, evidence, opinions on subjects of common experience and observation, admissibility, § 443.
sales
breach of contract by seller, consequential damages, § 662.
delay in delivery, evidence of rental value, § 665.
losses as elements of damage, labor and expenditures, § 80n.
non-delivery of property contracted for, consequential damages, § 662.
breach of warranty as to quality or quantity, damages, interest, expenses, and special injuries, § 672.
defective machinery, sale, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.
engine, sale of, warranty of quality, damages for breach, interest, expenses and special injuries, § 675.
trespass, destruction of property, damages, compensation, § 1015.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
use interrupted, aggravation and special damages, § 1028.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587n.
water, breach of contract to supply, consequential losses, contractor's liability, § 702.
pollution of stream, right to damages, nominal damages, § 10.

Mines and Mining
carriers of goods
refusal to transport, damages, increased expenditures, loss of customers, § 901.
liability for loss of shipper's profits, notice to carrier of contract for profits, shipper's good faith, § 900.
remote consequences, § 902.
causes of action, entirety, damage to real property, § 114.
successive actions for damage to real property, § 115n.
coal, sales, liquidated damages, stipulations when damages are uncertain, § 293n.
trover, measure of damages, value of property enhanced by defendant, § 1127.
contract for particular work, breach, liability for profits lost and expenses incurred, § 698.
recovery by contractors, part performance of severable contract, § 708.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
conveyance of mining claim, liquidated damages, stipulation when damages are uncertain, illustrations, § 293.
drainage, contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
percolating waters, damnum absque injuria, § 3.
eminent domain, compensation, basis for estimating value of land, § 1074.
injury to property not taken, ascertainment of damages, facts which may be considered, §§ 1067-1069.
expenditures to lessen loss, § 1073.
payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
injunction bonds, damages from restraint of injunction, §§ 527, 528.
leases, evidence of value, opinion, § 446.
rent, amount as affected by subsequent facts, § 845.
malicious prosecution, damages, elements, expenses, § 1238.
oil wells on leased land, liquidated damages, stipulation when damages are uncertain, § 290.
operation enjoined, injunction bonds, damages from restraint of injunction, § 528.
ores
sales, breach of contract, non-delivery of property contracted for, property not in market, recovery of lost profits, § 652.
re-sale of goods, § 647.
trover, measure of damages, value of property enhanced by defendant, § 1126.
value of property, proof of, § 1113.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.
phosphate, certainty of damages, anticipated profits, § 59n.
shafts, eminent domain, measure of compensation, § 1064n.
subterranean waters, drainage into stream, damage without injury, § 3.
trespass, additional injury to land beyond taking away timber and minerals, liability, § 1021.
gist of action, who may sue, § 1009.
license, damages where person in possession under license sues, § 1012.
measure of damages, benefit received, § 1014.
mining ores, liability for destroying or carrying away ores, value as affected by defendant's acts, §§ 1019, 1020.
permanent injury, estimate of damages, § 1017.
remediable injuries, estimate of damages, § 1018.

Mines and Mining—continued.
vendor and purchaser
breach of contract by vendor, elements of damage, loss of bargain, mitigation, § 584.
rescission, adjustment of counter demands, § 587.

Minnesota
agent's liability to third persons, measure of damages, action without authority, § 798.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
interest, § 556.
partial failure of consideration, § 545.
principal sum, certainty, § 541.
stipulations for costs and attorney's fees, § 564.
breach of marriage promise, seduction, consequences, § 985.
carriers of goods, breach of contract, physical and mental suffering, as elements of damage, § 915.
connecting carriers, damages, interstate commerce, § 931.
loss or injury to goods, loss at place of shipment, § 924.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 942.
child birth, personal injuries, premature birth, increase of suffering, § 1244.
contracts for particular work, contractor's right to payment, rights in insurance money, interest, § 706.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
contracts for services, compensation, statute of frauds, § 684.
covenants, breach, defenses and crosclaims against purchase money, § 636.
covenants of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
eminent domain
assessment of benefits and damages, lands considered, § 1088.
time of assessment, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
evidence of value and damages, § 1089.
measure of compensation, § 1064.
railroad property condemned for railroad uses, compensation, § 1078.
exemplary damages, parties liable, master's liability for acts of servants, § 410.
insurance, total loss, what constitutes, § 807.
interest on bills and notes, § 556.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
lessee's right to damages for injury to business, § 867.
mitigation of damages by lessee, § 871.
repairs, lessor's liability for special and consequential damages, § 874.
life and accident insurance, termination of contract, liability, § 838.
machinery sold, warranties of quality and quantity, breach, damages, § 670.
malicious prosecution, mitigation, evidence, § 1239.
nuisance, continuity, when nuisance is not continuous wrong, § 1042.
interference with business, element of damage, § 1054.
personal injuries, actions, husband and wife, § 1252.
earning capacity diminished, loss of time, pleading, § 1247.
railroads, animals injured, interest, actions for torts, § 355.
replevin, damages, property not returned, § 1148.
judgment, replevin bonds, actions, effect of change in statute, § 508.

Minnesota—continued.
suretyship, right of subrogation, availability, § 736.
telegraphs and telephones, mental anguish, damages, grounds upon which liability is denied, § 978.
negligence in transmission of message, knowledge of sender's purpose, details, § 971.
trespass to personal property, damages, mental suffering, § 1095.
trespass to real property, crops injured or destroyed, damages, § 1023.
exemplary and statutory damages, § 1031.
occupation of land by railroads, damages, § 1016.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.

Miscarriage
abusive language, assault, consequential damages, nervous shock without impact, right to recover damages, § 24.
breach of marriage promise, aggravation, seduction, consequences, medical expenses, child-birth, or miscarriage, § 985.
collision with automobile, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.
consequential damages, act of injured party, fraud and exposure to peril, § 39.
liability of carriers, extraordinary circumstances, § 36.
nervous shock without impact, right to recover damages, § 24.
passenger directed to leave train three miles from destination, liability for injuries, § 36.
elements of damages, mental suffering, §§ 95, 96.
eviction of tenant, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
false imprisonment of husband, consequential damages for torts, liability, illustrations, § 19.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
compensatory damages, mental suffering independent of physical harm, § 96.
nervous shock as physical injury, consequential damages, §§ 22-24.
nervous shock without impact, consequential damages, § 21.
personal injuries, consequences of injury, recovery for secondary consequences, aggravation of disease, § 1244.
excessive or inadequate verdicts, discretion of jury as to damage, instructions, § 1256n.
premature birth of idiot, nervous shock as physical injury, consequential damages, § 23a.
threats to arrest debtor, consequential damages for torts, liability, illustrations, § 19.
nervous shock without impact, right to recover damages, § 24.
wilful or malicious injuries, consequential damages, § 44.

Mississippi
attorneys' fees, attachment, bonds, recovery of costs and expenses of attachment suit, § 516.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
bonds of public officers, construction, § 485.
covenants, breach, defenses and crossclaims against purchase money, Mississippi rule, §§ 635, 636.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
suit against remote covenantor, § 614.
death by wrongful act, facts to be considered in estimating damages, § 1268.
recovery for death of child, § 1272.

Mississippi—continued.
eminent domain, compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
property not taken, consequential injury, § 1062.
evidence of injury, annuity and life tables, § 455.
exemplary damages, allowance, in what actions recoverable, § 392.
parties liable, master's liability for acts of servant, § 410.
injunction vacated, injunction bond, right of action, when it arises, parties who may sue, § 522.
landlord and tenant, condemnation of demised premises, effect as to lease, § 853.
rent, lessee's liability for interest, § 854.
marine insurance, valued policies, admiralty and fire, § 806.
novation, bills and notes, stipulations for costs and attorney's fees, § 564.
personal injuries, compensatory damages, pecuniary and other circumstances of parties, § 1254.
telegrams, negligence in transmitting message, liability when object of sender is known, § 963.
mitigation of damages by injured party, § 973.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, exemplary damages, § 1131.
usury, effect, contracts not void for usury, § 315n.

Missouri
assessment of damages, default or demurrer as admission, § 429.
attorney's fees, attachment, bonds, recovery of costs and expenses of attachment suit, § 516.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
payment, guaranty of payment, measure of liability of guarantor, § 732.
stipulations for costs and attorney's fees, § 564.
bonds, public officers, construction, § 485.
statutory bonds, liability of sureties, § 475.
breach of marriage promise, excuses for breach, § 990.
injury to feelings, and other elements of damage, § 986.
carriers of goods, limitation of liability by contract, interstate commerce, § 904.
carriers of passengers, liability for exemplary damages, § 951.
contract for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants against incumbrances as covenants running with the land, damages recoverable for breach, rule in some states, § 625.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
nominal damages, measure of damages, § 600.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
suit against remote covenantor, § 614.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
damages to deceased's estate, § 1277.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
wrongdoer's improvements, § 1076.
deduction for benefits, special benefits, § 1084.
evidence of value and damages, § 1089.

Missouri—continued.
eminent domain—continued.
interest, element of compensation, § 1091.
railroad property condemned for railroad uses, compensation, § 1078.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, death by wrongful act, pleading of damages, § 426.
parties liable, master's liability for acts of servant, § 410.
pleading, matter of aggravation, necessity of alleging, § 422n.
insurance, total loss, what constitutes, § 807.
interest, agreement for more than legal rate after maturity, penalty, § 318n.
allowance, stockholders' statutory liabilities, § 343.
landlord and tenant, condemnation of demised premises, effect as to lease, § 853.
malicious prosecution, mitigation, evidence, § 1239.
marine insurance, valued policies, admiralty and fire, § 806.
nuisance, elements of damage, interest and expenses, § 1048.
interest in estate, damages affected by, § 1057.
permanent injury, estoppel from recovery of future damages, § 1046.
personal injuries, compensatory damages, pecuniary and other circumstances of parties, § 1254.
excessive or insufficient verdicts, power of court over verdicts, § 460.
interest, actions for torts, § 355.
loss of capacity for enjoyment as damages, § 1243.
probate bonds, liability as between sets of sureties, § 498.
railroads, animals injured, interest, actions for torts, § 355.
replevin, damages, intermediate injury and appreciation, § 1152.
property not returned, § 1148.
telegrams, mental anguish, damages, grounds upon which liability is denied, § 978.
trespass to real property, trees and mining ores, liability, § 1019.
trover, damages, interest and value of use of property, § 1115.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses, and counterclaims, rule in various states, § 636.

Mistake
agency, assumption of agency, liability to third persons, § 796.
recovery of money from agent, agent's liability to third persons, § 799.
assessment of damages, correction of error, § 434.
bills and notes, interest, § 556.
carriers of goods, losses, liability of carrier, § 931.
compensatory damages, breach of contract, motive as affecting damages, § 99.
compromise and settlement, bills and notes, partial want of consideration, effect, § 543.
contracts for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
covenants
breach of covenants for title, measure of damages, consideration, presumption of consideration, admissibility of evidence, § 594.
object of covenants, indemnity if title fails, § 591.
creditor's right to make application of payments, § 238.

Mistake—continued.
employee discharged, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
erection of building on land of another, mitigation of damages, § 1027.
exemplary damages, allowance, grounds upon which allowed, § 393.
injunction bonds, damages, defenses, scope of injunction, § 530.
interest, allowance on money had and received, § 352.
bills and notes, § 556.
compound interest, computation, application and effect of partial payments, § 379.
right to interest between partners, § 342.
judgment, necessity of judgment following verdict, § 466.
liquidated damages, intention to liquidate, evidence and effect of, § 284.
payment, application by creditor, § 238.
compound interest, computation, application, and effect of partial payments, § 379.
interest as between partners, § 342.
person to whom payment may be made, § 231.
person who may make payment, § 230.
what is not payment, setting aside, § 217.
remittitur, excessive and insufficient verdict, § 460.
sale of goods by factor, direct damages, what constitutes direct damages, § 14.
sales, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 653.
right of seller to recover purchase price and interest, abatement of price, § 567.
taxes, payment of, recovery of interest, § 337.
telegraphs and telephones, error in transmitting message, damages recoverable, expenses, § 966.
mistake or change of message, liability when object of sender is known, §§ 961, 963.
trespass to real property, exemplary damages, mitigation, § 1032.
measure of damages for taking and carrying away, timber improved, statutory damage, § 1020.
verdicts, excessive or insufficient verdict, setting aside, § 459.
rendition and amendment of verdict, § 457.

Mitigation of Damages
absence of malice, § 150.
admiralty torts, mitigation of liability, § 1295.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
neglect by agent of duty or agreement concerning insurance, § 772.
assault, agreement to fight, § 151.
payment of fine, § 151.
provocation, words, § 151.
assessment of damages, cause of action, right to controvert, § 431.
— reduction of damages, evidence of defendant, § 430.
assumpsit, mitigation of damages, action for rebuilding house, § 544.
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
bankruptcy, mitigation of damages, no mitigation when benefit not derived from defendant, § 158.
benefit, no mitigation when benefit not derived from defendant, § 158.
reduction of loss or benefit, § 164.
bills and notes, consideration, partial failure of consideration, availability of defense, § 545.
defense as resting on principle of rescission of contract, § 548.

Mitigation of Damages—continued.
breach of contract
mitigation of damages, § 154.
measure of prevention, return of property, discharge of plaintiff's debt, § 156.
no mitigation when benefit not derived from defendant, § 158.
breach of marriage promise, § 154.
certainty of damages, uncertain mitigation of breach, § 73.
lack of chastity, seduction, disease, § 990.
buildings destroyed to prevent fire, § 154.
burden of proof of damages, § 438.
carriers of goods
breach of contract to furnish goods for shipment, charter parties, mitigation of damages, duty of carrier, §§ 880, 882.
shipper's rights in profits made by carrier, § 881.
goods lost or injured, damages less than value of goods at destination, §§ 922, 923.
mitigation of liability by insurance, § 929.
carriers of passengers, negligence or breach of duty, mitigation of damages, § 949.
character and feelings, injury to, § 163.
consent of plaintiff to act complained of, § 162.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
contracts for work
delaying or stopping work, performance stopped by law, § 714.
recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, § 713.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
covenant against incumbrances, breach of covenant, right to recover damages, knowledge of incumbrances, § 620.
covenants for title, breach of covenant, conveyances, measure of damages, § 599.
mitigation or prevention of damages, §§ 601, 602.
covenants of warranty and quiet enjoyment, breach, measure of damages, partial breach, § 609.
mitigation of damages, § 611.
elements of damages, losses, expenses incurred to prevent or lessen damages, § 88.
employer may finish work at contractor's expense, § 91.
extent of duty, § 90.
vendor and vendee, § 89.
equitable doctrine, § 149.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
evidence, intendments against plaintiff for holding back evidence, § 440.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
evidence under general allegation of damage, § 418.
exemplary damages
enhancement and mitigation of, § 404.
wealth of defendant, scope of inquiry, § 405.
penal offenses, § 402.
restriction and denial, rule as to compensatory damages, § 395.
false imprisonment, § 154.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.

Mitigation of Damages—continued.
insurance, accident policies, scope of recovery, conflict between English and American decisions, § 836.
landlord and tenant, abandonment of lease, damages, § 844.
entry to make repairs, § 154.
mitigation of damages by lessee, § 871.
repairs, covenant by lessor to repair, breach of covenant, measure of liability, § 872.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
reduction of loss or benefit, § 164.
malice, absence of, § 150.
malicious prosecution, § 154.
measures of prevention, return of property, discharge of plaintiff's debt, § 156.
mesne profits, claims for improvements, taxes, § 999.
negligence, official neglect, § 160.
officer making modification of rule, § 161.
nuisance, § 1055.
officers, measure of damages against officers for neglect of duty, nominal damages, §§ 489, 491.
payment, § 167.
payment to plaintiff after suit, effect, § 436.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
medical and surgical aid, recovery of expenses, § 1250.
mitigation of damages, admissibility of evidence, § 1255.
plaintiff's acts and negligences, § 155.
pleading in mitigation, §§ 165, 166.
probate bonds, guardian's bond, mitigation of damages, § 497.
quantum meruit, evidence in reduction of damages, rule at common law, § 544.
recoupment, affirmative relief not obtainable, § 186.
notice of crossclaim, § 190.
validity of claim essential, § 174.
replevin
bonds, actions, effect of judgment in replevin suit, § 506.
judgment, what may be shown in defense or in mitigation, § 507.
recovery for intermediate injury and depreciation of property, § 1151.
sales
acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
liability for not accepting, remedies of seller, § 647.
breach of contract by seller, consequential damages, § 663.
delay in delivery, damages, § 664.
mitigation of vendor's liability to vendee, § 666.
delivery impossible, damages, § 655.
evidence of loss, § 653.
non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
purchase price paid, highest intermediate value, vendee's duty to lessen damages, § 656.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
mitigation of damages, consent of parent, § 1284.
evidence, chastity, § 1284.
slander and libel, mitigation, evidence, common reports as to plaintiff's guilt, § 1227.
provocation, §§ 152, 153.

Mitigation of Damages—continued.
telegrams, mitigation of damages by injured party, negligence in transmission or delivery of messages, § 973.
tender, right to make, demands, § 261.
timber, unlawful cutting of trees, § 154.
trespass, § 154.
trespass to personal property, § 1104.
aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
mitigation of damages, ownership of property, motive, § 1107.
trespass to real property, exemplary damages, mitigation, § 1032.
remediable injuries, estimate of damages, § 1018.
trover, conversion of money securities, measure of damages, § 1132.
mitigation of damages, §§ 1138-1141.
vendor and purchaser
breach of contract by vendor, damages, suits for specific performance, § 590.
elements of damage, loss of bargain, mitigation, § 584.
oral contract, § 583.
recovery when contract does not fix price, § 575.
vessels, breach of contract to furnish goods for shipment, mitigation of loss, duty of carrier, § 880.

Mobs and Riots
elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
interest, recovery, statutory liability for riots, § 330.
killing of prisoners, private injuries covered by official bonds, § 487.
trespass to personal property, mitigation of damages, § 1104.

Models
carriers, delay in transportation, goods to be used for competing for prizes, measure of damages, § 71.

Molasses
carriers of goods, freight charges, time when freight is due and earned, § 887.

Money
see also Currency.
baggage, sleeping car companies, liability, § 956.
what constitutes baggage, § 954.
bills and notes, necessity that bills and notes be payable only in money, § 559.
value, § 565.
carriers
delay in transportation, liability of carriers, § 905.
knowledge of or notice to carrier that goods must not be delayed, § 914.
duty of carrier, care of property, money stolen, § 916.
characteristics, § 205.
Confederate money, delay in transportation, negligence, proximate cause, § 903.
evidence, proof of pecuniary items by plaintiff, § 441.
exchange, rate of exchange, §§ 212, 213.
factors, funds, remitting, consequences of failure to obey orders, § 785.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
judgments, certainty, necessity that judgment be certain, § 467.
landlord and tenant, rent payable in specific articles, recovery, § 846.
Legal Tender Act, § 210.

Money—continued.
liquidated damages, certainty, contracts for payment of money, §§ 286, 287.
losses as elements of damage, what losses consist of, § 79.
payment, currency, § 207.
breach of contract to pay money, measure of damages, § 76.
mode of payment, §§ 214-216.
money of country of performance, § 206.
pecuniary representative of value, Ch. VI, §§ 205-213.
presumptions, value, effect of fluctuations in currency, § 211.
salvage services, amount recoverable, interest, conflict of laws, § 719.
tender, amount, sufficiency, § 267.
conditions, tender must be unconditional, § 270.
effect of tender, collateral securities, § 277.
money paid into court, § 276.
in what money tender may be made, § 263.
manner of making, § 268.
paying money into court, § 278.
necessity of paying money into court, § 274.
requisites, tender must be kept good, § 272.
sufficiency, amount, § 267.
waiver and omission of tender on sufficient excuse, § 273.
trover, money securities, conversion, action, measure of damages, § 1132.
use prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
value, effect of changes in value of money, § 208.
effect of fluctuation in currency, § 211.
time of contracting, § 209.
value of bills and notes, solvent parties, measure of damages, § 565.
vendor and purchaser
damages recoverable by purchaser against vendor, adjustment of counter equities in specific performance, § 589.
rescission, adjustment of counter demands, § 587.

Money Deposited
liquidated damages, stipulation for payment of fixed sum for partial or total breach, § 295.

Money Had and Received
breach of covenants for title, measure of damages, effect of recovery on total breach, § 596.
interest, allowance of interest on money had and received, § 352.
pleading, how interest claimed in pleading, § 387n.
mutual credit, compensation by mutual demand, § 148.
vendor and purchaser, breach of contract by contract by vendor, defaulting vendee's rights, § 586.
measure of damages, conflict of American decisions, § 580.

Money Loaned
agent's violation of duty, secret profits, § 769.
breach of contract, certainty of damages, anticipated profits, § 60.
consequential damages, liability under special circumstances, § 51.
greater damage than interest for failure to loan money, § 77.
measure of damages, failure to loan money, § 76.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
broker's compensation for services, measure of compensation, § 683.
liability, § 786.
conflict of laws
interest, effect of change in law of place of contract, § 368.
law governing where usury is involved, §§ 363, 364.
parties, in different states, § 361.

Money Loaned—continued.
elements of damage, failure to loan money, § 76.
false representation, measure of damages, § 1171.
interest, agreements for interest, rate applicable after debt due, § 309.
agreements for more than legal rate after maturity, not usury but penalty, § 318.
allowance of interest on money loaned, § 325.
conflict of laws, contracts between parties in different states, § 360.
effect of change in law of place of contract, § 368.
effect of usury, §§ 362, 363.
necessity of demand, § 351.
right to interest, § 300.
right to interest between partners, § 342.
suspension, war preventing payment, § 382.
payment, application by debtor, evidence, § 237.
usury, when contracts not void for usury, § 315.

Money Paid
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
covenants of warranty and quiet enjoyment, breach, measure of damages, extinguishment of adverse title by covenantee, § 610.
interest, allowance, money paid, §§ 326, 327.
suretyship
remedy for indemnity, action against principal for money paid, § 745.
measure of recovery, § 748.
payment giving right to reimbursement, §§ 750, 751.
when right of action accrues, § 747.
vendor and purchaser, breach of contract by vendor, defaulting vendee's rights, § 585.
recovery on parol contract, § 583.

Money Stolen
payment, what is not payment, § 217.

Monopolies
see, also, Combinations and Monopolies.
conspiracy, business, measure of damages sustained by one driven out of business, § 1174.

Montana
bills and notes, stipulations for costs and attorneys' fees, § 564.
evidence, physical examination of plaintiff, § 451.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
interest on judgment pending review, § 389.
replevin, damages, property not returned, § 1148.
trover
damages, property of fluctuating value, § 1118.
rule in particular states, § 1111.

Moral Obligation
injury warranting right to damages, § 2.

Morphine Sold for Quinine
child killed, negligence in selling drugs, nominal damages, right to recovery, statutes as to death by wrongful act, § 10.

Mortality Tables
covenants for title, breach of covenants, life estates conveyed, ascertainment of value, use of life tables, § 601.

Mortality Tables—continued.
death by wrongful act, damages, recovery by widow, § 1265.
estates of decedents, damages, pecuniary loss to estate, § 1277.
evidence, annuity and life tables, admissibility in evidence, § 455.
personal injuries, prospective damages, number of actions maintainable, § 1251.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.

Mortar
sales, breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 672.

Mortgages
agency, authority, agent acting without or in disregard of authority, damages, § 787n.
bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 776.
appeal and supersedeas bonds, liability if judgment is in part for money or in rem, Rule of U. S. Supreme Court, § 533.
assignment, consequential damages, breach of contract, proximate consequences of breach, § 45n.
damages recoverable by vendor against purchaser, recovery when contract does not fix price, § 575.
evidence of value, property without market value, § 449.
injunction bonds, damages from restraint of injunction, § 527.
payment, guaranty of payment, measure of liability of guarantor, § 732.
mode of making payment, § 216.
suretyship, contribution, basis, liability for costs, § 756.
tender, necessity that tender be unconditional, § 270.
value of property, elements of value, presumptions, breach of contract to assign, § 448.
attorney's negligence, act or omission as proximate cause of injury, consequential damages, § 30n.
bills and notes, liability of drawer and endorser for principal sum, § 555.
parol evidence to show defect of consideration, admissibility, § 551.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bond to satisfy mortgage, breach of covenant to pay incumbrances, measure of damages, § 631.
bonds, penalty as limit of recovery, exception as to interest, § 478n.
cancellation, measure of damages against sureties on official bonds, § 488.
cause of action, entirety, damages accruing subsequent to action, § 113.
conflict of laws
interest, law governing where usury is involved, § 364.
parties in different states, § 361.
covenants, actions, defenses and crosclaims against purchase money, New York rule, § 633.
defenses in equity, § 641.
covenants against incumbrances, breach, § 621.
amount of incumbrances as measure of damages, English and Canadian rule, § 624.
definition, what are incumbrances, § 620.
effect on executory contract, § 621.
rule of damages, criticism, § 626.
remote losses, § 622.
covenants for title, breach of covenants for title, damages, nominal damages, mortgage foreclosure, § 602.

Mortgages—continued.
covenants of warranty and quiet enjoyment, breach, action, parties, § 603.
damages, § 631.
existence of lien, satisfaction, § 609.
extinguishment of adverse title by covenantee, § 610.
property as consideration, § 606.
scope, remedy for breach, § 603.
covenants to pay incumbrances, nature and form, breach, damages, § 631.
creditor's right to make application of payments, §§ 238-240.
damage to mortgaged premises, mitigation of damages, reduction of loss or benefits, § 164.
demand of payment, allowance of interest on accounts, § 350.
discharge or satisfaction
payment, bill, note or check, § 225.
evidence of payment, § 233.
tender, conditions, tender must be unconditional, § 270.
dower, limitations, incumbrances, dower right subject to incumbrances, §§ 1006, 1007.
eminent domain, interest on compensation, § 1091.
time of assessment of damages and benefits, § 1083.
evidence of payment, § 233.
express indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 766.
false representations, title of real estate, false representations as to measure of damages, § 1171.
fences, releases, extrinsic evidence and construction, § 255.
fire insurance
damages, general rule, right of mortgagor to recover insurance, § 821.
insurance by mortgagee, § 829.
foreclosure, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
appeal and supersedeas bonds, interest and damages, award on appeal, § 538.
liability in state courts if judgment is in part for money or in rem, § 534.
breach of contract to loan money, consequential damages recoverable only when contemplated by parties, § 46.
greater damage than interest for failure to pay or to loan money, § 77.
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
evidence of payment, § 233.
injunction bonds, damages from restraint of injunction, foreclosure enjoined, § 528.
defenses, facts not available as defenses, § 529.
injury to crops, consequential damages, § 19.
interest, allowance, money paid, § 326.
allowance from time when money ought to be paid, § 329.
award on appeal, §§ 538, 539.
compound interest, illustrations, § 374.
suspension of interest, process, payment prevented by legal process, § 381.
liquidated damages, amount, large sum to secure payment of small sum, § 288.
marshaling and distribution, principle on which priority determined, § 197.

Mortgages—continued.
foreclosure—continued.
rights where one creditor may resort to two funds and another to only one, § 145.
measure of damages against officers for neglect of duty, nominal damages, § 490.
measure of damages against sureties on official bonds, § 488.
payment, mode of making payment, § 216.
penalties, limit of recovery, interest, § 478.
restitution after reversal of judgment, § 469.
sale, value of mortgaged land conveyed, false representations, damages, § 1174.
suretyship, right of surety to compel payment by debtor, § 749.
tender, when tender may be made, § 262.
usury, recovery under usury statute, § 317.
vendor and purchaser, action for purchase money defenses and counterclaims, New York rule, § 633.
rule in various states, § 636.
fraud, deed executed rather than mortgage, measure of damages, § 1171.
false representations, measure of damages, elements, costs of suit, § 1173.
reliance on representations, negligence of injured party, § 1168.
remote, conjectural and contingent damages, § 1175.
sale of mortgage induced by fraud, damages, § 1171.
guaranty, measure of guarantor's liability, § 729.
guarantor's liability where collateral is given, § 734.
lost profits, remote damages, § 729.
payment, application, general payments applied to debt, least secured, § 245.
guaranty of collection, liability for costs, diligence, § 733.
injunction bonds, damages, facts not defenses, § 529.
damages from restraint of injunction, § 526.
injury to property, security diminished, measure of damages, § 1034.
insurance, collateral security, life insurance as collateral security, violation of condition by insured, § 834.
injury, extent, measure of damages on open policies, § 81.
interest, agreements for interest, rate applicable after debt due, § 308.
allowance of interest on account, § 350.
conflict of laws, contracts between parties in different states, § 361.
effect of usury, § 364.
debt, interest due by agreement as debt, § 371.
liquidated damages, certainty, contracts for payment of money, § 286.
rate applicable after debt is due, § 308.
right to interest as affected by marital relation, § 341.
suspension, miscellaneous cases, § 380.
payment prevented by legal process, § 381.
tender stopping interest, when tender may be made, § 385.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
breach of covenant of quiet enjoyment, general rule of damages, § 864.
mortgagee in possession, interest as between landlord and tenant, § 339.
liquidated damages, certainty, contracts for payment of money, § 287.
interest as damages, §§ 286, 287.
marshaling and distribution, effect of creditor releasing part, § 194.
rights of creditors where funds belong to two depositors, § 196.
sale subject to encumbrances, § 193.
official bonds, private injuries covered by official bonds, § 487.
payment, application by creditor, §§ 238, 240.
application by debtor, § 236.

Mortgages—continued.
Payment—continued.
breach of contract to pay special obligations, measure of damages, §§ 77, 79.
collaterals collected or lost by negligence of collector as payments, § 228.
extension of time, breach of contract, elements of damage, losses, § 79.
general payment applied to debt least secured, § 245.
gift inter vivos, payment by, § 221.
indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
note, bill or check, payment by, § 229.
person to whom payment may be made, § 231.
person who may make payment, § 230.
pro rata application, § 242.
power of sale, breach of contract not to exercise power, elements of damage, losses, § 79.
records, agent's particular duties and liabilities, duty to record, principal's right to indemnity, § 771.
entry of satisfaction, officers, neglect of duty, measure of damages, nominal damages, § 490.
neglect of clerk to index mortgage, damages, losses, attorney's fees in defending suit, § 83n.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
redemption, breach of contract, elements of damage, losses, § 79.
refusal to execute, breach of contract, damages recoverable by vendor against purchaser, measure of damages, § 570.
release of payment of mortgage, who may execute, § 256.
removal of fixtures, mitigation of damages, reduction of loss or benefit, § 164.
rent, apportionment of rent, § 849.
replevin
bonds, actions, defenses, mitigation of damages, § 507n.
judgment, what may be shown in defense or in mitigation, § 507.
damages for detention, recovery of value of use of property, § 1144.
defendant's rights, damages, § 1155.
mitigation of damages, § 1159.
recovery of damages as affected by title or interest in property, § 1160.
judgment, option of taking property or its value, § 1148.
sales, attachment bonds, wrongful attachment, damages recoverable, § 512.
breach of contract, action by purchaser against seller, proof of value of property, § 654.
marshaling assets, distribution, sale subject to incumbrances, § 193.
warranties of title, existence, § 668.
sale of goods, trover, mitigation of damages, § 1138.
sale of mortgaged land, broker's compensation, amount, basis for computation, § 683.
fraud, false representations, remote, conjectural and contingent damages, § 1176.
strict foreclosure, instances of interest on interest, § 374.
suretyship
creditor's duty to realize on securities, limitation of release to injury sustained by surety, § 738.
refusal of payment, application of deposits to indebtedness, § 737.
express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 766.

Mortgages—continued.
suretyship—continued.
measure of surety's liability, § 723n.
surety's remedies for indemnity, contribution between co-sureties, basis of contribution, liability for torts, § 756.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
payment giving right to reimbursement, § 750.
right of surety to compel debtor to pay, § 749.
right to call upon creditor to collect debt, damages, § 741.
tender, by whom tender may be made, § 264.
effect, collateral securities, § 277.
necessity that tender be unconditional, § 279.
persons to whom tender should be made, § 265.
requisites, in what money tender must be made, § 263.
time of making tender, § 262.
title insurance, nature of contract, § 840a.
trespass, injunction bonds, damages from restraint of injunction, § 526.
trespass to personal property, title or interest of plaintiff in property, amount of damages recoverable, § 1097.
trover
damages, general rule, exception as to place of conversion, § 1109.
limitation of recovery to plaintiff's interest in property, §§ 1136, 1137.
special or consequential damages, § 1129.
time of conversion, § 1112.
usury, who may take advantage of usury, § 314.
value of property, evidence, actual sales, offers for property, market quotations, § 447.
vendor and purchaser
breach of contract by purchaser, measure of damages, § 570.
assumption of mortgage, notes given for price, § 571.
interest on purchase money, § 577.
breach of contract by vendor, adjustment of counter equities in specific performance, § 589.
measure of damages, nominal damages, elements of damages, § 582.

Motions
injunction vacated, injunction bonds, right of action, when it arises, parties who may sue, § 522.
set-off of judgments, nature of action immaterial, foreign judgment, § 203.
when granted, § 199.

Motive
attachment, bonds, exemplary damages, §§ 513, 514.
contracts, breach of contract, exemplary damages, compensation, wrong done with bad motive, violation of contract, § 390.
damnum absque injuria, § 3.
elements of damage, motive, confusion of goods, how motive affects consequences, § 101.
distinction made for bad motive, contracts, § 99.
tort actions, § 100.
exemplary damages, compensation, wrong done with bad motive, violation of contract, § 390.
malice in law and malice in fact, § 394.
injunction bond, power of court of equity, § 521.
right to compensation not affected by motive, § 98.
sales, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.

Motive—continued.
trespass to real property, exemplary damages, mitigation, § 1032.
use of property, damnum absque injuria, § 3.

Mules
automobiles frightening mule, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.
carriers of goods, loss or injury to property, recovery for expenses and labor in lessening loss, § 921.
sales, telegraphs and telephones, knowledge of sender's purpose, details, § 969.

Multiplicity of Suits
see also Equity.
vendor and purchaser, action for purchase money, defenses and counterclaims, diversity of decision, § 632.

Municipal Bonds
bills and notes, liability of drawer and endorser for principal sum, § 555.
interest, miscellaneous case of suspension of interest, § 380.
issue of bonds enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.

Municipal Corporations
actions, defenses, circuity of action, operation of principle in favor of plaintiff, § 145.
attorney's fees, injunction bonds, damages, costs and expenses attorneys' fees, § 524.
bonds, interest, suspension, miscellaneous cases, § 380.
certificate of indebtedness, payment, genuineness of certificates, § 223.
claim against municipality, ad damnum, limit of recovery, erroneous claim of damages, § 417.
amendment of claim for personal injuries, erroneous claim, effect, § 417.
compensation of laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
culvert, child falling into, consequential damages for torts, liability, illustration, § 18.
debts, payment, place of payment, § 214.
elements of damage, losses, indemnity to municipality, counsel fees, § 83.
eminent domain, assessment of damages and benefits, lands to be considered, § 1088.
compensation, basis for estimating value of land, § 1074.
deduction for benefits, special benefits, § 1084.
exemplary damages, liability of municipalities for exemplary damages, § 412.
funds, tender, to whom tender may be made, § 265.
indemnity to municipality, losses as elements of damage, notice to defend action, § 83.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
interest, allowance against government, § 332.
allowance on taxes, § 337.
condemnation proceedings, § 336.
demand, necessity to secure allowance of interest, § 351.
statutory liability for riots, § 330.
leases, business, recovery for damages to business of lessee, § 868.
repairs, breach of covenant to repair, measure of liability, § 858.
licenses, revocation of licenses as damnum absque injuria, § 3.
mobs and riots, interest, allowance of interest, statutory liability for riots, § 330.

Municipal Corporations—continued.
mobs and riots—continued.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
officers and agents, dismissal, exemplary damages, liability of municipalities, § 412.
liquidated damages, contracts, validity, § 279.
parties, joint and several liability for torts, § 140.
tender, persons to whom tender should be made, § 265.
ordinances regulating water companies, liquidated damages, evidence and effect of intention to liquidate, § 284.
payment, place of making payment, § 214.
railroad aid, contracts for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
liquidated damages, mode of liquidating, computation of time, § 281.
sidewalks, see Sidewalks.
sinking fund, certainty of damages, failure of municipal corporations to provide sinking fund, § 74.
streets, see Highways and Streets.
tender, interest, necessity of demand, § 351.
trespass to real property, destruction, damages, § 1015.
warrants, cause of action, severance of entire demand, § 109.
payment, what is not payment, § 217.

Murder
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.

Museum
carriers of goods, delay, liability where facts are known, § 913.
loss of property, liability for mental suffering, § 915.

Music and Musical Instruments
baggage, what constitutes baggage, § 954.
sale of, liquidated damages, payment of fixed sum for partial or total breach of contract, § 294n.

Mutilation
notes, payment, what is not payment, § 217.

Mutual Credits
compensation by mutual demand, § 148.
payment, mode of payment, § 215.

N

Names
beneficiaries, death by wrongful act, pleading of damages, § 426n.

National Banks
see Banks and Banking.
usury, effect of usury, § 313.

Natural Consequences of Acts
see Consequential Damages; Proximate Result.
consequences of damages, right to recover, § 16.

Navigable Waters
see also Riparian Owners; Vessels; Waters and Water Courses.
collision of boats, consequential damages, § 18.

Navigable Waters—continued.
consequential damages, act complained of must be efficient cause of damage, § 30.
dams, negligence in operation, consequential damages, § 19.
nuisance, interference with business, element of damage as distinct injury affecting premises, § 1054.
private nuisance, special damages, necessity of alleging, § 420.
obstruction to navigation
carriers of goods, delay in transportation, negligence, proximate cause, § 903.
freight charges, time when freight is due and earned, § 887.
consequential damages, certainty, recovery of items of damages which are certain, § 55.
intervening cause, § 38.
liability for principal loss extending to details for incidents, § 54.
elements of damages, § 1048.
interference with business, element of damage, § 1054.
public wrongs, obstruction of canal, right to damages, § 4.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.

Ne Exeat
failure to prosecute, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.

Nebraska
attachment bonds, damages recoverable, § 512.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorneys' fees, § 564.
bonds, statutory bonds, liability of sureties, § 475.
covenants for title, construction of covenant of seizin, what constitutes breach, § 591.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
wrongdoer's improvements, § 1076.
evidence of value and damages, § 1089.
property not taken, consequential injury, § 1062.
evidence of injury, annuity and life tables, § 455.
physical examination of plaintiff, § 451.
execution enjoined, injunction bonds, damages from restraint of injunction, § 528.
exemplary damages, restriction or denial of exemplary damages, § 398.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
insurance, total loss, what constitutes, § 807.
interest, compound interest, interest on instalments of interest, § 375.
landlord and tenant, partial destruction of demised property, effect as to rent, § 851.
malicious prosecution, mitigation, evidence, § 1239.
replevin
damages, increase in value by defendant, § 1154.
property not returned, § 1148.
parties, who may sue, § 1143.
trespass to personal property, special and consequential damages, §§ 1101, 1102.
trespass to real property, occupation of land by railroads, damages, § 1016.
trees and mining ores, liability, § 1019.
trover, evidence of value, § 1113.
usury, effect, contracts not void for usury, § 315n.

Nebraska—continued.
vendor and purchaser, breach of contract by vendor, measure of damages, conflict of American decisions, § 579.

Neck Injured
evidence, photographs as evidence of damages, § 454.

Negligence
see Personal Injuries; Telegraphs and Telephones, and similar titles.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, §§ 775, 776.
duty of agent to inform principal, reports, § 769.
duty of agent to render accounts, effect of misrepresentations, § 784.
insurance, neglect by agent of duty or agreement concerning insurance, § 772.
liability for acts of agents, exemplary damages, parties liable, liability of master for acts of servants, §§ 408, 409.
liability of agent for tort, § 800.
particular duties and liabilities of agent, right of principal to indemnity, scope of agent's liability, § 771.
architects, negligence, parties, joint liability, extinguishment or severance, § 136.
assessment of damages, evidence of defendant in reduction of damages, § 430.
attachment, forthcoming bonds, measure of damages, § 518.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.
attorneys, act or omission as proximate cause of injury, consequential damages, § 30n.
actions for compensation, value of services rendered, admissibility of evidence, § 682.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
measure of agent's liability, defaults in regard to bills and notes, § 776.
bailments, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
bills and notes, partial failure of consideration, nature of defense, cross-action, § 546.
value of bills and notes, solvent parties, measure of damages, § 565.
bonds, measure of damages against officers for neglect of duty, nominal damages, § 489.
bonds of employees, suretyship, contract not to be extended by construction rule as to bonds of surety companies, § 725.
brokers, agency, duties, liability, disregard of instructions, § 786.
burning of building, tort, parties, joint right or liability, determination, principles, § 137.
carriers of goods, apportionment of damage, mutual fault, § 928.
delay, knowledge of or notice to carrier that goods must not be delayed, § 913.
liability for loss of market value of property, quantity or quality, § 906.
basis of rule, § 907.
liability for negligence proximate cause, § 903.
notice of arrival, neglect to give notice of refusal to receive goods, § 910.
transportation of dead bodies, physical and mental suffering as elements of damage, § 915.
duty of carrier, care of property, burden of proof as to injury or loss, § 917.

Negligence—continued.
carriers of goods—continued.
freight charges, recoupment against freight, negligence or violation of contract, § 896.
goods lost or injured, apportionment of damages in case of mutual fault, § 928.
goods having market value, damages, § 918.
proof of value, § 933.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
limitation of liability, contracts, limitation of common law liability, Carmack Amendment, § 904.
perishable property, liability of carrier, property not protected from weather, § 931.
carriers of passengers, nature of obligation, liability of carrier in tort, § 934.
negligence or breach of duty, damages recoverable, nature of injury, § 942.
exemplary damages, difference in rule in some states, § 951.
cause of action, entirety, damage to property and personal injury, § 118.
splitting, necessity and advantage of successive actions, § 127.
consequential damages, § 16.
acts of third persons, § 40.
certainty, recovery for successive consequences of act or omission, § 57.
liability as affected by extraordinary circumstances, illustrations, § 35.
nervous shock without impact, right to recover damages, § 24.
proximate consequences of act or omission, wilful or malicious injuries, § 43.
right to damages, § 16.
stockholder's right of action for negligence in conducting corporations, injury through third person, § 33.
construction of building, cause of action, entirety, damage to real property, § 116.
contracts for services, express contracts, necessity of full performance, inability to perform, stipulation for notice where servant quits employ, § 690.
implied contracts, right to recover for services rendered, § 679.
contracts for work, breach of contract, contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
defects, consequential damages, § 705.
contractual exemptions from liability for damages, § 6.
contributory negligence, admiralty, torts, damages recoverable, effect of contributory negligence, §§ 1286, 1288.
mitigation of damages, § 155.
trespass to personal property, mitigation of damages, § 1104.
covenants of warranty and quiet enjoyment, breach, measure of damages, conflict of laws, what law controls, § 605.
death, action, right of action at common law, § 1259.
elements of damage, mental suffering, § 95.
value of property, § 105.
eminent domain, deduction for benefits, special benefits, § 1087.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1068.
exemplary damages, allowance, grounds upon which allowed, § 393.
liability of municipalities, § 412.
malice in law and malice in fact, § 394.
restriction and denial, Massachusetts rule, § 397.
rule in Connecticut, § 400.
rule of United States Supreme Court, § 392.

Negligence—continued.
factors, accounts, duty of factor to render, effect of misrepresentation, § 784.
sale of goods, care, factor's duty, § 777.
liability for making sale on unauthorized terms, § 782.
measure of liability, sale at unauthorized price, § 778.
Federal Employers' Liability Act, see Federal Employers' Liability Act.
fraud, false representation, belief of defendant in representations, § 1169.
reliance on representations, negligence of injured party, § 1168.
gross negligence
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
necessity that anguish proceed from act causing physical injury, § 95.
guaranty, measure of guarantor's liability, lost profits, remote damages, § 729.
imputed negligence, personal injuries, mitigation of damages, admissibility of evidence, § 1255.
interest, actions for torts, § 355.
allowance against agents, trustees and officers, § 353.
leases, covenants, exemplary damages for breach of various covenants, § 866.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
mitigation of damages by lessee, § 871.
partial destruction of demised property, effect as to rent, § 851.
rent, duty to pay, effect of partial destruction of demised property, liability under statutes, § 851.
rent payable in specific articles, recovery, § 846.
repairs, breach of covenant to repair, measure of liability, § 858.
lessor's liability for special and consequential damages, § 874.
lessee's duty, recovery by lessee for making repairs, § 873.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
master and servant, exemplary damages, parties liable, master's liability for acts of servant, § 408.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
mitigation of damages, evidence disclosing fact, reducing injury, § 159.
plaintiff's acts and negligences, § 155.
pleading, § 166.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
money paid, allowance of interest, § 326.
nervous shock as physical injury, consequential damages, § 22.
nervous shock without impact, consequential damages, § 21.
officers
negligence of, attachment bonds, wrongful attachment, damages recoverable, § 512.
measure of damages, against officers for neglect of duty, nominal damages, §§ 489-492.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
parent and child, child run over by vehicle, items of special damages, § 952.
parties, joint and several liability for torts, §§ 140, 141.
payment by note, bill or check, § 229.

Negligence—continued.
payment, collaterals collected or lost by negligence of collector as payments, § 228.
personal injuries, interest, allowance of interest in actions for torts, § 355.
pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
proximate cause
consequential damages, § 16.
act complained of must be sufficient cause of injury, §§ 29, 31.
quantum meruit, recovery for services, evidence, defenses, § 679.
railroad's negligence, collision, consequential damages, extension of liability by statutes, § 16.
releases, extrinsic evidence and construction, § 255.
measure of damages against officers for neglect of duty, nominal damages, § 491.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
salvage service, forfeiture of right to compensation, § 721.
nature of peril, duty of claimant, persons who may be salvors, §§ 716, 717.
necessity of saving property, § 718.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
connection between cause of action and cross-claim, § 183.
fraud, breach of warranty, negligence, etc., §§ 179, 180.
liquidated and unliquidated damages, § 185.
validity of claim essential, § 174.
suretyship, creditors' duty to realize on securities, application of deposit to indebtedness, § 737.
surety's right to defend between principals, § 743.
telegrams, delay in transmission or delivery of messages, damages recoverable, § 961.
knowledge of sender's purpose, § 968.
liability when object of sender is known, § 961.
mistake or change of message, illustration, §§ 962-964.
limitation of liability, extent of power to limit liability, persons bound by stipulations, conflict of laws, § 958.
loss of employment and profits of business, § 967.
messages in cypher, or company not informed of its importance, §§ 959, 960.
mitigation of damages by injured party, negligence in transmission or delivery of messages, § 973.
timber destroyed, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
trespass to real property, liability for destroying trees or timber, § 1019.
trusts, interest, allowance against agents, trustees and officers, § 353.
vendor and purchaser
breach of contract by vendor, adjustment of counter demands, rescission, § 587.
adjustment of counter equities in specific performance, § 588.
measure of damages, nominal damages, elements of damages, § 582.
wilful or malicious injuries, consequential damages, § 43.
elements of damage, mental suffering, § 96.

Negligence—continued.
wool injured, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Negotiable Instruments
see Bills and Notes.

Negroes
firing on negroes, preventing trade, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.

Nervous Shock
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
ejection of passengers, consequential damages, liability of carriers, extraordinary circumstances, § 36.
mental anguish independent of other injury, § 942.
threat of ejection, recovery for mental suffering independent of other injury, § 943.
consequential damages, act of injured party, fraud and exposure to peril, § 39.
nervous shock as physical injury, §§ 22-23a.
miscellaneous cases, § 24.
right to recovery for nervous shock, § 22.
right to recover for injury to health, § 23.
nervous shock without impact, § 21.
elements of damage, mental suffering, § 95.
eviction of tenant, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
evidence, expressions, conduct and religious belief of sufferer, § 453.
payment of checks, breach of contract to pay money, special obligations, measure of damages, § 77.
personal injuries, damages where negligence only is alleged, mental anguish, § 1245.
pleading, special damages, necessity of alleging, § 421.
telegrams, negligence in transmission of messages, damages, § 965.
liability when object of sender is known, § 961.
mental suffering, summary of authorities, § 979.
vehicles colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23a.
verdicts, excessive or insufficient verdicts, § 459n.
wife injured, parties, joint right or liability for tort, determination, § 137.

Neurasthenia
nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
mitigation of damages, extent of duty to lessen or prevent damages, § 90n.

Nevada
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
exemplary damages, allowance, in what actions recoverable, § 392.
death by wrongful act, pleading of damages, § 426.
parties liable, master's liability for acts of servant, § 410.
removal of timber enjoined, injunction bonds, damages from restraint of injunction, § 527.
replevin, damages, property not returned, § 1148.
defendant's rights, special and consequential damages, § 1158.

New Hampshire
bills and notes, interest, compound interest, interest on instalments of interests, § 375.
partial failure of consideration, § 545.
bonds, administration of estates, liability of sureties, § 495.
contracts for services, statutes as to hours of work, § 681.
eminent domain, deduction for benefits, special benefits, § 1086.
effect of judgment for compensation, abandonment of proceedings, § 1090.
evidence of value and damages, § 1089.
interest, element of compensation, § 1091.
railroad, property condemned for railroad uses, compensation, § 1078.
exemplary damages, allowance, difference of views, § 391.
parties liable, master's liability for acts of servant, § 410.
restriction and denial of exemplary damages, § 396.
fire insurance, losses and damages, recovery in special cases, § 827.
interest, suspension, tender stopping interest, unliquidated damages, § 384.
landlord and tenant, lessee's right to damages for injury to business, § 869.
mesne profits, elements of damages, costs of ejectment suit, § 993.
nuisance, continuity, when nuisance is not continuous wrong, § 1043.
mitigation of damages, deduction for benefits, § 1056.
suretyship, contribution, basis, liability for costs, § 756.
trespass to personal property, damages for taking or destroying property, interest, § 1096.
trespass to real property, occupation of land by railroads, damages, § 1016.
usury, recovery under usury statute, § 317.

New Jersey
assessment of damages, right to call new jury, § 433.
bills and notes, partial failure of consideration, § 545.
bonds, administration of estates, liability of sureties, § 495.
breach of marriage promise, damages for loss of marriage, defendant's wealth, § 988.
excuses for breach, § 990.
carriers of passengers, liability for exemplary damages, § 951.
contracts for particular work, employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
death by wrongful act, children's loss, death of parent, § 1267.
special damages, § 1278.
dower, damages for detention of dower, § 1003.
eminent domain, assessment of damages and benefits, time of, § 1083.
evidence of value and damages, § 1089.
injury to property not taken, ascertainment, § 1070.
railroad property condemned for railroad uses, compensation, § 1078.
fire insurance, mortgagee as insurer, § 829.
fraud, pleading, § 1180.
judgment, necessity of certainty, § 467.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
mesne profits, elements of damages, costs of ejectment suit, § 993.
nuisance, mitigation of damages, deduction for benefits, § 1056.
personal injuries, mitigation of damages, evidence, § 1255.
replevin, damages, property not returned, § 1148.

New Jersey—continued.
slander and libel, damages, mental suffering and physical incapacity, § 1214.
trespass to personal property, special and consequential damages, § 1100.
vendor and purchaser, breach of contract by vendor, measure of damages, conflict of American decisions, § 579.
English rule, application, § 581.

New Mexico
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.

New Trial
assessment of damages, error, correction of error in assessment, § 434.
interest, judgments pending review, § 389.
verdict before judgment, § 388.
nominal damages, effect of failure to allow, § 11.
verdicts, excessive and insufficient verdict, lack of evidence to sustain, remittitur, §§ 459, 460.
necessity that judgment follow verdict, § 466.
violation or rights, actual damages, triviality right to nominal damages, § 11.

New York
agency, measure of agent's liability, defaults in regard to bills and notes, § 776.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
arbitration and award, bonds, § 539c.
attachment bonds, defenses, mitigation of damages, § 515.
attorney's fees, attachment, bonds, recovery of costs and expenses of attachment suit, § 516.
baggage lost or injured, measure of damages, § 955.
bills and notes, guaranty, effect of indorsing negotiable paper, § 730.
payment, guaranty of payment, measure of liability of guarantor, § 732.
re-exchange and damages on bills dishonored, § 561.
bonds, penalty as limit of recovery, exception as to interest, § 478.
carriers of goods, limitation of liability by contract, interstate commerce, § 904.
qualification of carrier's liability by notice, interstate commerce, § 926.
carriers of passengers, liability for exemplary damages, § 951.
recovery for injury to wife, child or servant, § 952.
contract for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
contractor's right to payment, rights in insurance money, interest, § 706.
demand for part performance of entire contract, recovery, contractor on quantum meruit, § 710.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.
recovery by contractors, part performance of severable contract, § 708.
covenants, actions, defenses and cross-claims against purchase money, New York rule, § 633.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
covenants against incumbrance as covenants running with the land, damages recoverable for breach, rule in some states, § 625.

New York—continued.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
suit by covenantee against remote covenantor, § 614.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
dower, damages for detention of dower, § 1003.
right subject to incumbrances, § 1007.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, value for condemnor's purpose, § 1075.
compensation, wrongdoer's improvements, § 1076.
deduction for benefits, special benefits, § 1087.
elevated railroad and subway cases, § 1080.
evidence of value and damages, § 1089.
injury to property not taken, ascertainment, § 1068.
interest, element of compensation, § 1091.
evidence, physical examination of plaintiff, § 451.
exemplary damages as compensation and punishment, who may recover, § 401.
factor's duties, sale, measure of liability, sale at unauthorized price, § 778.
fire insurance, losses and damages, recovery in special cases, § 827.
mortgagee as insurer, § 829.
fraud, damages, expenses of litigation, § 1177.
false representations, defendant's belief in representations, necessity, § 1169.
remedies, election, § 1174.
pleading, § 1180.
remote damages, § 1175.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
insurance, total loss, what constitutes, § 807.
interest, allowance, stockholders' statutory liabilities, § 343.
landlord and tenant, breach of covenant for quiet enjoyment, general rule of damages, § 864.
condemnation of demised premises, effect as to lease, § 853.
covenants of landlord, breach, special and consequential damages, § 865.
destruction of demised premises, effect as to rent, § 852.
insurance, breach of covenant to insure property, damages, § 862.
partial destruction of demised property, effect as to rent, § 851.
rent, lessee's liability for interest, § 854.
repairs, lessee's duty, recovery for making, § 873.
lessee's right to damages for injury to business, § 868.
lessor's liability for special and consequential damages, § 874.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
life and accident insurance, character of contract, § 832.
malicious prosecution, elements of damage, § 1237.
mitigation, evidence, § 1240.
marine insurance, losses, general average, § 819.
mesne profits, interest, § 997.
limitation of damages to value of use, consequential and punitive damages, § 994.
remedy under code, § 1000.
nuisance, elements of damage, interest and expenses, § 1048.
interest in estate, damages affected by, § 1057.
interference with business, element of damage, § 1054.
joint and several liability, private and public nuisance, § 1059.

New York—continued.
nuisance—continued.
mitigation of damages, deduction for benefits, § 1056.
parties liable for, § 1035.
personal injuries, civil damage laws, exemplary damages, § 1253.
damages where negligence only is alleged, mental anguish, § 1245.
loss of time or injury to business, earning capacity diminished, § 1246.
replevin, damages, property not returned, § 1148.
exemplary damages, § 1145.
parties, who may sue, § 1143.
sales
breach of contract by seller, non-delivery of stock, § 657.
purchase price paid, damages, § 656.
executed sales, recovery by seller of full value, payment by bill or note, § 644.
warranties of quality and quantity, breach, damages, § 670.
interest, expenses and special injuries, § 672.
seduction, mitigation of damages, evidence of plaintiff, § 1284.
sewers and drains, nuisance, remote consequences, liability, § 1051.
slander and libel, defenses, failure of plea of justification, §§ 1224, 1225.
exemplary damages, § 1216.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
right of recoupment by surety, equitable offset of joint indebtedness, § 744.
right of surety to compel payment by debtor, § 749.
telegraphs and telephones, knowledge of sender's purpose, notice to company, § 968.
liability when object of sender is known, negligence in transmitting message, § 963.
repetition of message, limitation of liability, § 958.
trade-marks, infringement, measure of damages in equity and at law, §§ 1201, 1202.
trespass to personal property, damages, mental suffering, § 1095.
mitigation of damages, application of property to owner's benefit, § 1105.
trespass to real property, exemplary and statutory damages, § 1031.
ice injured, diversion of water, § 1022.
occupation of land by railroads, damages, § 1016.
trees and mining ores, liability, § 1019.
trover, conversion of insurance policies, damages, § 1133.
damages, attorney's fees, § 1130.
interest and value of use of property, § 1115.
place of conversion, liability of purchaser, effect of wilfulness, § 1110.
property of fluctuating value, § 1119.
conflict in New York cases, § 1120.
rule in particular states, § 1111.
mitigation of damages, § 1138.
vendor and purchaser, action for purchase money, defenses and counterclaims, New York rule, § 633.
breach of contract by vendor, measure of damages, conflict of American decisions, § 580.
recovery on parol contract, § 583.
necessity that vendor convey perfect title, effect of condemnation proceedings, § 572.
verdict, double, treble and exemplary damages, § 464.
vessels, charter parties, breach of contract to furnish goods for shipment, measure of damages, § 878.

New Zealand
death by wrongful act, compensation for pecuniary losses, § 1262.
trade-marks, infringement, measure of damages in equity and at law, § 1202.

Newspaper Route
evidence of value, property without market value, § 448.
sales, evidence of value of property, breach of contract by seller, § 654.
slander and libel, aggravation of damages, § 1209.
statutory duty of post-master to advertise letters, breach of duty, who may bring suit for breach, § 32.
trover, evidence of value, § 1113.
measure of damages, property without market value, § 1117.

Next of Kin
Federal Employers' Liability Act, who are under, § 1332.
recovery by collateral kindred for death, see Death by Wrongful Act.

Noise
damnum absque injuria, elevation of railroad tracks, § 3.
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.
property not taken, consequential injury, § 1062.
ascertainment of compensation, § 1066.
street railroads, pleading, special damages, necessity of alleging, § 420.

Nominal Damages
Ch. II, §§ 9-11.
admiralty, torts, recovery of damages by passengers, measure of damages, nominal damages, § 1288.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
compensation, certainty of damages, § 69.
particular duties and liabilities of agent, principal's right to indemnity, § 770.
amount, § 9.
ascertainment of amount, § 2.
assessment of damages, jury tam quam, § 432.
attachment bonds, exemplary damages, recovery, § 513.
attorney's negligence, measure of liability, defaults in regard to bills and notes, § 776.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bills and notes, want or failure of consideration, § 542.
breach of contract, nominal damages, right to, § 10.
breach of contract to pay money, special obligations, measure of damages, § 77.
building contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
carriers of passengers, ejection, place, removal of passengers at wrong place, loss of time and expense, consequences of exposure, § 938.
certainty of damages, anticipated profits, § 60.
child killed, negligence in selling drugs, nominal damages, right to recovery, statutes as to death by wrongful act, § 10.
contracts for services, necessity for full performance of express contract, inability to perform, § 687.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
contracts for tuition, measure of damages, non-attendance of pupil, refusal to pay fees, § 678.
contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.

Nominal Damages—continued.
contracts for work—continued.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, § 713.
covenant to pay incumbrances, breach, measure of damages, § 631.
covenants against incumbrances
breach, damages where incumbrance is permanent, § 627.
English and Canadian rule of damages, § 624.
rule of damages, criticism, § 626.
remote losses, § 622.
rule in some states, § 625.
connection with covenant for quiet enjoyment, § 630.
covenant in presenti, § 621.
effect on executory contract, § 621.
covenants for title
breach, mitigation or prevention of damages, § 601.
nominal damages, actual loss not shown, §§ 597, 598.
covenants running with land, § 600.
personal covenants connected with covenants of warranty, nominal damages, § 598.
remedies by grantee, recovery of expenses, § 598.
damages, elementary limitation of damages, § 75.
death by wrongful act, nominal damages, recovery, § 1264.
pleading in actions to recover for death, § 426.
dower, covenant against incumbrances, damages for breach, permanent incumbrance, § 627.
eminent domain, compensation, nominal damages, § 1063.
evidence of value of services, opinion evidence, § 680.
exemplary damages, basis on actual damages, nominal damages, § 406.
guaranty, contract of surety not to be extended by construction, illustration, § 727.
illustration of right to nominal damages, § 10.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
liability for losses and expenses, proximate result of act complained of, § 84n.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
insurance policy, conversion, measure of damages, § 1133.
issues, effect of not answering allegation of damage, § 416.
judgment, effect, assessment of damages, § 465.
maxim "De minimis non curat lex," application, § 11.
nature and purpose, § 9.
new trial, § 11.
officers and public employees, measure of damages against officers for neglect of duty, nominal damages, §§ 489-492.
English rule, § 492.
official bonds, measure of damages against sureties, § 488.
payment to plaintiff after suit, effect, § 436.
pleading, issues, effect of not answering allegation of damage, § 416.
special damages, necessity of alleging, § 419.
probate bonds, execution, manner, recoveries which may be had, § 494.
recoupment, nature of defense, § 170.
vendor and purchaser, § 184.
replevin
bonds, actions, damages recoverable, § 505.
condition required by modern statutes, § 501.
damages recoverable, § 505.
damages for detention, measure of damages, § 1144.

Nominal Damages—continued.
replevin—continued.
recovery for intermediate injury and depreciation of property, § 1151.
return of property, damages recoverable if property is not returned, § 1147.
right a substantial one, § 11.
sales
breach of contract, action by purchaser against seller, proof of value of property, § 654.
non-delivery of property not in market, recovery of lost profits, § 652.
breach of warranty, special damages, necessity of alleging, § 420.
breach of warranty of title, damages, § 669.
evidence of value of property, breach of contract by seller, § 654.
telegrams, conflict of laws, statutes as to recovery for negligent delay in transmission of messages, § 972.
negligence in transmitting or delivering messages, delay, knowledge of sender's purpose, § 968.
loss of employment and profits of business, § 967.
trade-marks, infringement, parties defendant, § 1200.
trespass to real property, definition, scope of remedy, § 1010.
suit by tenant, possessor or licensee, damages, § 1012.
trover
mitigation of damages, § 1139.
wilful taking or refusal to surrender, § 1140.
vendor and purchaser
breach of contract by vendor, measure of damages, § 578.
conflict of American decisions, § 579.
English rule, § 578.
nominal damages, elements of damages, § 582.
rescission, adjustment of counter demands, § 587.
suits for specific performance, § 590.
verdicts, excessive and insufficient verdict, cure of error, remittitur, §§ 459, 460.
necessity of certainty, § 461.
parties, verdict where there are several parties, § 463.
violation of rights, actual damages, triviality, right to nominal damages, § 11.
water, diversion of surface waters, rule of civil law, recovery of nominal damages, § 3.
what constitutes nominal damages, § 9.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.

Non-Suit
see Discontinuance; Dismissal and Non-Suit.

North Carolina
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
interest, compound interest, interest on instalments of interest, § 375.
stipulations for costs and attorneys' fees, § 564.
bonds of public officers, construction, § 485.
carriers of goods, delay, liability where facts are known, § 913.
refusal to receive property, damages, § 905.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 942.
contract for particular work, recovery by contractors, part performance of severable contract, § 708.
covenants of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.

North Carolina—continued.
covenants of warranty and quiet enjoyment—continued.
expenses, costs and counsel fees as damages, § 618.
eminent domain, evidence of value and damages, § 1089.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
pleading, matter of aggravation, necessity of alleging, § 422n.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
interest, compound interest, computation, application and effect of partial payments, § 379.
malicious prosecution, mitigation, evidence, § 1239.
nuisance, continuity, when nuisance is not continuous wrong, § 1045.
permanent injury, estoppel from recovery of future damages, § 1046.
personal injuries, compensatory damages, pecuniary and other circumstances of parties, § 1254.
excessive or insufficient verdicts, power of court over verdicts, § 460.
replevin, damages, property not returned, § 1148.
sales, seed, warranty of quality, damages for breach, interest, expenses and special injuries, § 674.
warranty of title, breach, measure of damages, § 669.
seduction, gist of action, proof of service, § 1281.
sewers and drains, nuisance, remote consequences, liability, § 1051.
telegraphs and telephones, mental anguish, damages, evidence, § 975.
negligence, mitigation of damages by injured party, § 973.
repetition of message, limitation of liability, § 958.
trespass to personal property, special and consequential damages, § 1101.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover, damages, interest and value of use of property, § 1115.
property of fluctuating value, measure of damages, North Carolina rule, § 1124.
usury, recovery under usury statute, § 317.

North Dakota
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
eminent domain, compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
replevin, bonds, liability of sureties, dismissal of replevin suit, § 499.
measure of damages, § 1144.
trover, damages, property of fluctuating value, § 1118.
rule in particular states, § 1111.

Nose Injured
pleading, special damages, necessity of alleging, § 421.

Notaries
assessment of damages without jury, § 428.
fees, notes, amount recoverable by holder of note, determination, § 540.
interest, allowance against agents, trustees and officers, § 353.
neglect of duty, mitigation of damages, extent of duty to lessen or prevent damages, § 90.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
omission to give notice of protest, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.

Notes and Bills
see Bills and Notes.

Notice
agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
carriers of goods, breach of contract, remote consequences, § 902.
delay in delivery, consequential damages, notice of special circumstances, § 52.
expenses of further transportation, liability for, § 912.
knowledge of or notice to carrier that goods must not be delayed, §§ 913, 914.
goods lost or injured, conduct of shipper as affecting damages, § 925.
qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
refusal to transport, breach of contract, carrier's liability for remote consequences, § 902.
contracts for services, express contracts, necessity of full performance, inability to perform, stipulation for notice where servant quits employ, § 690.
contracts for works for particular purpose, liability for non-performance, consequential losses, § 702.
covenants against incumbrances, breach, right to recover damages, § 620.
covenants of warranty and quiet enjoyment, breach, consideration as measure of recovery, rule in England and Canada, § 607.
expenses, costs and attorney's fees as damages, § 618.
notice of suit to covenantor, § 615.
parties against whom recovery may be had, parties plaintiff, § 613.
presumption of consideration, admissibility of evidence, § 594.
scope, remedy for breach, § 603.
suit against remote covenantor, § 614.
what constitutes breach, § 604.
elements of damage, notice to indemnitor to fix liability, necessity, §§ 86, 87.
fraud, false representations, reliance on representations, negligence of injured party, § 1168.
guaranty, right to terminate liability, § 728.
indemnity, express indemnity, effect of judgment, § 767.
necessity of notice to indemnitor to fix liability, § 86.
remote and consequential losses, damages recoverable, costs, expenses and attorney's fees, § 762.
indemnity to municipality, losses as elements of damage, notice to defend action, § 83.
insurance, re-insurance, nature of contract, liability of re-insurer, § 840.
interest, compensation, tacit agreement to pay interest on accounts, § 322.
demand, necessity to secure allowance of interest, § 351.
miscellaneous case of suspension of interest, § 380.
judicial sale without notice, mitigation of damages, measure of prevention, § 157.
leases, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
repairs by lessor, lessee's duty, recovery by lessee for making repairs, § 873.
losses as elements of damage, damages by relying on performance, § 81.
master and servant, employee quitting without notice, recoupment and counterclaim, § 180.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
wrongful discharge of employees, measure of damages, remedies, § 692.

Notice—continued.
miscarriage, consequential damages, nervous shock without impact, right to recover damages, § 24.
sales
acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
buyer's right to return property, § 651.
refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract, re-sale of goods, § 647.
vendee's right to return property, § 650.
breach of contract by seller, consequential damages, § 663.
non-delivery of property not in market, recovery of lost profits, § 652.
set-off, counterclaim and recoupment, notice of crossclaim, § 190.
suretyship, express indemnity against judgments, effects of judgment, § 767.
judgment against co-sureties, conclusiveness, § 760.
surety's remedies for indemnity, contribution between co-sureties, actions, conclusiveness of judgment, § 760.
surety's right to call upon creditor to collect debt, damages, § 741.
surety's right to defend between principals, § 743.
telegrams, delay in delivery of message, knowledge of sender's purpose, necessity of disclosure of details, §§ 969-971.
liability for delay in transmission when object of sender is known, § 961.
mistake or change of message, liability when object of sender is known, illustration, §§ 962-964.
liability where message is in cypher or company is not informed of its importance, §§ 959, 960.
loss of employment and profits of business, damages, § 967.
tender, persons to whom tender should be made, § 265.
place of making, § 269.
when tender may be made, § 262.
walls falling, consequential damages, certainty, liability for principal loss extending to details and incidents, § 54.

Novation
bills and notes, stipulations for costs and attorney's fees, § 564.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 536.
exemplary damages, § 1052.

Nuisance
abatement, cause of action, entirety, damage to real property, § 114.
liquidated damages, stipulation for payment of fixed sum for partial or total breach, § 295.
mitigation of damages, § 1055.
breach of agreement to abate, liquidated damages, stipulations when damages are uncertain, § 290.
business, interference with business, element of damage as distinct injury affecting premises, § 1054.
cause of action, continuous breach of contract or infraction of rights not an entirety, § 125.
damage to real property, §§ 114, 115.
continuity, exemplary damages, § 1052.
general principles, § 1036.
liability of person causing nuisance, § 1040.
pleading, allegation of damage, nuisance, § 1060.
successive actions, continuity of nuisance, requiring successive action, § 1038.
damages recoverable in first action, § 1039.

Nuisance—continued.
continuity—continued.
when nuisance is not a continuous wrong, §§ 1042-1045.
election to treat as permanent wrong, effect, § 1046.
crops injured, damages recoverable, value of crops, § 1049.
interest on value of crops, § 1049.
deeds, parties liable for, § 1035.
definition, what is nuisance, § 1035.
destruction of buildings, mitigation of damages, trespass, § 1027.
distinctions, general principles of the law of nuisance, difference from trespass, § 1036.
estates, damages affected by interest in estate, § 1057.
exemplary damages, § 1052.
expenditures, future expenditures as damages, § 1041.
grantee, parties liable for nuisance, § 1035.
husband and wife, interest in estate, damages affected by, § 1057.
joint and several liability, § 1059.
lateral support, removal, right to damages, § 1053.
leases, business, recovery for damages to business of lessee, § 868.
covenant for quiet enjoyment, what constitutes breach, § 863.
eviction of lessee, recovery of rent barred, § 848.
improper use of premises, liability, § 861.
lessee's right to damages for injury to business, § 868.
parties liable for nuisance, § 1035.
repairs, covenants for repairs by lessee, § 855.
mitigation of damages, deduction for benefits, § 1056.
evidence disclosing fact reducing injury, § 159.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
nature
private and public nuisances, § 1058.
distinction, § 1059.
nominal damages, liability of wrongdoer of nominal damages, § 1037.
parties, joint and several liability, private and public nuisance, § 1059.
liability for nuisance, § 1035.
permanent injury, depreciation and market value as damages, § 1047.
pleading, allegation of damage, nuisance, § 1060.
special damages, necessity of alleging, § 420.
successive actions, continuity of nuisance, damages, amendment of pleadings, § 1039.
presumptions, parties liable for, § 1035.
private nuisance, evidence, adaptation to damages claimed, § 437.
parties liable for nuisance, § 1035.
special damages, necessity of alleging, § 420.
private remedy for public nuisance, § 1058.
public nuisance, parties, joint and several liability for torts, § 141.
parties liable for nuisance, creation, continuance, § 1035.
special damages, necessity of alleging, § 420.
railroads, mitigation of damages, deduction for benefits, § 1056.
remainders and reversions, interest in estate, damages affected by, § 1057.
remedy, private remedy for public nuisance, § 1058.
remote consequences of injury, recovery of damages, §§ 1050, 1051.
repairs, elements of damages, § 1048.
special elements of damages, delay, § 1048.
inconvenience, § 1048.
interest, § 1048.
necessity of alleging, § 420.
repairs, § 1048.
trees, injuries to trees, etc., damages recoverable, value of trees, § 1049.
use of property, damnum absque injuria, § 3.

Nuisance—continued.
water, diversion of surface waters, rule of civil law, recovery of nominal damages, § 3.
diversion of subterranean waters, measure of damages, decrease in value of land, § 1049.
wilful or malicious injuries, consequential damage, § 44.

Nurse Injured
amount of damages, opinion evidence, § 444.
verdicts, excessive or insufficient verdicts, § 459n.

Nurses
death by wrongful act, widow, damages recoverable by widow, § 1265.
expenses for nursing and medical care, pleading, special damages, necessity for alleging, § 421.
recovery, § 1250.
record books, baggage, what constitutes baggage, § 954.
services to injured person, evidence, opinions, on subjects of common experience and observation, admissibility, § 443.

O

Oats
sale of oats containing castor beans, animals injured, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Occupying Claimant's Act
see Improvements.
improvements, recovery under statute, effect on right to recovery in action for breach of warranty, § 608.

Odor
dead horse on railroad track, nuisance, remote consequences, liability, § 1051.

Officers and Public Employees
see Official Bonds.
action, right of action against public officer, § 484.
agent's liability to third persons, § 796.
arrest, officer's neglect of duty, measure of damages, nominal damages, § 489.
assault, loss of office, consequential damages, act or omission as proximate cause of injury, § 29.
mitigation of damages, evidence disclosing fact reducing injury, § 159.
attachment, officer's neglect of duty, measure of damages, nominal damages, § 490.
attorneys' fees, injunction bonds, damages, costs and expenses, attorneys' fees, § 524.
certificates of indebtedness, payment, genuineness of certificates, § 223.
compensation, laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
payment, to whom payment may be made, § 231.
quantum meruit, recovery for services rendered, § 679.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
compensation withheld, interest, allowance against government, § 332.
contracts for services, necessity of full performance, inability to perform, § 687.
contracts to liquidate damages, validity, § 279.

Officers and Public Employees—continued.
corporate officers, see Corporations.
default, payments, application, general payments applied to debt least secured, § 245.
destruction of property as damnum absque injuria, § 3.
duties violated, bills and notes, illegality of consideration, effect, § 550.
emoluments, wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
exemplary damages, liability of officers for exemplary damages, § 412.
false imprisonment, exemplary damages, mitigation, § 1258.
funds, interest as compensation, right to interest, § 321n.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
recovery of costs and expenses, attorney's fees, § 524.
interest, allowance against agents, trustees and officers, § 353.
allowance on account, § 349.
judgments, § 333.
payment unreasonably and vexatiously delayed, § 323.
judicial sales, non-compliance with statute, breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
levy of execution, trespass to real property, mitigation of damages, § 1027.
license fees, collection, interest as compensation, right to interest, § 321n.
mitigation of damages, official neglect, § 160.
neglect of clerk to index mortgage, damages, losses, attorney's fees in defending suit, § 83n.
officer making modification of rule, § 161.
money paid in violation of duty, recoupment for fraud, breach of warranty, negligence, etc., § 180.
negligence, attachment bonds, damages recoverable, § 512.
interest, allowance against agents, trustees and officers, § 353.
measure of damages, against officers for neglect of duty, nominal damages, §§ 489-492.
replevin bonds, original conditions, § 499.
payment, evidence of payment, § 233.
process
parties, joinder of parties, general and special owners, § 139.
joint and several liability, § 140.
trespass to personal property, aggravation increasing damages, injury to feelings, exemplary damages, § 1095.
prosecution, consequential damages, injury through third person, § 33.
replevin
defendant's right, measure of damages for detention of property, § 1157.
recovery of damages as affected by title or interest in property, § 1160.
recovery for intermediate injury and depreciation of property, § 1152.
restitution after reversal of judgment compensation for loss of use of property, liability of third parties, § 469.
right of action against officers, § 484.
trespass, aggravation and special damages, § 1029.
exemplary damages, liability of officers, § 412.
ratification of unauthorized acts of officers, § 1031.
landlord and tenant, covenants, breach, exemplary damages, § 866.
process, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
trover, exemplary damages, wilful and malicious tort, § 1131.
mitigation of damages, wilful taking or refusal to surrender, § 1140.

Officers and Public Employees—continued.
trover—continued.
recovery of value of property subject to public sale, proof of value, § 1116.
special or consequential damages, § 1129.
violation of rights, actual damages, triviality, right to nominal damages, § 11.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.

Official Bonds
absolute liability for money received, § 479.
acknowledgment, false certificate, measure of damages against sureties, § 488.
action, right of action against public officers, § 484.
adjustment of liability between sets of sureties, §§ 480, 481.
arrest, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
breach, nominal damages, § 9, n 1.
cause of action, entirety, what is not a double remedy, § 119.
clerk of court, private injuries covered by official bonds, § 487.
construction, § 485.
continuance of guaranty, § 724.
contract not to be extended by construction, § 725.
illustration, § 727.
contribution, who are co-sureties, § 755.
counties, payment, place of making payment, § 214.
death, absolute liability for money received, § 479.
de facto officer, private injuries, covered by official bonds, § 487.
defense of circuity of action, § 143.
depositaries, bonds, absolute liability for money received, § 479.
discharge or reduction of surety's responsibility by act of creditor, § 735.
execution of probate bonds, manner, recoveries which may be had, § 494.
expiration of term, liability of public officers, adjustment of liability between sets of sureties, § 480.
express indemnity
damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
mental and physical suffering, trespass, § 763.
express indemnity against judgments, effect of judgment, § 767.
interest, allowance against government, § 332.
conflict of laws, bonds to United States, § 359.
liquidated damages, intention to liquidate, evidence and effect of, § 284.
measure of damages, against sureties, § 488.
mode of redress for official dereliction, § 486.
neglect of duty by other officers, effect, § 482m.
payment, application, debtor's right to direct application, § 235.
place of payment, § 214.
personal liability, circuity of action, defenses of, § 143.
private injuries covered by official bonds, § 487.
probate bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
conditions in general, § 493.
estates of decedents, bonds for administration of, § 493.
guardian's bond, mitigation of damages, § 497.
sureties' liabilities, § 496.
liability as between sets of sureties, § 498.
mitigation of damages, § 497.
release by creditor or one or more parties, effect, § 742.
replevin
bonds, assessment of damages in suit on bond, § 502.

Official Bonds—continued.
replevin—continued.
condition for return of property, § 500.
conditions of, history, § 499.
conditions required by modern statutes, § 501.
damages recoverable, § 505.
damages when plaintiff recovers as special owner, effect of change in statute, § 508.
effect of judgment in replevin suit, § 506.
evidence of value of property, § 504.
judgment, what may be shown in defense or in mitigation, § 507.
when sureties are not liable for judgment in replevin suit, § 503.
bonds by defendant to retain property, damages, § 509.
right of action against officers, § 484.
right of subrogation, when and to whom available, § 736.
statutory bonds, condition required by statute, necessity of compliance, § 475.
term of office, measure of damages against sureties, § 488.

Ohio
bills and notes, consideration fraudulent or illegal in part, § 549.
damages on protested foreign bills, re-exchange, § 563n.
guaranty, liability where collateral is given, § 734.
principal sum, certainty, § 541.
stipulations for costs and attorneys' fees, § 564.
contracts for particular work, employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
covenant against incumbrances as covenant running with land, § 625.
covenants, for title, measure of damages, nominal damages, § 600.
nature of covenant, breach, § 592.
what constitutes breach, § 592.
death by wrongful act, conflict of laws, injuries in another state, § 1280.
dower, right subject to incumbrances, § 1007.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
escape of prisoner, officers, neglect of duty, measure of damages, nominal damages, § 489.
fraud, damages, expenses of litigation, § 1177.
insurance, total loss, what constitutes, § 807.
interest, allowance, stockholders' statutory liabilities, § 343.
compound interest, interest on instalments of interest, § 375.
landlord and tenant, partial destruction of demised property, effect as to rent, § 851.
repairs, breach of covenant to repair, measure of liability, § 858.
nuisance, permanent injury, estoppel from recovery of future damages, § 1046.
officers, neglect of duty, measure of damages, nominal damages, § 489.
personal injuries, exemplary damages, § 1253.
probate bonds, liability as between sets of sureties, § 498.
replevin bonds, liability of sureties, dismissal of replevin suit, § 499.
slander and libel, exemplary damages, § 1216.
mitigation, retraction, § 1231.
suretyship, remedy for indemnity, who is principal, § 746.
trover, damages, attorneys' fees, § 1130.
exemplary damages, § 1131.
usury, effect, contracts not void for usury, § 315n.
verdicts, general verdict on several counts, § 462.

Oils
compensatory damages, property sued for improved by wrongdoer, § 102.
fire causing loss of building, consequential damages, acts or omission as proximate cause of damage, § 29.
fire insurance, losses and damages, recovery in special cases, § 827.
joint adventures, fraud, natural and proximate consequences of fraud, § 1164.
sales, anticipation of injury to person, illustration, § 25.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 675.
storage, consequential damages, act complained of must be efficient cause of damage, § 29.
telegrams, negligence in transmitting message, liability when object of sender is known, § 964.
tenants in common, lease of property, liability for value of oil produced, § 1034.
trover, damages, value of property enhanced by defendant, § 1126.
wells, drilling, contract for particular work, breach, contractor's liability, § 697.
liquidated damages, stipulations when damages are uncertain, § 290.
remainders and reversions, injuries to rights of parties not in possession, § 1034.

Oklahoma
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 942.
liability for exemplary damages, § 951.
evidence, physical examination of plaintiff, § 451.
nuisance, permanent injury, estoppel from recovery of future damages, § 1046.
replevin, damages, property not returned, § 1148.
telegraphs and telephones, mental anguish, damages, grounds upon which liability is denied, § 978.
trespass to personal property, special and consequential damages, §§ 1101, 1102.
trover, damages, interest and value of use of property, § 1115.
rule in particular states, § 1111.
usury, recovery under usury statute, § 317.

Olives
compensatory damages, property sued for improved by wrongdoer, § 102.

Opium
sales, warranty of quality or quantity, damages for breach, interest, expenses and special injuries, § 671.

Options
breach of contract, damages recoverable by purchaser against vendor of land, measure of damages, nominal damages, elements of damages, § 582.
broker's compensation for services, effect of misconduct, § 683.
evidence of value of services, opinion evidence, § 680.
manner of performance of duty, effect of misconduct, § 683.
sale for agent's advantage, § 683.
fire insurance, contract to replace or rebuild, § 830.
payment, application by creditor, § 239.
sales, acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.

Options—continued.
sales—continued.
breach of contract by seller, payment in specific articles, value, damages, § 660.

Orchard
certainty of damages, anticipated profits, prospective growth of orchard, § 62.

Orchid
sale, warranties of quality and quantity, breach, damages, § 670.

Oregon
appeal and supersedeas bonds, interest and damages, award on appeal, § 539.
bills and notes, guaranty, effect of indorsing negotiable paper, § 730.
partial failure of consideration, § 545.
principal sum, certainty, § 541.
stipulations for costs and attorneys' fees, § 564.
covenant to pay incumbrances, breach, damages, § 631.
death by wrongful act, damages to deceased's estate, § 1277.
eminent domain, assessment of damages and benefits, time of, § 1083.
evidence of value and damages, § 1089.
mesne profits, elements of damage, costs of ejectment suit, § 993.
remedy under code, § 1000.
official bonds, measure of damages against sureties, § 488n.
slander and libel, defenses, failure of plea of justification, § 1225.
trespass to real property, exemplary and statutory damages, § 1031.
trover, damages, property of fluctuating value, § 1119.

Oxen Stolen
consequential damages, certainty, recovery of items of damages which are certain, § 55.

Oysters
breach of contract to furnish material for oyster growers, liability for non-performance, consequential losses, § 702.

P

Pain and Suffering
see also Mental Anguish.
action by husband, wife or parent, personal injuries, § 1252.
assault and battery, special damages, necessity of alleging, § 421.
baggage, sleeping car companies, liability, § 956.
carriers of goods, breach of contract, physical and mental suffering as elements of damage, § 915.
carriers of passengers
negligence or breach of duty, damages for pain and suffering, past and prospective damages, § 944.
damages for physical and mental suffering, injury to character, § 942.
refusal to carry, damages, loss of time, expense, exposure and humiliation, § 936.
threat of ejection, recovery for mental suffering independent of other injury, § 943.
consequences of injury, recovery for secondary consequences, aggravation of disease, § 1244.
damages, discretion of jury as to damages, instructions, § 1256.
elements, § 1241.
pain and suffering, physical and mental pain, § 1242.
recovery for mental suffering, aggravated wrong, § 1243.

Pain and Suffering—continued.
damages—continued.
rule where negligence only is alleged and where wrong was wilful, § 1245.
death by wrongful act, damages, mental anguish, restriction to pecuniary losses, § 1263.
dower, expulsion of widow, actual damages, injury to health, pain and suffering, § 1029.
elements of damage, mental suffering, § 95.
personal torts, § 93.
evidence, adaptation of evidence to damages claimed, § 437.
expressions, conduct and religious belief of sufferer, § 453.
opinion evidence, § 441.
opinions on subjects of common experience and observation, admissibility, § 443.
pecuniary items, necessity of proof by plaintiff, opinions, § 441.
exemplary damages
restriction and denial, rule as to compensatory damages, § 395.
reasons for rule, New Hampshire rule, § 396.
exhibition of injured parts, means of injury, § 452.
exposure, allegations to show mental anguish, § 1029.
future damages, § 123.
interest, actions for torts, § 355.
malicious prosecution, elements of damage, § 1237.
mitigation of damages, admissibility of evidence, § 1255.
nuisance, remote consequences, liability, § 1051.
opinion evidence, § 441.
instances of rejection and admission of opinions, § 443.
parties, action for injury to child, § 1252.
personal torts, elements of damage, § 93.
pleading, necessity of alleging special damages, § 421.
prospective damages, number of actions maintainable, § 1251.
personal injuries, ascertainment, § 123.
slander and libel, damages, mental suffering and physical incapacity, § 1214.
special damages, necessity of alleging, § 421.
suretyship, express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
telegraphs and telephones, delay in delivery of message, damages, physical pain, § 965.
trespass, elements of damage, insults, § 1029.
trespass to real property, aggravation and special damages, § 1029.
verdicts, excessive or insufficient, §§ 459n, 1242n.
discretion of jury as to damages, instructions, § 1256.

Paint
sales, breach of contract, non-delivery of property contracted for, consequential damages, illustration, § 663.
warranty of quality, damages for breach, interest, expenses and special injuries, § 671n.

Paper Collar
infringement of patent, suretyship, express indemnity, damages recoverable, § 762.

Paralysis
personal injuries, damages, discretion of jury as to damages, instruction, excessive or inadequate verdicts, § 1256n.
pleading, special damages, necessity of alleging, § 421.

Parent and Child
see also, Alienation of Affections; Infants.
bonds, guardian's bond, mitigation of damages, § 497.

Parent and Child—continued.
carriers of goods, delay, transportation of dead bodies, physical and mental suffering as elements of damage, § 915.
carriers of passengers, child injured, damages for physical injury to child, excessive verdicts, § 953n.
duty of carriers, separation of passenger and children, recovery for mental suffering independent of other injury, § 943.
negligence or breach of duty, injury to wife, child or servant, actions, § 952.
child, en ventre sa mere, injuries to unborn child, right to damages, § 8.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
contracts for services, compensation, quantum meruit recovery, presumption where family relation exists, § 679.
employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
conveyances, payment, evidence of payment, § 233.
death by wrongful act, children, death of child, right to recover for, damages, § 1272.
damages, children's loss from death of parents, § 1267.
determination, evidence, facts and circumstances to be considered, § 1269.
elements, loss of services, loss of society, § 1263.
restriction to pecuniary losses, rule in England and Canada, § 1262.
pleading in actions to recover for death, § 426.
recovery for death of child by mother, imputed negligence, § 27.
dower, children, action for rents and profits, dower not demanded, § 1003.
imputed negligence, consequential damages, § 27.
interest, allowance, annuities and legacies, § 344.
money had and received, § 352.
loss of services, death, right of action at common law, § 1259.
seduction, gist of action, loss of services, § 1281.
parties plaintiff, action under statutes, § 129.
personal injuries to child, actions, parent's action, § 1252.
causes of action, entirety, parties to actions under statutes, § 129.
deformity or disfiguration, damages recoverable, § 952.
earning capacity diminished, damages, § 1246.
recovery for loss of time or decreased capacity, § 1249.
expenses for physical and surgical aid, recovery, § 1250.
injured parts, exhibition of, exhibition of means of injury, § 452.
joint injury, entirety of causes of action, damages to parties jointly, § 128.
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
mitigation of damages, admissibility of evidence, § 1255.
neglect of parents to secure medical treatment, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
personal and other circumstances of parties, § 1254.
special damages, child run over by vehicle, § 952.
probate bonds, guardian's bond, mitigation of damages, § 497.
quantum meruit, recovery for services rendered, § 679.
seduction, damages recoverable, exemplary and compensatory damages, evidence to be considered, § 1283.
daughter seduced by employer's son, consequential damages, act or omission as proximate cause of injury, § 29.
recoupment and counterclaim, § 180.
mitigation of damages, consent of parent, § 1284.
evidence, chastity, § 1284.
parties plaintiff, who may maintain action, § 1282.

Parent and Child—continued.
support of parent, consequential damages, act complained of must be efficient cause, § 29.
suretyship, right of surety, to defend between principals, § 743n.
telegraphs and telephones, mitigation of damages by injured party, negligence in transmission or delivery of messages, § 973.

Paris Green
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Parties
admiralty torts, who may sue, recovery by owner of cargo, § 1296.
alienation of affections, action, right to maintain, § 1285.
animals injured, joint and several liability for torts, § 141.
associations and societies, trusts, causes of action, entirety, recovery by party in whom legal interest is vested, § 130.
attachment, bonds, wrongful attachment, parties who may sue, § 511.
beneficial parties, action for benefit of another, bills and notes, recovery of principal sum, § 541.
bills and notes, action, defendants, joinder, effect of non-joinder and misjoinder, § 135.
joint makers, consideration fraudulent or illegal in part, effect, § 549.
bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
breach of marriage promise, who may sue, § 983.
cause of action
entirety, contract apportioning legal interests, § 131.
damages to parties jointly, § 128.
implied assumpsit follows consideration, § 132.
parties to actions under statutes, § 129.
recovery by party in whom legal interest is vested, § 130.
release or death of one or several parties entitled to damages, § 133.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
conspiracy, parties, joint and several liability for torts, § 140.
covenants of warranty and quiet enjoyment, breach, action, parties, § 603.
notice of suit to covenantor, bringing in new parties, § 615.
parties against whom recovery may be held, parties plaintiff, § 613.
suit against remote covenantor, § 614.
exemplary damages, parties liable, liability of master for acts of servants, §§ 408-411.
Federal Employers' Liability Act, actions under, § 1352.
fraud, parties, plaintiffs and defendants, § 1179.
injunction bonds, right of action, when it arises, who may sue, § 522.
joinder of parties, attachment bonds, parties who may sue, § 511.
general and special owners, § 139.
joint liability, entirety of tortious act, § 138.
execution of release by or to one or several claiming or liable, effect, § 257.
exemplary damages, joint liability for, § 407.
extinguishment or severance, § 136.
injunction bonds, damages, facts not defenses, § 529.
tender, persons to whom tender should be made, § 265.
mesne profits, who may recover, § 992.
misjoinder, defendants, effect of misjoinder, § 135.
plaintiff's, objection as fatal, § 134.
non-joinder, defendants, effect of non-joinder, § 135.
ownership, general and special owners, § 139.

Parties—continued.
personal injuries, action by husband, wife or parent, § 1252.
release, effect, execution of release by or to one or several claiming or liable, § 257.
who may execute, § 256.
replevin, who may sue, § 1143.
sales, executed sales, recovery by seller against buyer, § 642.
salvage service, requisites, parties liable, § 715.
seduction, parties plaintiff, who may maintain action, § 1282.
set-off, counterclaim and recoupment, §§ 175, 176.
validity of claim essential, § 174.
set-off of judgments, interest of real parties considered, § 200.
statutory duties, breach of duty, who may bring action, § 32.
suretyship, surety's remedies for indemnity, action against principal, who is principal, § 746.
telegraphs and telephones, negligence, who may sue, § 972.
torts, entirety of act, parties injured, § 138.
joint and several liability, §§ 140, 141.
acts of members of partnership, § 142.
civil damage statutes, § 142.
trade-marks, infringement, parties defendant, § 1200.
trover, who may bring action of trover, § 1108.
verdict, parties, verdict where there are several parties, § 463.

Partition
covenants for title, breach, recovery of nominal damages, actual loss not shown, § 598.
landlord and tenant, rent, apportionment, § 850.
tenants in common, recoupment and counterclaim, between vendor and purchaser, § 184.

Partnership
accord and satisfaction, consideration, act or promise which is new consideration, § 249.
accounts, cause of action, entirety, items of accounts, § 111.
payment, application by creditor, § 239.
attachment bonds, wrongful attachment, damages recoverable, § 513.
bills and notes, consideration fraudulent or illegal in part, § 549.
defense of circuity of action, § 143.
suretyship, assumption of contract, method, bills and notes, § 731.
breach of contract, certainty of damages, profits on dissolution of partnership, § 68.
compensation for gains, profits and losses sustained, § 78.
elements of damages, losses, labor expenditures, § 80.
evidence of value, § 445.
breach of partnership articles, right of action, § 68.
causes of action
entirety, effect of release by or death of one of several entitled to entire damages, § 133.
recovery by party in whom legal interest is vested, § 130.
release or death of one or several parties entitled to damages, § 133.
contracts for work, for particular purpose, breach, liability for non-performance, consequential losses, § 702.
contracts for services, wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
creditor's right to make application of payments, § 239.
death by wrongful act, damages, determination, facts and circumstances to be considered, § 1268.
debt due from wife to husband, payment, effect, § 218.
dissolution, certainty of damages, profits on dissolution of partnership, § 68.

Partnership—continued.
dissolution—continued.
contract of surety not to be extended by construction, illustrations, § 727.
interest as between partners, § 342.
fraud, false representations, measure of damages, confidential relation between parties, § 1171.
injunction bond, right of action, when it arises, parties who may sue, § 522.
interest as between partners, § 342.
liquidated damages, stipulation when damages are uncertain, § 290.
malicious prosecution, elements of damage, § 1237.
exemplary damages, liability of partner, § 1237.
parties injured, entirety of tortious act, § 138.
parties, joinder of defendants, effect of non-joinder and misjoinder, § 135.
joinder of parties, general and special owners, § 139.
joint and several liability for torts, § 140.
acts of members of partnership, § 142.
entirety of causes of action as to parties injured, § 138.
joint liability, extinguishment or severance, § 136.
parties plaintiff, person in whom legal interest is vested, § 130.
payment, application by creditor, § 239.
person to whom payment may be made, § 231.
personal injuries, earning capacity, recovery for loss of time or decreased capacity, § 1249.
profits, elements of damages, gains and losses, liability for, § 78.
recoupment and counterclaim, parties, § 175.
release, who may execute, § 256.
replevin, bonds, actions, defenses, mitigation of damages, § 507n.
defendant's rights, recovery of damages as affected by title or interest in property, § 1160.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
fraud, false representations, remote, conjectural and contingent damages, § 1175.
suretyship, express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 765.
contribution between co-sureties, insolvency of co-surety, firm as one surety, § 757.
remedy for indemnity, who is principal, § 746.
surviving partner, action by, circuity of action, defenses of, § 143.
trover, recovery of damages, limitation of recovery to plaintiff's interest in property, § 1136.

Party Walls
see also, Adjoining Landowners; Lateral Support.
consequential damages, certainty, liability for principal loss extending to details and incidents, § 54.
construction, interest, allowance on money paid, § 327.
covenant against incumbrances, damages for breach, permanent incumbrance, § 628.
definition, what are incumbrances, § 620.
covenants of warranty and quiet enjoyment, breach, measure of damages, existence of lien, satisfaction, § 609.
money paid, allowance on interest on money paid, § 327.
nuisances, joint and several liability, § 1059.
trespass, injuries to walls, damages recoverable, § 1025.
mitigation of damages, consent of plaintiff to act complained of, § 162.
pleading, necessity of pleading facts in mitigation, § 166.
walls defective, parties, joint and several liability for torts, § 141.

Pass
see Tickets.

Passenger Injured
alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
distinction between liability in tort and on contract, § 48.
alighting from street car, parties, joint and several liability for torts, § 141.
assault, consequential damages, nervous shock without impact, right to recover damages, § 24.
exemplary damages, parties liable, master's liability for acts of servant, § 408.
breach of contract, damages as including other than pecuniary elements, § 92.
canals, act or omission as proximate cause of injury, consequential damages, § 30.
carried beyond destination, consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
character as affecting damages for personal injuries, § 94.
conductor allowing persons to ride on freight train contrary to rules, agent's particular duties and liabilities, principal's right to indemnity, § 771.
consequential damages, assault on woman in station, child frightened and killed by train, liability, § 35.
extraordinary circumstances, insanity of injured person, § 36.
injured passenger rendered susceptible to disease, § 36.
nervous shock as physical injury, right to recovery for nervous shock, § 22.
nervous shock without impact, right to recover, § 21.
delay, breach of contract, consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
delayed train, injury to passenger, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
ejection, consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
exemplary damages, allowance, grounds upon which allowed, § 393n.
enhancement and mitigation, § 404.
wealth of defendant, scope of inquiry, § 405.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
nervous shock, proximate consequences of act or omission, § 36.
passenger who is Christian Scientist, damages recoverable, control of feelings, § 940.
evidence of damage, § 946.
exposure of passenger, consequential damages, breach of statutory duty, illness of passenger, § 32.
exposure to peril, act of injured party, § 39.
ferry-boat striking slip, injury to passenger, intervening or proximate cause, § 37.
imputed negligence, § 27.
indiscreet acts not grounds for damages, § 940.
jumping from coach, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.
mental anguish independent of other injury, § 942.
mitigation of damages, benefit not derived from defendant, § 158.
obstruction at depot, consequential damages, proximate cause, act of third person as cause, § 42.
physical and mental suffering of passenger, injury to character, § 942.

Passenger Injured—continued.
protection of passengers, duty of carrier, § 941.
railroad car unheated, illness of passenger as proximate consequences of failure to notify passenger of destination, § 36.
refusal to carry, exemplary damages, § 937.
stage coach falling into canal, consequential damages, proximate cause, act of third person as cause, § 42.
stage-coach upset, consequential damages, proximate cause, acts of injured party, fraud and exposure to peril, § 39.
suicide, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
train not stopping, pleading, special damages, necessity of alleging, § 421.
verdicts, excessive or inadequate verdicts, §§ 953n, 1256n.
wrong destination
consequential damages, certainty, recovery for successive consequences of act or omission, § 57.
passenger directed to leave train three miles from destination, liability for injuries, § 36.

Passion and Prejudice
remittitur, propriety of remittitur, excessive damages, § 459.
verdicts, excessive or insufficient verdicts, §§ 459, 460.

Pasture
animals evicted, pleading, special damages, necessity of alleging, § 420.
breach of contract, measure of damages, remoteness or uncertainty of stipulated compensation, § 684.
horse injured by trespassing horse, consequential damages, act or omission as proximate cause of damages, § 31.
injunction bonds, damages from restraint of injunction, § 527.
lack of pasturage, elements of damage, expense incurred to prevent or lessen damages, extent of duty, § 90.
leases, assignment or subletting, breach of covenant not to assign, damages, § 861.
business, recovery for damages to business of lessee, § 868.
covenants, breach, exemplary damages, § 866.
lessee's rights to damages for injury to business, § 868.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
nuisance, permanent injury, depreciation and market value as damages, § 1047.
suretyship, express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
trespass to real property, aggravation and special damages, § 1028.
suit by tenant, possessor or licensee, damages, § 1012.

Patents
Ch. XXXI, §§ 1181-1197.
annual licenses, liquidated damages, stipulation when damages are uncertain, illustrations, § 293.
assignments, infringement, who liable, § 1186.
bills and notes, consideration, parol evidence to show defect of consideration, §§ 552-554.
bonds, express indemnity, damages recoverable, costs, expense and attorney's fees, remote and consequential losses, § 762.
equity, compensation in equity, computation of profits, §§ 1190, 1191.
infringement, assignment of damages, recovery by assignee, § 1186.
attorney's fees, damages, § 1188.
right to recover, § 85n.

Patents—continued.
infringement—continued.
damages recoverable at law, evidence, § 1185.
infringement of part of thing used or sold, damages, § 1186.
license fees, §§ 1183, 1184.
profits as damages, § 1185.
equity, compensation in equity, computation of profits, to what time made, § 1192.
interest on profits, § 1197.
theory on which allowed, § 1189.
exemplary damages, § 1188.
interest on damages, infringement of patents, §§ 340, 1187.
persons liable for damages, § 1186.
profits, recovery, license fees not established, § 1196.
remedies, damages recoverable, § 1181.
judicial summary of legal and equitable remedies, § 1182.
suretyship, express indemnity, damages recoverable, § 762.
whole article not patented, ascertainment of profits, § 1195.
compensation recoverable for infringement, profits, § 1193.
mitigation of liability, § 1194.
interest on damages for infringing patents, §§ 340, 1187.
license fees, damages recoverable at law, §§ 1183, 1184.
liquidated damages, stipulations when damages are uncertain, § 293.
license to sell, bills and notes, consideration, parol evidence to show defect of consideration, § 552.
liquidated damages, alternative contracts, § 282.
replevin, defendant's rights, measure of damages for detention of property, § 1157.
sales
breach of contract by seller, payment in specific articles, value, damages, § 660.
non-delivery of property contracted for, property not in market, recovery of lost profits, § 652.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
recoupment for fraud, § 179.
warranty of quality, damages for breach, interest, expense and special injuries, § 675.
warranty of title, breach, measure of damages, § 669.

Paupers
appropriation for support of poor, interest, allowance against government, § 332.
assault and battery, consequential damages, injury through third person, § 33.
bail bonds in civil actions, measure of damages, § 539b.
cause of action, entirety, continuing obligations, § 112.

Payment
accord and satisfaction, §§ 246-252a.
act or promise which is new consideration, sufficiency, § 249.
agents, liability to third persons, scope of authority, § 796.
persons, to whom payment may be made, § 231.
application, agreement, debtor's right to direct application, § 236.
bonds, penalty as limit of recovery, interest, § 477.
court, application by the court, § 241.
creditor's right to make application of payments, §§ 238-240.
debtor's right to direct application, §§ 235, 236.
evidence, § 237.
general payment, application to debt bearing interest and first to interest, § 244.
application to debt least secured, § 245.

Payment—continued.
application—continued.
application to oldest debt, § 243.
general rule, § 234.
pro rata application of payments, § 242.
usury, recovery under usury statute, § 317.
arbitration and award, payment, mode of payment, § 215.
assumpsit, payment, pleading, § 232.
bills and notes, amount payable at maturity, ascertainment, § 540.
consideration, parol evidence to show defect of consideration, different agreement, § 552.
partial failure of, defense as resting on principle of rescission of contract, § 548.
illegality of consideration, effect, § 550.
interest as damages to be paid by maker or acceptor, §§ 556, 557.
liability of drawer and endorser for principal sum, § 555.
re-exchange and damages, when not recoverable, § 562.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
want or failure of consideration, § 542.
bonds, avoidance of penalties, American statutes and practice, § 474.
breach of contract to pay money, measure of damages, § 76.
burden of proof, §§ 232, 438.
carriers, duty of carrier, care of goods, recovery for injury to or loss of goods by bailee, § 918.
freight charges, amount of charges in absence of express agreement, § 884.
checks, breach of contract to pay money, special obligations, measure of damages, § 77.
what is not payment, § 217.
collaterals collected or lost by negligence of creditor as payments, §§ 228, 229.
conditional payment by bill, note or check, § 226.
conflict of laws, place of contract, determination, § 357.
contracts for particular work, approval, payment, § 706.
breach, consequential losses, contractor's liability, § 702.
contract price as measure of damages, action by contractor against employer, § 706.
demand for extra work, basis for adjustment, § 707.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, consequential losses, mitigation of damages, § 713.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
severable contracts, recovery on part performance, action by contractor against employer, § 708.
contracts for services, default, time of making payment of compensation, § 684.
express contract, necessity of full performance of entire contract, entire and apportionable contract, § 691.
covenant to pay incumbrances, breach, damages, § 631.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
covenants of warranty and quiet enjoyment, breach, measure of damages, § 605.
mitigation of damages, § 611.
creditor's right to make application of payments, § 240.
definitions, § 214.
demand of
allowance of interest, accounts, § 350.
right to interest as affected by marital relation, § 341.

Payment—continued.
devise of legacy, payment by, § 220.
effect, § 218.
elements of damage, greater damages than interest for failure to pay money, § 77.
non-payment of money, § 76.
eminent domain, title to property, compensation, to whom compensation should be paid, § 1082.
evidence, § 223.
pecuniary items, necessity of proof by plaintiff, opinions, § 441.
failure to make payment, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
forged notes and checks, §§ 223, 224.
gift inter vivos, payment by, § 221.
guaranty, distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
measure of liability of guarantor of payment, § 732.
right to terminate liability, § 728.
injunction bonds, defenses, facts not available as defenses, § 529.
installments, bonds, breach of covenants, assignment, § 472.
mode of payment, § 215.
suretyship, remedy for indemnity, accrual of right of action, § 747.
interest, agreements for interest, rate applicable after debt due, § 309.
allowance from time when money ought to be paid, § 329.
bills and notes, interest on, § 556.
compound interest, payments, computation, application and effect of partial payments, §§ 378, 379.
periodical interest after maturity of debt, § 377.
conflict of laws, law governing as to interest, parties in different states, § 360.
damages accessory to principal, § 372.
judgments pending review, § 389.
partners, interest as between, § 342.
right to interest, § 300.
suspension of interest, miscellaneous cases, § 380.
process, payment prevented by legal process, § 381.
tender stopping interest, § 383.
time of making tender, § 385.
unliquidated damages, § 384.
landlord and tenant
rent, apportionment, § 849.
interest, lessee's liability for interest, § 854.
payment, recovery of rent payable in specific articles or taxes, § 846.
termination of lease by lessor, effect as to rent, § 847.
liquidated damages, waiver of right to liquidate damages, § 299.
"marshaling" and "distribution" defined, § 191.
medium of payment, bills and notes, checks, §§ 225-227.
bills of insolvent banks, § 224.
counterfeit money, §§ 223, 224.
currency, § 207.
executed sales, recovery by seller against buyer, § 642.
money, legal tender act, § 210.
payment to be made in money of country of performance, § 206.
value, effect of fluctuations in currency, § 211.
mitigation of damages, § 167.
reduction of loss or benefit, § 164.
mode of making, §§ 214-216.
mail, § 214.
money, effect of changes in value of money, § 208.

Payment—continued.
mortgages, breach of contract, payment of mortgage, measure of damages, § 79.
officers
bonds, liability of public officers, adjustment of liability between sets of sureties, § 480.
private injuries covered by official bonds, § 487.
part payment, accord and satisfaction, agreement to discharge whole debt, §§ 248, 248a.
effect, § 218.
interest, compound interest, computation, application and effect of partial payments, § 378.
payment into court, breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
effect, admission of cause of action, § 435.
payment to plaintiff after suit, effect, § 436.
penalties, condition of defeasance of bonds, payment before or pending suit, statute 4 and 5 Anne, § 473.
persons to whom payment may be made, § 231.
place of payment, § 214.
duty of debtor to seek creditor, § 214.
person to whom payment may be made, § 231.
pleading, § 232.
necessary allegations, § 232.
presumptions, payment by bill, note or check, § 225.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
how made, § 468.
retaining money by executors, etc., § 222.
sales, breach of contract by seller, non-delivery of property contracted for, damages, § 656.
part of stipulated quantity received, recovery by seller, § 646.
payment in specific articles, value, damages, §§ 659-661.
purchase price paid, damages, § 656.
warranties of quality and quantity, breach, damages, § 670.
suretyship
contribution between co-sureties, § 754.
accrual of right of action, § 759.
creditor's duty to realize on securities, refusal of payment, application of deposits to indebtedness, § 737.
indemnity of surety by principal, adjustment of right of co-sureties, § 758.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
right of subrogation, when and to whom available, § 736.
right to call upon creditor to collect debt, damages, § 741.
surety's remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
payment giving right to reimbursement, §§ 750, 751.
when right of action accrues, § 747.
tender, §§ 260-278.
acceptance, effect, § 271.
time of making tender, § 262.
time, executed sales, recovery by seller of full value, payment by bill or note, § 644.
payment before debt is due, effect, § 219.
value of bills and notes, solvent parties, measure of damages, § 565.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
defaulting vendee's right, § 586.

Payment—continued.
vendor and purchaser—continued.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, nominal damages, § 582.
rescission, adjustment of counter demands, § 587.
damages recoverable by vendor against purchaser, measure of damages, notes given for price, assumption of mortgage, § 571.
recoupment for defect of title and for tort, § 573.
recovery when contract does not fix price, § 575.
right of seller of land to recover purchase price and interest, abatement of price, § 567.
what constitutes, §§ 214-216.
what is not payment, § 217.
who may make payment, § 230.

Peas
carriers of goods, delivery, liability for time and expense of obtaining property, § 911.

Pecuniary Representative of Value
Ch. VI, §§ 205-213.

Pedestrian Injured
collision of vehicles, injury to pedestrian, consequential damages, liability, § 19.
consequential damages, breach of statutory duty, person injured, unlawful beating of horse, § 32.
doctrine of imputed negligence, § 27.
intervening cause, ladder on sidewalk striking pedestrian, § 37.
railroad track, consequential damages, nervous shock without impact, right to recover, § 21.

Pedigree
evidence of value, property without market value, §§ 448, 449.

Pelvis Fractured
personal injuries, verdicts, excessive or inadequate verdicts, § 1242n.

Penalties and Forfeitures
appeal and supersedeas bonds in federal supreme court, § 532.
arbitration bonds, liability of sureties, measure of damages, § 539c.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bonds
condition of defeasance, payment before or pending suit, statute 4 and 5 Anne, § 473.
"penalties" defined, § 470.
impossible conditions, effect, § 476.
interest allowance on penalty, § 331.
judgments, interest on, § 333.
penalty as limit of recovery, interest, §§ 477, 478.
relief from penalties, American statutes and practice, § 474.
verdict, necessity that judgment follow verdict, § 466.
broker's compensation for services, effect of misconduct, § 683.
manner of performance of duty, effect of misconduct, § 683.
conflict of laws, interest, law governing where usury is involved, § 365.
confusion of goods, compensatory damages, motive as affecting damages, tort actions, § 101.
contracts, non-performance of agreements, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.
penalties in affirmative agreements, breach, remedies, § 471.

Penalties and Forfeitures—continued.
contracts for services, entire and apportionable contracts, § 691.
necessity of full performance of contract, § 686.
inability to perform, §§ 687, 688.
stipulation for notice where servant quits employ, § 690.
copyright, infringement, compensatory and penal recoveries, § 1199.
covenants, incumbrances, what are incumbrances, § 620n.
deposits, liquidated damages, payment of fixed sum for partial or total breach of contract, § 295.
elements of damage, motive, how motive affects consequences of confusion of goods, § 101.
exemplary damages, allowance, in what actions recoverable, § 392.
penal offenses, § 402.
injunction bonds, defenses, facts not available as defenses, § 529.
interest
agreements for more than legal rate after maturity, § 318.
relief of debtor in Illinois, § 319.
allowance, money loaned, § 325.
statutory penalties, § 330.
conflict of laws, effect of usury, § 365.
leases, covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
improper use of premises, liability, § 861.
liquidated damages, certainty, contracts for payment of money, § 287.
distinguished from penalty, § 283.
intention to liquidate, evidence and effect of, § 284.
interest as damages, § 286.
stipulation for payment of fixed sum for partial or total breach, §§ 294, 295.
when damages are uncertain, illustrations, § 293.
stipulation where damages are certain and easily proved, § 289.
validity, § 279.
waiver of right to liquidate damages, § 299.
officers and public employees, bonds, mode of redress for official dereliction, § 486.
right of action against officers, § 484.
pleading, statutory damages, necessity of specially alleging, § 425.
presumptions, liquidated damages, amount, large sum to secure payment of small sum, § 288.
sales, forfeiture of right to damages, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
salvage service, forfeiture of right to compensation, § 721.
tender, amount, sufficiency, § 266.
usury, agreements for more than legal rate after maturity, usury, when debtor relieved, § 319.
recovery under usury statute, § 316.
when contracts not void for usury, § 315.
vendor and purchaser
breach of contract by vendor, defaulting vendee's right, § 585, 586.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.
right of seller of land to recover purchase price and interest, abatement of price, § 567.
conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.
waiver of right to declare forfeiture, § 567.

Penitentiary
consequential damages, breach of contract, proximate consequences of breach, § 45n.

Penitentiary—continued.
rape by escaped convict, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Pennsylvania
agent's duty to render accounts, effect of misrepresentations, § 784.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
principal sum, certainty, § 541.
stipulations for costs and attorney's fees, § 564.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
bonds, penalty as limit of recovery, exception as to interest, § 478.
breach of marriage promise, seduction as aggravation of damages, § 984.
carriers of goods, qualification of carrier's liability by notice, interstate commerce, § 926.
contracts for particular work, employer's liability for delaying or stopping work, recovery, § 713.
covenants, breach, defenses and crossclaims against purchase money, § 639.
covenants against incumbrances, breach, measure of damages, remote losses, § 622.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
death by wrongful act, beneficiaries, § 1261.
children's loss, death of parent, § 1267.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, § 1074.
value for condemnor's purpose, § 1075.
deduction for benefits, special benefits, § 1086.
evidence of value and damages, § 1089.
injury to property not taken, ascertainment, §§ 1066-1068.
consequential injury, § 1062.
expenditures, to lessen loss, § 1072.
interest, element of compensation, § 1091.
evidence of injury, annuity and life tables, § 455.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
interest on judgment pending review, § 389.
landlord and tenant
rent, amount as affected by subsequent facts, § 845.
lessee's liability for interest, § 854.
condemnation of demised premises, effect as to lease, § 853.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
life and accident insurance, character of contract, § 832.
mesne profits, elements of damages, costs of ejectment suit, § 993.
nuisance, interference with business, element of damage, § 1054.
permanent injury, estoppel from recovery of future damages, § 1046.
removal of lateral support, measure of damages, § 1053.
officers, neglect of duty, measure of damages, nominal damages, § 489.
personal injuries
actions, husband and wife, § 1252.
parent's action, § 1252.
prospective damages, § 1251n.
expenses for physical and medical air, recovery, § 1250.
mitigation of damages, evidence, § 1255.
probate bonds, liability as between sets of sureties, § 498.

Pennsylvania—continued.
replevin
damages, intermediate injury and appreciation, § 1151.
exemplary, § 1145.
property not returned, § 1147.
suit on bond, non-liability of sureties for judgment in replevin suit, § 503.
set-off, defenses, mitigation of damages, § 507n.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, delay in delivery, damages, § 664.
non-delivery of stock, § 657.
slander and libel, aggravation of damages, wealth and rank of parties, § 1210.
exemplary damages, § 1216.
suretyship, right of surety to put creditors in motion, § 741.
trespass to real property, additional injury to land, liability, § 1021.
ice injured, diversion of water, § 1022.
occupation of land by railroads, damages, § 1016.
remediable injury, damages, § 1018.
trees and mine ores, liability, § 1019.
trover
damages, property of fluctuating value, Pennsylvania rule, § 1121.
exemplary, § 1131.
value of property enhanced by defendant, § 1127.
limit of recovery, plaintiff's interest in property, § 1137.
special and consequential damages, § 1129.
usury, effect, contracts not void for usury, § 315n.
vendor and purchaser, action for purchase money, defenses and counterclaims, Pennsylvania rule, § 639.
breach of contract by purchaser, measure of damages, § 570.
breach of contract by vendor, measure of damages, English rule, application, § 581.
recovery on parol contract, § 583.

Pensions
death by wrongful act, pension money received by widow, effect as to damages recoverable for death, § 1265.

Peril
see Imminent Peril.

Perjury
right of action, impeachment of judgment, § 4.
subornation of perjury, public wrongs, right of action, remedies available, § 4.

Personal Injuries
Ch. XXXVI, §§ 1241-1258.
see, also, Death by Wrongful Act; Earning Capacity; Health; Pain and Suffering, and similar titles.
accord and satisfaction, compromise of disputed claim, § 251.
actions, husband and wife, injury to wife, § 1252.
intoxicating liquors, civil damage acts, § 1252.
number of actions maintainable, prospective damages, § 1251.
parents action, § 1252.
wife's action, § 1252.
adjoining owners, lateral support, removal, buildings threatened, damnum absque injuria, § 3.
admissions, evidence, expressions, conduct and religious belief of sufferer, § 453.
amendment of claim, erroneous claim of damage, effect, § 417.

Personal Injuries—continued.
amount of damages, opinion evidence, § 444.
annuity and life tables, admissibility, § 455.
assault and battery, cause of action, entirety, injury to property and person by same act, § 118.
bills and notes, want or failure of consideration, note given to mother of child assaulted, § 542.
business, injury to business as element of damage, § 1246.
carriers of passengers, compensation, physical and mental suffering of passenger, injury to character, § 942.
refusal to carry, damages, § 935.
causes of action
entirety, damage accruing subsequent to action, § 113.
damage to property and injury to persons by same act, § 118.
character as affecting damages for personal injuries, § 94.
children, damages anticipated, § 25.
claim against municipality, ad damnum, limit of recovery, erroneous claim of damages, § 417.
consequential damages, anticipation of injury as to person, § 25.
breach of statutory duty, person injured, unlawful beating of horse, § 32.
certainty, liability for principal loss extending to details and incidents, § 54.
recovery for secondary consequences, aggravation of disease, etc., § 1244.
damages, elements, § 1241.
motive with which injury was inflicted, § 1241.
personal torts, § 93.
earning capacity diminished, element of damage, § 1246.
evidence, § 1248.
measure of recovery, § 1249.
pleading, § 1247.
evidence of injury, annuity and life tables, § 455.
expression, conduct and religious belief of sufferer as evidence of damages, § 453.
opinions on subjects of common experience and observation, admissibility, § 443.
photographs as evidence of damages, § 454.
physical examination of plaintiff, § 451.
exemplary damages, § 1253.
allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
malice in law and malice in fact, § 394.
mitigation of damages, admissibility of evidence, § 1255.
pleading, matters of aggravation, necessity of alleging, § 422.
exhibition, injured parts, means of injury, § 452.
future damages, § 123.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
interest, actions for torts, § 355.
intoxicating liquors, civil damage laws, actions by spouse or parent, § 1252.
jury, discretion of jury as to damages, instructions, § 1256.
leases, repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
loss of capacity for enjoyment as damages, § 1243.
medical and surgical aid, recovery of expenses, § 1250.
mitigation of damages, benefit not derived from defendant, § 158.
evidence, admissibility, § 1255.
exemplary damages, § 1253.
extent of duty to lessen or prevent damages, § 90.
plaintiff's acts and negligences, § 155.
nervous shock without impact, consequential damages, § 21.

Personal Injuries—continued.
nominal damages, illustrations of right to nominal damages, § 10.
object of law of damages, compensation, § 12.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
instances of rejection and admission of opinions, § 443.
pain and suffering
recovery for physical and mental suffering, § 1242.
aggravated wrong, § 1243.
rule where negligence only is alleged and wrong was wilful, § 1245.
parties, general and special owners, § 139.
parties plaintiff, damages to parties jointly injured, § 128.
entirety of tortious act, § 138.
pecuniary conditions of parties, other circumstances, damages, § 1254.
personal torts, elements of damage, § 93.
physical examination, discretion of court, § 451.
pleading, special damages, necessity of alleging, § 421.
prospective damages, ascertainment, § 123.
recovery, § 1251.
release, construction, extrinsic evidence, § 255.
special damages, expenses for physical and surgical aid, recovery, § 1250.
necessity of alleging, § 421.
survival, personal injuries, right of action, effect of death at common law, § 1259.
time
loss of time as element of damage, § 1246.
measure of recovery for loss of time, § 1249.
unmarried woman, special damages, necessity of alleging, § 420.
value of services, opinion evidence as to value of property, § 446.
verdicts
excessive or insufficient, §§ 459, 460.
discretion of jury as to damages, § 1256.
irrelevant evidence, power of court to order remittitur, § 460.
wild animals, mitigation of damages, § 154.

Personal Property
see also Trespass to Personal Property, etc.
attachment bonds, damages recoverable, property injured, § 512.
breach of covenants, of warranty and quiet enjoyment, damages, expenses, costs and attorney's fees as damages, § 617n.
burglar alarm system defective, goods stolen, consequential damages, acts or omission as proximate cause of damages, § 29.
contracts for services, mode of compensating, § 684.
destruction of property, attachment bonds, damages recoverable, § 512.
carriers of goods, freight charges, time when freight is due and earned, § 887.
fire, consequential damages, intervening cause, § 37.
replevin bonds, actions, defenses, mitigation of damages, § 507n.
trespass to real property, damages, § 1015.
remediable injury, damages, § 1018.
elements of damage, property sued for improved by wrongdoer, § 102.
fire insurance, damages, general rule, total loss, value of property, § 821.
fraud, false representations, measure of damages, difference in value of property, § 1171.
goods frozen, false deeds to land taken, inability to provide cellar, necessity that damages result from injury, proximate cause, § 29.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, §§ 527, 528.
interest, quantum meruit claims between vendor and purchaser, § 328.
suspension, tender stopping interest, when tender may be made, § 386.

Personal Property—continued.
nominal damages, right to damages for violation of legal rights, § 10.
payment by gift inter vivos, § 221.
proof of value, actual sales, offers for property, market quotations, § 447.
removal of burning property, consequential damages, acts or omission as proximate cause of damage, § 20.
replevin bonds, actions, defenses, mitigation of damages, § 507n.
sales
breach of contract by seller, payment in specific articles, value, damages, § 659.
purchase price paid, damages, § 656.
taking or detention, pleadings, items, necessity of itemizing damages in pleadings, § 424.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 961.
trespass, aggravation of damages, injury to personal property, § 1030.
exemplary damages, circumstances of outrage, insult, destruction of personal property, § 1031.
trover, damages, general rule, exception as to place of conversion, § 1109.
use prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.

Pest House
location of pest house, consequential damages, § 32.

Phosphate
mining, certainty of damages, anticipated profits, § 59n.

Photographs
duty of carrier, damages for injuries to or loss of non-marketable property, § 919.
evidence of injury, photographs, § 454.
invasion of privacy, elements of damage, mental suffering, § 96.

Physical Examination
personal injuries, evidence, physical examination of plaintiff, § 451.

Physicians and Surgeons
see Medicines and Surgery.

Pictures
carriers of goods, indemnity, necessity of notice to indemnitor to fix liability, § 87n.
sales, false representations, recoupment and counterclaim, nature of defense, § 170.
trover, damages, property of fluctuating value, § 1118.

Pilots
salvage services, nature of peril, duty of claimant, persons who may be salvors, § 717.

Pirates
marine insurance, losses, general average, § 818.
salvage services, nature of peril, duty of claimant, persons who may be salvors, §§ 716, 717.

Pitchfork Injured
injury to pitchfork, nominal damages, right to, de minimis non curat lex, § 11.

Planing Machine
sales, breach of contract by seller, delay in delivery, evidence of rental value, § 665.

Plans
carriers
delay in transportation, goods to be used for competing for prizes, measure of damages, § 71.
injury to or loss of non-marketable property, damages, § 919.
contract for particular work, contractor's liability for breach, defect in plan, § 701.
covenants of warranty and quiet enjoyment, breach, measure of damages, conflict of laws, what law controls, § 605.
guaranty, measure of guarantor's liability, § 729.
quantum meruit recovery for services, evidence, defenses, § 679.

Platform Falling
indemnity, liability for losses and expenses, proximate result of act complained of, § 84n.

Platforms and Depots
see Carriers of Passengers; Passenger Injured, etc.
heat, depot not heated, consequential damages, § 36.
obstruction, consequential damages, proximate cause, act of third person as cause, § 42.
threat to push passenger from platform, jumping, damages recoverable, § 914.

Plats
eminent domain, assessments of damages and benefits, lands to be considered, § 1088.

Pleading
see also, Abatement and Revival; Ad Damnum; Amendments; Answer; Complaint; Set-off, Counterclaim and Recoupment.
accord and satisfaction, § 232.
ad damnum, interest, manner of claiming interest in pleading, § 387.
necessity of stating, § 414.
admissions, payment of money into court, effect, admission of cause of action, § 435.
receiver's bonds, liability of sureties, § 539a.
tender, effect of plea of tender, § 275.
aggravation, necessity of alleging matters of aggravation, § 422.
traverse, § 423.
back injured, pleading, special damages, necessity of alleging, § 421.
bills and notes, consideration, parol evidence to show defect of consideration, different agreement, § 552.
breach of contract, necessity of stating case, which entitles plaintiff to damages, § 413.
business, loss of custom, pleading, special damages, § 420.
code pleading, aggravation of damages, matters of aggravation not traversable, § 423.
interest, manner of claiming interest in pleading, § 387.
conflict of laws, interest, pleading and proof of foreign law, § 367.
covenants, actions, defenses and crossclaims against purchase money, § 633.
covenants of warranty and quiet enjoyment, breach, necessary allegations, eviction, § 604.
death by wrongful act, necessity of alleging damages, § 426.
Federal Employers' Liability Act, actions for death, § 1349.

Pleading—continued.
Federal Employers' Liability Act—continued.
alternative allegations setting up both state and federal law, § 1350.
amendments, § 1348.
requisites and sufficiency under, § 1347.
fraud, pleading and evidence, necessary allegations, § 1180.
general issue, payment, pleading, § 232.
payment to plaintiff after suit, effect, § 436.
vendor and purchaser, action for purchase money, defenses and counterclaims, §§ 633, 637.
insurance, proof of loss, pleading, § 812.
interest, manner of claiming interest in pleading, § 387.
right to interest, § 300.
issues, effect of not answering allegation of damage, § 416.
items, necessity of itemizing damages, § 424.
mitigation of damages, payment, § 167.
pleading, § 166.
necessity of stating case, which entitles plaintiff to damages, § 413.
nuisances, allegations of damages, § 1060.
successive actions, continuity, nuisance, damages recoverable in first action, § 1039.
payment, § 232.
personal injuries, earning capacity, pleading, § 1247.
pleas, abatement
avoidance, circuity of action, damages must be equal, § 146.
indemnity, breach of agreement, necessity of actual injury, damage as gist of action, § 761.
parties, joint right or liability, determination, principles, § 137.
misjoinder of plaintiffs, objection as fatal, § 134.
payment to plaintiff after suit, effect, § 436.
tender, when tender may be made, § 262.
verdict, parties, verdict where there are several parties, § 463.
replevin, special damages, pleading, necessity of alleging, § 1146.
set-off, counterclaim and recoupment, crossclaim used in defense cannot be sued upon, § 189.
notice of crossclaim, § 190.
special damages, necessity of alleging, illustrations, §§ 420, 421.
state of frauds, vendor and purchaser, damages recoverable by purchaser against vendor of land, oral contract, § 583.
tender, effect of plea of tender, § 275.
necessity of pleading tender, § 274.
variance, set-off, counterclaim and recoupment, notice of crossclaim, § 190.

Pledges
accord and satisfaction, consideration, act or promise which is new consideration, § 249.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
arbitration bonds, liability of sureties, measure of damages, § 539c.
attorneys, liens, tender, effect of tender on collateral securities, § 277.
bills and notes, amount recoverable by holder of bill or note, principal sum, § 541.
note given as security, want or failure of consideration, § 542.
principal sum, certainty, § 541.
value of bills and notes, solvent parties, measure of damages, § 565.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
conversion, recoupment and counterclaim, § 180.
creditor's right to make application of payments, § 238.
guaranty, collateral, guarantor's liability where collateral is given, § 734.

Pledges—continued.
insurance, life insurance as collateral security, violation of condition by insured, § 834.
interest, allowance against agents, trustees and officers, § 353n.
insurance policy, conversion, measure of damages, § 1133.
liquidated damages, mode of liquidating, computation of time, § 281.
payment, application by creditors, § 238.
collateral collected or lost by negligence of collector as payments, § 228.
replevin, damages for detention, recovery of value of use of property, § 1144.
sales, breach of contract, non-delivery of property contracted for, damages, purchase price paid, highest intermediate value, vendee's duty to lessen damages, § 656.
suretyship
creditor's duty to realize on securities, limitations of release to injury sustained by surety, § 738.
refusal of payment, application of deposits to indebtedness, § 737.
release of securities by creditors, injury to surety, value of released securities, § 740.
right of subrogation, when and to whom available, § 736.
surety's remedies for indemnity, indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
telegraphs and telephones, negligence in transmitting message, liability when object of sender is known, § 961.
tender, conditions, tender must be unconditional, § 270.
effect, collateral securities, § 277.
trover, measure of damages, property of fluctuating value, §§ 1119, 1120.
recovery of damages, limitation of recovery to plaintiff's interest in property, § 1137.

Plumbers
inspection, measure of damages against officers for neglect of duty, nominal damages, § 492.
landlord and tenant, repairs, lessor's covenant to repair, breach, measure of liability, § 872.

Pneumonia
depot not heated, consequential damages, liability of carriers, extraordinary circumstances, § 36.

Poisons
animals injured, amount of damages, opinions of witnesses, admissibility, § 444.
label erroneous, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
sales
consequential damages, anticipation of injury of person, proximate cause of injury, § 25.
intervening cause, sale of poison to intoxicated person, death as result, § 38.
sale of feed, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Police
wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.

Police Power
amount of damages, power of state, violation of statute, § 2, n 5.

Porch Defective
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.

Pork
sale of pork, breach of warranty, elements of damage, losses, expenses incurred to prevent or lessen damages between vendor and vendee, § 89.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
telegraphs and telephones, negligence in transmission of message, knowledge of sender's purpose, details, § 971.

Porto Rico
death by wrongful act, recovery for death of child, § 1272.
Federal Employers' Liability Act, applicability to, § 1299.

Portrait
carriers of goods, injury to or loss of non-marketable property, damages, § 919.

Post Office
advertisement of letters, consequential damages, breach of statutory duties, § 32.
breach of contract to transport mail, contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
mail carriers, registered letters, measure of damages against sureties on official bonds, § 488.
obstruction of mails, taking letter from post office, damages, § 960.
payment, place of making payment, § 214.
rate of postage enjoined, injunction bonds, damages from restraint of injunction, § 528.
transportation of mail, contracts for particular work, breach, liability for profits lost and expenses incurred, § 698.

Potatoes
sales, acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
breach of contract by seller, delivery impossible, damages, § 655.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Powder
landing cargo, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
sale, suretyship, contract not to be extended by construction, § 726.

Practice
Federal Employers' Liability Act, under, § 1351.

Pregnant Woman Injured
assault on husband, consequential damages, nervous shock without impact, right to recover, § 24.
consequential damages, passenger directed to leave train three miles from destination, liability for injuries, § 36.
proximate cause, acts of injured party, fraud and exposure to peril, § 39.
eviction of tenant, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
vehicles colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23a.

Preserves
patents, infringement, damages, whole article not patented, mitigation of liability, § 1194.

Presumptions
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, § 775.
duty of agent to inform principal, reports, § 769.
liability of agent to third persons, measure of damages, action without authority, § 798.
particular duties and liabilities of agent, principal's right to indemnity, § 770.
assessment of damages, admission of damages by default or demurrer, § 429.
attachment bonds, defenses, mitigation of damages, § 515.
attorneys, actions for compensation, value of services rendered, admissibility of evidence, § 682.
bills and notes, parol evidence to show defect of consideration, admissibility, § 551.
stipulations for costs and attorney's fees, § 564.
want or failure of consideration, § 542.
breach of marriage promise, presumption of chastity, excuse for breach of contract, § 989.
carriers of goods, carrier's duty, goods lost or injured, proof of value, § 933.
connecting carrier's duty, goods lost or injured apportionment of damages in case of mutual fault, § 928.
limitation of liability, qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
carriers of passengers, duty of carrier, protection of passenger, § 941.
negligence or breach of duty, exemplary damages, § 950.
conflict of laws, law governing liabilities on bills and notes, § 563.
place of contract, determination, § 357.
consequential damages, carrier's liability, extraordinary circumstances, insanity of injured person, § 36.
consideration, bills and notes, want or failure of consideration, § 754.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
demands for extra work, basis for adjustment, § 707.
liability for non-performance, consequential losses, § 702.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, § 713.
material not furnished, effect of not abandoning contract, contractor's rights, § 714.
contracts for services, compensation, quantum meruit recovery, presumption where family relation exists, § 679.
continuation of original contract, § 685.
measure of damages, determination of amount of wages by employer, presumption of continuance of obligation, § 678.
wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
covenants against incumbrances, breach, right to recover damages, § 620.
rule of damages, payment of incumbrances, damages if not paid, § 623.
covenants for title, breach, measure of damages, consideration, presumption of consideration, admissibility of evidence, § 594.
covenants of warranty and quiet enjoyment, breach, measure of damages, conflict of laws, what law controls, § 605.

Presumptions—continued.
death by wrongful act, damages, children's loss from death of parents, § 1267.
pleading in actions to recover for death, § 426.
direct damages, what constitutes direct damages, § 14.
evidence, intendments against plaintiff for holding back evidence, § 440.
intendments against defendant for holding back evidence, § 439.
value, property without market value, § 448.
factor's, duties, sale, measure of liability, sale at unauthorized price, § 778.
liability for failure to sell at certain time, § 781.
guaranty, contracts not to be extended by construction, illustrations, §§ 726, 727.
endorsement of negotiable paper, effect, § 730.
husband and wife, right to interest as affected by marital relation, § 341.
indemnity, express indemnity, effect of judgment, § 767.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
defenses, what may be shown as defense, § 530.
right of action, when it arises, who may sue, § 522.
insurance, paid up policy, refusal to issue, measure of damages, § 839.
intent, payments, application, by court, § 241.
invasion of rights, presumptions of injury, right to damages, § 2.
master and servant
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
measure of damage remedies, § 692.
officers, measure of damages against officers for neglect of duty, nominal damages, §§ 489, 490.
payment, application by court, § 241.
evidence of payment, § 233.
measure of liability of guarantor of payment, § 732.
note, bill or check, § 225.
prima facie case, burden of proof of damages, § 438.
probate bonds, guardian's bond, sureties' liabilities, § 496.
quantum meruit recovery for services, presumptions where family relation exists, § 679.
replevin bonds, evidence of value of property, § 504.
sales, breach of contract, payment in specific articles, presumed value of notes, etc., §§ 659-661.
warranties of quality and quantity, breach, damages, § 670.
seduction, mitigation of damages, presumptions of chastity, character of plaintiff, § 1284.
suretyship, bills and notes, methods by which surety's contract may be assumed, commercial paper, § 731.
construction of contract, continuance of guaranty, § 724.
creditor's duty to acquire liens, necessity of notice of reliance, § 739.
express indemnity against judgments, effect of judgment, § 767.
indemnity of surety by principal, adjustment of right of co-sureties, § 758.
judgment against co-sureties, conclusiveness, § 760.
liability of public officers, adjustment of liability between sets of sureties, § 480.
release of securities by creditors, injury to surety, value of released securities, § 740.
surety's remedies for indemnity, action against principal, who is principal, § 746.
contribution between co-sureties, who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.

Presumptions—continued.
suretyship—continued.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
telegraphs and telephones, delivery of messages, delay, presumptions, § 957.
trespass to real property, exemplary damages, circumstances of outrage, insult, destruction of personal property, § 1031.
value of judgment, elements, evidence, § 448.
verdict, damages, statutory, double and treble damages, power of court or jury, § 464.
general verdict on several counts, § 462.
parties, verdict where there are several parties, § 463.

Price
evidence of value, actual sales, offers for property, market quotations, § 447.
admissibility, § 445.
breach of contract by seller, § 654.
patents, infringement, measure of damages, § 1186.
vendor and purchaser, breach of contract, damages, right of seller of land to recover purchase price and interest, abatement of price, § 567.

Principal
see Interest.

Principal and Agent
see Agency.

Principal and Surety
see Suretyship.

Printing
plates, trespass to personal property, damages, ascertainment of value of non-marketable property, § 1099.

Priorities
marshaling and distribution, definition, § 191.
principal on which priority determined, § 197.
rights of creditors where funds belong to two depositors, § 196.
rights where one creditor may resort to two funds and another to only one, § 145.
payment, application pro rata, § 242.
general payments applied to debt least secured, § 245.
set-off of judgments, interest of real parties considered, § 200.
telegraphs and telephones, mitigation of damages by injured party, negligence in transmission or delivery of messages, § 973.

Prizes
carriers, delay in transportation, goods to be used for competing for prizes, measure of damages, § 71.
certainty of damages, chances for prizes and promotions, § 71.
loss of profits, inaccurate transmission of message preventing horse from being entered in race, § 71.

Probate Bonds
see Executors and Administrators; Official Bonds.

Process
abuse of process, cause of action, entirety, what is not a double remedy, § 119.

Process—continued.
abuse of process—continued.
exemplary damages, allowance, in what actions recoverable, § 392.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
malicious prosecution, elements of damage, § 1237.
parties, bonds, wrongful attachment, parties who may sue, § 511.
trespass to personal property, trespass from beginning, damages, § 1107.
cause of action, severance, contract to do several things successively or one thing continuously, § 110n.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
false return
consequential damages, acts of third persons, § 40.
proximate cause, act of third person as cause, § 40.
officers, neglect of duty, measure of damages, nominal damages, § 491.
interest, suspension, payment prevented by legal process, § 381.
officers, measure of damages against officers for neglect of duty, nominal damages, §§ 489, 490.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
parties, joint and several liability for torts, § 140.
payment
application, debtor's right to direct application, § 235.
pro rata application, § 242.
mode of making payment, § 216.
release of property, measure of damages against officers for neglect of duty, nominal damages, § 491.
requisites, what will operate as release, § 258.
replevin bonds, condition required by modern statutes, § 501.
serving, officers, neglect of duty, measure of damages, nominal damages, § 489.
trespass, exemplary damages, liability of officers, § 412.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, application of property or money to owner's benefit, § 1106.
trover, exemplary damages, wilful and malicious tort, § 1131.
wrongful issuance, parties, joint and several liability for torts, § 140.

Profits
see also Mesne Profits.
agency, duty of agent, liability, disregard of instructions, §§ 773, 774.
measure of agent's liability under various circumstances, loss of profits, § 774.
stock received in violation of trust, liability of agents to principal, § 773.
violation of duty, secret profits, § 768.
amount of damages, opinion evidence, § 444.
appeal and supersedeas bonds, liability, damages, § 533.
rents and profits, § 533.
attachment bonds, damages recoverable, §§ 512, 513.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
breach of contracts, compensation for gains, profits and losses sustained, § 78.
consequential damages, market value, § 52.
necessity of stating case, which entitles plaintiff to damages, § 413.
broker's compensation for services, measure of compensation, § 683.

Profits—continued.
carriers of goods, negligent delay in transportation, liability for loss of market value of property, basis of rule, §§ 906-908.
refusal to carry, loss of shipper's profits, § 900.
carriers of passengers, injury to passenger, proof of damage, § 946.
causes of action, entirety, prospective damages, § 120.
certainty of damage, animals, prospective growth, § 62.
chances for prizes and promotions, § 71.
commercial and insurance agencies, § 69.
contingent advantage, § 72.
contract between agents and principals, § 69.
labor, § 66.
orchard, prospective growth, § 62.
profits from commercial venture, § 67.
profits on dissolution of partnership, § 68.
special contract, §§ 63, 64.
collision between vessels, consequential damages, certainty, liability for principal loss extending to details for incidents, § 54.
contract for particular work
breach, consequential losses, contractor's liability, § 702.
liability for profits lost and expenses incurred, § 698.
damages for delay, § 703.
actual loss, § 704.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, § 713.
performance prevented, contractor's rights, certainty of proof of profits, § 714.
stopped by law, contractor's rights, § 714.
contracts for services, compensation, computation of profits or commissions, § 684.
express contracts, determination, continuation of original contract, § 685.
profits of business as compensation, evidence, breach of contract, § 684.
wrongful discharge, duty to mitigate damages presumption of subsequent employment, § 693.
measure of damages, liability for expenses and lost commissions, § 694.
remedies, actions, § 692.
copyright, infringement, compensatory and penal recoveries, § 1199.
covenants of warranty and quiet enjoyment, breach, mitigation of damages, § 611.
damages, determination, what may be considered by jury, § 824.
elements of damages, gains and losses, liability for, § 78.
greater damage than interest for failure to pay or to loan money, § 77.
eminent domain
injury to property not taken, ascertainment, § 1068.
remote damages, § 1071.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
fire insurance, losses, mitigation of liability, what jury may consider, § 824.
fraud, false representations, measure of damages, difference in value, § 1171.
guaranty, measure of guarantor's liability, § 729.
injunction bonds, damages from restraint of injunction, loss of profits, §§ 526-528.
interest, infringement of patents, § 340.
covenants for repairs by lessee, measure of liability for not making repairs, §§ 856-858.
lessor's liability for special and consequential damages, § 874.

Profits—continued.
interest—continued.
landlord and tenant, breach of covenant for quiet enjoyment, general rule of damages, § 864.
lessee's right to damages for injury to business, §§ 867-870.
mitigation of damages by lessee, § 871.
repairs, covenant by lessor to repair, breach of covenant, measure of liability, § 872.
right to interest between partners, § 342.
losses as elements of damage, damages by relying on performance, § 81.
malicious prosecution, damages, elements, expenses, § 1238.
master and servant, wrongful discharge of servant, duty to mitigate damages, presumption of subsequent employment, § 693.
mesne profits, action for, mitigation of damages, reduction of loss or benefit, § 164.
nuisances, pleading, allegations of damage, § 1060.
remote consequences, liability, § 1050.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
partnership articles, breach of, right of action, § 68.
patents
damages recoverable for infringement, profits as damages, §§ 1182, 1183, 1185.
whole article not patented, § 1193.
ascertainment of profits, § 1195.
mitigation of liability, § 1194.
equity, compensation in equity, computation of profits, §§ 1190, 1191.
interest on profits, § 1197.
license fees not established, recovery of profits, § 1196.
pleading, special damages, necessity of alleging, loss of profits, §§ 420, 421.
replevin, consequential damages, damages arising naturally and proximately from wrong, § 1146.
damages for detention, recovery of value of use of property, § 1144.
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
breach of contract by purchaser, action by seller, § 647.
production of property according to order, rule of damages, liability for remote loss, § 649.
breach of contract by seller, consequential damages, § 662.
delay in delivery, damages, § 664.
evidence of rental value, § 665.
evidence of loss, § 653.
goodwill sold, certainty of proof, § 658.
non-delivery of property contracted for, consequential damages, § 662.
property not in market, recovery of lost profits, § 652.
vendee's contract to re-sell, § 653.
non-delivery of stock, § 657.
disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
warranty of quality, damages for breach, interest, expenses and special injuries, §§ 671, 672.
warranty of title, breach, damages, § 669.
special damages, loss of profits, necessity of alleging, §§ 420, 421.
telegrams
delay or negligence in transmission or delivering of message, damages recoverable, loss of employment and profits, of business, §§ 961, 967.
mitigation of damages by injured party, § 973.

Profits—continued.
trade-marks, infringement, damages, measure of damages in equity and at law, §§ 1201, 1202.
trespass to personal property, mitigation of damages, § 1104.
special and consequential damages, remote damages, § 1102.
taking or destroying property, interest, value of use, § 1096.
trespass to real property, aggravation, special damages, § 1028.
party wall injured, damages, § 1025.
remediable injury, damages, § 1018.
special damages, injury to business, loss of profits, § 1029.
trover, allowance of interest, amount, § 1115.
special or consequential damages, § 1129.
trusts, breach of, interest, allowance against agents, trustees and officers, § 353.
vendor and purchaser
action by vendor against purchaser, interest on purchase money, § 577.
conveyance in consideration of non-pecuniary covenants, § 576.
breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
defaulting vendee's right, § 586.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, conflict of American decisions, § 579.
rescission, adjustment of counter demands, § 587.
vessels, shipper's rights in profits made by carrier, § 881.

Promissory Notes
see Bills and Notes.

Promotions
certainty of damages, chances for prizes and promotions, § 71.

Property
see Personal Property; Real Property; Market Value, etc.
cause of action, chose in action, § 7.
entirety, damage to property and injury to persons by same act, § 118n.
damage to real property, § 114.
consideration, breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
contracts for service of attorney, evidence of value, § 682n.
covenants, breach of covenants for title, measure of damages, consideration, presumption of consideration, admissibility of evidence, § 594.
breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606.
elements of damage, motive, tort actions, property injured, § 100.
value of property, § 105.
evidence of value, actual sales, offers for property, market quotations, §§ 446, 447.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
injuries, duty of agent to adhere to instructions, liability for exceeding commission, § 774.
landlord and tenant, destruction of demised premises, effect as to rent, § 852.
partial destruction of demised property, effect as to rent, § 851.
repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
torts, parties, joint right or liability, determination, principles, § 137.
losses as elements of damage, what losses consist of, § 79.

Property—continued.
market value, opinion evidence as to value of property, admissibility, § 446.
mitigation of damages, no mitigation when benefit not derived from defendant, § 158.
negligence, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
nominal damages, illustrations of right to nominal damages, § 10.
object of law of damages, compensation, § 12.
opinion evidence, instances of rejection and admission of opinions, § 443.
special damages, necessity of alleging special damages, illustrations, § 420.
taking property for public use, see Eminent Domain.

Prosecuting Attorneys
duties, bonds of public officers, construction, § 485.

Prospective Damages
see Remote Damages.

Prostitution
nuisance, interference with business, element of damage as distinct injury affecting premises, § 1054.

Protest Fees
damages on bills of exchange dishonored, re-exchange, § 560.

Provocation
see Mitigation of Damages.

Proximate Result
see Consequential Damages.
agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, §§ 770, 771.
anticipation of injury to persons, consequential damages, proximate cause, § 25.
attachment bonds, damages recoverable, § 512.
carriers of goods, delay in transportation, liability for negligence, proximate cause, § 903.
delivery, refusal to deliver, recovery for time and expenses of obtaining property, § 911.
carriers of passengers, negligence or breach of duty, passenger's indiscreet acts, right to damages, § 940.
place, ejection of passenger at wrong place, damages sustained on track, § 939.
refusal to carry, damages, passenger's indiscreet acts, § 940.
seats, failure to provide, damages recoverable, § 941.
certainty of consequential damages, recovery for successive consequences of act or omission, § 58.
direct and consequential damages, § 13.
express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
extension of liability by statutes, consequential damages, § 16.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
insurance, accident policies, character, indemnity contracts, damages recoverable, § 835.
marine insurance, cause of loss, necessity that cause of damage be proximate cause, § 803.
intervening cause, what constitutes, §§ 37, 38.

Proximate Result—continued.
leases, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.
limitation of damages to natural and proximate consequences of injury, § 13.
mitigation of damages, plaintiff's acts and negligences, § 155.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
railroad's negligence, collision, consequential damages, extension of liability by statutes, § 16.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 671.
telegraphs and telephones, negligence in transmitting or delivering messages, delay, knowledge of sender's purpose, § 968.
vendor and purchaser, breach of contract, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.

Public Amusements
see Theaters.
elements of damage, losses, damage by relying on performance, § 81.
exclusion of person, consequential damages, breach of statutory duties, § 32.
elements of damage, mental suffering, § 95.
negligence, consequential damages, acts of third person, § 40.

Public Enemies
carriers of goods, duty to care for property, § 916.
liability for consequential damages, intervening cause, § 37.
destruction of private property, damnum absque injuria, § 3.

Public Improvements
assessments
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
covenant running with land, § 625.
delay, interest where payment is unreasonably and vexatiously delayed, § 323.
evidence of value, § 445.
landlord and tenant, rent payable in specific articles, recovery, § 846.
recovery of attorney's fees in suit to set aside assessment, consequential damages, recovery for successive consequences, § 58.
tender, effect, collateral securities, § 277.
value, evidence, admissibility, § 445.
bids, certainty of damages, contingent advantage, § 72.
bond of contractor, suretyship, discharge or reduction of surety, act of creditor, § 735n.
bonds, liquidated damages, intention to liquidate, evidence and effect of, § 284.
contracts, alternative contracts, liquidated damages, § 282.
contractors' liability, general rule, liability for profits lost and expenses incurred, § 698.
necessity of full performance of express contract, inability to perform, § 688.
performance stopped by law, contractor's rights, § 714.

Public Improvements—continued.
easements, breach of covenant against incumbrances, rule of damages, payment of incumbrances, damages if not paid, § 623.
interest, allowance from time when money ought to be paid, § 329n.
eminent domain, deduction for benefits, special benefits, §§ 1085, 1087.
effect of judgment for compensation, abandonment of proceedings, § 1090.
time of assessment of damages and benefits, § 1083.
fraud, damages, cost of putting work in condition, § 1174.
interest, allowance against government, § 332.
payment unreasonably and vexatiously delayed, § 323.
special assessments, § 337.
suspension of interest, process, payment prevented by legal process, § 381.
recoupment and counterclaim for negligence, § 180.

Public Lands
sale by county, vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.
title
breach of covenants of warranty and quiet enjoyment, mitigation of damages, § 611.
taxes and interest as items of damages, § 616.

Public Officers
see Officers and Public Employees.

Public Policy
attorneys, compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
contract for services of attorney, evidence of value, § 682.
bills and notes, stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
bonds, condition, illegal act, effect, § 474.
broker's compensation, amount, basis for computation, § 683.
necessity of completing sale, effect of custom or usage, § 683.
contracts, conflict of laws, general rule as to contracts, § 357.
contractual exemptions from liability for damages, § 6.
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
interest, compound interest, § 373.
liquidated damages, certainty, contracts for payment of money, §§ 286, 287.
necessity of valid contract, § 280.
suretyship, construction of contract, § 724.
torts, consequential damages for torts, right to damages, § 16.

Public Wrongs
section 4.

Pumps
patents, infringement, damages, whole article not patented, § 1193.

Punishment
see Exemplary Damages.

Punitive Damages
see Exemplary Damages.

Purchase
see Sales; Vendor and Purchaser.

Q

Quality
sales, warranty of title, implied warranty, § 668.

Quantum Meruit
ad damnum, erroneous claim of damages, effect, § 417.
broker's compensation, amount, basis for computation, § 683.
necessity of completing sale, effect of custom or usage, § 683.
carriers, freight charges, amount of charges in absence of express agreement, § 884.
compensatory damages, breach of contract, motive as affecting damages, § 99.
contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699.
demand for part performance of entire contract, recovery by contractor on quantum meruit, §§ 709-711.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, consequential losses, mitigation of damages, § 713.
contracts for services
compensation, §§ 678, 679.
analogy to salvage or making invention, § 679.
presumption where family relation exists, § 679.
statute of frauds, § 684.
evidence of value, § 680.
express contracts, necessity of full performance of entire contract, recovery on quantum meruit, § 686.
invalidity of contracts because of statute of frauds, recovery for services rendered, measure of damages, § 684.
necessity of full performance, inability to perform, §§ 687-690.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
measure of damages, remedies, actions, § 692.
covenants of warranty and quiet enjoyment, breach, measure of damages, where property is consideration, § 606.
evidence, reduction of damages, rule at common law, § 544.
value of attorney's services, opinion evidence, § 680.
interest, allowance of interest on unliquidated demands, § 347.
claim to interest, § 324.
vendor and purchaser, § 328.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
recoupment and counterclaim, § 168.
acts which may be basis of recoupment, § 181.
remoteness or uncertainty of stipulated compensation, effect, measure of damages, § 684.
salvage services, requisites, parties liable, § 715.
tender, right to make, demands, § 261.
vendor and purchaser, breach of contract, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.

Quantum Valebat
recoupment and counterclaim, acts which may be basis of recoupment, § 181.

Quarantine
passengers removed, protection of passengers, duty of carrier, § 941.

Quarries
blasting rocks, elements of damage, mental suffering, § 95.

Quarries—continued.
eminent domain, injury to property not taken, ascertainment to damages, facts which may be considered, §§ 1066, 1070.
landlord and tenant, rent, amount as affected by subsequent facts, § 845.
nuisance, remote consequences of nuisance, liability for, § 1051.
sales
certainty of damages, anticipated profits, § 60.
profits of special contracts, § 64.
non-delivery of property contracted for, property not in market, recovery of lost profits, § 652.

Questions of Law and Fact
appeal, interest and damages awarded on appeal, § 59.
broker's compensation, amount of compensation, reasonable amount, where principal refuses to sell land, § 683.
consequential damages, what constitutes, award for probable consequences, § 15.
fraud, false representations, materiality, § 1167.
payment, application, debtor's right to direct application, § 235.
telegraphs and telephones, mitigation of damages by injured party, burden of proof, questions for jury, § 973.

Quia Timet
covenants, actions for purchase money, defenses in equity, § 641.
suretyship, right of surety to compel payment by debtor, § 749.

Quiet Enjoyment
see Covenants.

Quieting Title
removal of cloud on title, damages recoverable by purchaser against vendor of land, defaulting vendee's rights, conflict of American cases, § 586.

Quit-claim Deeds
breach of covenants of warranty and quiet enjoyment, parties against whom recovery may be had, parties plaintiff, § 613.
effect of statute, declaring words, "grant, bargain and sell" covenants of seizin, § 591.

Quo Warranto
appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 534.

R

Race Horses
evidence of value, property without market value, § 448.

Rags
sales, recoupment for negligence in transmitting disease, § 180.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Railroads
see also Alighting from Train; Carriers of Goods; Carriers of Passengers; Passenger Injured; and similar titles.
animals injured, cause of action, severance, § 110n.
consequential damages, fence statutes, scope of statutes, § 20.
liability, illustration, § 18.
interest, actions for torts, § 355.
nuisance, remote consequences of nuisance, liability for, § 1051.

Railroads—continued.
arrest of engineer on duty, consequential damages, § 19.
assault on passenger, consequential damages for torts, liability, illustrations, § 19.
beneficial insurance association, contractual exemption from liability for damages, § 6.
bridges, eminent domain, right to compensation, § 1061.
chairs, sale of railway chairs, refusal to accept property produced according to order, damages, remote losses, § 649.
collision, nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
nervous shock without impact, consequential damages, § 21.
parties, joint and several liability for torts, § 141.
train colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23.
wagon injured, consequential damages for torts, liability illustrations, § 18.
conductor allowing persons to ride on freight train contrary to rules, agent's particular duties and liabilities, principal's right to indemnity, § 771.
construction
breach of contract, consequential damages, liability under special circumstances, damages contemplated by parties, § 51.
consequential losses, contractor's liability, § 702.
crossings, damages as including other than pecuniary elements, § 92.
damages for delay, actual loss, § 704.
proximate consequences of breach, illustrations, § 46.
special circumstances, § 52n.
certificate of architect, engineer, etc., necessity, effect upon whom binding, § 712.
contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, §§ 1066, 1070.
employer's liability for delaying or stopping work, recovery on contracts or quantum meruit, § 713n.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
guaranty, measure of guarantor's liability, § 729.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
personal injuries, pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
prevention of construction, injunction bonds, damages from restraint of injunction, § 528n.
recoupment and counterclaim, set-off in favor of government, parties, § 176.
releases, extrinsic evidence and construction, § 255.
contracts of railroad, certainty of damages, anticipated profits, § 59n.
conveyances, covenants of seizin and good right to convey, nature of covenant, breach, § 592.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
coupling cars, trespass to real property, aggravation and special damages, § 1029.
crossings, construction, breach of contract, contractor's liability, § 697.
failure to construct, elements of damage, pecuniary elements, other elements, § 92.

Railroads—continued.
crossings—continued.
farm crossings, eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1068.
intoxicated person injured, consequential damages, § 19.
nervous shock as physical injury, consequential damages, § 22.
signals not given, liability for damages, § 16.
view obstructed, consequential damages, § 19.
dead horse on railroad track, nuisance, remote consequences, liability, § 1051.
depots, breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
consequential damages, assault on woman in station, child frightened and killed by train, liability, § 35.
proximate cause, person struck by dead body, § 35.
construction, breach of contract, consequential losses, contractor's liability, § 702.
vendor and purchaser, conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.
heat, depot not heated, consequential damages, liability of carriers, extraordinary circumstances, § 36.
wagon injured by cars, consequential damages, § 18.
derailment of train, consequential damages for torts, liability, illustration, § 18.
nervous shock as physical injury, consequential damages, § 23.
ejection of passengers
exemplary damages, enhancement and mitigation of exemplary damages, § 404.
wealth of defendant, scope of inquiry, § 405.
eminent domain, assessments of damages and benefits, lands to be considered, § 1088.
basis for estimating value of land, § 1074.
breach of covenants of warranty and quiet enjoyment, measure of damages, where property is consideration, § 606n.
cause of action, entirety, successive actions for damage to real property, § 116.
compensation, what is just compensation, § 1063.
deduction for benefits, special benefits, §§ 1086, 1087.
effect of judgment for compensation, abandonment of proceedings, § 1090.
injury to property not taken, § 1065.
ascertainment of damages, facts which may be considered, §§ 1066, 1067.
consequential injury, § 1062.
expenditures to lessen loss, §§ 1072, 1073.
remote damages, § 1071.
measure of compensation, § 1064.
nominal damages, § 1063.
payment, to whom payment of compensation should be made, existence of servitude or easements, rights remaining in owner, § 1082.
railroad property taken for railroad uses, § 1078.
railroad property taken for street and telegraph uses, effect on compensation, proof of value, § 1077.
right to compensation for property taken, § 1061.
time of assessment of damages and benefits, § 1083.
title and nature of interest condemned and purpose of use, proof of value, § 1077.
wrongdoer's improvements, entry with or without consent of owner, § 1076.

Railroads—continued.
engineer arrested, consequential damages for torts, liability, illustrations, § 19.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
excavation, lateral support destroyed, consequential damages for torts, liability, illustration, § 18.
exemplary damages, joint liability for, § 407.
parties liable, master's liability for acts of servant, § 408.
extortion, bonds, penalty as limit of recovery, exception as to interest, § 478n.
failure to stop train, pleading, necessity of alleging special damages, § 421.
Federal Employers' Liability Act, see Federal Employers' Liability Act.
fences, animals escaping, consequential damages, §§ 18, 19.
breach of covenants against incumbrance, damages where incumbrance is permanent, § 628.
consequential damages, breach of contract, proximate consequences of breach, § 45n.
consequential damages under fence statutes, § 20.
fires, consequential damages, § 18.
indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
injury to hose used to extinguish fire, anticipation of injury, § 25.
mitigation of damages, insurance money, statutes, § 1027.
floods, eminent domain, right to compensation, § 1061.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
free pass as compensation, remoteness or uncertainty of stipulated compensation, effect on, measure of damages, § 684.
guaranty, measure of guarantor's reliability, lost profits, remote damages, § 729.
injuries to persons near track, intoxicated person, consequential damages, acts of third person, § 41.
interference with fire department, consequential damages, anticipation of injury, to persons, proximate cause, § 25.
jerks and jars, conductor thrown off train, consequential damages for torts, liability, illustration, § 18.
consequential damages, nervous shock, without impact, right to recover, § 21.
nervous shock without impact, consequential damages, § 21.
joint liability, exemplary damages, joint liability for, § 407.
landlord and tenant, lessee's right to damages for injury to business, § 868.
rent, duty to pay, effect of taking premises for public use, § 853.
repairs, lessor's liability for special and consequential damages, § 874.
license to use track, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
loss of baggage, contracts, limitation of common law liability, Carmack Amendment to Interstate Commerce Act, § 904.
market value of property, opinion evidence as to value of property, § 446.
mother separated from children on train, consequential damages, nervous shock without impact, right to recover damages, § 24.
municipal aid, contracts for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699n.
liquidated damages, manner of liquidating, computation of time, § 281.
noise, smoke and cinders as damnum absque injuria, elevation of railroad tracks, § 3.

Railroads—continued.
nuisance
continuance of liability of person who causes nuisance, § 1040.
when nuisance is not a continuous wrong, §§ 1042, 1044.
mitigation of damages, deduction for benefits, § 1056.
parties liable for nuisance, creation, continuance, § 1033.
private nuisance, special damages, necessity of alleging, § 420.
operation, damnum absque injuria, § 3.
parties, availability of set-off against assignees, § 176.
penalties, bonds, limit of recovery, interest, § 478.
reorganization, interest, allowance of interest on account, § 349.
relief department, contractual exemptions from liability for damages, § 6.
right of way
covenant against incumbrances, breach, covenant running with land, § 625.
definition, what are incumbrances, § 620n.
measure of damages, remote losses, § 622.
rule of damages, payment of incumbrances, damages if not paid, § 623.
permanent incumbrance, § 627.
obtaining right of way, contract for particular work, breach, consequential losses, contractor's liability, § 702.
rules and regulations, negligence or breach of duty, exemplary damages, difference in rule in some states, § 951.
violation, engine unattended, consequential damages, § 18.
sale of railroad and canal, repairs, covenant of purchaser to keep property in repair, effect, measure of damages for breach of covenant, § 860.
scrip, replevin, recovery for intermediate injury and depreciation of property, § 1152.
servants, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
deprivation of shelter, malicious trespass, aggravation and special damages, § 1029.
injuries, acceptance of benefits, accord and satisfaction, consideration, act or promise which is new consideration, § 249.
verdicts, excessive or inadequate verdicts, § 1256n.
liability for acts of agents, exemplary damages, parties liable, liability of master for acts of servants, §§ 409, 411.
negligence of employee, limitation of liability by contract, interstate commerce, § 904.
sidetrack abandoned, carriers of goods, refusal to carry, increased expenses, loss of customers, § 901.
contract to construct, consequential losses, contractor's liability, § 702n.
contractor's liability for damages for delay, rental value, expenses, § 703.
special train, passenger alighting at wrong place, damages peculiar to passenger, § 939.
speed of train, consequential damages, § 19.
stock, agent's rights, reimbursement, effect of mode of doing business, § 792.
sale, guaranty, measure of guarantor's liability, § 729.
subscription, interest as compensation, § 320n.
taxes, interest, allowance of interest on taxes, § 337.
tracks, intoxicated person injured, consequential damages for torts, liability, illustrations, § 19.
pedestrian injured, consequential damages, nervous shock without impact, right to recover, § 21.
train blown over by storm, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.

Railroads—continued.
train not stopping, pleading, special damages, necessity of alleging, § 421.
trespass to real property, fences, destruction of fences, injury, damages, § 1024.
mitigation of damages, § 1027.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
trover, damages, general rule, exception as to place of conversion, § 1109.
washout, interest, actions for torts, § 355.

Rain
consequential damages, proximate cause, wrongful act as proximate cause of damages, § 38.

Rape
assault with intent to rape, elements of damage, mental suffering, § 95, n 24.
pain and suffering, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
breach of marriage promise, aggravation of damages, § 984.
carriers of passengers, protection of passengers, duty of carrier, § 941.
character as affecting damages for personal injuries, § 94n.
convict escaping, consequential damages, liability as affected by extraordinary circumstances, illustrations, § 35.
trespass, aggravation of damages, threats to burn house, ravish wife, etc., § 1029.
mitigation of damages, § 1027.

Rates
see Carriers of Goods; Interest; Money.

Real Property
Ch. XXV, §§ 1008-1060.
see also, Adverse Possession; Fixtures; Remainders and Reversions, etc.
appeal and supersedeas bonds, liability if judgment is in part for money or in rem, rule of United States Supreme Court, § 533.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
city lots, evidence of value, § 445.
conflict of laws, contracts, determination of place of payment, § 357.
covenants, incumbrances, what are incumbrances, § 620.
market value, evidence, admissibility, § 445.
opinion evidence as to value of property, § 446.
unimproved lands, value of property-evidence, actual sales, offers for property, market quotations, § 447.
use prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.

Receipts
accord and satisfaction, release, distinctions, § 254.
liquidated damages, stipulation when damages are uncertain, illustrations, § 293.
payment. application by debtor, evidence, § 237.
effect, § 218.
tender, conditions, tender must be unconditional, § 270.

Receivers
appointment, appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
attachment bonds, damages recoverable, § 512.

Receivers—continued.
banks, interest, necessity of demand, § 351.
bonds, liability of sureties, § 539a.
broker's compensation for services, measure of compensation, § 683.
certainty of damages, chances of promotion, § 71.
compensation, amount of compensation, § 683.
implied contracts, right to recover for services rendered, § 679.
quantum meruit, recovery for services rendered, § 679.
corporations, interest, allowance of interest on judgments, § 333n.
expenses, indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, §§ 527, 528.
interest, allowance from time when money ought to be paid, § 329.
money paid, allowance of interest on money paid, § 327.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.
payment, application by creditor, § 239.
person to whom payment may be made, § 231.
replevin, bond to retain property, breach, measure of damages, § 509.
sales, injunction bonds, damages from restraint of injunction, § 528.
suretyship, creditor's duty to acquire liens, necessity of notice of reliance, § 739.
telegraphs and telephones, negligent delay in transmission or delay in delivery of message, liability for loss of employment and profits of business, § 967.
trover, allowance of interest, amount, § 1115.

Receiving Stolen Goods
trover, special and consequential damages, § 1129.

Recognizance
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
interest, agreement to pay money with interest, construction, § 305.
allowance from time when money ought to be paid, § 329.
statutory bonds, condition required by statute, necessity of compliance, § 475.

Recorder of Deeds
see Register of Deeds.

Records
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
deeds, recording deed, breach of contract, damages recoverable by vendor against purchaser, measure of damages, § 570.
duty to record, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 771.
examination of record, contract for particular work, contractor's liability, consequential damages for defective work, § 705.
fraud, false representations, reliance on representations, negligence of injured party, § 1168.
insolvency, official bonds, measure of damages against sureties, § 488.
mortgages, agent's particular duties and liabilities, principal's right to indemnity, § 771.
cancellation of mortgages, official bonds, measure of damages against sureties, § 488.
entry of satisfaction of mortgages, officers, neglect of duty, measure of damages, nominal damages, § 490.
neglect of clerk to index mortgage, damages, losses, attorney's fees in defending suit, § 83n.
payment, evidence of payment, § 233.

Records—continued.
mortgages—continued.
satisfaction, evidence of payment, § 233.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
official bonds, private injuries covered by official bonds, § 487.

Recoupment
see Set-off, Counterclaim and Recoupment.

Re-exchange
see Bills and Notes.

Reference
breach of contract, damages, right of seller of land to recover purchase price and interest, abatement of price, § 567.
sales, executed sales, recovery by seller after rescission of contract, price fixed by third party, § 653.

Reformation of Instruments
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 619.
deeds, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
nominal damages, effect of failure to allow, § 11.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Refrigerator Defective
mitigation of damages, extent of duty to lessen or prevent damages, § 90.

Refrigerator Sold
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Register of Deeds
negligence, measure of damages against sureties on official bonds, § 488.
officers, non-performance of official duties, right of action, § 484.

Registration of Title
see Abstracts of Title.
breach of covenants of warranty and quiet enjoyment, measure of damages, value of land at time of loss as measure of damages, Torrens Act, § 606.

Relations
contracts for services, compensation, quantum meruit recovery, presumption where family relation exists, § 679.
death, aliens, rights of non-resident aliens, statutes as to death by wrongful act, § 1261.
pleading of damages, § 426.
malicious prosecution, damages, elements, family of plaintiff, condition, § 1237.
tender, persons by whom tender may be made, § 264.

Release
accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
compromise of disputed claim, § 251.
accord and satisfaction distinguished, § 254.
agreements not to sue, § 144.

Release—continued.
apportionment of rent, § 850.
attachment, bonds, damages recoverable, § 512.
forthcoming bonds, measure of damages, § 518.
causes of action, entirety, effect of release by or death of one of several entitled to entire damages, § 133.
construction, § 255.
contractual exemptions from liability for damages, § 6.
covenant for title, breach, mitigation or prevention of damages, § 601.
covenants not to sue, § 259.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
covenants
warranty and quiet enjoyment, breach, parties by and against whom recovery may be had, § 613.
suit against remote covenantor, measure of damages, § 614.
defenses, circuity of action, reciprocal operations, § 147.
definition, § 214.
evidence, extrinsic evidence, § 255.
execution by or to one of several claiming or liable, § 257.
Federal Employers' Liability Act, effect under, § 1340.
fraud, false representations, measure of damages, where release is procured by fraud, § 1171.
landlord and tenant, rent, apportionment, § 850.
liens, indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
marshaling and distribution, effect of creditor releasing part, § 194.
parties, joint liability, extinguishment or severance, § 136.
payment, definition, § 214.
note, bill or check, § 226.
probate bonds, liability as between sets of sureties, § 498.
reciprocal obligations, circuity of action, § 147.
requisites, what will operate as release, § 258.
right of way, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
suretyship, creditor's duty to acquire liens, notice of reliance thereon, § 739.
creditor's duty to realize on securities, limitation of release to injury sustained by surety, § 738.
injunction bonds, damages, costs and expenses, attorneys' fees, § 525.
release by creditors of one or more parties, effect, § 742.
securities released by creditors, value, § 740.
surety's remedies for indemnity, contribution between co-sureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
tender, effect, collateral securities, § 277.
tender, conditions, tender must be unconditional, § 270.
who may execute, § 256.

Religion and Religious Societies
eminent domain, compensation for injury to property, churches, elevated railroads and sub-ways, § 1080.
expression, conduct and religious belief of sufferer as evidence of damages, personal injuries, § 453.
pastor, contract for services, mode of compensating, § 684.

Remainders and Reversions
actions, injuries to property, pleading, § 1033.
cause of action, severance, contract to do several things successively, or one thing continuously, § 110n.

Remainders and Reversions—continued.
eminent domain
compensation, injuries to various interests, damages in favor of tenants, § 1081.
wrongdoer's improvements, entry with or without consent of owner, § 1076.
injury to property not taken, ascertainment, §§ 1066, 1070.
proof of value of property and damages, § 1089.
fire insurance, contribution, several policies on destroyed property, § 822.
damages, insurance by mortgagee, § 829.
injuries to property, torts, parties, joint right or liability, determination, principles, § 137.
interest, allowments of interest on annuities and legacies, § 344.
judgments, interest on, § 333.
leases, assignment, liability of assignee for repairs, § 859.
breach of covenant for quiet enjoyment, general rule of damages, § 864.
rent, apportionment, § 849.
duty to pay, effect of taking premises for public use, § 853.
repairs, assignee's liability for repairs, § 859.
covenants for repairs by lessee, measure of liability for not making repairs, § 856.
termination of lease, lease by life tenant, § 853.
life estates, annuity and life tables, admissibility, § 455.
covenant against incumbrance, damages for breach, permanent incumbrance, § 628.
definition, what are incumbrances, § 620n.
replevin, damages for detention, recovery of value of use of property, § 1144.
mesne profits, claims for improvements, taxes, defenses, § 999.
damages recoverable, consequential and punitive damages, § 994.
nuisance, estates, damages affected by interest in estate, § 1057.
permanent injury, depreciation and market value as damages, § 1047.
special elements of damages, repairs, § 1048.
parties, entirety of tortious act, § 138.
joint right or liability for tort, determination, § 137.
trespass, injuries to rights of parties not in possession of property, compensation, § 1033.
permanent injury, estimate of damages, § 1017.
suit by tenant, possessor or licensee, damages, § 1012.
value, evidence, opinions on common experience and observation, admissibility, § 443.
vendor and purchaser, breach of contract by vendor, recovery on parol contract, § 583.

Remedies
adequate relief for violation of rights, § 1.
agency, remedies of principal against agent, § 768.
appeal and supersedeas bonds, remedies of judgment creditors, § 531.
bills and notes, guaranty of collection, liability for costs, diligence, § 733.
carriers of passengers, nature of obligation, liability of carrier in tort, § 934.
remedies of action in tort or breach of contract, § 934.
causes of action
entirety, parties to actions under statutes, § 129.
what is not a double remedy, § 119.
conflict of laws, interest, law governing where usury is involved, § 365.
contracts for particular work, contractor's right to payment, rights in insurance money, interest, § 706.

Remedies—continued.
covenants against incumbrances and covenants of seizin, similarity, § 625.
covenants of warranty and quiet enjoyment, scope, remedy for breach, § 603.
fraud, false representations, remedies by purchaser of property, rescission, action for damages, § 1174.
injunction bonds, damages, costs and expenses, attorneys' fees, § 524.
scope and effect of obligation, § 520.
legal system, object of system of law, adequate relief for violation of rights, § 1.
liquidated damages, alternative contracts, § 282.
effect of stipulation on right of action, § 298.
master and servant, wrongful discharge of employees, measure of damages, remedies, § 692.
mesne profits, remedy under the code, § 1000.
object of law of damages, compensation, § 12.
officers and public employees, bonds, mode of redress for official dereliction, § 486.
patents, infringement, legal and equitable remedies, §§ 1181, 1182.
probate bonds, execution of probate bonds, manner, recoveries which may be had, § 494.
public wrongs, right of action, remedies available, § 4.
replevin bonds, damages when plaintiff recovers as special owner, effect of change in statute, § 508.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
action by seller against purchaser, breach of contract, § 647.
suretyship
surety's remedies for indemnity, action against principal for money paid, § 745.
action against principal, who is principal, § 746.
consequential damages, liability of principal, § 753.
contribution between co-sureties, accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
basis of contribution, liability for torts, § 756.
conclusiveness of judgment, § 760.
insolvency of co-surety, firm as one surety, § 757.
who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
payment giving right to reimbursement, §§ 750, 751.
right of subrogation, when and to whom available, § 736.
right of surety to compel debtor to pay, § 749.
vendor and purchaser, action for purchase money, defenses and counterclaims, §§ 639, 640.
breach of contract by purchaser, legal remedy of vendor against purchaser, § 568.
measure of damages, § 569.
damages recoverable by purchaser against vendor of land, oral contract, § 583.

Remittitur
see Appeal and Error.

Remote Damages
see Consequential Damages.
agent, liability for exceeding commission, § 774.
ascertainment, only present worth of future damages given, § 124.
attachment bonds, damages recoverable, §§ 512, 513.

Remote Damages—continued.
breach of contract, causes of action, entirety, prospective damages, § 120.
measure of damages, losses as elements of damage, § 79.
vendor of land, recovery against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
recovery by purchaser against, measure of damages, § 581.
breach of contract to pay money, special obligations, measure of damages, § 77.
building contracts, contractor's liability, general rule, benefit of contract to employer, cost and inconvenience, § 697.
carriers of goods, delay in transportation, goods to be used for competing for prizes, measure of damages, § 71.
carriers of passengers
negligence or breach of duty, damages for pain and suffering, past and prospective damages, § 944.
injury to wife, child or servant, actions, § 952.
passenger alighting at wrong destination, consequential damages, distinction between liability in tort and on contract, § 48.
passenger's indiscreet acts, right to damages, § 940.
refusal to transport, breach of contract, carrier's liability for remote consequences, § 902.
seats, failure to provide, damages recoverable, § 941.
causes of action, splitting, § 120.
certainty of damages, anticipated profits, prospective growth of orchard, § 62.
contract between agents and principals, § 69.
certainty of proof of future damages, § 121.
municipal corporations, failure to provide sinking funds, § 74.
profits from commercial venture, § 67.
consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.
certainty of damages, necessity, proximate result of act or omission, § 53.
nervous shock without impact, right to recover damages, § 24.
proximate cause, act of third person as cause, § 40.
right to damages, torts, § 16.
what constitutes, award for probable consequences, § 15.
contract for particular work, contractor's liability, consequential damages for defective work, § 705.
delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 703.
delaying or stopping work, consequential losses, mitigation of damages, § 713.
effect of not abandoning contract, performance stopped by law, § 714.
non-performance, consequential losses, § 702.
services, wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
liability for expenses and lost commissions, § 694.
covenants of warranty and quiet enjoyment, breach, measure of damages, conflict of laws, what law controls, § 605.
eminent domain
compensation, basis for estimating value of land, § 1074.
elevated railroads and sub-ways, § 1080.
injury to property not taken, ascertainment, § 1067.
evidence, certainty of proof of future damages, action for enticing away apprentice, servant or son, or procuring discharge of servant, § 122.
explosion, consequential damages for torts, liability, illustration, § 18.

Remote Damages—continued.
express indemnities, costs, expenses and attorney's fees, remote and consequential losses, § 762.
fraud, remote, conjectural and contingent damages, §§ 1175, 1176.
guaranty, measure of guarantor's liability, § 729.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
insurance, accident policies, character, indemnity contracts, damages recoverable, § 835.
leases, business, recovery for damages to business of lessee, § 867.
repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
nuisance, expenditures, future expenditures as damages, § 1041.
successive actions, continuity, nuisance, damages recoverable in first action, § 1039.
object of law of damages, award of compensation, § 12.
paupers, consequential damages, injury through third person, § 33.
personal injuries, actions, number of actions maintainable, prospective damages, § 1251.
ascertainment of damages, § 123.
pleading, necessity of demand of damages in code complaint, § 415.
replevin, special and consequential damages, § 1146.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract, production of property according to order, rule of damages, liability for remote loss, § 649.
slander and libel, special damages, § 1215.
suretyship, express indemnity, damages recoverable, § 762.
telegrams, negligence in transmitting or delivering messages, delay, knowledge of sender's purpose, § 968.
liability for error or delay in transmission of messages, damages recoverable, § 961.
trade-marks, infringement, measure of damages, in equity and at law, § 1202.
trespass to personal property, certainty of damages, § 1093.
special and consequential damages, remote damages, § 1100.
trespass to real property, aggravation, special damages, §§ 1028, 1030.
vendor and purchaser, conveyance in consideration of non-pecuniary covenants, measure of damages for breach, § 576.

Removal of Causes
Federal Employers' Liability Act, actions under, § 1353.

Removal of Property
replevin bonds, actions, damages recoverable, § 505.

Rents
see Landlord and Tenant.

Repairs
adjoining landowners, injury to foundation of house, action for cost of repairing, items, § 860.
admiralty torts, interest, right to recover interest on damages, total or partial loss, § 1294.
partial loss, elements of damages, §§ 1292, 1293.
agency, expenditures of agent, right to reimbursement, § 789.
liability of agent for tort, § 800.
amount of damages, opinions of witnesses, admissibility, § 444.
automobiles, evidence, opinions on subjects of common experience and observation, admissibility, § 443.
breach of contract to repair, losses as elements of damages, expenses to prevent or lessen damages, § 88.

Repairs—continued.
bridges, consequential damages, act or omission as proximate cause of injury, § 29.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
buildings, consequential damages, acts or omission as proximate cause of damages, § 29.
defenses, circuity of action, operation of principle in favor of plaintiff, § 145.
evidence, opinions on subjects of common experience and observation, admissibility, § 443.
canals, act or omission as proximate cause of injury, consequential damages, § 30.
causes of action, advantage of successive actions, § 127.
consequential damages, breach of contract, proximate consequences of breach, § 45n.
contract for particular work, accident preventing performance, liability, § 700.
breach, defects to be remedied, liability for expenses and consequential losses, § 699.
contractor's liability, consequential damages for defective work, § 705.
damages for delay, § 703.
defects, consequential damages, § 705.
contract for particular work, breach, consequential losses, contractor's liability, § 702.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
entire and apportionable contracts, § 691.
covenants, causes of action, entirety, continuous breach of contract or infraction of rights, § 125.
dower, right subject to incumbrances, § 1007.
eminent domain, property not taken, injury, compensation, § 1065.
fences, consequential damages for torts, liability, illustration, § 18.
ferries, consequential damages, certainty, recovery of items of damages, which are certain, § 55.
fire insurance, contract to replace or rebuild, § 830.
losses, mitigation of liability, what jury may consider, § 824.
highways and streets, repair, right of indemnity of municipality, parties contracting to repair, § 83.
landlord and tenant, actions to recover rent, abandonment of lease, § 844.
assignment or subletting, breach of covenant not to assign, damages, § 861.
liability of assignee for repairs, § 859.
certainty of damages, breach of contract to lease premises, § 65.
eviction of lessee, recovery of rent barred, § 848.
mitigation of damages, § 154.
rent, duty to pay, effect of partial destruction of demised property, liability under statutes, § 851.
repairs
covenants for repairs by lessee, § 855.
breach of covenant to repair, measure of liability, §§ 856, 858.
covenants to repair by lessor, § 872.
lessee's duty, recovery by lessee for making repairs, § 873.
machinery
contract for particular work, contractor's liability, damages for delay, actual loss, § 704.
recovery by contractors, part performance of severable contract, § 708.

Repairs—continued.
marine insurance, injury, extent, damages in case of partial loss, § 816.
losses, adjustment on principle of indemnity, § 817.
market value of property, evidence, admissibility, § 445.
mesne profits, defenses, claims for improvements, taxes, etc., § 999.
nuisance, elements of damages, § 1048.
remote consequences, liability, § 1050.
special elements of damages, repairs, § 1048.
opinion evidence, instances of rejection and admission of opinions, § 443.
sale of railroad and canal, repairs, covenant of purchaser to keep property in repair, effect, measure of damages for breach of covenant, § 860.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, consequential damages, § 662.
delay in delivery, mitigation of liability, § 666.
evidence of value of property, § 654.
warranties of quality and quantity, breach, damages, § 670.
interest, expenses and special injuries, § 671.
schools, implied assumpsit following consideration, § 132.
street railways, repairs enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
suretyship, surety's right to defend between principals, § 743.
threshing machine, contract for particular work, breach, defects to be remedied, liability for expenses and consequential losses, § 699.
trespass to personal property, damages, ascertainment of value of non-marketable property, § 1099.
expenses to recover, restore, and protect property, damages, § 1103.
special and consequential damages, § 1101.
taking or destroying property, interest, value of use, § 1096.
trespass to real property, remediable injury, damages, § 1018.
suit by tenant, possessor or licensee, damages, § 1012.
vehicles, amount of damages, opinion evidence, § 444.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
measure of damages, nominal damages, § 582.
oral contract, § 583.
suits for specific performance, § 590.
vessels, contract for particular work, contractor's liability, consequential damages, for defective work, § 705.
wharves, consequential damages for torts, liability, illustration, § 18.

Replevin
Ch. XXIX, §§ 1143-1162.
adequate relief or violation of rights, § 1.
appeal and supersedeas bonds, analogy to replevin bonds, § 531.
liability if judgment is in part for money or in rem, rule of U. S. Supreme Court, § 533.
liability in state courts if judgment is in part for money or in rem, § 535.
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
bonds
assessment of damages, default or demurrer as admission, § 429.
effect of judgment in replevin suit, § 506.
suit on bond, § 502.
conditions of replevin bonds, history, § 499.
return of property, § 500.
statutes, condition required by modern statutes, § 501.
damages recoverable, § 505.

Replevin—continued.
bonds—continued.
damages when plaintiff recovers as special owner, effect of change in statute, § 508.
demand, necessity to secure allowance of interest, § 351.
evidence of value of property, § 504.
insufficient bonds, measure of damages against officers for neglect of duty, nominal damages, § 491.
judgment, what may be shown in defense or in mitigation, § 507.
when sureties are not liable for judgment in replevin suit, § 503.
official bonds, measure of damages against sureties, § 488.
penalty, as limit of recovery, exception as to interest, § 478n.
recovery for intermediate injury and depreciation of property, § 1152.
statutory bonds, condition required by statute, necessity of compliance, § 475.
suretyship, measure of surety's liability, § 723n.
bonds by defendants to retain property, damages, § 509.
building condemned, measure of damages, § 1144.
carriers, duty of carrier, care of property, liability for goods injured or lost, liability of shipper for freight charges, § 918.
causes of action, entirety, double remedies, § 119.
mistake of remedy, effect, § 106.
severance, cause of action not divisible, § 106.
consequential damages, damages arising naturally and proximately from wrong, § 1146.
continuance, replevin bonds, damages recoverable, § 505.
damages affected by object of action, distinction in pursuit of property, detinue and replevin, § 1149.
damages for detention of property, measure of damages, expenses, § 1144.
defendant's rights, damages, § 1155.
detention of property, measure of damages, § 1157.
recovery of value of use of property in lieu of interest, § 1157.
exemplary damages, § 1158.
mitgation of damages, § 1159.
part of property found for each party, rights of parties, § 1162.
plaintiff obtaining possession and failing in suit as wrongdoer, § 1156.
set-off, counterclaim, and recoupment, § 1161.
special and consequential damages, § 1158.
title or interest in property, recovery as affected by interest in property, § 1160.
detinue and replevin, nature of actions, § 1143.
dismissal, replevin, defendant's rights, mitigation of damages, § 1159.
exemplary damages, right to recover, aggravating circumstances, § 1145.
expenses, consequential damages, damages arising naturally and proximately from wrong, § 1146.
express indemnity, damages recoverable, costs, expenses and attorney's fees; remote and consequential losses, § 762.
fences, action for fences or material composing it, damages, § 1144.
inconvenience, measure of damages, § 1144.
injury and depreciation of property, recovery for intermediate injury and depreciation, §§ 1151-1153.
interest, actions for torts, § 355.
damages for detention, measure of damages, § 1144.
necessity of demand, § 351.
recovery of value of use of property in lieu of interest, § 1144.
judgment, option of taking property or its value, § 1148.
leases, covenants, special and consequential damages for breach of various covenants, § 865.

Replevin—continued.
leases—continued.
recoupment of damages by tenant, § 182.
life tenants, measure of damages, § 1144.
lost property, measure of damages against officers for neglect of duty, nominal damages, § 491.
measure of damages, increase in value of property by defendant, § 1154.
mitigation of damages, replevin, recovery for intermediate injury and depreciation of property, § 1151.
mortgages, measure of damages, § 1144.
nature of action, § 1143.
nominal damages, recovery for intermediate injury and depreciation of property, § 1151.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, §§ 491, 492.
part of property found for each party, rights of parties, § 1162.
parties, general and special owners, § 139.
who may sue, § 1143.
penalties, bonds, limit of recovery, interest, § 478.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
pleading, necessity of alleging, § 1146.
pledges, measure of damages, § 1144.
property of no value, nominal damages, § 9, n 1.
recoupment and counterclaim, connection between cause of action and crossclaim, § 183.
liquidated and unliquidated damages, § 185.
parties, § 175.
return of property, damages recoverable if property is not returned, §§ 1147, 1148.
special damages, § 1146.
trees, replevin, measure of damages, § 1144.
trespass to personal property, mitigation of damages, § 1104.
trover, special or consequential damages, § 1129.
use of property, recovery for use, § 1150.
value of property, recovery for increase in value, § 1150.
vendor and vendee, measure of damages, § 1144.

Reprisals
reprisals at common law, deduction from dower, § 1005.

Reputation
see Character.
assault with intent to commit rape, recovery for mental suffering, rule where negligence only is alleged and where wrong was wilful, § 1245.
elements of damage, personal torts, § 93.
injury to reputation
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
exemplary damages, § 514.
contracts for services, wrongful discharge, measure of damages, liability for expenses and lost commissions, § 694.
pleading, special damages, necessity of alleging, § 421.
malicious prosecution, injury to reputation, § 1237.
mitigation of damages, reputation of plaintiff, § 1240.
unauthorized suit or appeal, liability for damages, § 1236.
personal torts, elements of damage, § 93.
slander and libel
mitigation, evidence, common reports as to plaintiff's guilt, § 1227
reputation of plaintiff, § 1232.
special damages, accusations not actionable per se, § 1218
trover, special and consequential damages, § 1129.

Request
sale implied, executed sales, recovery by seller against buyer, § 642.

Res Adjudicata
see Judgments.
action for recovery of land as bar to action for recovery of mesne profits, § 991.
cause of action, entirety, what is not a double remedy, § 119.
mistake of remedy, effect, § 106.
severance, causes of action not divisible, § 106.
splitting, continuing, obligations, § 112.
contract to do several things successively or one thing continuously, § 110.
covenants against incumbrances as covenants running with the land, damages recoverable for breach, rule in some states, § 625.
covenants for title
breach, conveyances, damages, § 599.
measure of damages, effect of recovery on total breach, § 596.
nominal damages, actual loss not shown, § 598.
injunction bonds, right of action, when it arises, who may sue, § 522.
replevin as bar to action of trespass, § 1146.
bonds, actions, effect of judgment in replevin suit, § 506.
set-off, counterclaim and recoupment, crossclaim used in defense cannot be sued upon, § 189.
verdicts, parties, verdict where there are several parties, § 463.

Res Gestæ
personal injury, expressions, conduct and religious belief of sufferer as evidence of damages, § 453.

Rescission
accord and satisfaction, rescission before breach, § 252a.
bills and notes
consideration, partial failure, defense as resting on principle of rescission of contract, § 548.
nature of defense, cross action, § 546.
fraud or illegality as defense, availability, § 549.
contracts
breach of, consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
damages for breach of contract for sales, realty and personalty, § 566.
elements of damage, losses, expenses incurred to prevent or lessen damages, § 88.
fraud, effect, necessity of rescission, § 549.
contracts for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, §§ 709, 711.
contracts for services, wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
covenants for title, breach, damages, recovery of proportion of consideration, part of title lost, § 602.
covenants of warranty and quiet enjoyment, breach, measure of damages, where property is consideration, § 606.
definition, § 253.
fraud, interest, money, obtained by extortion or wrongfully withheld or disposed of, § 354.
interest, quantum meruit claim to interest between vendor and purchaser, § 328.
liquidated damages, stipulations when damages are uncertain, § 293.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
recoupment and counterclaim, parties, § 175.

Rescission—continued.
sales
acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
buyer's right to return property, § 650.
liablity for not accepting, remedies of seller, § 647n.
breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
purchase price paid, highest intermediate value, vendee's duty to lessen damages, § 656.
breach of warranty, remedies, rescission, return of goods, § 668.
consequential damages, anticipation of injury, proximate cause, § 25.
executed sales, recovery after rescission of contract, price fixed by third party, § 643.
interest, quantum meruit claims between vendor and purchaser, § 328.
part of stipulated quantity received, recovery by seller, § 645.
warranty of quality, damages for breach, interest, expenses and special injuries, § 671.
vendor and purchaser, action for purchase money, defenses and counterclaims, §§ 633, 634.
breach of contract by vendor, § 571.
adjustment of counter demands on rescission, § 587.
adjustment of counter equities in specific performance, § 589.
defaulting vendee's right, §§ 585, 586.
damages recoverable by vendor against purchaser, necessity that seller convey perfect title, effect of condemnation proceedings, § 572.
interest, compensation, right to interest, § 321.
title, time for conveyance of good title, § 572.

Rescue
see Salvage.

Reservoir
eminent domain, injury to property not taken, ascertainment, § 1070.
wall injured, negligence, interest, actions for torts, § 355.

Restaurant
leases, covenants not to sublet or assign, liability for breach, proximate cause of loss, improper use of premises, § 861.

Restitution
see Writ of Restitution.

Restrictions
see Building Restrictions.

Retail Price
see Price; Market Value, etc.
sales, acceptance of goods, buyers' notice of refusal to accept, sellers' duty to mitigate damages, § 648.

Revenue
government revenue collector, payment by note, bill or check, § 225.
internal revenue, interest, allowance of interest against agents, trustees, and officers, § 353.

Reversal
judgment reversed on appeal, see Appeal and Error.

Review
see Appeal and Error.

Reward
certainty of damages, chances of promotion, § 71.
contracts for services, entire apportionable contracts, performances, forfeiture of wages, compensation recoverable, § 691.
salvage service, agreements, right to fix specific amount as compensation for salvage service, § 716.
amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.
derelict property, amount of salvage recoverable, § 720.
interest, conflict of laws, § 719.
requisites, parties liable, § 715.
telegraphs and telephones, message not delivered, damages recoverable, § 961.
trespass to personal property, expenses to recover, restore, and protect property, damages, § 1103.

Rheumatism
passengers ejected, consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.

Rhode Island
administrator's sale, vendor and purchaser, breach of contract by purchaser, measure of damages, § 570.
assessment of damages, default or demurrer as admission, § 429.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
interest, compound interest, interest on instalments of interest, § 375.
breach of marriage promise, seduction as aggravation of damages, § 984.
carriers of passengers, liability for exemplary damages, § 951.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
eminent domain, assessment of damages and benefits, time of, § 1083.
interest
compound, computation, application, effect of and partial payments, § 379.
periodical interest after maturity of debt, § 377.
mesne profits, elements of damages, costs of ejectment suit, § 993.
replevin, suit on bond, assessment of damages, § 502.
suretyship, express indemnity, damages recoverable, § 762.
trespass to personal property, damages for taking or destroying property, interest, § 1096.

Ribs Injured
personal injuries, amount to be allowed for pain and suffering, verdicts, § 1242n.
discretion of jury as to damages, instructions, § 1256n.
pleading, special damages, necessity of alleging, § 421.

Right to Damages
Ch. I, §§ 1-8.
actionable injuries, right to damages, nominal damages, § 9.
contractual exemptions from liability for damages, § 6.
damnum absque injuria, § 3.
illegal transactions, § 5.
injuria sine damno, § 3.
injuries to unborn child, § 8.
injury warranting right to damages, § 2.
invasion of rights, presumption of injury, right to damages, § 2.

Right to Damages—continued.
legal system, object of system of law, adequate relief for violation of rights, § 1.
losses as elements of damage, what losses consist of, § 79.
moral obligation disregarded, § 2.
nature of right, § 7.
nominal damages, illustrations of right to, § 10.
public wrongs, § 4.
right to damages, damnum absque injuria, § 3.
survival of right, § 7.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Riots
see Mobs and Riots.

Riparian Owners
see Waters and Water Courses.
alluvium, right to sell, eminent domain, injury to property not taken, ascertainment, § 1067.
eminent domain, compensation, basis for estimating value of land, § 1074.
injury to property not taken, ascertainment, § 1067.
remote damages, § 1071.
natural flow of water, illustrations of right to nominal damages for interference with right, § 10.
pollution of stream, consequential damages, certainty, liability for principal loss, extending to details and incidents, § 54.
right to damages, nominal damages, § 10.
surface waters, nominal damages, right to nominal damages, trespass, § 10.
trespass to real property, remediable injury, damages, § 1018.

Robbery
bonds of employees, suretyship, contract not to be extended by construction, rule as to bonds of surety companies, § 725n.
civil damage laws, consequential damages, extension of liability by statute, § 16.

Rocks Falling
blasting, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.

Roof
construction for particular work, breach, consequential losses, contractor's liability, § 702.

Rope Sold
guaranty, measure of guarantor's liability, § 729.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Royalties
see Patents.
interest on damages, infringement of patents, § 340.

Rubber
breach of contract to convey manufacturing plant, evidence of value, property without market value, § 448.

Rules of Court
interest on judgments, § 333.

Runaway Horse
consequential damages, certainty of damages, necessity, proximate result of act or omission, § 53.
highways and streets, consequential damages in highway cases, § 26.
liability, illustrations, §§ 17, 18.

Runaway Mule
automobiles frightening mule, consequential damages, nervous shock as physical injury, right to recovery for nervous shock, § 22.

Rupture
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256.

S

Safes
damage to fire-proof safe, amount of damages, opinions of witnesses, admissibility, § 444.
sales, contracts for services, compensation, mode of compensating, profits, § 684.
warranty, breach, consequential damages, proximate consequences of breach, illustrations, § 46.
damages, interest, expenses and special injuries, sale of burglar proof safe, § 672.

Safety Appliance Act
assumption of risk, where violated, § 1323.
interurban railroads, when within the act, § 1305.
negligence, necessity of proving where violated, § 1322.
Porto Rico, applicability to, § 1299.

Sales
Ch. XIV, §§ 642-676.
see also specific topics such as, Animals; Business; Coal; Lumber; Machinery; etc., real estate, sale of, see Vendor and Purchaser.
acceptance, breach of contract, liability for not accepting goods, remedies, § 647.
buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
buyer's right to return property, § 650.
refusal to acept property produced according to order, damages, remote losses, § 649.
warranties of quality, existence, § 667.
administrators and executors, direct damages, what constitutes direct damages, § 14.
agency, duty of agent, liability, disregard of instructions, §§ 773, 774.
expenditures of agent, right to reimbursement, § 789.
liability of agent to third persons, acts in excess of or without authority, measure of damages, § 798.
measure of agent's liability under various circumstances, § 774.
particular duties and liabilities of agent, right of principal to indemnity, scope of agent's liability, § 771.
violation of duty, secret profits, § 769.
assignment of claim for goods sold, value of property, elements, evidence, § 448.
attachment bonds, damages recoverable, wrongful attachment, actual damages, § 512.
bills and notes, consideration fraudulent or illegal in part, § 549.
illegality of consideration, effect, § 550.

Sales—continued.
bills—continued.
stipulations for attorney's fees and costs effect on negotiability, amount recoverable, § 564.
breach of contract
acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
refusal to accept property produced according to order, damages, remote losses, § 649.
certainty of damages, anticipated profits, § 59n.
consequential damages, proximate consequences of breach, illustrations, § 46.
part of stipulated quantity received, recovery by seller, § 646.
pleading, demand of damages in code complaint, § 415.
realty and personalty, § 566.
special damages, necessity of alleging, § 419.
breach of contract by seller, consequential damages, § 662.
delay in delivery, damages, § 664.
evidence of rental value, § 665.
mitigation of liability, § 666.
delivery impossible, damages, § 655.
evidence of loss, § 653.
goodwill sold, certainty of proof, § 658.
non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
non-delivery of stock, § 657.
payment in specific articles, value, damages, §§ 659-661.
purchase price paid, damages, § 656.
breach of contract not to engage in business, special damages, necessity of alleging, § 420.
breach of contract not to sell others, damages, § 675a.
breach of warranty
bills and notes, consideration, parol evidence to show defect of consideration, § 554.
partial failure of consideration, availability of defense, § 545.
defense as resting on principle of rescission of contract, § 548.
certainty of damages, anticipated profits, § 60.
collateral ventures or financial condition of party, liability not affected by, § 47.
consequential damages, recovery only when contemplated by parties, § 45, n 25.
illustrations, § 46.
defenses to actions for purchase money, § 676.
elements of damage, expense incurred to prevent or lessen damages, extent of duty, § 90.
losses, expenses incurred to prevent or lessen damages between vendor and vendee, § 89.
fraud, false representations, cost of putting property injured in good condition, recovery, § 1173.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
interest, allowance on unliquidated demands, §§ 347, 348.
parties, joint right or liability for tort, determination, § 137.
pleading, special damages, necessity of alleging, § 420.
profits, required certainty of anticipated profits, § 59.
quality, damages for breach of warranty as to quality or quantity, general rule, § 670.
determination, § 667.
implied warranty, § 667.
effect of express warranty of title, § 668.

Sales—continued.
breach of warranty—continued.
interest, expenses, and special injuries, §§ 671-675.
quantity, damages for breach of warranty as to quantity or quality, general rule, § 670.
interest, expenses, and special injuries, §§ 671-675.
recoupment, § 179.
connection between cause of action and crossclaim, § 183.
crossclaim used in defense cannot be sued upon, § 189.
definition and history of, § 169.
fraud, breach of warranty, negligence, etc., §§ 179, 180.
maturity of claim or demand, statute of limitations, § 177.
nature of defense, § 170.
vendor and purchaser, § 184.
replevin, defendant's rights, set-off, counterclaim and recoupment, § 1161.
seeds, certainty of damage required, § 61.
special damages, necessity of alleging, § 420.
title, damages on breach of warranty of title, § 669.
effect of express warranty, § 668.
implied warranty of title, § 668.
warranty, what constitutes, § 668.
cause of action, severance of entire demand, § 109.
splitting, contract to do several things successively or one thing continuously, § 110.
caveat emptor, warranties of quality, existence, § 667.
warranties of title, existence, § 668.
certainty of damages, contract between agents and principals, § 69.
compensatory damages, value of property as measure of damages, § 105.
conditional sales, trover, recovery of damages, limitation of recovery to plaintiff's interest in property, § 1137.
consideration, breach of contract by seller, payment in specific articles, value, damages, § 659.
total failure of consideration, illustration, § 542.
contract, acceptance of goods, liability for not accepting, remedies of seller, § 647.
warranties of quality, existence, §§ 667, 668.
warranties of title, existence, § 668.
contract for services, compensation, computation of profits, § 684.
contract to deliver ice, liquidated damages, stipulation when damages are uncertain, illustrations, § 293.
corporations, stock, acceptance of goods, liability for not accepting remedies of seller, § 647.
counterclaim, part of stipulated quantity received, recovery by seller, § 645.
creditor's right to make application of payments, § 238.
dangerous articles, wilful or malicious injuries, consequential damages, § 44.
default, part of stipulated quantity received, recovery by seller, §§ 645, 646.
defects in articles sold, anticipation of injury to persons, illustrations, § 25.
consequential damages, liability, under special circumstances, § 51.
defenses to actions for purchase money, § 676.
delivery
acceptance of goods, buyer's right to return property, § 650.
liability for not accepting, remedies of seller, § 647.
action by seller against purchaser, recovery for part of stipulated quantity, § 646.
breach of contract by seller, consequential damages, § 662.
delay in delivery, damages, § 664.
evidence of rental value, § 665.

Sales—continued.
delivery—continued.
liquidated damages, waiver of right, § 299.
mitigation of liability, § 666.
proximate consequences of breach, illustrations, § 46.
recovery for successive consequences of act or omission, § 56.
delivery impossible, damages, § 655.
evidence of loss, § 653.
non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
non-delivery of stock, § 657.
payment in specific articles, value, damages, §§ 660, 661.
purchase price paid, damages, § 656.
evidence of value of property, breach of contract by seller, § 654.
executed sales, recovery by seller of full value, payment by bill or note, § 644.
failure to deliver machine, consequential damages, recovery for successive consequences, § 56.
failure to deliver property, contracts for work, delay in performance, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
profits, required certainty of anticipated profits, § 59.
liquidated damages, payment of fixed sum for partial or total breach of contract, § 295.
part of stipulated quantity received, recovery by seller, § 645.
warranties of quality and quantity, breach, damages, § 670.
existence, § 667.
disregard of instructions, loss resulting from sale, measure of damages, § 79.
drugs, consequential damages, intervening cause, sale of poison to intoxicated person, death as result, § 38.
earnest money
breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
purchase price paid, damages, § 656.
evidence
breach of contract by seller, delay in delivery, evidence of rental value, § 665.
evidence of loss, § 653.
goodwill sold, certainty of proof, § 658.
non-delivery of property contracted for, property obtainable in open market, damages, § 651.
intendments against plaintiff for holding back evidence, § 440.
payment, § 233.
value, actual sales, offers for property, market quotations, § 447.
breach of contract by seller, § 654.
executed sales
recovery by seller against buyer, § 642.
payment by bill or note, § 644.
expenses, acceptance of goods, liability for not accepting, remedies of seller, § 647.
warranty of quality or quantity, damages for breach, interest, expenses and special injuries, §§ 671-675.
factor's duties, care of goods, § 777.
liability, failure to sell at certain time, § 780.
sale at unauthorized price, § 778.
sale on unauthorized terms, § 782.
fraud, evidence of value, § 445n.
exemplary damages, allowance, in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.

Sales—continued.
fraud—continued.
false representations, credit of insolvent person, recovery of value of goods sold, § 1174.
materiality, § 1167.
measure of damages, § 1171.
confidential relation between parties, § 1171.
elements, costs of suit, § 1173.
seller defrauded, § 1171.
person to whom false representations are made, representations need not be made to plaintiff, § 1170.
recovery of purchase money and interest, failure of title, § 1174.
remedies by purchaser of property, rescission, action for damages, § 1174.
remote, conjectural and contingent damages, §§ 1175, 1176.
sale of automobile, misrepresentations as to ability to pay, damages, § 1174.
time for rescission of sale of worthless horse, § 1173.
what are false representations, § 1166.
natural and proximate consequences of fraud, §§ 1163, 1165.
wilful or malicious injuries, consequential damages, § 44.
guaranty
contract not to be extended by construction, illustrations, § 726.
rule as to bonds of surety companies, § 725n.
measure of guarantor's liability, § 729.
indemnity, necessity of notice to indemnitor to fix liability, § 87n.
infants, sale to infants, consequential damages for torts, liability, illustrations, § 19.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
inspection, acceptance of goods, buyer's right to return property, § 650.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 643.
warranties of quality and quantity, breach, damages, § 670.
existence, § 667.
remedies on breach, § 668n.
instalments, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
interest
acceptance of goods, liability for not accepting, remedies of seller, § 647.
refusal to accept property produced according to order, damages, remote losses, § 649.
allowance of interest, accounts, § 349.
compensation, tacit agreement to pay interest on accounts, § 322.
money had and received, § 352.
unliquidated demands, §§ 347, 348.
breach of contract by seller, purchase price paid, damages, § 656.
conflict of laws, contracts between parties in different states, § 361.
debt, interest due by agreement as debt, § 371.
executed sales, recovery by seller against buyer, § 642.
recovery by seller of full value, payment by bill or note, § 644.
warranties of quality and quantity, breach, damages, § 670.
interest, expenses and special injuries, §§ 671-675.
warranty of title, breach, measure of damages, § 669.
judgment, sale subject to, bills and notes, consideration, parol evidence to show defect of consideration, § 553.
lien, discharge of, payment by note, bill or check, § 225.
liquidated damages, payment of fixed sum for partial or total breach of contract, § 294.

Sales—continued.
liquidated damages—continued.
stipulation for payment of fixed sum for partial or total breach, § 295.
stipulations when damages are uncertain, § 290.
manufactured articles
elements of damage, losses, liability of third person, covenants of indemnity, § 82.
liability under special circumstances, contemplation of parties, § 51.
market value, evidence, admissibility, § 445.
mitigation of damages, acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
breach of contract by seller, delay in delivery, damages, § 664.
mitigation of liability, § 666.
non-delivery of property in market, damages recoverable by buyer, § 651.
purchase price paid, damages, § 656.
defenses to action for purchase money, § 676.
notice, acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.
offer of sale, value of property, evidence, actual sales, offers for property, market quotations, § 447.
orders, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
executed sales, recovery by seller against buyer, § 642.
partial payment, warranties of quality and quantity, breach, damages, § 670.
part performance, losses as elements of damage, labor and expenditures, § 80.
patents, express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
payments, application by court, § 241.
breach of contract by seller, evidence of loss, § 653.
non-delivery of property in market, damages recoverable by buyer, § 651.
property, not in market, recovery of lost profits, § 652.
payment in specific articles, value, damages, §§ 659-661.
purchase price paid, damages, § 656.
note, bill or check, § 225.
persons, who may make payment, § 230.
performance, part of stipulated quantity received, recovery by seller, § 645.
pleading, acceptance of goods, liability for not accepting, remedies of seller, § 647.
necessity of demand of damages in code complaint, § 415.
presumptions
breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
payment in specific articles, value, damages, §§ 659-661.
price
breach of contract by seller, delay in delivery, damages, § 664.
evidence of loss, § 653.
non-delivery of property in market, damages recoverable by buyer, § 651.
property not in market, recovery of lost profits, § 652.
purchase price paid, damages, § 656.
buyer's right to return property, § 650.
damnum absque injuria, § 3.
defenses to action for purchase money, § 676.
executed sales, recovery by seller against buyer, § 642.
recovery by seller of full value, payment by bill or note, § 644.

Sales—continued.
price—continued.
rescission of contract, price fixed by third party, § 643.
factor's duties, sale, measure of liability, sale at unauthorized price, § 778.
part of stipulated quantity received, recovery by seller, § 645.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
warranties of quality and quantity, breach, damages, § 670.
interest, expenses and special injuries, § 671.
warranty of title, breach, measure of damages, § 669.
quantity of goods, recovery for part of stipulated quantity, §§ 645, 646.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
executed sales, recovery by seller against buyer, § 642.
fraud, breach of warranty, negligence, etc., § 179.
remedies
acceptance of goods, liability for not accepting, remedies of seller, § 647.
notice by vendee of refusal to accept, duty of vendor to mitigate liability of vendee, § 648.
warranty of quality, existence, remedies on breach, § 668.
remote loss, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
replevin, damages for detention, recovery of value of use of property, § 1144.
re-sale, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, consequential damages, § 662.
delay in delivery, damages, § 664.
evidence of loss, § 653.
consequential damages, special circumstances, § 52.
evidence of value of property, breach of contract by seller, § 654.
goods bought for resale, knowledge of parties, consequential damages, special circumstances, § 52.
warranties of quality and quantity, breach, damages, § 670.
rescission
breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.
purchase price paid, damages, § 656.
consequential damages, anticipation of injury, proximate cause, § 25.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 643.
interest, allowance of interest on money obtained by extortion or fraud, or wrongfully withheld or disposed of § 354.
warranty of quality, existence, remedies on breach, § 668.
right to sell property, damnum absque injuria, § 3.
samples, warranties of quality, existence, § 667.
slaves sold, bills and notes, consideration, parol evidence to show defect of consideration, § 553.
special damages, breach of contract by seller, delay in delivery, damages, § 664.
warranty of quality or quantity, damages for breach, interest, expenses and special injuries, §§ 671-675.
stoppage in transitu, payment by note, bill or check, § 225.
suretyship, contract of surety not to be extended by construction, illustrations, § 727.
creditor's duty to realize on securities, refusal of payment, application of deposits to indebtedness, § 737.
surety's remedies for indemnity, indemnification of surety by principal, adjustment of right of co-sureties, § 758.

Sales—continued.
telegrams, negligent delay in transmission or delivery of message, liability for loss of employment and profits of business, § 967.
liability when object of sender is known, illustration, § 962.
mitigation of damages by injured party, § 973.
tender, persons by whom tender may be made, § 264.
time of making tender, § 262.
time, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
title, allowance of interest on money had and received, § 352.
transfer of title, replevin bonds, damages recoverable, § 505.
trespass to personal property, market value of property, damages recoverable, § 1098.
mitigation of damages, § 1104.
title or interest of plaintiff in property, amount of damages recoverable, § 1097.
trover, measure of damages, property fluctuating in value, rule in different states, § 1111.
mitigation of damages, § 1138.
value of bills and notes, solvent parties, measure of damages, § 565.
value of property, proof of value, § 654.

Salesman Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Saltpetre Cave Sold
consequential damages, anticipation of injury, proximate cause, § 25.

Salt Sold
telegraphs and telephones, negligence in transmitting message, liability, when object of sender is known, § 963.

Salvage
admiralty torts, partial loss, elements of damage, § 1293.
agreements, right to fix specific amount as compensation for salvage service, § 716.
amount recoverable, considerations upon which compensation is fixed, interest, conflict of laws, § 719.
derelict property, § 720.
interest, conflict of laws, § 719.
contracts for services, recovery on quantum meruit, analogy to salvage or making invention, § 679.
derelict property, amount of salvage recoverable, § 720.
duty to claimant, § 717.
forfeiture of right to compensation, § 721.
peril, nature, § 717.
persons who may be salvors, § 717.
property, necessity of saving, § 718.
requisites, parties liable, § 715.
salvors, definitions, § 718.
vessels, payment, to whom payment may be made, § 231.

Samples
baggage, loss or injury, measure of damages, § 955.
what constitutes baggage, § 954.
carriers of goods, delay, liability where facts are known, § 913.
sales, warranties of quality, existence, § 667.

Satisfaction
see also, Accord and Satisfaction.

Saving Questions for Review
see Appeal and Error.

Saving Questions for Review—continued.
ad damnum, limit of recovery, erroneous claim of damages, § 417.
objections, defendants, joinder, effect of non-joinder and misjoinder, § 135.
parties plaintiff, misjoinder or non-joinder, objection as fatal, § 134.

Scales
sales, warranty of quality, damages for breach, interest, expenses and special injuries, § 671.

Scalp Injured
pleading, necessity of alleging special damages, § 421.

Schools and School Districts
breach of contract to employ teacher, losses as elements of damage, labor and expenditures, § 80n.
measure of damages, §§ 678, 684.
contract for tuition, measure of damages, non-attendance of pupil, refusal to pay fees, § 678.
contracts for services of teacher, mode of compensating, § 684.
necessity of full performance, inability to perform, § 688.
wrongful discharge, duty to mitigate damages, presumption of subsequent employment, § 693.
parent and child, bonds, guardian's bond, mitigation of damages, § 497.
repairing, cause of action, entirety, implied assumpsit follows consideration, § 132.
tender by inhabitants, persons by whom tender may be made, § 264.
warrants, interest, allowance against government, § 332.

Sciatic Nerve Injured
pleading, special damages, necessity of alleging, § 421.

Scire Facias
see Judgments.

Seals
accord and satisfaction, agreement, necessity of full execution, § 252.
release, distinctions, § 254.
bills and notes, consideration, parol evidence to show defect of consideration, different agreement, § 552.
illegality of consideration, effect, § 550.
release, construction, extrinsic evidence, § 255.

Seamen
see Vessels.

Searches and Seizures
elements of damage, mental suffering, § 95.
trespass, mitigation of damages, § 1027.
search for intoxicating liquors, damages for humiliation, mental anguish, § 1029.

Sea Wall
consequential damages, tendency of act or omission to cause damages, injury need not be foreseen, § 28.

Second Hand Goods
sales, warranties of quality, existence, § 667.

Seduction
Ch. XXXVIII, §§ 1281-1285.
action, gist of action, loss of services, § 1281.
breach of marriage promise
aggravation of damages, § 984.
consequences, medical expenses, child-birth, or miscarriage, § 985.
lack of chastity, seduction, disease, § 990.
consequential damages, act complained of must be efficient cause, § 29.
damages recoverable, compensatory and exemplary damages, § 1283.
daughter seduced by employer's son, consequential damages, act or omission as proximate cause of injury, § 29.
daughter seduced by servant, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
recoupment and counterclaim, § 180.
exemplary damages, allowance, in what actions recoverable, § 392.
restriction or denial of, rule in Massachusetts, § 397.
rule of United States Supreme Court, § 392.
health, damages recoverable, evidence to be considered, § 1283
mental suffering, elements of damage, §§ 95, 979.
necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, character and feelings, injuries to, § 163.
consent of parent, § 1284.
evidence, chastity, § 1284.
exemplary damages in action for breach of promise, § 1284.
no mitigation when benefit not derived from defendant, § 158.
parties, who may maintain action, § 1282.
pleading, necessity of alleging special damages, § 421.
trespass, aggravation of damages, § 1030.
wages, action for, recoupment for seduction, § 180.

Seed
breach of warranty
certainty of damages, § 61.
interest, expenses and special injuries, damages, §§ 672, 673, 675.
consequential damages, breach of contract, sale of inferior seed, proximate consequences of breach, illustrations, § 46.

Seizin
see Covenants.

Sepulchre Violated
see Cemeteries.
exemplary damages, malice in law and malice in fact, § 394.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
trespass to real property, aggravation and special damages, § 1029.

Sequestration
bonds, statutory bonds and undertaking to pay damages and costs, damages recoverable, § 85.
indemnity, liability for losses and expense, § 84.
replevin, bond by defendant to retain property, damages, § 509.
trespass to personal property, special and consequential damages, § 110.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.

Servants
see Master and Servant.

Set-off, Counterclaim and Recoupment
acts which may be basis of recoupment, § 181.

Set-off, Counterclaim and Recoupment—continued.
affirmative relief not obtainable, recoupment, § 186.
allegations, special damages, necessity of alleging, § 419.
attachment bonds, defenses or mitigation of damages, what may be shown, § 515.
bills and notes, liability of drawer and endorser for principal sum, § 555.
partial failure of consideration, nature of defense, cross action, § 546.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
want or failure of consideration, recoupment, § 542.
breach of contract, pleading, sufficiency of allegations, right to damages, § 413.
burden of proof, measure of damages, § 188.
carriers of goods, recoupment against freight, § 896.
cause of action, connection between and crossclaim, § 183.
contract for particular work, contract price as measure of damages, action by contractor against employer, recoupment, § 706.
demand for part performance of entire contract, recovery by contractor on quantum meruit, § 710.
contract for services, necessity of full performance of express contract, inability to perform, § 688.
violation of contract, employee's liability, recoupment of damages, consequential losses, § 695.
contract or subject matter of action, crossclaim must rest on, § 178.
counterclaim, remedy by, § 173.
covenants
breach, defenses and crossclaims against purchase money, §§ 633-639.
defenses in equity, § 641.
defenses under the code, counterclaim, actions for purchase money, § 640.
diversity of decisions, § 632.
covenants for title, breach of covenants, set-off for mesne profits, § 601.
cross-actions, affirmative relief not obtainable, § 186.
crossclaim used in defense cannot be sued upon, § 189.
election of defendant to file crossclaim or sue upon his demand, § 187.
factors, reimbursement, right of factor to reimburse himself by sales, § 790.
fraud, recoupment for fraud, breach of warranty, negligence, etc., §§ 179, 180.
leases, covenants, recoupment by either lessor or lessee, § 876.
crossclaims between landlord and tenant, § 182.
repairs, covenant to repair by lessor, rights of lessee, § 872.
liquidated and unliquidated damages, recoupment, § 185.
maturity of claim or demand, statute of limitations, § 177.
nature of defense, §§ 170, 171.
negligence, recoupment for fraud, breach of warranty, negligence, etc., §§ 179, 180.
nominal damages, right to nominal damages, amount, § 9.
notice of crossclaim, § 190.
parties, §§ 175, 176.
payment, collaterals collected or lost by negligence of collector as payments, § 228.
recoupment, constituent features of, § 172.
definition and history of, §§ 168, 169.
election of defendant to file crossclaim or sue upon his demand, § 187.
omission to set up defense of recoupment, effect, § 695.

Set-off, Counterclaim and Recoupment—continued.
replevin, bonds, judgment, what may be shown in defense or in mitigation, § 507.
right of set-off, counterclaim, or recoupment, defendant's rights, § 1161.
sales, executed sales, recovery by seller against buyer, § 642.
part of stipulated quantity received, recovery by seller, § 645.
recoupment for fraud, breach of warranty, negligence, etc., §§ 179, 180.
set-off of debts, payment, mode of payment, § 215.
set-off of judgments, assignee, rights, absolute purchase of judgment, § 202.
interest of real parties considered, § 200.
liens of attorneys, § 204.
nature of action immaterial, foreign judgment, § 203.
power of court to direct set-off, § 198.
right, set-off not granted before judgment, § 201.
when granted, § 199.
suretyship, right of recoupment by surety, equitable off-set of joint indebtedness, § 744.
tender, effect, money paid into court, § 276.
trover, recovery of damages, limitation of recovery to plaintiff's interest in property, recoupment, § 1137.
usury, recovery under usury statute, § 317.
validity of claim essential, § 174.
vendor and purchaser, breach of contract by vendor, adjustment of counter equities in suits for specific performance, § 590.
recoupment between vendor and purchaser, § 184.
recoupment for defect of title and for tort, § 573.
rescission, adjustment of counter demands, § 587.
stipulation as to rents, damages recoverable by purchaser against vendor of land, oral contract, § 583.

Settlements
see Compromise and Settlement.

Sewers
condemnation proceedings, cause of action, entirety, successive actions for damage to real property, § 116.
compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1067.
expenditures to lessen loss, § 1072.
remote damages, § 1071.
construction, gas main broken, explosion, consequential damages, § 18.
nuisance, remote consequences of injury, recovery of damages, § 1050.

Sex
exemplary damages, enhancement and mitigation, scope of inquiry, § 405.

Shaving Notes
bills and notes, value, § 565.

Sheep
contracts to cure, entire and apportionable contracts, § 691.
breach of contract, measure of damages, § 79.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
diseased sheep
consequential damages, liability, illustrations, § 18.

Sheep—continued.
diseased sheep—continued.
proximate consequences of breach, § 45n.
act of third person as cause, § 40.
trespass to real property, aggravation, special damages, § 1028.
sales, telegrams, negligence in transmitting message, liability when object of sender is known, § 962.
warranty of quality, damages for breach, interest, expenses and special injuries, § 675.

Sheriffs and Constables
arrest, official bonds, private injuries recovered by official bonds, § 487.
attachment of animals, official bonds, measure of damages against sureties, § 488.
bail bonds in civil actions, assignment, measure of damages, § 539b.
distinctions, liability of sureties, § 539b.
bonds, action on, cause of action, entirety, what is not a double remedy, § 119.
indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
effect of judgment, § 767.
exemplary damages, compensation, wrong done with bad motive, violation of contract, § 390n.
mental and physical suffering, liability for original trespass, § 763.
measure of damages against officers for neglect of duty, nominal damages, § 489.
measure of damages against sureties on official bonds, § 488.
private injuries covered by official bonds, § 487n.
suretyship, contribution, who are co-sureties, § 755.
release by creditors of one or more parties, effect, § 742.
right of subrogation, availability, § 736n.
execution, failure to return, interest, allowance on statutory penalties, § 330.
levy of execution, parties, joinder of parties, general and special owners, § 139.
exemplary damages, liability of public officers, § 412.
measure of damages against officers for neglect of duty, nominal damages, English rule, § 492.
mitigation of damages, official neglect, § 160.
negligence, attachment bonds, damages recoverable, § 512.
measure of damages, nominal damages, § 489.
measure of damages against sureties, § 488n.
replevin bonds, original conditions, § 499.
payment, to whom payment may be made, § 231.
replevin
bonds, conditions, history, § 499.
damages when plaintiff recovers as special owner, effect of change in statute, § 508.
measure of damages against sureties, § 488.
judgment, option of taking property or its value, § 1148.
sales, injunction bonds, damages from restraint of injunction, § 528n.
mitigation of damages, measures of prevention, § 157.
sheriff's jury, assessment of damages, cause of action, right to controvert, § 431.

Shirting
sales, breach of contract, consequential damages, market value, § 52n.
non-delivery of property not in market, recovery of lost profits, § 652.
payment in specific articles, value, damages, §§ 660, 661.

Shoulder Injured
verdicts, excessive or inadequate verdicts, § 1242n.
discretion of jury as to damages, instructions, § 1256n.

Shrubbery
nuisance, injury to crops and trees, damages, § 1049.

Sickness
see Illness.

Side Injured
pleading, special damages, necessity of alleging, § 421.

Sidewalks
change of grade, cause of action, severance, contract to do several things successively or one thing continuously, § 110n.
child injured by horse, consequential damages, act or omission as proximate cause of damages, § 31n.
collision of vehicles, injury to pedestrian, consequential damages, liability, § 19.
defects, defenses, circuity of action, operation of principle in favor of plaintiff, § 145.
destruction of property, damages, compensation, § 1015.
eminent domain, injury to property not taken, expenditures to lessen loss, § 1072.
fall of ladder, injury to pedestrian, consequential damages for torts, intervening cause, § 37.
parties, joint and several liability for torts, § 140n.
railroads, occupation of land by railroads, liability for damages, rental value, § 1016.
trespass to real property, remediable injuries, estimate of damages, § 1018.
wrongful removal, trespass to personal property, remedy, comprehensiveness, § 1094.

Signals
railroad's negligence, collision, consequential damages, extension of liability by statutes, § 16.

Silk
sales, agent's disregard of orders, purchase, shipment and sale of goods, § 773.

Silver Ore
sale, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.

Simulation
evidence, physical examination of plaintiff, § 451.

Skull Fractured
pleading, special damages, necessity of alleging, § 421.

Slander and Libel
Ch. XXXIV, §§ 1203-1233.
accusation actionable per se, exemplary damages, § 1216.
injuries to business, § 1213.
presumption of malice, § 1208.
right to nominal damages, § 10.
scope of rule in libel, § 1204.
want of chastity, evidence in mitigation, § 1231.

Slander and Libel—continued.
accusations not actionable per se, special damages, §§ 1218, 1219.
injury to feelings, § 1220.
natural consequence of defamation, § 1221.
criticism of doctrine, § 1222.
actor injured, consequential damages, act or omission as proximate cause of injury, § 29.
agents, liability for acts of, exemplary damages, parties liable, liability of master for acts of servants, § 408.
aggravation of damages, §§ 1208, 1209.
failure of evidence to support facts in mitigation, § 1230.
officer to publish retraction, good faith, mitigation of damages, § 1231.
wealth and rank of parties, §§ 1210, 1211.
apprentices, false statements as to, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
assessment of damages, evidence of defendant in reduction of damages, § 430.
attorney's negligence, loss of right of action, consequential damages, for torts, right to damages, § 16.
causes of action, entirety, damage to property and injury to persons by same act, § 118.
certainty of damages, defeat of candidate for office because of slander, § 71.
character, defamation of character as gravamen, § 1211.
evidence in mitigation, § 1226.
consequential damages, act complained of must be efficient cause, § 29.
act of third person as cause, § 40.
loss of right of action for slander, § 16.
wilful or malicious injuries, § 44.
damages, amount, consideration upon which based, §§ 1206, 1207.
discretion of jury, § 1217.
damnum absque injuria, slanderous statements, matters of public interest, § 3.
defeat of candidate for office, certainty of damages, chances of promotion, § 71.
evidence, expressions, conduct and religious belief of sufferer, § 453.
exemplary damages, § 1216.
allowance, grounds upon which allowed, § 393n.
in what actions recoverable, § 392.
rule of United States Supreme Court, § 392.
basis of exemplary damages on actual damages, nominal damages, § 406.
discretion of jury, § 1217.
malice in law and malice in fact, § 394.
parties liable, master's liability for acts of servant, §§ 408, 410.
restriction or denial of exemplary damages, rule in Nebraska, § 398.
express indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
imputation of immorality, consequential damages, acts of third person, § 41.
interest, allowance of interest on unliquidated demands, § 347.
justification, effect of failure of plea of justification, effect of statutes, § 1225.
evidence sustaining plea of justification, § 1228.
failure of plea of justification, effect, § 1224.
loss of employment, slander, consequential damages, act or omission as proximate cause of injury, § 29.
malice, effect of failure of plea of justification, § 1226.
evidence, § 1209.
mitigation, § 1229.
exemplary damages, liability for acts of wife, § 1216.

Slander and Libel—continued.
malice—continued.
gist of action, § 1205.
presumptions, accusations actionable per se, § 1208.
mental suffering and physical incapacity, § 1214.
mitigation of damages, § 1210.
absence of malice, § 150n.
assault, provocation, agreement to fight, payment of fine, § 151.
character of defendant, poverty, § 1233.
effect of statutes, § 1230.
evidence, anger, mental distress, § 1232.
common reports as to plaintiff's guilt, § 1227.
insanity, § 1231.
intoxication, § 1231.
plaintiff's bad character, conduct and declaration, § 1126.
provocation, § 1233.
rumors in existence as to statement published, § 1233.
truth of words, necessity of pleading, §§ 1228, 1229.
evidence generally, §§ 1231-1233.
pleading, necessity of pleading facts in mitigation, § 166.
reputation of plaintiff, § 1232.
nature of wrong, § 1203.
new trial, allowance of nominal damages, rule in California, § 11.
nominal damages, illustrations of right to, § 10.
parties, entirety of causes of action as to parties injured, § 138.
joint and several liability for torts, § 140.
parties injured, entirety of tortious act, § 138.
pleading, matters of aggravation, traverse, § 423.
necessity of alleging matters of aggravation, § 422.
special damages, necessity of alleging, § 419.
provocation, mitigation of damages, §§ 152, 153.
publication of prosecution, consequential damages, injury through third person, § 33.
repetition wrong, aggravation of damages, §§ 1208, 1209.
damages recoverable, § 1207.
reputation, accusations actionable per se, injuries to business, § 1212.
retraction, evidence in mitigation, § 1231.
refusal to retract, aggravation of damages, § 1209.
right to damages, when right vests, § 7.
slander of title, actionable words, malice, damages, § 1223.
joint and several liability for torts, § 140.
pleading, special damages, necessity of alleging, § 420.
special damages
accusations not actionable per se, §§ 1218, 1219.
damages as natural consequence of defamation, § 1221.
criticism of doctrine, § 1222.
injury to feelings, § 1221.
proximate result of slander, § 1215.
tradesman or mechanic defamed, consequential damages, injury through third person, § 33.
verdict, amendment and correction of verdict, § 458.
excessive or insufficient, § 459.
violation of rights, actual damages, triviality, right to nominal damages, § 11.

Slander of Title
see Slander and Libel.

Slaughter-House
nuisance, continuity, when nuisance is not continuous wrong, § 1043.

Slaves
interest and damages awarded on appeal, § 539.
quantum meruit recovery for services rendered, § 679.
replevin, recovery for intermediate injury and depreciation of property, §§ 1151, 1153.
sale
bills and notes, consideration, parol evidence to show defect of consideration, sale subject to judgment, § 553.
payment by note, bill or check, § 229.
interest, allowance, money had and received, § 352.
conflict of laws, contracts between parties in different states, § 361.
warranty of quality, damages for breach, interest, expenses and special injuries, § 671.
warranty of title, breach, measure of damages, § 669n.
seizure by process, consequential damages, certainty, recovery of items of damages which are certain, § 55.
trespass for taking, mitigation of damages, pleading, necessity of pleading facts in mitigation, § 166.
slaves carried away and frightened, consequential damages, § 17.
trespass to realty, consequential damage for torts, liability, illustration, § 18.
trover, recovery of damages, limitation of recovery to plaintiff's interest in property, § 1136.

Sleeping Car Companies
see Carriers of Passengers.
baggage, liability, § 956.
exemplary damages, joint liability for, § 407.

Sleigh Overturned
consequential damages for torts, liability, illustrations, § 17.

Smallpox
carriers of passengers, recovery by passenger for special loss, § 947.

Smoke
amount of damages, opinion evidence, § 444.
eminent domain
injury to property not taken, ascertainment, § 1066.
compensation, § 1065.
consequential injury, § 1062.
noise, smoke, and cinders as damnum absque injuria elevation of railroad tracks, § 3.
nuisance, remote consequences, liability, § 1051.

Smuggling
salvage service, forfeiture of right to compensation, § 721.

Snow
see Ice and Snow.

Societies
see Associations and Societies.

Soldiers
see Militia.
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Soot
eminent domain, property not taken, consequential injury, § 1062.

South Carolina
apportionment of damages, verdicts, where there are several parties, § 463.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
carriers of goods, liability for partial loss of goods, value limited, § 927.
carriers of passengers
refusal to carry, § 935.
exemplary damages, § 937.
covenants, breach, defenses and crossclaims against purchase money, § 637.
covenants against incumbrances as covenants running with the land, damages recoverable for breach, rule in some states, § 625.
covenants of warranty and quiet enjoyment, breach, action by covenantee against remote covenantor, § 614.
expenses, costs and counsel fees as damages, § 618.
death by wrongful act, damages recoverable, facts and circumstances to be considered in estimating, § 1270.
dower, damages for detention of, § 1003.
eminent domain, evidence of value and damages, § 1089.
evidence, physical examination of plaintiff, § 451.
exemplary damages, basis on actual damages, nominal damages, § 405.
matter of right, power of court over verdict, § 403.
parties liable, master's liability for acts of servant, § 410.
interest, agreement for more than legal rate after maturity, penalty, § 318n.
allowance, stockholders' statutory liabilities, § 343.
compound interest, interest on instalments of interest, § 375.
periodical interest after maturity of debt, § 377.
mesne profits, limitation of damages to value of use, consequential and punitive damages, § 994.
nuisance, injury to crops and trees, damages, § 1049.
personal injuries, compensatory damages, pecuniary and other circumstances of parties, § 1254.
interest, actions for torts, § 355.
probate bonds, liability as between sets of sureties, § 498.
removal of timber enjoined, injunction bonds, damages from restraint of injunction, § 527.
sales, warranties of title, existence, § 668.
telegraphs and telephones, mental anguish, damages, evidence, § 975.
trover, conversion of share of stock, damages, § 1135.
damages, property of fluctuating value, § 1118.
rule in particular states, § 1111.
usury, effect, contracts not void for usury, § 315.
vendor and purchaser, action for purchase money, defenses and counterclaims, South Carolina and Virginia rule, § 637.
verdicts, general verdict on several counts, § 462.

South Dakota
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
bonds, penalty as limit of recovery, exception as to interest, § 477.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
trover, damages, property of fluctuating value, § 1118.
rule in particular states, § 1111.
vendor and purchaser, breach of contract by vendor, defaulting vendee's right, § 586.

Special Damages
ad damnum, erroneous claim of damages, effect, § 417.
allegations, proof under general allegation of damage, § 418.
animals injured, necessity of alleging, special damages, illustrations, § 420.

Special Damages—continued.
breach of contract, special damages, necessity of alleging, §§ 419, 420.
breach of covenants against incumbrance, damages where incumbrance is permanent, § 627.
carriers of goods
delay in delivery, consequential damages, notice of special circumstances, § 52.
liability, § 905.
liability for loss of market value of property, basis of rule, § 908.
carriers of passengers, negligence or breach of duty, recovery for special loss, loss of employment or in business, § 947.
refusal to carry, damages, § 935.
elements of damage, expense incurred to prevent or lessen damages, extent or duty, § 90.
greater damage than interest for failure to pay or to loan money, § 77.
false imprisonment, pleading, special damages, punitive damages, § 1257.
leases, covenants, special and consequential damages for breach of various covenants, § 865.
repairs by lessor, breach of contract, liability of lessor for special and consequential damages, § 874.
machinery delayed, breach of contract, consequential damages, special circumstances, § 52n.
personal injuries, expenses for physical and surgical aid, recovery, § 1250.
pleading, itemization of damages, demands unliquidated, § 424.
matter of aggravation, necessity of alleging § 422n.
necessity of alleging, illustrations, §§ 420, 421.
replevin, bonds, actions, damages, recoverable, § 505.
special damages, pleading, necessity of alleging, § 1146.
sales, breach of warranty as to quality or quantity, damage, interest, expenses and special injuries, §§ 671-675.
delay in delivering property, damages, action by purchaser against seller, § 664.
slander and libel, accusation not actionable per se, special damages, §§ 1218, 1219.
special damages, § 1215.
trespass to personal property, special and consequential damages, §§ 1100-1102.
trespass to real property, pleading special damages, §§ 1028-1030.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
trover, measure of damages, value of property enhanced by defendant, § 1129.
mitigation of damages, § 1139.
special or consequential damages, § 1129.
vendor and purchaser
damages recoverable by purchaser against vendor of land, adjustment of counter equities in specific performance, § 588.
elements of damage, mitigation, § 584.
verdicts, excessive or insufficient, power of court, § 460.
general verdict on several counts, § 462.

Specialty
covenants, breach, defenses and crossclaims against purchase money, § 637.
merger, parties, joint liability, extinguishment or severance, § 136.

Specific Performance
adequate relief for violation of rights, § 1.
interest
compound, illustrations, § 374.
instances of interest on interest, § 375.
suspension, tender stopping interest, when tender may be made, § 386.
recoupment and counterclaim, between vendor and purchaser, § 184.
tender, effect of plea of tender, § 275.
necessity of pleading and paying money into court, § 274.
vendor and purchaser, appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
breach of contract by purchaser, legal remedy of vendor against purchaser, § 568.
measure of damages, § 570.
damages recoverable by purchaser against vendor of land, defaulting vendee's rights, conflict of American cases, § 586.
interest on purchase money, § 577.
measure of damages, § 570.
oral contract for sale of land, § 583.
specific performance, § 590.
adjustment of counter equities, §§ 588-589.
rescission, adjustment of counter demands, § 587.
violation of contract to lease, certainty of damages, § 65.

Speculative Damages
see Remote Damages.

Spine Injured
exhibition of injured parts, means of injury, § 452.
personal injuries, damages, discretion of jury as to damages, instructions, excessive or inadequate verdicts, § 1256.
pleading, necessity of alleging special damages, § 421.

Splitting Causes of Action
see Actions.

Spring Gun
consequential damages, anticipation of injury of person, proximate cause of injury, § 25.

Squib Thrown
consequential damages, proximate cause, act of third person as cause, § 40.

Stables
erection of stables enjoined, injunction bonds, damages from restraint of injunction, § 528.

Stage Coach
breach of contract to carry passengers, agreement to furnish stage line, measure of damages, § 877n.
falling into canal, consequential damages, proximate cause, act of third person as cause, § 42.
passenger injured, consequential damages, act of injured party, fraud and exposure to peril, § 39.

Stairways
easements, breach of covenant of warranty and quiet enjoyment, damages, expenses, costs and counsel fees as damages, § 619.
covenants against incumbrances, definition, what are incumbrances, § 620n.

States
funds, interest as compensation, right to interest, § 321n.
interest, allowance against government, § 332.
condemnation proceedings, § 336.
payment, place of making payment, § 214.
officers and agents, absolute liability for money received, § 479.
interest, allowance against agents, trustees and officers, § 353.
liquidated damages, contracts, validity, § 279.
suretyship, right of subrogation, availability, § 736.
recoupment and counterclaim, parties, § 176.
suit in behalf of state, injunction bonds, power of equity, § 521.
treasurer, bonds, absolute liability for money received, § 479.

Statu Quo
agency, stock received in violation of trust, liability of agent to principal, § 773.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
covenants, breach, defenses and crosselaims against purchase money, § 637.
covenants of seizin and good right to convey, breach, nominal damages recoverable if actual loss not shown, § 597.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 589, 590.
defaulting vendee's right, § 586.
elements of damage, mitigation, § 584.

Statute of Frauds
see Frauds, Statute of.

Statute of Limitations
see Limitation of Actions.

Statutes
see Death by Wrongful Act.
ad damnum, necessity of demand of damages in code complaint, § 415.
agent's liability to third persons, statutory authority, § 796.
appeal and supersedeas bonds, liability, rents and profits, § 533.
arbitration bonds, liability of sureties, measure of damages, § 539c.
attachment bonds, accrual of cause of action, § 510.
exemplary damages, recovery, § 513.
parties who may sue, § 511.
attorney's compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
auctioneers, expenditures of agent, right to reimbursement, § 789.
bail bonds in civil actions, distinctions, liability of sureties, § 539b.
bills and notes, consideration, partial failure of consideration, admissibility of evidence, § 547.
damages on protested foreign bills, re-exchange, § 563n.
law governing liabilities on bills and notes, allowance of damages, § 563.
stipulations for costs and attorney's fees, § 564.
bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
conditions, instances of liability under statutes specifying certain conditions of appeal bonds, §§ 536, 537.
conditions required by statute, necessity of compliance, § 475.
penalty as limit of recovery, interest, §§ 477, 478.
public officers, construction of bonds of, § 485.

Statutes—continued.
carriers of goods, qualification of carrier's liability by notice, effect of Carmack Amendment to Interstate Commerce Act, § 926.
causes of action, entirety, parties to actions under statutes, § 129.
compensation of laborers, effect of statutes fixing rate, damages for breach of contract, § 678.
consequential damages, breach of statutory duties, § 32.
extension of liability by statutes, § 16.
contract for particular work, certificate for architect, engineer, etc., necessity, effect, § 712.
covenants, effect of statute, declaring words "grant, bargain and sell" covenants of seizin, § 591.
covenants of warranty, breach, bills and notes, want or failure of consideration, § 542.
death, child killed, negligence in selling drugs, nominal damages, right to recovery, statutes as to death by wrongful act, § 10.
right of action at common law, § 1259.
double damages, mesne profits, action for, damages recoverable, consequential and punitive damages, § 994.
eminent domain, deduction for benefits, special benefits, § 1087.
effect of judgment for compensation, abandonment of proceedings, § 1090.
interest on compensation, § 1091.
evidence of value, suit on replevin bond, § 504.
exemplary damages, malice in law and malice in fact, § 394.
matter of right, power of court over verdict, § 403.
improvements, mesne profits, defenses, claims for improvements, taxes, etc., § 999.
recovery under statute, effect on right to recover in action for breach of warranty, § 608.
injunction bonds, damages recoverable, collection of judgment enjoined, § 528.
costs and expenses, attorneys' fees, § 524.
defenses, facts not available as defenses, § 529.
what may be shown as defense, § 530.
mode of assessing damages, § 523.
power of court of equity, § 521.
scope and effect of obligation, § 520.
interest
agreements, different rate after debt due, § 312.
interest from date until debt paid, § 310.
legal or stipulated rate applies from date, § 307.
promise to pay money with interest, rule of construction, § 305.
rate fixed by law or custom, § 306.
usury, agreements for more than legal rate before maturity, effect, § 313.
allowance, annuities and legacies, § 344.
bills and notes, § 556.
from time when money ought to be paid, § 329.
judgments, § 333.
statutory penalties, § 330.
taxes, § 337.
award on appeal, § 538.
common law, interest at common law in America, § 303.
conflict of laws, effect of change in law of place of contract, §§ 368-370.
pleading and proof of foreign law, § 367.
England, interest, legalized by statute, § 302.
pleading, how interest claimed in pleading, § 387.
rate applicable after debt is due, § 309.
recovery, statutory liability for riots, § 330.

Statutes—continued.
interest—continued.
suspension of
tender stopping interest, unliquidated damages, § 384.
when tender may be made, § 386.
judgment, effect, assessment of damages, § 465.
landlord and tenant, actions to recover rent, abandonment of lease, § 844.
covenant for repairs by lessor under statute, duty of lessor, breach of covenant, measure of liability, § 872.
rent, duty to pay, effect of destruction of demised premises, § 852.
effect of partial destruction of demised property, liability under statutes, § 851.
liens, suretyship, construction of contract, § 724.
liquidated damages, evidence and effect of intention to liquidate, § 284.
master and servant, breach of contract, compensation as measure of damages, § 678.
compensation for labor fixed by statute, effect, § 678.
contractual exemptions from liability for damages, § 6.
implied contracts, duty to pay for services rendered, § 679.
measure of damages, recovery under statutes for unpaid wages, § 678.
statutes limiting hours of work, effect, recovery for services rendered, § 681.
mesne profits, interest, recovery of interest on mesne profits, § 997.
remedy under the code, § 1000.
mitigation of damages, pleading, § 166.
mobs and riots, interest, allowance of interest, statutory liability for riots, § 330.
officers and public employees, absolute liability for money received, § 479.
bonds, construction, § 485.
measure of damages against officers for neglect of duty, nominal damages, § 490.
right of action against officers, § 484.
parties, bonds, wrongful attachment, parties who may sue, § 511.
statutory duties, breach of duty, who may bring action, § 32.
patents
infringement, right to recover exemplary damages, § 1188.
statutory remedies, § 1181.
personal injuries, civil damage laws, exemplary damages, § 1253.
pleading, interest, manner of claiming interest in pleading, § 387.
statutory damages, necessity of specially claiming or alleging, § 425.
wrongful attachment, § 510.
post office, obstruction of mails, taking letter from post office, damages, § 960.
statutory duty of post-master to advertise letters, breach of duty, who may bring action for breach, § 32.
probate bonds, liability as between sets of sureties, § 498.
railroad fires, indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
release, construction, extrinsic evidence, § 255.
repeal, bills and notes, illegality of consideration, effect, § 550.
interest, conflict of laws, effect of change in law of place of contract, §§ 370, 371.
usury, when contracts not void for usury, § 315.
replevin
bonds, actions, effect of change in statute, § 508.
assessment of damages in suit on bond, § 502.
condition required by modern statutes, § 501.
damages when plaintiff recovers as special owner, effect of change in statute, § 508.

Statutes—continued.
replevin—continued.
evidence of value of property, § 504.
original conditions, § 499.
damages recoverable if property is not returned, § 1147.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
set-off, counterclaim and recoupment, notice of crossclaim, § 190.
maturity of claim or demand, statute of limitations, § 177.
remedy by counterclaim, effect, § 173.
right to maintain counterclaim, § 176.
slander and libel, aggravation, failure of evidence to support facts pleaded in mitigation, § 1230.
suretyship, interpretation of surety's contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
recoupment, surety's right to set up, equitable offset of joint indebtedness, § 744.
reduction or discharge of surety's responsibility by act of creditor, § 735.
release of one or more of several parties, effect, § 742.
telegrams, transmission, neglect to transmit or deliver message, liability where message is in cipher or company is not informed of its importance, §§ 959, 960.
mental suffering, authorities denying recovery of damages for mental suffering, § 977.
effect of statute allowing recovery for mental anguish, messages sent out of state, § 972.
who may sue for delay in transmission of messages, § 972.
tender, effect of plea of tender, § 275.
manner of making, § 268.
necessity that tender be unconditional, § 270.
trespass, trees, measure of damage, measure of damages for taking and carrying away, timber improved, statutory damage, § 1020.
trespass to personal property, damages exceeding compensation, exemplary damages, § 1092.
trover, measure of damages, property fluctuating in value, rule in different states, §§ 1111, 1118.
usury, recovery under usury statutes, §§ 316, 317.
when contracts not void for usury, § 315.
vendor and purchaser, action for purchase money, defense and counterclaims, defenses under the code, § 640.
damages recoverable by purchaser against vendor of land, measure of damages, conflict of laws, what law governs, § 580.
verdicts
damages, exemplary damages, allowance in verdict by court or jury, § 464.
statutory, double and treble damages, power of court or jury, § 464.
excessive or insufficient, power of court to order remittitur, § 460.
general verdict on several counts, § 462.
interest on verdict before judgment, § 388.
necessity that judgment follow verdict, § 466.
wool injured, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Steam
breach of contract to furnish, consequential damages, § 705.

Steel Plates
sales, breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652n.

Stipulated Damages
see Liquidated Damages.

Stipulations
see Limitation of Liability.
attorney's compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
bills and notes, stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
carriers of goods, demurrage, detention of goods, § 897.
cause of action, severance, contract to do several things successively, or one thing continuously, § 110.
contracts for services, stipulation for notice where servant quits employ, § 690.
wages, determination of amount by employer, presumption of continuance of obligation, § 678.
guaranty, measure of guarantor's liability, lost profits, remote damages, § 729.
interest, rate applicable after debt is due, §§ 308, 309.
payment, application by creditor, § 238.
telegraphs and telephones, limitation of liability, extent of power to limit liability, persons bound by stipulation, conflict of laws, § 958.

Stock
see Corporations.

Stock Yards
nuisance, definition, what is nuisance, § 1035.

Stockbrokers
agents, liability to third persons, acts in excess of or without authority, measure of damages, § 798.
duties, liability for disregard of instructions, § 786.
expenditures of agent, right to reimbursement, § 789.
indemnity, agent's right to indemnity for losses or damages, § 793.
reimbursement, right of agent, effect of mode of doing business, § 792.
sales, breach of contract, non-delivery of stock, damages, § 657.

Stolen Property
payment, what is not payment, § 217.
return, trover, special or consequential damages, § 1129.

Stomach Injured
personal injuries, damages, discretion of jury as to damages, instruction, excessive or inadequate verdicts, § 1256n.

Stone Thrown in Window
consequential damages, nervous shock, right to recover for injury to health, § 23a.

Stoppage In Transitu
see Sales.

Storage
see Warehouses.

Stores
customer in store falling through shaft, consequential damages, injury not foreseen, § 28, n28.

Straw Sold
contracts for services, entire and apportionable contracts, § 691.

Street Railroads
see Carriers of Goods; Carriers of Passengers; Railroads; Passenger Injured, and similar titles.
agents, liability for acts of, exemplary damages, § 411.
construction, liquidated damages, waiver of right, § 299.
contract to furnish cars, damages for delay, § 703.
defective engine, sales, breach of warranty as to quality or quantity, damages, interest, expenses and special injuries, § 675.
ejection of passenger
consequential damages, distinction between liability in tort and on contract, § 49.
nervous shock without impact, right to recover damages, § 24.
drunken man, nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
eminent domain, compensation, railroad property taken for railroad uses, § 1078.
fare, tender, amount, sufficiency, § 267n.
Federal Employers' Liability Act, when not within, § 1305.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
infant as licensee, consequential damages, proximate cause, act of third person as cause, § 42.
injuries to passengers, parties, joint and several liability for torts, § 141.
nuisance, pleading, special damages, necessity of alleging, § 420.
passengers, continuance of relation, when terminated, § 941.
protection of passengers, duty of carrier, § 941.
refusal to carry passengers, exemplary damages, § 937.
repairs enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
trespass, railroads, occupation of land by railroads liability for damages, rental value, § 1016.
trespassers, employees permitting children to ride on platform, consequential damages, § 42.

Streets
see Highways and Streets.

Strikes
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.

St. Vitus Dance
mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.

Subrogation
express indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 766.
suretyship, creditor's duty to acquire liens, necessity of notice of reliance, § 739.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
right of subrogation, when and to whom available, § 736.

Subscriptions
contracts for services, mode of compensating, § 684.
loss of subscriptions, necessity of alleging special damages, illustrations, § 420.

Substantial Damages
see Actual Damages.

Substitution
sales, breach of contract by seller, non-delivery of property in market, damages recoverable by buyer, § 651.

Substitution of Parties
equity, replevin bonds, actions, defenses, mitigation of damages, § 507n.

Subways
eminent domain, compensation for injury to property, elevated railroads and subways, § 1080.

Suffering
see Pain and Suffering.

Sugar
sales, breach of contract by seller, evidence of loss, § 653.

Suicide
passenger injured, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.

Suits
see Actions.

Sulphur Fumes
nuisance, injury to crops and trees, damages, § 1049.

Summary Proceedings
officers and public employees, bonds, mode of redress for official dereliction, § 486.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.

Sunday
breach of contract, recovery on quantum meruit, § 679.
carriers of goods, loss or injury to property, recovery for expenses and labor in lessening loss, § 921.
computation of time, liquidated damages, manner of liquidating, computation of time, § 281.
contracts for services, implied contracts, duty to pay for services rendered, § 679.
statutes as to hours of work, § 681.
illegal transactions, right of action, damages not recoverable, § 5.
payment, evidence, § 233.
profits, landlord and tenant, lessee's right to damages for injury to business, § 869.
statutes limiting hours of work, effect, recovery for services rendered, § 681.
tender, time of making tender, § 262.

Supersedeas
see Appeal and Error.

Support
alienation of affections, action by wife, damages recoverable, evidence, § 1285.
bastards, agreement to support, cause of action, severance, § 110n.
breach of contract, certainty of damages, § 63.
compensation as measure of damages, § 678.
consequential damages, act or omission as proximate cause of injury, § 29.

Support—continued.
breach of contract—continued.
contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
measure of damages, what services included in contract, § 678.
wrongful dismissal of employee, measure of damages, remedies, actions, § 692.
cause of action, entirety, continuing obligations, § 112.
certainty of contract, measure of damages, what services included in contract, § 678.
consequential damages, loss of support, extension of liability by statutes, § 16.
death by wrongful act
children, right to recover for death of child, damages, § 1272.
loss of support, § 1273.
children's loss from death of parent, § 1267.
pleading of damages, § 426.
widow, damages recoverable by widow, § 1265.
parent as guardian, bonds, mitigation of damages, § 497.
quantum meruit recovery for services, presumptions where family relation exists, § 679.

Surety Insurance
see Insurance.

Suretyship
Ch. XVII, §§ 722-767.
see also, Bonds; Guaranty, etc.
accommodation paper, interest, conflict of laws, general rule as to contracts, § 357n.
accord and satisfaction, act or promise which is new consideration, sufficiency, § 249.
adjustment of liability between sets of sureties, bonds of public officers, §§ 480-481.
alteration, discharge or reduction of surety's responsibility by act of creditor, § 735.
appeal and supersedeas bonds, conditions, liability of sureties, § 531.
attachment bonds, damages recoverable, wrongful attachment, actual damages, §§ 512, 513.
bills and notes
consideration, fraudulent or illegal in part, effect, § 549.
parol evidence to show defect of consideration, § 554.
methods by which surety's contract may be assumed, commercial paper, § 731.
bonds, obligation, effect of failure to perform at law and in equity, § 470.
payment by administrators of estate, § 222.
penalties, limit of liability, penal bond, § 478.
breach of contract, elements of damage, losses, liability of third person, covenants of indemnity, § 82.
liability of surety company, expense of procuring new bonds, § 838.
breach of contract to pay money, special obligations, measure of damages, § 77.
cause of action, entirety, what is not a double remedy, § 119.
construction, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
contracts not to be extended by construction, rule as to bonds of surety companies, § 725, 727.
contract of suretyship, questions arising out of contract, § 722.
creditor's duty to acquire liens, necessity of notice of reliance, § 739.

Suretyship—continued.
creditor's duty to realize on securities, limitations of release to injury sustained by surety, § 738.
refusal of payment, application of deposits to indebtedness, § 737.
creditor's right to make application of payments, § 238.
defendants, joinder, effect of non-joinder and misjoinder, § 135.
discharge or reduction of surety's responsibility, act of creditor, § 735.
liability as between sets of sureties, § 498.
distinguishing characteristics of guaranties, right to terminate liability, interest and attorney's fees, § 728.
elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
estates of decedents, execution of probate bonds, manner, recoveries, which may be had, § 494.
exemplary damages, liability of sureties for exemplary damages, § 412.
funds intermingled, bonds, liability of public officers, adjustment of liability between sets of sureties, § 481.
guaranty of collectibility, liability for costs, diligence, § 733.
indemnity and surety insurance, rule of construction, § 840b.
indemnity, losses as elements of damage, money paid to third persons, § 82.
necessity of notice to indemnitor to fix liability, § 86.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
interest, agreement to pay money with interest, construction, § 305n.
allowance, money paid, § 326.
conflict of laws, law governing as to interest, parties in different states, § 361.
leases, parties, joinder of defendants, effect of non-joinder and misjoinder, § 135.
life and accident insurance, termination of contract, liability, § 838.
liquidated damages, intention to liquidate, evidence and effect of, § 284.
measure of guarantor's liability, lost profits, remote damages, § 729.
mitigation of damages, extent of duty to lessen or prevent damages, § 90.
officers and public employees
bonds, construction, § 485.
neglect of duty by other officers, effect, § 482.
default, payments, application, general payments applied to debt least secured, § 245.
defense of circuity of action, bonds, § 143.
private injuries covered by official bonds, § 487.
right of action against officers, § 484.
parties, bonds, wrongful attachment, parties who may sue, § 511.
joint and several liability for torts, § 140.
payment
application, court, § 241.
creditor, § 240.
debtor, §§ 235, 236.
general payment applied to oldest debt, § 243.
collaterals collected or lost by negligence of collector as payments, § 228.
effect, § 218.
note, bill or check, § 226.
retaining money by executors, § 222.
probate bonds, actions on bond as to sureties, liability for executor's debt to estate, § 495.
conditions of administration bonds, history, § 493.
guardian's bond, sureties' liabilities, § 496.
liability as between sets of sureties, § 498.
recoupment and counterclaim, parties, § 175.

Suretyship—continued.
release, injunction bonds, damages, costs and expenses, attorneys' fees, § 525n.
parties, release of one or more of several parties, effect, § 742.
requisites, what will operate as release, § 258.
securities, release by creditors, injury to surety, value of released securities, § 740.
tender, effect, collateral securities, § 277.
what constitutes, covenant not to sue, § 259.
remedies of surety
action against principal for money paid, § 745.
measure of recovery, § 748.
when right of action accrues, § 747.
who is principal, § 746.
consequential damages, liability of principal, § 753.
contribution between co-sureties, § 754.
accrual of right of action, voluntary payment, validity of debt, conflict of laws, § 759.
actions, conclusiveness of judgment, § 760.
basis of contribution, liability for torts, § 756.
insolvency of co-surety, firm as one surety, § 757.
who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
indemnification of surety by principal, adjustment of rights of co-sureties, § 758.
liability of principal for surety's cost, § 752.
payment giving right to reimbursement, §§ 750, 751.
right of surety to compel debtor to pay, § 749.
replevin, bond by defendant to retain property, damages, § 509.
bonds, assessment of damages in suit on bond, § 502.
evidence of value of property, § 504.
judgment, what may be shown in defense or in mitigation, § 507.
right of surety to defend between principals, § 743.
right of surety to set up recoupment, equitable offset of joint indebtedness, § 744.
sets of sureties, guardian's bond, sureties' liabilities, § 496.
statutory bonds, condition required by statute, necessity of compliance, § 475.
subrogation, right of subrogation, when and to whom available, § 736.
usury, who may take advantage of usury, § 314.
verdicts, where there are several parties, § 463n.
wrongful issuance of process, parties, joint and several liability for torts, § 140.

Surgery
see Medicine and Surgery.

Surprise
special damages, necessity of alleging, § 421.

Survey
erroneous survey, measure of damages against sureties on official bonds, § 488.
vendor and purchaser
breach of contract by vendor, elements of damage, loss of bargain, mitigation, § 584.
measure of damages, nominal damages, § 582.

Survival of Actions
see Abatement and Revival.

Suspension of Interest
see Interest.

Switchman Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1256n.

Switch Open
train colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23.

Sympathy
elements of damage, mental suffering, § 96.

T

Taking Property for Public Use
see Eminent Domain.

Tallow
trover, evidence of value, § 1113.

Tannery
nuisance, continuity, when nuisance is not continuous wrong, § 1042.
damages recoverable, first action, § 1039.
mitigation of damages, deduction for benefits, § 1056.

Taxes
abatement of taxes, recovery of interest, § 337.
agency, right of agent to compensation, duties, § 768.
assessment, alteration, consequential damages, acts of third person, § 40.
breach of contract to pay money, special obligations, measure of damages, § 77.
collection
bonds of public officers, adjustment of liability between sets of sureties, § 480.
construction, § 485.
contract of surety not to be extended by construction, § 725.
measure of damages against sureties, § 488.
right of subrogation, availability, § 736.
exemplary damages, liability of public officers, § 412.
failure to collect, parties plaintiff, action under statutes, § 129n.
illegal taxes, collection of, consequential damages, proximate cause, acts of third person as cause, § 40.
interest on taxes, § 337.
levy irregular, elements of damage, expense incurred to prevent or lessen damage, extent of duty, § 90.
measure of damages against officers for neglect of duty, nominal damages, § 492.
refusal to levy, exemplary damages, basis of exemplary damages on actual damages, nominal damages, § 406.
covenants against incumbrances, breach, amount paid to remove incumbrance as damage, § 623.
definition, what are incumbrances, § 620.
covenants for title, breach of covenant, reconveyances, measure of damages § 599.
covenants of warranty and quiet enjoyment
measure of damages for breach, § 605.
existence of lien, satisfaction, § 609.
interest and taxes as items of damage, § 616.
mitigation of damages, § 611.
dogs, proof of value of dogs, § 449.
dower, right subject to incumbrances, § 1007.

Taxes—continued.
exemptions, eminent domain, compensation, injury to property not taken, § 1065.
false imprisonment, damages, elements, securing release from restraint, § 1257.
fire insurance, damages, mitigation of liability of insurer, § 823.
fund in custodia legis, injunction bonds, damages from restraint of injunction, § 526.
interest, allowance, judgments, § 333.
taxes, § 337.
mesne profits, defenses, claims for improvements, taxes, etc., § 999.
who may recover, § 992.
money paid, allowance of interest, § 326.
officers, bonds, adjustment of liability between sets of sureties, § 480n.
duties of officers, mitigation of damages, officer making modification of rules, § 161.
payment, agent's particular duties and liabilities, principal's right to indemnity, § 771.
breach of covenants of warranty and quiet enjoyment, measure of damages, conflict of laws, what law controls, § 605.
evidence of payment, § 233.
interest, allowance on money paid, § 326.
mitigation of damages, reduction of loss or benefit, § 164.
trover, mitigation of damages, § 1138.
rent, payment, recovery of rent payable in specific articles or taxes, § 846.
restitution after reversal of judgment, compensation for loss of use of property, liability of third parties, § 469.
return, evidence of value, § 445.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
action by seller against purchaser, breach of contract, damages, § 647.
mitigation of damages, measures of prevention, § 157.
officers, neglect of duty, measure of damages, nominal damages, § 492.
suretyship, right of subrogation, when and to whom available, § 736.
tax sales, mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.
tender, persons by whom tender may be made, § 264.
trover, mitigation of damages, § 1141.
valuation, eminent domain, proof of value of property and damages, § 1089.
evidence, admissibility, § 445.
vendor and purchaser
breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
oral contract, § 583.
rescission, adjustment of counter demands, § 587.
damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
interest on purchase money, § 577.

Teachers
see Schools and School Districts.
breach of contract to employ teachers, losses as elements of damage, labor and expenditures, § 80n.
personal injuries, recovery for secondary consequences, § 1244.
verdicts, excessive or insufficient verdicts, § 459n.

Teeth Injured
verdicts, excessive or insufficient verdicts, § 459n.
discretion of jury as to damages, instruction, § 1256n.

Telegraphs and Telephones
Ch. XXII, §§ 957-982.
actions, form, parties, § 972.
agents, duty in employment of, § 957.
attachment, damages, loss of claim, § 965.
breach of contract, damages as including other than pecuniary elements, § 92.
breach of contract to furnish telephone service, amount of damage, opinions of witnesses admissibility, § 444.
certainty of damages, loss of profits, inaccurate transmission of message preventing horse from being entered in race, § 71.
cipher messages, use of foreign language, § 959.
conflict of laws, limitation of liability, § 958.
consideration, defenses to actions for negligence, § 957.
construction, trespass to real property, permanent wrong, damages, § 1017.
damages, loss of claim, § 965.
defenses, consideration, defenses to actions for negligence, § 957.
delay in transportation, goods to be used for competing for prizes, measure of damages, § 71.
liability for negligence, proximate cause, § 903.
delay or non-delivery of message, attachment of property by other creditors, § 965.
certainty of damages, chances for prizes or promotion, § 71.
cipher messages, §§ 959, 960.
consequential damages, act complained of must be efficient cause of damage, § 29.
elements of damage, pecuniary elements, other elements, § 92.
injury to credit, damages recoverable, § 965.
knowledge of sender's purpose, necessity of disclosure of details, §§ 968-971.
liability for expenses, § 966.
liability when object of sender is known, § 961.
illustrations, § 962-964.
loss of claim, damages, § 965.
loss of employment and profit of business, damages, § 967.
mental anguish, § 97.
authorities denying recovery of damages for mental suffering, § 977.
close degree of relationship, social, sick or death messages, § 975.
conclusion of author as to allowance of damages, § 980.
consequential damages, right to recover for anxiety and mortification, § 24.
damages, evidence, § 975.
effect of statute allowing recovery for mental anguish, messages sent out of state, § 972.
grounds upon which liability for damages for mental suffering is allowed, § 976.
grounds upon which liability for damages for mental suffering is denied, § 978.
measure of damages, recoveries in particular cases, § 981.
message forbidding marriage of daughter, damages for mental anguish, § 964.
nominal damages, when recoverable, social messages, § 975.
recovery for mental suffering independent of other injury, § 943.
summary of authorities, § 979.
nominal damages, illustration of right to, § 10.
notice to company, sick and death messages, § 981.
physical pain, loss of life, damages, § 965.
presumptions, § 957.

Telegraphs and Telephones—continued.
delay or non-delivery of message—continued.
right to nominal damages, § 10.
sick and death messages, duty to mitigate damages, procuring other physician, § 973.
mental suffering, conflict of decisions, § 975.
trouble, inconvenience and annoyance, § 965.
wilfulness, evidence, message delayed, § 957.
exemplary damages, § 974.
elements of damage, mental suffering, liability of telegraph companies, § 97.
eminent domain, compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
injury to property not taken, ascertainment of damages, facts which may be considered, § 1067.
expenditures to lessen loss, § 1072.
railroad property taken for street and telegraph uses, effect on compensation, proof of value, § 1077.
exemplary damages, negligence in transmitting messages, § 974.
expenses, negligence in transmission of message, liability for expenses, § 966.
failure or refusal to transmit message, cipher messages, § 959.
exemplary damages, § 974.
liability for expenses, § 966.
liability when object of sender is known, § 961.
presumptions, § 957.
forged messages, cipher messages, § 959.
free delivery limits, negligence in transmitting message, liability when object of sender is known, § 961.
gambling, illegal transactions, right of action, damages not recoverable, § 5.
interest, allowance of interest in actions for torts, § 355.
limitation of liability, error in unrepeated message, §§ 957, 958.
extent of power to limit liability persons bound by stipulations, conflict of laws, § 958.
mistake, cipher messages, § 959.
certainty of damages, chances for prizes and promotion, § 71.
damages recoverable, expenses, § 966.
knowledge of sender's purpose, details, § 969.
liability when object of sender is known, § 961.
illustration, §§ 962-964.
limitation of liability, negligence, § 958.
loss of claim, § 965.
mitigation of damages by injured party, § 973.
presumptions, § 957.
nature of duty of telegraph and telephone companies, § 957.
nominal damages, negligence in transmission of message, loss of employment and profits of business, damages, § 967.
notice
knowledge of sender's purpose, details, § 969.
liability when object of sender is known, § 961.
notice to company, § 968.
operator injured, train colliding with building, consequential damages, nervous shock, right to recover for injury to health, § 23.
parties, actions, form, parties, § 972.
poles, eminent domain, injury to property not taken, ascertainment, § 1067.
remote damages, time lost in endeavoring to secure removal of pole, trespass, § 1029.
profits, negligence in transmission of message, loss of employment and profits of business, damages, § 967.
refusal of service, damages, § 957.

Telegraphs and Telephones—continued.
removal of telephone, damages, annoyance, inconvenience and humiliation, § 965.
repetition of message, limitation of liability, § 958.
right to damages, illegal transactions, § 5.
telephone service, mental suffering, notice, sick messages, § 975.
refusal to furnish, exemplary damages, § 974.
transmission of messages, consideration, § 957.
trespass, permanent injury, estimate of damages, § 1017.

Tenants in Common
apportionment of rent, § 850.
causes of action, entirety, successive actions for damage to real property, § 115n.
eminent domain, title to property, compensation, to whom compensation should be paid, § 1082.
foreclosure of mortgage, interest, allowance, money paid, § 326.
injury to estate, mitigation of damages, consent of plaintiff to act complained of, § 162.
interest, allowance of interest on money had and received, § 352.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 843.
eviction of lessee as preventing recovery of rent, what constitutes eviction, § 848.
lease of property, liability for value of oil produced, § 1034.
rent, apportionment, § 850.
interest, allowance on money had and received, § 352.
mesne profits, who may recover, § 992.
mitigation of damages, consent of plaintiff to act complained of, § 162.
parties, joint right or liability, determination, principles, § 137.
partition, recoupment and counterclaim between vendor and purchaser, § 184.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
vendor and purchaser, § 184.
trespass to personal property, title or interest of plaintiff in property, amount of damages recoverable, § 1097.
trover, measure of damages, value of property enhanced by defendant, § 1126.
who may bring action, § 1108.
waste, injuries to property, remainders and reversions, damages recoverable, § 1034.

Tender
acceptance, effect, § 271.
agency, by whom tender may be made, § 264.
to whom tender may be made, § 265.
attachment, forthcoming bonds, § 517.
attorney's lien, paying money into court, § 278.
person to whom tender may be made, § 265.
bank checks, in what money tender must be made, § 263.
banks, place of making tender, § 269.
clerks, persons to whom tender may be made, § 265.
collateral securities, effect of tender on, § 277.
compromise and settlement, sufficiency of tender, amount, § 266.
conditions, tender must be unconditional, § 270.
corporations, officers, by whom tender may be made, § 264.
court, effect of tender when money paid into court, § 276.
necessity of paying money into court, § 274.
paying money to court, § 278.
covenants against incumbrances, breach, § 621.
definition, § 385.

Tender—continued.
interest, agreements for interest, rate applicable after debt due, § 309.
right to interest, §§ 300, 321.
suspension of interest, tender stopping interest, § 383.
time of making tender, §§ 385, 386.
unliquidated damages, § 384.
liquidated damages, alternative contracts, § 282.
manner of making, § 268.
mitigation of damages, measures of prevention of damage, return of property, § 156.
money, legal tender act, § 210.
place of making tender, § 269.
interest, necessity of demand, § 351.
payment, mode of making payment, § 216.
what is not payment, § 217.
persons by whom tender may be made, § 264.
persons to whom tender should be made, § 265.
plea of tender, effect, § 275.
pleading, necessity, § 274.
replevin
bonds, actions, defenses, mitigation of damages, § 507.
assessment of damages in suit on bond, § 502.
condition required by modern statutes, § 501.
judgment, what may be shown in defense or in mitigation, § 507.
bonds to retain property, breach, measure of damages, § 509.
requisites, in what money tender must be made, § 263.
tender must be kept good, § 272.
right to make, § 260.
demands, § 261.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, purchase price paid, damages, § 656.
breach of warranty, remedies, rescission, return of goods, § 668.
sufficiency, amount, §§ 266, 267.
time, when tender may be made, § 262.
trespass to personal property, mitigation of damages, § 1104.
usury, pleading, necessity of tender of principal sum, § 313n.
vendor and purchaser, breach of contract, legal remedy of vendor against purchaser, § 568.
damages recoverable by vendor against purchaser, measure of damages, § 569.
notes given for price, assumption of mortgage, § 571.
recovery when contract does not fix price, § 575.
waiver and omission of tender on sufficient excuse, § 273.

Tennessee
administrators' bonds, appeal, supersedeas bonds, conditions, § 531.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537n.
assessment of damages, evidence of defendant in reduction of damages, § 430.
attachment, bonds, exemplary damages, § 514.
replevin bonds, conditions required by statute, § 501.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
interest, compound interest, interest on instalments of interest, § 375.
stipulations for costs and attorney's fees, § 564.
value, § 565.
bonds, penalty as limit of recovery, exception as to interest, § 478.
public officers, construction of bonds, § 485.

Tennessee—continued.
carriers of passengers, injury to passenger, mental anguish independent of other injury, § 942.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
facts to be considered in estimating damages, § 1268.
eminent domain, assessment of damages and benefits, time of, § 1083.
basis for estimating value of land, value for condemnor's purpose, § 1075.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
husband and wife, exemplary damages, joint liability for, § 407.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
interest, agreement for more than legal rate after maturity, penalty, § 318n.
nuisance, permanent injury, estoppel from recovery of future damages, § 1046.
personal injuries, excessive or insufficient verdicts, power of court over verdicts, § 460.
probate bonds, liability as between sets of sureties, § 498.
replevin, damages, property not returned, § 1148.
sales, seed, warranty of quality, damages for breach, interest, expenses and special injuries, § 674.
seduction, mitigation of damages, evidence of plaintiff, § 1284.
slander and libel, exemplary damages, § 1216.
suretyship, right of surety to put creditors in motion, § 741.
telegraphs and telephones, mental anguish, damages, evidence, § 975.
negligence, mitigation of damages by injured party, § 973.
trespass to real property, destruction of trees and mining ores, value as affected by defendant's acts, § 1020.
occupation of land by railroads, damages, § 1016.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, §§ 636, 638.
breach of contract by vendor, rescission, adjustment of counter demands, § 587.
verdicts, impeachment by affidavits, § 456.

Terror
see Fright.
elements of damage, mental suffering, § 95.

Texas
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
attachment, bonds, exemplary damages, § 514.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
principal sum, certainty, § 541.
stipulations for costs and attorney's fees, § 564.
carriers of goods, breach of contract, remote consequences, § 902.
delay, liability where facts are known, § 913.
injury to or loss of non-marketable property, damages, § 919
liability for partial loss of goods, value limited, § 927.
limitation of liability by contract, interstate commerce, § 904.
carriers of passengers, damages for refusal to carry, § 935.
injury to passenger, mental anguish independent of other injury, § 943.
liability for exemplary damages, § 951.

Texas—continued.
contract for particular work, recovery by contractors, part performance of severable contract, § 708.
covenants, breach, defenses and crossclaims against purchase money, § 638.
covenants against incumbrances as covenants running with land, § 625.
covenants of warranty and quiet enjoyment, breach, action by covenantee against remote covenantor, § 614.
expenses, costs and counsel fees as damages, § 618.
death by wrongful act, children's loss, death of parent, § 1267.
compensation for pecuniary losses, exemplary damages, § 1263.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, effect of title and nature of interest condemned and purpose of use, § 1077.
what is just compensation, § 1063.
evidence of value and damages, § 1089.
measure of compensation, § 1064.
evidence, physical examination of plaintiff, § 451.
exemplary damages, basis on actual damages, nominal damages, § 405.
pleading, matter of aggravation, necessity of alleging, § 422n.
fraud, remote damages, § 1175.
injunction bonds, recovery of costs and expenses, attorneys' fees, § 524.
insurance, contract to replace or rebuild, § 830.
proof of loss, manner and time of making, waiver, § 810.
total loss, what constitutes, § 807.
interest, compound interest, interest on instalments of interest, § 375.
conflict of laws, pleading and proof of foreign law, § 367.
landlord and tenant, actions on covenants of lease, recoupment, § 876.
lessee's right to damages for injury to business, §§ 868, 870.
partial destruction, of demised property, effect as to rent, § 851.
malicious prosecution, mitigation, evidence, § 1240.
mesne profits, damages, property withheld, improvements, computation of rental value, § 996.
nuisance, depreciation in value as damages, § 1047.
injury to crops and trees, damages, § 1049.
remote consequences, liability, § 1051.
personal injuries, actions maintainable, prospective damages, § 1251n.
excessive or insufficient verdicts, power of court over verdicts, § 460.
interest, actions for torts, § 355.
loss of capacity for enjoyment as damages, § 1243.
railroads, animals injured, interest, actions for torts, § 355.
replevin
bonds, actions, damages recoverable, §§ 502, 505.
non-liability of sureties for judgment in replevin suit, § 503.
damages, defendant's rights, § 1155.
property not returned, § 1148.
sales, breach of contract by seller, purchase price paid, damages, § 656.
slander and libel, exemplary damages, § 1216.
statutes, usury, when contracts not void for usury, § 315.
telegrams, actions, form, parties, § 972.
cipher messages, negligence in transmission, notice of importance, § 960.
delay in delivery of message, damages, physical pain, § 965.
mental anguish, damages, evidence, § 975.
grounds upon which liability is denied, §§ 976, 978.
negligence in transmission of message, knowledge of sender's purpose, details, § 971.
loss of employment and profits of business, damages, § 967.
liability when object of sender is known, § 961.
mitigation of damages by injured party, § 973.
trespass to personal property, damages, mental suffering, § 1095.

Texas—continued.
trespass to real property, occupation of land by railroads, damages, § 1016.
trees and mining ores, liability, § 1019.
trover
damages, interest and value of use of property, § 1115.
place of conversion, liability of purchaser, effect of wilfulness, § 1110.
rule in particular states, § 1111.
evidence of value, § 1113.
exemplary damages, § 1131.
special and consequential damages, § 1129.
usury, effect, contracts not void, for usury, § 315.
recovery under usury statute, § 317.
vendor and purchaser, breach of contract by vendor, elements of damage, loss of bargain, mitigation, § 584.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.
verdicts, excessive or insufficient verdict, power of court, rule in Texas, § 460.

Texas Fever
animals injured, liability of carrier, § 931.

Theaters and Shows
see Actors; Public Amusements.
breach of contract, actor's contract, liquidated damages, stipulation when damages are uncertain, § 292.
guarantying arrival of troupe at theater, liability under special circumstances, contemplation of parties, § 51.
theatrical performance, certainty of damages, anticipated profits, § 60.
carriers of goods
delay in transportation, liability of carriers, § 905.
knowledge of or notice to carrier that goods must not be delayed, § 913.
liability where facts are known, § 914.
special loss, liability for, § 947.
carriers of passengers, breach of contract, consequential damages, liability, under special circumstances, § 51.
removal of passenger at wrong place, damages peculiar to passenger, intervening cause, § 939.
contracts with actors for services, entire and apportionable contracts, performance, forfeiture of wages, compensation recoverable, § 691.
exclusion of person, consequential damages, injury to public, § 32.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
gas fixtures, destruction of property, damages, compensation, § 1015.
intoxicating liquors sold, consequential damages, proximate cause, act of third person as cause, § 40.
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.
personal injuries, damages, earning capacity diminished, § 1246.
telegraphs and telephones, negligent delay in transmission or delay in delivery of message, liability for loss of employment and profits of business, § 967.
ticket purchased, losses as elements of damage, damages by relying on performance, § 81.
ticket revoked, indignity, breach of contract, damages as including other than pecuniary elements, § 92.

Theaters and Shows—continued.
use of drama enjoined, injunction bonds, damages recoverable, damages from restraint of injunction, § 526.

Thigh Injured
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
pleading, necessity of alleging special damages, § 421.

Threats
arrest of husband, miscarriage of wife, consequential damage, § 19.
nervous shock as physical injury, consequential damages, miscellaneous cases, § 24.
associations, exemplary damages, liability of societies, § 412.
blacklisting, employee, allowance of exemplary damages, rule of United States Supreme Court, § 392.
carriers of passengers, abusive language to female passengers, acts of agents, liability of carrier, § 943.
damages recoverable by passenger, verdicts excessive, § 953n.
threat of ejection, liability for carrier for exemplary damages, § 937.
intimidation of servants, exemplary damages, liability of voluntary societies, § 412.
mitigation of damages, assault, provocation, agreement to fight, payment of fine, § 151.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
trespass, aggravation of damages, threats to burn house, ravish wife, etc., § 1029.
trover, special and consequential damages, § 1129.

Threshing Machines
delay in furnishing, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
repair, breach of contract, defects to be remedied, liability for expenses and consequential losses, § 699.
sales, breach of contract by seller, delay in delivery, mitigation of liability, § 666.
warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Tickets
see Carriers of Passengers.
railroad pass, cause of action, severance, contract to do several things successively, or one thing continuously, § 110.
contractual exemptions from liability for damages, § 6.
telegrams, negligence in transmitting message, liability when object of sender is known, § 961.

Ties
replevin, damages, increase in value by defendant, § 1154.

Timber
access, eminent domain, injury to property not taken, ascertainment, § 1067.
amount of damages, opinion evidence, trees injured, § 444.
bridge not repaired, timber lost, consequential damages, act or omission as proximate cause of injury, § 29.
carriers of goods, loss or injury to property, proof of value, § 933.
compensatory damages, property sued for improved by wrongdoer, § 102.

Timber—continued.
covenants of title, seizin and good right to convey, measure of damages for breach of covenants, consideration paid and interest, § 593n.
recovery of proportion of consideration, part of title lost, § 602.
covenants of warranty and quiet enjoyment, breach, measure of damages, existence of lien, satisfaction, § 609.
partial breach, § 609.
cutting and removing
breach of contract, contractor's liability, general rule, liability for profits lost and expenses incurred, § 698.
measure of damages, defects in work, necessity of remedying, liability for expenses and subsequential losses, § 699.
covenants against incumbrances, definition, what are incumbrances, § 620n.
exemplary damages, allowance, grounds upon which allowed, § 393n.
injunction bonds, damages from restraint of injunction, § 527.
interest, actions for torts, § 355.
license to cut, mitigation of damages, § 154.
mitigation of damages, § 154.
consent of plaintiff to act complained of, § 162.
measures of prevention, § 157.
return of property, discharge of plaintiff's debt, § 156.
recovery by contractors, part performance of severable contract, § 708.
right to cut, breach of covenants against incumbrance, damages where incumbrance is permanent, § 628.
servant's violation of contract, recoupment of damages, consequential losses, § 695.
wrongful cutting, special damages, necessity of alleging, § 420.
destruction, injury to property, security diminished, measure of damages, § 1034.
eminent domain, compensation, injuries to various interests, damages in favor of tenant, § 1081.
injury to property not taken, ascertainment, §§ 1066, 1070.
injunction bonds, damages recoverable, damages from restraint of injunction, suspension of owner's control of property, § 528.
injuries to trees, eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1070.
floods, cause of action, entirety, successive actions, for damage to real property, § 114.
irrigation districts, breach of contracts, consequential damages, § 52.
pleading, special damages, necessity of alleging, § 420.
leases, repairs, covenants by lessee for repairs, measure of liability for not making repairs, § 858.
mesne profits, action for, damages recoverable, consequential and punitive damages § 994.
nuisance, injuries to trees, etc., damages recoverable, value of trees, § 1049.
remote consequences, liability, § 1050.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
protection prevented, injunction bonds, damages from restraint of injunction, § 527.
replevin, damages, increase in value by defendant, § 1154.
measure of damages, § 1144.
sales
acceptance of goods, liability for not accepting, remedies of seller, § 647.
refusal to accept property produced according to order, damages, remote losses, § 649.

Timber—continued.
sales—continued.
bills and notes, consideration, parol evidence to show defect of consideration, § 553.
breach of contract, damages recoverable by purchaser against vendor of land, oral contract, § 583.
liability for profits lost and expenses incurred, § 698.
non-delivery of property contracted for, consequential damages, illustrations, § 663.
property not in market, recovery of lost profits, § 652.
delay in delivering property, damages, action by purchaser against seller, § 664.
executed sales, recovery by seller after rescission of contract, price fixed by third party, § 653.
fraud, false representations, recovery of purchase money and interest, failure of title, § 1174.
warranty as to quantity or quality, breach, damages, general rule, § 670.
existence of warranties of quality, § 667.
implied or express warranty of quality, § 667.
interest, expenses and special injuries, §§ 673, 674.
warranty of title, breach, measure of damages, § 669.
salvage service, amount recoverable, derelict property, § 720.
servants, act of, recoupment of damages, consequential losses, employee's liability for violation of contract, § 695.
trespass to real property, cutting trees, treble damages, § 1031.
shade trees, eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1066.
mitigation of damages, trespass to real property, § 1027.
trees converted to timber, elements of damage, property sued for improved by wrongdoer, § 102.
trespass to personal property, damages exceeding compensation, exemplary damages, § 1092.
mitigation of damages, § 1104.
trespass to real property, additional injury to land beyond taking away timber and minerals, liability, § 1021.
consequential damages for torts, liability, illustrations, § 18.
crops, destruction of and injury to growing crops, damages, § 1023.
interest on damages, § 1026.
license, damages where person in possession under license sues, § 1012.
mitigation of damages, § 1027.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
remediable injuries, estimate of damages, § 1018.
tenants, damages in suit by tenants, § 1012.
trees, liability for destroying trees or timber, § 1019.
measure of damages, trespass by mistake, § 1020.
trover
measure of damages, liability of purchaser, effect of wilfulness, § 1110.
value of property enhanced by defendant, §§ 1126, 1128.
mitigation of damages, payment of taxes, § 1138.
use prevented, injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
vendor and purchaser, breach of contract by vendor, adjustment of counter equities in specific performance, § 588.
waste, injuries to property, remainders and reversions, damages recoverable, § 1034.

Time
carriers of goods, freight charges, time when freight is due and earned, § 887.

Time—continued.
computation, liquidated damages, manner of liquidating, computation, of time, § 281.
evidence of payment, lapse of time, § 233.
interest, suspension, tender stopping interest, time of making tender, § 385.
rent, apportionment of rent, §§ 849, 850.
sales
acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.
right to return property, § 650.
breach of contract by seller, non-delivery of property not in market, recovery of lost profits, § 652.
breach of warranty, remedies, rescission, return of goods, § 668.
executed sales, recovery by seller of full value, payment by bill or note, § 644.
tender, time of making tender, § 262.
vendor and purchaser, necessity that vendor convey perfect title, § 572.
recovery by vendor when contract does not fix price, § 575.
title, time for conveyance of good title, § 572.

Time, Loss of
attachment bonds, damages recoverable, § 512.
recovery of costs and expenses of attachment suit, § 516.
carriers of goods, delivery, refusal to deliver, recovery for time and expenses of obtaining property, § 911.
carriers of passengers, alighting at wrong place, damages, loss of time, expenses, exposure, § 938.
negligence or breach of duty, damages, recoverable, nature of injury, § 942.
evidence, loss of business, earning capacity, § 945.
contracts for services of attorney, evidence of value, § 682.
contracts for work, liability of employer for delaying or stopping work, consequential losses, mitigation of damages, § 713.
covenants of seizin and good right to convey, breach, mitigation or prevention of damages, § 601.
damnum absque injuria, prosecution of groundless action in good faith, § 3.
elements of damage, personal torts, § 93.
fraud, measure of damages, expenditures, loss of time, § 1171.
injunction bonds, damages from restraint of injunction, § 527.
recovery of costs and expenses, attorney's fees, § 524.
landlord and tenant, covenants of landlord, breach, special and consequential damages, § 865.
losses as elements of damage, labor and expenditures, § 80n.
malicious prosecution, elements of damage, § 1237.
mitigation of damages, measures of prevention of damage, return of property, § 156.
personal injuries, future damages, § 123.
injuries to wife, parties, joint right or liability for tort, determination, § 137.
loss of time as element of damage, § 1246.
measure of recovery for loss of time, § 1249.
personal torts, elements of damage, § 93.
pleading, items, necessity of itemizing damages in pleadings, § 424.
special damages, necessity for alleging, §§ 420, 421.
sales, warranties of quality and quantity, breach, damages, § 670.
special damages, necessity of alleging, § 421.
vendor and purchaser, breach of contract by vendor, elements of damages, loss of bargain, mitigation, § 584.

Time, Loss of—continued.
vendor and purchaser—continued.
damages recoverable by purchaser against vendor of land, defaulting vendee's rights, § 585.
elements of damage, mitigation, § 584.
damages recoverable by vendor against purchaser, necessity that seller convey perfect title, effect of condemnation proceedings, § 572.

Tobacco
marine insurance, valued policies, admiralty and fire, § 806.
sale, factor's duties, sale, measure of liability, sale at unauthorized price, § 778.

Tools
delay in transportation by carrier, negligence, proximate cause, § 903.
injury to pitchfork, nominal damages, right to, § 11.
repair, consequential damages, breach of contract, proximate consequences of breach, § 45n.
replevin, consequential damages, damages arising naturally and proximately from wrong, § 1146.
trover, special and consequential damages, § 1129.

Torrens' Act
see Abstract of Title; Registration of Title.
covenants, warranty and quiet enjoyment, breach, measure of damages, value of land at time of loss, § 608.

Torts
see also, Admiralty.
accord and satisfaction, payment of part of debt, agreement to discharge whole, §§ 248, 248a.
agents
liability to third persons, torts, § 800.
joint and several liability for torts, § 140.
violation of duty by agent, remedies, § 768.
aggravation, necessity of alleging matters of aggravation, § 422.
assessment of damages, admission of damages by default or demurrer, § 429.
reduction of damages, evidence of defendant, § 430.
attorney's fees, exemplary damages, enhancement and mitigation, § 404.
bills and notes, partial failure of consideration, nature of defense, cross action, § 546.
carriers of passengers, duty of carrier, protection of passenger, § 941
nature of obligation, liability of carrier in tort, § 934.
remedies, action in tort, breach of contract, § 934.
cause of action
entirety, continuance of wrong not presumed, § 126.
continuous breach of contract or infraction of rights not an entirety, § 125.
damage to real property, § 116.
splitting, contract to do several things successively, or one thing continuously, § 110.
necessity and advantage of successive actions, § 127.
certainty of damages, tortious interference with business, § 70.
compensatory damages, motive as affecting damages, tort actions, § 100.
conflict of laws, interest, effect of change in law of place of contract, § 368.
measure of damages, law governing; breach of contract and tort. § 7.
consequential damages, § 16.
act complained of must be efficient cause of damage, § 30.

Torts—continued.
consequential damages—continued.
breach of contract, damages contemplated by parties, § 45.
proximate consequences of breach, § 45.
certainty of damages, necessity, proximate result of act or omission, § 53.
extension of liability by statutes, § 16.
illustrations, §§ 17, 19.
what constitutes, award for probable consequences, § 15.
contracts for services, discharge of servant, allowance of wages, deductions, § 686.
direct damages, what constitutes, § 14.
distinction between consequential liability in tort and on contract, §§ 48, 49.
elements of damage, distinctions in matter of proof, § 104.
losses, expenses incurred to prevent or lessen damage, §§ 88, 90.
motive, tort actions, § 100.
personal torts, § 93.
property sued for improved by wrongdoer, §§ 102, 103.
value of property, § 105.
evidence, adaptation of evidence to damages claimed, § 437.
proof of pecuniary items by plaintiff, § 441.
exemplary damages
allowance, difference of views, § 391.
rule of United States Supreme Court, § 392.
basis of exemplary damages on actual damages, nominal damages, § 406.
compensation for wrongs done with bad motive, violation of contract, § 390.
denial or restriction of exemplary damages, reasons for rule, §§ 395, 396.
enhancement and mitigation of exemplary damages, § 404.
wealth of defendant, scope of inquiry, § 405.
grounds authorizing allowance of exemplary damages, § 393.
parties liable, liability of master for acts of servants, §§ 408-411.
penal offenses, § 402.
express indemnity, contribution or indemnity between wrongdoers, basis upon which made, § 764.
highways and streets, repair, right of indemnity of municipality, parties contracting to repair, § 83.
illustrations of consequential damages, § 18.
indemnity, liability for losses and expenses, proximate result of act complained of, § 84.
injunction bonds, damages recoverable, damages from restraint of injunction, §§ 526, 527.
interest, allowance, judgments, § 333.
as compensation, § 320.
money obtained by extortion or fraud, or wrongfully withheld or disposed of, § 354.
right to interest, §§ 300, 321n.
suspension, tender stopping interest, unliquidated damages, § 384.
torts, § 355.
unliquidated demands, § 348.
intervening cause, what constitutes, § 37.
invasion of rights, presumption of injury, right to damages, § 2.
joint injury, entirety of causes of action, damages to parties jointly, § 128.
joint right or liability, determination of, § 137.
exemplary damages, joint liability for, § 407.
parties injured, entirety of tortious act, § 138.
payments, who may make payments, § 230.
release by or to one or several claiming or liable, effect, § 257.

Torts—continued.
joint right or liability—continued.
release, what constitutes, covenant not to sue, § 259.
wrongful attachment, damages recoverable, joint tort feasors, § 513.
judgment, necessity of judgment following verdict, § 466.
leases, business, recovery for damages to business of lessee, § 868.
covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
what constitutes breach, § 863.
covenants, recoupment by either lessor or lessee, § 876.
eviction of lessee, recovery of rent barred, § 848.
repairs, covenant by lessor to repair, breach of covenant, measure of liability, § 872.
losses as elements of damages, expenses to prevent or lessen damages, § 88.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, extent of duty to lessen or prevent damage, § 90
motive, right to compensation not affected by motive, § 98.
nature of action, consequential damages, passenger directed to leave train three miles from destination, liability for injuries, § 36.
nominal damages, illustrations of right to nominal damages, § 10.
object of law of damages, award of compensation, § 12.
officers as trustees, bonds, liability of public officers, adjustment of liability between sets of sureties, § 481.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.
official bonds, private injuries covered by official bonds, § 487.
parties, general and special owners, § 139.
joint and several liability for torts, §§ 140, 141.
acts of members of partnership, § 142.
civil damage laws, § 142.
joint liability, extinguishment or severance, § 136.
joint right or liability, determination, principles, § 137.
misjoinder of plaintiffs, objection as fatal, § 134.
parties injured, entirety of tortious act, § 138.
personal torts, verdicts, excessive or insufficient verdict, power of court, § 460.
pleading, necessity of demand of damages in code complaint, § 415.
traverse, matters of aggravation not traversable, § 423.
profits, required certainty of anticipated profits, §§ 59, 60.
prospective damages, certainty of proof, § 121.
release, construction, extrinsic evidence, § 255.
remedies, agency, remedies of principal against agent, § 768.
right to damages, nature, survival, § 7.
salvage service, nature of peril, duty of claimant, who may be salvors, § 716.
set-off, counterclaim and recoupment, connection between cause of action and crossclaim, § 183.
crossclaim must rest on contract or subject matter of action, § 178.
crossclaims between landlord and tenant, § 182.
liquidated and unliquidated damages, § 185.
special damages, necessity of alleging, § 420.
suretyship, surety's remedies for indemnity, contribution between co-sureties, § 764.
who are co-sureties, proof of relationship, bonds in legal proceedings, contribution in cases of tort, § 755.
telegrams, delay in transmission of messages, damages recoverable, § 961.
tender stopping interest, unliquidated damages, § 384.

Torts—continued.
trespass to real property, aggravation, special damages, § 1028.
exemplary damages, mitigation, § 1032.
vendor and purchaser, damages recoverable by vendor against purchaser, recoupment for defect of title and for tort, § 573.
verdicts, general verdict on several counts, § 462.
interest on verdict before judgment, § 388.
necessity that judgment follow verdict, § 466.
parties, verdict where there are several parties, § 463.

Towage
breach of contract, damages, loss of property, rental value, expenses, effect of mutual fault, § 704.
liability under special circumstances, contemplation of parties, § 51.
exclusion of vessel from water channel, consequential damages, breach of statutory duties, § 32.
salvage service, requisites, parties liable, § 715.

Tower Falling
death, consequential damages, liability, § 18.

Towns and Townships
defenses, circuity of action, operation of principle in favor of plaintiff, § 145.
highways and streets, duty to keep in safe condition, § 26.
interest, allowance against government, § 332.
mitigation of damages, official negligence, § 160.
official bonds, measure of damages, against sureties, § 488.

Trade Journals
agreement not to enter judgment, consequential damages, breach of contract, proximate consequences of breach, illustrations, § 46.

Trade-Marks
Ch. XXXIII, §§ 1200-1202.
infringement, damages, measure of damages in equity and at law, §§ 1201, 1202.
exemplary damages, § 1202.
interest, allowance of interest on profits, § 1202.
nature of wrong, § 1200.
parties defendant, § 1200.
nature of right to trade-marks, § 1200.
sales, breach of contract by seller, good-will sold, certainty of proof, § 658.

Trade Unions
blacklisting employees, exemplary damages, allowance, in what actions recoverable, § 392.
exemplary damages, liability of voluntary societies, § 412.
expulsion from
consequential damages, mental suffering, § 24.
proximate consequences of act or omission, wilful or malicious injuries, § 44.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
strike, servant's violation of contract, recoupment of damages, consequential losses, § 695.
threats, exemplary damages, liability of societies, § 412.

Trading Stamps
certainty of damages, contingent advantage, § 72.

Transcript
see Appeal and Error.

Transportation
see Carriers of Passengers.

Traveling Salesman
certainty of damages, contract between agents and principals, § 69.

Treble Damages
see Exemplary Damages.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
verdicts, damages, statutory, double and treble damages, power of court or jury, § 464.

Trees
see Timber.

Trespass
see also, Animals; Arrest; Assault and Battery; Carriers of Passengers; Covenants; Infants; Malicious Prosecution; Trover, and similar titles.
abusive language, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
agency, indemnity, right to indemnity, unlawful acts, § 794.
aggravation, amount of damages, opinion evidence, § 444.
threats to burn house, ravish wife, etc., § 1029.
assessment of damages
jury, assessment of damages without jury, § 428.
when new trial may be called, § 433.
attachment bonds, damages recoverable, § 512.
cause of action
entirety, continuance of wrong not presumed, § 126.
continuous breach of contract or infraction of rights not an entirety, § 125.
damages to real property, §§ 114-116.
double remedies, § 119.
splitting, contract to do several things successively, or one thing continuously, § 110.
cause of action not divisible, § 106.
consequential damages for torts, § 18.
act of injured party, fraud and exposure to peril, § 39.
liability as affected by extraordinary circumstances, illustrations, § 35.
liability of carriers, extraordinary circumstances, § 36.
proximate consequences of act or omission, wilful or malicious injuries, § 43.
contribution or indemnity between wrongdoers, § 764.
distinctions, nuisance, general principles of the law of nuisance, difference from trespass, § 1036.
elements of damage, losses, expense incurred to prevent or lessen damages, extent of duty, § 90.
mental suffering, § 95.
property sued for improved by wrongdoer, §§ 102, 103.
eminent domain, compensation, injuries to various interests, damages in favor of tenants, § 1081.
exemplary damages, allowance, difference of views, § 391.
grounds authorizing allowance, § 393.
in what actions recoverable, § 392.
joint liability for, § 407.
liability of public officers, § 412.

Trespass—continued.
exemplary damages—continued.
malice in law and malice in fact, § 394.
parties liable, master's liability for acts of servant, § 408.
restriction or denial of exemplary damages, § 397.
rule of United States Supreme Court, § 392.
express indemnity, contribution or indemnity between wrongdoers, basis upon which made, § 764.
damages recoverable, mental and physical suffering, liability by original trespass, § 763.
fright, liability for fright, entering dwelling in night-time, § 1029.
guaranty, contracts not to be extended by construction, illustrations, § 726.
injunction bonds, damages recoverable, damages from restraint of injunction, § 526.
liquidated damages, alternative contracts, § 282.
interest in actions for torts, § 355.
issues, effect of not answering allegation of damage, § 416.
joint liability, exemplary damages, joint liability for, § 407.
landlord and tenant, actions for use and occupation, measure of recovery, evidence, § 842.
business, recovery for damages to business of lessee, §§ 868, 869.
consequential damages, right to recover for mental suffering, § 24.
covenants, breach, exemplary damages, § 866.
recoupment by either lessor or lessee, § 876.
covenants for quiet enjoyment, what constitutes breach, § 863.
eviction of tenant, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
lessee's right to damages for injury to business, § 868.
malicious prosecution, damages, injuries to property, trespass, § 1235.
malicious trespass, aggravation and special damages, § 1029.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
mitigation of damages, § 154.
consent of plaintiff to act complained of, § 162.
extent of duty to lessen or prevent damages, § 90.
measures of prevention of damage, return of property, § 156.
no mitigation when benefit not derived from defendant, § 158.
pleading, § 166.
res gestæ, fuller proof of res gestæ in trespass, negligence, etc., § 159.
mortgages, injunction bonds, damages from restraint of injunction, § 526.
nominal damages, illustration of right to, § 10.
officer's neglect, attachment bonds, wrongful attachment, damages recoverable, § 512.
measure of damages against sureties on official bonds, § 488.
official bonds, measure of damages against sureties, § 488.
private injuries covered by official bonds, § 487.
opinion evidence, amount of damages, opinions of witnesses, admissibility, § 444.
parties, general and special owners, § 139.
joint and several liability for torts, §§ 140, 141.
entirety of causes of action as to parties injured, § 138.
parties injured, entirety of tortious act, § 138.
personal injuries, allowance of exemplary damages in actions for personal injuries, § 1253.
personal property, trespass to, Ch. XXVII, §§ 1092-1107.
aggravation increasing damages, injuries to feelings, exemplary damages, § 1095.
certainty of damages, § 1093.
damages exceeding compensation, exemplary damages, § 1092.

Trespass—continued.
personal property—continued.
exemplary damages, mitigation, § 1095.
expenses, recovery of expense for disposing of animal killed, § 1103.
feelings injured, aggravation increasing damages, § 1095.
interest, damages for taking or destroying property, § 1096.
market value of property, damages recoverable, § 1098.
value of non-marketable property, ascertainment, § 1099.
mitigation of damages, § 1104.
application of property to owner's benefit, §§ 1105-1107.
evidence, § 1107.
ownership of property, motive, § 1107.
remedy, comprehensiveness of remedy, § 1094.
replevin as bar to action of trespass, § 1146.
special and consequential damages, §§ 1100-1102.
taking or destroying property, interest, value of use, § 1096.
title of interest of plaintiff in property, amount of damages recoverable, § 1097.
trespass from beginning, damages, § 1107.
pleading, aggravation, necessity of alleging matters of aggravation, § 422.
issues, effect of not answering allegation of damage, § 416.
mitigation, § 165.
traverse, matters of aggravation not traversable, § 423.
process, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
prospective damages, certainty of proof, § 122n.
real property, trespass to
action, gist of, § 1009.
trespass, quare clausum fregit, nature of action, § 1010.
additional injury to land, liability, timber and minerals taken away, § 1021.
administrator, action by, parties, § 1009.
aggravation and special damages, §§ 1028-1030.
injury to personal property, § 1030.
taking and carrying away personal property, § 1030.
benefit received, measure of damages, § 1014.
mitigation of damages, § 1027.
cause of action, joinder, suit by executors, damages, § 1013.
color of title, damages where person in possession under color of title sues, § 1012.
compensatory damages, § 1011.
crops, destruction of and injury to growing crops, damages, § 1023.
damages, measure of damages, benefit received, § 1014.
definition of trespass, § 1010.
destruction of property, damages, § 1015.
encroachment, remediable injury, damages, § 1018.
executors, action by, damages, § 1013.
exemplary damages, circumstances justifying, § 1095.
circumstances of outrage, insult, destruction of personal property, § 1031.
mitigation, § 1031.
negligence, double or treble damages, § 1031.
ratification of unauthorized acts of officers, § 1031.
restriction and denial, § 397.
expenses, mitigation of damages, § 1027.
fences, destruction of fences, injury, damages, § 1024.
fixtures, remediable injury, damages, § 1018.
humiliation, mitigation of damages, § 1027.
husband and wife, action by, parties, § 1009.
ice, damage for destruction of carrying away of ice, § 1022.
improvements, mitigation of damages, § 1027.

Trespass—continued.
real property—continued.
injury to inheritance, rights of parties not in possession, §§ 1033, 1034.
interest on damages, § 1026.
licensee, action by, damages, § 1012.
mining ores, liability for destroying mining ores, § 1019.
measure of damage for taking and carrying away, royalty rule, § 1020.
value as affected by defendant's acts, § 1020.
mitigation of damages, § 1027.
breaking and entering house, intent to ravish woman, § 1027.
evidence disclosing fact reducing injury, § 159.
parties, who may sue, § 1009.
husband and wife, property of, § 1009.
party walls, injuries, damages recoverable, § 1025.
permanent injury, estimate of damages, § 1017.
pleading, matter of aggravation, necessity of alleging, § 422.
traverse, § 423.
possessor, action by, damages, § 1012.
parties who may sue, § 1009.
presumption of possession, § 1009.
railroads, occupation of land by railroad, liability for damages, rental value, § 1016.
remediable injury, damages, § 1018.
remedy, scope, § 1010.
replevin as bar to action of trespass, § 1146.
special damages, aggravation of damages, §§ 1028-1030.
tenants, action by, damages, § 1012.
trees, liability for destroying trees, conversion as principal wrong, value as affected by defendant's acts, §§ 1019, 1020.
value, remediable injury, damages, § 1018.
water, diversion of water, damages, § 1022.
recoupment and counterclaim, connection between cause of action and crossclaim, § 183.
recoupment between vendor and purchaser, § 184.
searches
trespass, malicious search for stolen property, § 1029.
search for intoxicating liquors, damages for humiliation, mental anguish, § 1029.
seduction, aggravation of damages, action of trespass, § 1030.
slaves carried away, consequential damages, § 17.
mitigation of damages, pleading, necessity of pleading facts in mitigation, § 166.
street railroads, employees permitting children to ride on platform, consequential damages, § 42.
suretyship, contract not to be extended by construction, § 726.
express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
verdicts, excessive or insufficient verdict, power of court, § 460.
parties, verdict where there are several parties, § 463.
wilful or malicious injuries, consequential damages, §§ 43, 44.

Trespass to Try Title
ad damnum, limit of recovery, erroneous claim of damages, § 417n.
appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587.

Trial
admissions, payment of money into court, admission of cause of action, § 435.
conduct of counsel, slander and libel, exemplary damages, § 1216.
discretion of court, amendment and correction of verdict, § 458.
injunction bonds, damages, costs and expenses, attorneys' fees, § 524.
personal injuries, physical examination of plaintiff, discretion of court, § 451.
value, evidence, admissibility, § 445.
Federal Employers' Liability Act, questions for jury in actions under, § 1357.
special interrogatories in actions under, § 1356.
remarks of counsel, breach of marriage promise, amount of damages, enhancement of damages, § 986.
verdicts
excessive or insufficient, power of court, § 460.
setting aside, § 459.
necessity that judgment follow verdict, § 466.

Triviality
violation of rights, actual damages, right to nominal damages, § 11.

Trover and Conversion
Ch. XXVIII, §§ 1108-1142.
account stated, conversion of money securities, § 1132.
action, nature of action, § 1108.
agents, bills and notes, measure of liability of agents for defaults in regard to commercial paper, §§ 775n, 776.
indemnity, agent's right to indemnity for losses or damages, § 793.
reimbursement, agent's rights, mode of doing business, § 792.
stock received in violation of trust, liability of agent to principal, § 773.
attachment bonds, express indemnity, damages recoverable, costs, expenses and attorney's fees, remote and consequential losses, § 762.
attorney's fees, § 1130.
bailments, losses as elements of damage, what losses consist of, § 79.
bankruptcy, recovery of value of property sold in bankruptcy proceedings, § 1116.
bills and notes, interest, allowance of interest on judgments, § 334.
recoupment and counterclaim, acts which may be basis of recoupment, § 181.
bonds, money securities, conversion, action, measure of damages, § 1132.
value of property, elements, evidence, § 448.
carriers of goods, loss of or injury to goods, compensation on basis of market value, § 918.
damages where there are successive carriers, effect of Carmack Amendment, § 932.
qualification of carrier's liability by notice, effect of Carmack Amendment, § 926.
recovery for expenses and labor in lessening loss, § 921.
cause of action
entirety, § 106.
double remedies, § 119.
mistake of remedy, effect, § 106.
severance, contract to do several things sucessively, or one thing continuously, § 110.
compensatory damages, property sued for improved by wrongdoer, § 103.
consequential damages, § 1129.
certainty, recovery of items of damages which are certain, § 55.

Trover and Conversion—continued.
covenants of warranty and quiet enjoyment, breach, damages, expenses, costs and attorney's fees as damages, § 617.
damages, general rule of damages, § 1109.
liability of purchaser, § 1110.
property of fluctuating value, §§ 1111, 1118, 1119, 1121.
Australian cases, § 1123.
Canadian cases, § 1123.
criticism and modification of the rule, § 1119.
departure from general rule, justification, § 1125.
English cases, § 1123.
Massachusetts rule, § 1122.
New York rule, § 1120.
North Carolina rule, § 1124.
Pennsylvania rule, § 1121.
property without market value, measure of damages, § 1117.
value of property enhanced by defendant, § 1128.
wilfulness, effect of, § 1110.
deeds, bonds to convey land, conversion, measure of damages, § 1134.
elements of damage, losses, § 79.
value of property, § 105.
eminent domain, recovery of value of property condemned for street, § 1116.
evidence, intendments against defendant for holding back evidence, § 439.
exemplary damages, wilful and malicious tort, § 1131.
express indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 766.
factors, remitting funds, effect of failure to obey orders, § 785.
sales, liability for failure to sell at certain time, § 780.
fraud, false representations, remote, conjectural and contingent damages, § 1175.
injunction bonds, damages recoverable, damages from restraint of injunction, § 527.
insurance policy, conversion, measure of damages, § 1133.
interest, actions for torts, § 355.
allowance against agents, trustees, and officers, § 353.
amount, § 1115.
insurance policy, conversion, measure of damages, § 1133.
judgments, allowance, § 334.
measure of damages, property of fluctuating value, § 1118.
English, Canadian and Australian cases, § 1123.
money obtained by extortion or fraud, § 354.
money securities, conversion of, measure of damages, § 1132.
partners, right to interest between, § 342.
pleading, how interest claimed in pleading, § 387.
property without market value, measure of damages, § 1117.
landlord and tenant, actions on covenants of lease, recoupment, § 876.
conversion, measure of damages, removal of fixtures, § 1134.
covenants, recoupment by either lessor or lessee, § 876.
master and servant, recoupment and counterclaim for negligence, § 180.
mitigation of damages, duty of plaintiff to mitigate damages, § 1142.
evidence, § 1141.
measures of prevention, § 157.
return of property, § 156.
pleading, § 166.
wilful taking or refusal to surrender, § 1140.
money securities, conversion, action, measure of damages, § 1132.
nominal damages, § 9, n1.
officers and public employees, recovery of value of property subject to public sale, proof of value, § 1116.

Trover and Conversion—continued.
parties, general and special owners, § 139.
who may bring action of trover, § 1108.
place of conversion, exception to general rule of damages, § 1109.
pleading, aggravation of damages, matters of aggravation not traversable, § 423.
interest, manner of claiming interest in pleading, § 387.
necessity of stating case which entitles plaintiff to damages, § 413.
special damages, necessity of alleging, § 420.
replevin bonds, actions, damages recoverable, § 505.
right to damages, nature, survival, § 7.
sales, breach of contract by seller, purchase price paid, damages, § 656.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
recoupment for fraud, breach of warranty, etc., § 180.
sheriffs, indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
sidewalks, wrongful removal, trespass to personal property, remedy, comprehensiveness, § 1094.
special damages, § 1129.
necessity of alleging special damages, illustrations, § 420.
stock, agent's disregard of orders, purchase, shipment and sale of goods, § 773.
conversion of shares of stock, measure of damages, § 1135.
pleading, sufficiency of allegations, right to damages § 413.
telegraphs and telephones, fraudulent act of agent, inducing bank to pay money to third person, damages recoverable, § 966.
ticket, mental anguish, necessity that anguish proceed from act causing physical injury, § 95.
time of conversion, § 1112.
value of property, enhancement by defendant, recovery, §§ 1126-1128.
fixtures, § 1114.
proof of value, § 1113.
title of plaintiff, limitation of recovery to plaintiff's interest, §§ 1136, 1137.
value of use of property, allowance in lieu of interest, § 1115.
vendor and purchaser, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
verdict, amendment and correction of verdict, § 458.
certainty, when verdict is deemed certain, § 461.
where there are several parties, § 463n.

Trusts
accounts, failure to account, interest, allowance against agents, trustees and officers, § 353.
actions, parties plaintiff, person in whom legal interest is vested, § 130.
agency, disregard of orders by agent, purchase, shipment and sale of goods, § 773.
stock received in violation of trust, liability of agent to principal, § 773.
attorney's compensation, actions by attorneys, value of services rendered, admissibility of evidence, § 682.
bills and notes, consideration, parol evidence to show defect of consideration, §§ 551, 552.
recovery of principal sum, beneficial parties, action for benfit of another, § 541.
cause of action
entirety, damages accruing subsequent to action, § 113.
recovery by party in whom legal interest is vested, § 130.

Trusts—continued.
compensation of trustees, contracts for services, implied contracts, right to recover for services rendered, § 679.
contract for services of attorney, evidence of value, § 682.
quantum meruit, recovery for services rendered, § 679.
compensatory damages, value of property as measure of damages, § 105.
conversion of funds, interest, allowance against agents, trustees and officers, § 353.
exchange of property, fraud, false representations, measure of damages, difference between value and amount paid, § 1172.
express trust, payments, application by debtor, § 235.
factors, remitting funds, effect of failure to obey orders, § 785.
fraud, false representations, damages recoverable, § 1174.
remote, conjectural and contingent damages, § 1175.
interest, allowance against agent, trustees and officers, § 353.
annuities and legacies, allowments of interest on, § 344.
compound interest, § 373.
conflict of laws, contracts between parties in different states, § 360.
money had and received, allowance of interest, § 352.
money paid, allowance of interest, § 327.
negligence, interest, actions for torts, § 355.
suspension of interest, process, payment prevented by legal process, § 381.
legacy in lieu of dower, interest, allowance on annuities and legacies, § 344.
payment, to whom payment may be made, § 231.
penalties, bonds, limit of recovery, interest, § 478.
probate bonds, estates of decedents, bonds for administration, § 493.
guardian's bond, sureties' liabilities, § 496.
replevin bonds, actions, defenses, mitigation of damages, § 507.
judgment, what may be shown in defense or in mitigation, § 507.
sale of trust property not authorized, fraud, damages, § 1174.
sales, warranties of title, existence, § 668.
suretyship, right of subrogation, availability, § 736.
tender, persons to whom tender should be made, § 265.
trespass to real property, executors and administrators, damages in suit by executor, personal representative or trustee, § 1013.
trustee ex maleficio, liability for profits, causes of action, damages accruing subsequent to action, § 113.
vendor and purchaser, damages recoverable by purchaser against vendor of land, measure of damages, nominal damages, elements of damages, § 582.

Tuberculosis
personal injuries, mitigation of damages, evidence, § 1255.

Tug Boats
application of Federal Employers' Liability Act to, see Federal Employers' Liability Act.
exclusion of vessel from water channel, consequential damages, breach of statutory duties, § 32.

Tumor
pleading, special damages, necessity of alleging, § 421.

Turnpikes and Toll Roads
causes of action, entirety, damage to real property, § 114.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.

Turntables
infants injured
consequential damages, proximate cause, act of third person as cause, § 40.

U

Ultra Vires
see Corporations.

Undertakers
sale of coffin, fraud, false representations, remote, conjectural and contingent damages, § 1176.

Undertakings
see Bonds; Contracts.
elements of damage, losses, bonds and undertakings, damages and costs, § 85.

United States
see also Federal Courts.
bonds to the United States law governing as to interest, § 359.
claims, evidence of value, property without market value, § 448.
interest, allowance against government, § 332.
contracts for particular work, liability of employer for delaying or stopping work, effect of not abandoning contract, § 714.
performance stopped by law, contractor's rights, § 714.
eminent domain, compensation, wrongdoer's improvements, entry with or without consent of owner, § 1076.
time of assessment of damages and benefits, § 1083.
officers, bonds, absolute liability for money received, § 479.
public improvements, recoupment and counterclaim for negligence, § 180.
suretyship, contract of surety not to be extended by construction, illustration, § 727.
discharge or reduction of surety, act of creditor, § 735n.
suretyship, interpretation of contract, continuance of commercial guaranties, liability for successive terms of bank cashier, § 724.
trespass to real property, interest on damages, § 1026.

United States Supreme Court
Federal Employers' Liability Act, review in actions under, § 1358.

Universities
see Schools and School Districts.
fraud, false representations, authority to confer degrees, measure of damages, § 1171.

Unlawful Detainer
see Forcible Entry and Unlawful Detainer.

Unliquidated Damages
see Liquidated Damages.

Use and Occupation
actions for use and occupation of property, see Landlord and Tenant.

Use of Property
injunction bonds, damages from restraint of injunction, § 528n.
replevin bonds, actions, damages recoverable, § 505.
non-liability of sureties for judgment in replevin suit, § 503.

Usury
see Interest.
agreements, different rate of interest after debt is due, § 312.
more than legal rate of interest after maturity, usury, when debtor relieved, § 319.

Usury—continued.
agreements—continued.
more than legal rate of interest before maturity, usury, effect, § 313.
bills and notes, conflict of laws, effect of usury, § 364.
interest on bills and notes, § 556.
stipulations for attorney's fees and costs, effect on negotiability, amount recoverable, § 564.
broker's compensation, liquidated damages, mode of liquidating, computation of time, § 281.
compound interest, § 373.
conflict of laws, effect of change in law of place of contract, § 370.
law governing where usury is involved, §§ 362-365.
corporations, who may take advantage of usury, § 314.
covenant against incumbrances, damages for breach, permanent incumbrance, § 627.
creditor's right to make application of payments, § 240.
definition, agreements for more than legal rate before maturity, usury, effect, § 313.
double rate of interest, recovery under usury statute, § 317.
judgments, interest on, § 333.
payments
application, by court, § 241.
debt bearing interest, application to interest first, § 244.
debtor's right to direct application, § 236.
general payment applied to debt bearing interest, first to interest, § 244.
penalties, agreements for more than legal rate of interest after maturity, § 318.
persons, who may take advantage of usury, § 314.
recovery under usury statute, §§ 316, 317.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
cause of action, connection between and crossclaim, § 183, n 77.
suretyship, creditor's duty to realize on securities, refusal of payment, application of deposit to indebtedness, § 737.
remedies for indemnity, action against principal for money paid, measure of recovery, § 748.
right of surety to defend between principals, § 743.
validity, when contracts not void for usury, § 315.

Utah
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorneys' fees, § 564.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
ejectment, appeal and supersedeas bonds, liability if judgment is in part for money or in rem, § 533.
eminent domain, assessment of damages and benefits, time of, § 1083.
compensation, wrongdoer's improvements, § 1076.
interest, actions for torts, § 355.
trespass to real property, ice injured, diversion of water, § 1022.
trover, damages, property of fluctuating value, § 1119.

Uterus Injured
personal injuries, verdicts, excessive or inadequate verdicts, § 1242n.

V

Value
see Market Value.
agency, exclusive agency, evidence of value, §§ 445, 446.
attachment, bonds, damages recoverable, § 512.
forthcoming bonds, measure of damages, § 518.

Value—continued.
baggage, disclosure of value, § 954.
baggage lost or injured, measure of damages, § 955.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
carriers of goods, damages, refusal to carry, cost of transportation, § 899.
delay in transportation, refusal to receive property, damages, § 905.
freight charges as affected by value of property, § 885.
loss or injury to property, proof of value, § 933.
contract for services, evidence of value, § 680.
attorney, contract for services of, evidence of value, § 682.
covenants against incumbrances, breach, rule of damages, remote losses, § 622.
covenants for title, breach, measure of damages, costs of eviction, expenses, § 593.
covenants of warranty and quiet enjoyment, measure of damages for breach, § 605.
property as consideration, § 606.
depreciation of value, eminent domain, injury to property not taken, ascertainment, § 1066.
mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.
elements of damage, value of property, § 105.
eminent domain, compensation, what is just compensation, § 1063.
master and servant, breach of contract, recovery on quantum meruit. § 679.
money, effect of changes in value of money, § 208.
value at time of contracting, § 209.
nuisance, depreciation in value as damages, § 1047.
interference with business, element of damage, § 1054.
quantum meruit recovery for services, evidence, defenses, § 679.
sales
breach of warranty as to quantity or quality, damages, general rules, § 670.
interest, expenses and special injuries, § 672.
trespass to real property, remediable injury, damages, § 1018.
trover
damages, interest and value of use of property, § 1115.
property of fluctuating value, § 1118.
evidence of value, § 1113.
fixtures, § 1114.
vendor and purchaser
breach of contract by purchaser, measure of damages, § 570.
conveyance in consideration of non-pecuniary covenants, § 576.
recovery by vendor when contract does not fix price, § 575.
damages recoverable by purchaser against vendor of land, elements of damage, mitigation, § 584.
oral contract, § 583.
suits for specific performance, § 590.

Variance
see Pleading.

Varnishing Machine
sales, warranty of quality, damages for breach, interest, expenses and special injuries § 672.

Vehicles
assault by hack driver, personal injuries, verdicts, excessive or inadequate verdicts, § 1242n.
attachment bonds, damages recoverable, § 512.

Vehicles—continued.
collision
consequential damages, acts of third person as cause, § 40.
liability, illustrations, § 17.
nervous shock as physical injury, right to recovery for nervous shock, § 22.
right to recover for injury to health, § 23a.
runaway, § 17.
injury to pedestrian, consequential damages, liability, § 19.
negligence or breach of duty, exemplary damages, difference in rule in some states, § 951.
defect in harness, consequential damages, § 26.
driver's contracts for services, continuation of original contract, § 685.
exemplary damages, parties liable, master's liability for acts of servant, § 408.
horse and cart unattended, consequential damages, § 19.
imputed negligence of driver to passenger, § 27.
injuries to vehicle, causes of action, entirety, damage to property and injury to persons by same act, § 118.
wagon injured by cars at railroad depot, consequential damages, § 18.
insurance, total loss, what constitutes, § 807.
negligence, driving van into house, nervous shock as physical injury, consequential damages, § 23a.
passenger injured, consequential damages, acts of third person, § 42.
imputed negligence, § 27.
removal of property, replevin bonds, actions, damages, recoverable, § 505.
repairs, amount of damages, opinions of witnesses admissibility, § 444.
sale of manufactured articles, market value, special circumstances, consequential damages, § 52, n 91.
sales, breach of contract, liquidated damages, payment of fixed sum for partial or total breach of contract, § 295n.
breach of warranty as to quality or quantity, damages, interest, expenses, and special injuries, §§ 672, 675.
streets, leaving vehicles unattended in street, injuries to pedestrians, consequential damages, § 19.
trade-marks, infringement, measure of damages in equity and at law, § 1202.

Vendor and Purchaser
Ch. XIII, §§ 566-641.
see also, Abstracts of Title; Covenants; Real Property; etc.
abatement of price, contracts, obligation of purchaser, § 557.
agency, expenditures of agent, right to reimbursement, § 789.
attachment bonds, wrongful attachment, damages recoverable, sale not consummated, § 512.
bills and notes
consideration, parol evidence to show defect of consideration, assignment of note, § 554.
different agreement, parol evidence to show, § 552.
partial failure of consideration, availability of defense, § 545.
defense as resting on principle of rescission of contract, § 548.
nature of defense, cross action, § 546.
value of bills and notes, solvent parties, measure of damages, § 565.
breach of contract, compensation for gains, profits and losses sustained, § 78.
compensatory damages, motive as affecting damages, § 99.
damages for breach of contracts for sales, realty and personalty, § 566.

Vendor and Purchaser—continued.
breach of contract—continued.
elements of damage, losses, labor and expenditure, § 80.
motive, distinction made for bad motive, contracts, § 99.
purchaser's breach of contract, assailability of invalidity of contract, § 574.
conveyance in consideration of non-pecuniary covenants, § 576.
default, rights of vendor, § 585.
interest on purchase money, recovery, § 577.
legal remedy, injury resulting from non-performance, § 568.
measure of damages, §§ 569, 570.
notes given for price, assumption of mortgage, § 571.
necessity that seller convey perfect title, effect of condemnation proceedings, § 572.
recoupment for defect of title and for tort, § 573.
recovery when contract does not fix price, § 575.
right of seller to recover purchase price and interest, abatement of price, § 567.
special contract to pay damages, failure to remove vendor's lien, § 631.
vendor's breach of contract, adjustment of counter equities in specific performance, §§ 588, 589.
defaulting vendee's rights, § 585.
conflict of American decisions, § 586.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, conflict of American decisions, § 579.
English rule, § 578.
application, § 581.
nominal damages, § 582.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.
suits for specific performance, damages, § 590.
conflict of laws, breach of contract by vendor, measure of damages, conflict of American decisions, § 579.
consideration, bills and notes, want or failure of consideration, § 542.
breach of contract by vendor, recovery on parol contract, § 583.
validity, purchaser's right to assail validity of contract, § 574.
contracts, covenant against incumbrances, effect on executory contract, § 621.
forfeiture, waiver of right to declare forfeiture, § 567.
necessity that vendor convey perfect title, § 572.
obligation of purchaser, § 567.
recovery by vendor when contract does not fix price, § 575.
validity, purchaser's right to assail validity of contract, § 574.
contracts for services, employee's liability for violation of contract, recoupment of damages, consequential losses, § 695.
covenants, see Covenants.
default
breach of contract by vendor, defaulting vendee's rights, § 585.
conflict of American decisions, § 586.
rescission, adjustment of counter demands, § 587.
interest on purchase money, action by vendor against purchaser, § 577.
defenses, breach of contract by vendor, measure of damages, English rule application, § 581.
purchase money, actions for, defenses and crossclaims against, §§ 632-641.
demand for performance, covenant against incumbrances, effect on executory contract, § 621.
deposits, breach of contract by vendor, defaulting vendee's rights, § 585.

Vendor and Purchaser—continued.
elements of damage
expense incurred to prevent or lessen damage, extent of duty, § 90.
vendor and vendee, § 89.
notice to indemnitor to fix liability, necessity, § 87.
value of property, § 105.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1067.
evidence, recovery by vendor when contract does not fix price, § 575.
executed sales, recovery after rescission of contract, price fixed by third party, § 643.
executory contracts, covenants against incumbrances, breach, § 621.
expenses
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
measure of damages, nominal damages, § 582.
express indemnity, contracts varying from indemnity, intent to indemnify, when cause of action arises, measure of recovery, § 765.
forfeiture, waiver of right to declare forfeiture, § 567.
fraud
breach of contract by vendor, measure of damages, conflict of American decisions, § 579.
English rule, application, § 581.
recovery on parol contract, § 583.
consequential damages, acts of third person, § 42.
expenses of litigation, recovery in addition to actual damages, § 1177.
false representations effecting sale, damages, § 1171.
measure of damages, difference between value and amount paid, § 1172.
difference in value, § 1171.
seller defrauded, § 1171.
reliance on representations, negligence of injured party, § 1168.
remedies by purchaser of property, rescission, action for damages, § 1174.
remote, conjectural and contingent damages, § 1175.
parties, plaintiffs and defendants, § 1179.
validity, purchaser's right to assail validity of contract, § 574.
frauds, statute of, recovery of damages on oral contract for sale of land, § 583.
good faith, mesne profits, claims for improvements, taxes, § 999.
improvements, breach of contract by vendor, recovery on parol contract, § 583.
injunction bonds, damages from restraint of injunction, sale enjoined, § 528n.
interest
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
measure of damages, nominal damages, § 582.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.
contracts, obligation of purchaser, § 567.
purchase money, interest on, action by vendor against purchaser, § 577.
quantum meruit claim to interest between vendor and purchaser, § 328.
liens, breach of contract by vendor, rescission, adjustment of counter demands, § 587.
discharge, payment by note, bill or check, § 225.
payment by bill, note or check, § 225.
tender, effect, collateral securities, § 277.
liquidated damages, alternative contracts, § 282.

Vendor and Purchaser—continued.
liquidated damages—continued.
part performance accepted where damages are liquidated, effect of, § 296.
stipulation for payment of fixed sum for partial or total breach, § 294.
stipulations when damages are uncertain, §§ 290, 293.
mesne profits, defenses, claims for improvements, taxes, etc., § 999.
who may recover, § 992.
mortgages, breach of contract by purchaser, measure of damages, assumption of mortgage, § 571.
negligence of abstractor, elements of damage, losses, § 79.
interest in actions for torts, § 355.
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 492.
parties, covenants of warranty and quiet enjoyment, breach, parties by and against whom recovery may be had, § 613.
payment
breach of contract by purchaser, measure of damages, assumption of mortgage, § 571.
interest on purchase money, action by vendor against purchaser, § 577.
recovery by vendor when contract does not fix price, § 575.
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
damages, suits for specific performance, § 590.
defaulting vendee's right, § 585.
conflict of American decisions, § 586.
elements of damage, loss of bargain, mitigation, § 584.
measure of damages, English rule, application, § 581.
nominal damages, § 582.
rescission, adjustment of counter demands, § 587.
recoupment by purchaser for defective title and for tort, § 573.
personal property, sales of, see Sales.
profits, breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
purchase money, covenants, actions for purchase money, defenses in equity, §§ 632-641.
railroad and canal, sale of, repairs, covenant of purchaser to keep property in repair, effect, measure of damages for breach of covenant, § 860.
remedies, breach of contract by vendor, damages, suits for specific performance, § 590.
repairs, breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
liability for not making repairs, special cases, § 860.
resale
breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
defaulting vendee's right, § 585.
elements of damage, loss of bargain, mitigation, § 584.
rescission, adjustment of counter demands, breach of contract by vendor, § 587.
defaulting vendee's right, § 586.
interest, compensation, right to interest, § 321.
quantum meruit claim to interest between vendor and purchaser, § 328.
recoupment and counterclaim, parties, § 175.
right of way, agreement to sell, release of damages, construction, extrinsic evidence, § 255.
right to possession, tender, when tender may be made, § 262.
saltpeter cave sold, anticipation of injury to persons, illustrations, § 25.

Vendor and Purchaser—continued.
set-off, counterclaim and recoupment, acts which may be basis for recoupment, § 181.
defenses and crossclaims, covenants, action for purchase money, §§ 632-640.
recoupment between vendor and purchaser, § 184.
recoupment by purchaser for defective title and for tort, § 573.
recoupment for fraud, breach of warranty, negligence, etc., § 179.
special damages, necessity of alleging, breach of warranty, § 420.
specific performance, appeal and supersedeas bonds, instances of liability, specific conditions, § 536.
breach of contract by vendor, damages, suits for specific performance, § 590.
suit for specific performance, damages anticipated, defect of title, § 25.
suretyship, express indemnity, contracts varying from indemnity, causes of action, measure of recovery, § 766.
taxes, breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.
telegraphs and telephones, negligent delay in transmission or delay in delivery of message, liability for loss of employment and profits of business, § 967.
tender, conditions, tender must be unconditional, § 270.
necessity of pleading and paying money into court, § 274.
title, damages recoverable by vendor of land against purchaser, interest on purchase money, title defective, § 577.
necessity that vendor convey perfect title, effect of condemnation proceedings, § 572.
recoupment by purchaser for defective title and for tort, § 573.
title insurance, nature of contract, § 840a.
torts, recoupment by purchaser for defective title and for tort, § 573.
trespass to real property, license, damages where person in possession under license sues, § 1012.
parties injured, entirety of tortious act, § 138.
value of property, evidence, actual sales, offers for property, market quotations, § 447.
waiver of right to declare forfeiture, § 567.
waste, breach of contract by vendor, adjustment of counter equities in specific performance, §§ 588, 589.

Verdicts
amendments of verdicts, §§ 457-458.
argument of counsel, excessive and insufficient verdicts, improper argument of counsel, 459.
assessment of damages, error, correction of error in assessment, § 434.
verdict where there are several parties, § 463.
assumpsit, amendment and correction of verdict, § 458.
breach of bond or non-performance of agreement, assignment assessment of damages and costs, statute of 8 and 9 William III, § 472.
carriers of passengers, negligence or breach of duty, excessive verdicts, § 953.
certainty, necessity of verdict being certain, § 461.
when verdict is deemed certain, § 461.
deliberations of jury, § 456.
excessive and insufficient verdicts, §§ 459, 460.
lack of evidence to sustain, remittitur, § 459.
necessity that judgment follow verdict, § 466.
personal injuries, amount to be allowed for pain and suffering, § 1242n.
discretion of jury as to damages, instructions, § 1256.
telegrams, negligence in transmission or delivery, mental anguish, measure of damages, recoveries in particular cases, § 982.

Verdicts—continued.
exemplary damages, allowance in verdict by court or jury, § 464.
matter of right, power of court over verdict, § 403.
general verdict on several counts, effect, § 462.
impeachment of verdict by affidavits, § 456.
instructions, excessive or insufficient verdict, disregard of instructions, § 460.
interest on verdict before judgment, § 388.
itemization of damages, § 456.
joint liability, exemplary damages, joint liability for, § 407.
judgment, certainty, necessity that judgment be certain, § 467.
necessity that judgment follow verdict, § 466.
jury, deliberations, § 456.
parties, verdict where there are several parties, § 463.
passion and prejudice, exemplary damages, enhancement and mitigation of exemplary damages, § 404.
quotient verdicts, § 456.
right to damages, when right vests, § 7.
setting aside, amount of damages, § 2.
quotient verdict, § 456.
statutory, double and treble damages, power of court or jury, § 464.
surplusage, erroneous statements, findings beyond issues, § 461.
variance and inconsistent findings in verdict, effect, § 461.

Vermont
appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 535.
assumpsit, verdicts, amendment and rendition of, § 458.
bonds, administration of estates, liability of sureties, § 495.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
recovery by contractors, part performance of severable contract, § 708.
covenants of warranty and quiet enjoyment, breach, measure of damages, value of land at time of loss, § 608.
eminent domain, assessment of damages and benefits, time of, § 1083.
interest, allowance on annuities and legacies, § 344.
compound interest, interest on instalments of interest, § 375.
officers, neglect of duty, measure of damages, nominal damages, § 489.
replevin, successful plaintiff as wrongdoer, § 1156.
suit on bond, assessment of damages, § 502.
slander and libel, damages, mental suffering and physical incapacity, § 1214.
suretyship, construction of contract, continuance of guaranty, § 724.
remedy of surety for indemnity, payment giving right to reimbursement, § 750.
trespass to personal property, special and consequential damages, § 1100.
trespass to real property, exemplary and statutory damages, § 1031.
trover, damages, interest and value of use of property, § 1115.

Vessels
see also, Admiralty.
abandoned vessels, salvage service, derelict property, amount of salvage recoverable, § 720.
abandonment of voyage, causes of action, entirety, double remedies, § 119.
certainty of damages, § 61.
anticipated profits, § 60.
freight charges, time when freight is due and earned, § 887.
agency, duty of agent to adhere to instructions, liability for exceeding commission, § 774.

Vessels—continued.
agency—continued.
insurance, neglect by agent of duty or agreement concerning insurance, § 772.
sales, disregard by agent of orders for the purchase, shipment and sale of goods, loss of profits, § 773.
violation of duty by agent, secret profits, § 769.
application of Federal Employers' Liability Act to, see Federal Employers' Liability Act.
baggage, loss or injury, what is baggage, value, § 954.
barge hired, cause of action, entirety, items of accounts, § 111.
breach of contract of transportation, damages as including other than pecuniary elements, § 92.
elements of damage, losses, expense incurred to prevent or lessen damage, employer may finish work at contractor's expense, § 91.
recovery for costs of other means of transportation, § 91.
breach of contract to furnish goods for shipment
charter-parties, damages for breach of charter to load with enumerated articles, § 883.
mitigation of damages, duty of carrier, § 880.
burden of proof, § 882.
partial breach, measure of damages, § 879.
shipper's rights in profits made by carrier, § 881.
cargo, apportionment of damage, mutual fault, § 928.
delivery, refusal to deliver, recovery for time and expenses of obtaining property, § 911.
duty of carrier, goods lost or injured, apportionment of damages in case of mutual fault, § 928.
interest, allowance on money paid, § 326.
landing cargo, consequential damages, proximate consequences, illustrations, § 46.
charter parties, breach of contract to furnish goods for shipment, measure of damages, § 878.
certainty of damages, § 61.
compensation for procuring charter, quantum meruit recovery for services, evidence, defenses, § 679.
defenses, circuity of action, equality of damages, necessity, § 146.
demurrage, detention of goods, § 897.
loss of vessel, circuity of action, damages must be equal, § 146.
refusal to carry goods, increased expenses, loss of customers, § 901.
wrongful detention, certainty in nature and cause of damages required, § 53.
collisions, compensation by mutual demand, § 148.
consequential damages, certainty, liability for principal loss extending to details for incidents, § 54.
liability, illustrations, § 18.
delay in transportation of goods, liability for loss of market value, § 909.
injury to or loss of goods having market value, damages, § 918.
interest, actions for torts, § 355.
marine insurance, cause of damage must be proximate, § 803.
mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, §§ 156, 157.
mutual credit, compensation by mutual demand, § 148.
seaman injured, mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
construction, contract for particular work, contractor's liability for damages for delay, rental value, expenses, § 703.
construction of sea wall, consequential damages, injury not foreseen, § 28.
contract to furnish boats, damages for delay, § 703.

Vessels—continued.
dams, negligence in operation, consequential damages, § 19.
delay in transportation, breach of contract to supply coal, liability under special circumstances, contemplation of parties, § 51.
consequential damages, delay in harbor, certainty of damages, necessity, proximate result of act or omission, § 53.
liability for loss of market value, application of rule to ocean carriage, § 909.
liability for negligence, proximate cause, § 903.
mitigation of damages, benefit not derived from defendant, § 158.
duty of carrier, care of property, burden of proof as to injury or loss, § 917.
duty to transport, rates, breach of duty or contract, carrier's liability, § 898.
goods lost or injured, apportionment of damages in case of mutual fault, § 928.
compensation on basis of market value, § 918.
consequential damages for torts, intervening cause, § 37.
damages, what law governs, § 918.
interest on damages, § 920.
recovery by shipper for expenses and labor in lessening loss, § 921.
recovery for injury to or loss of goods by bailee, § 918.
money stolen, § 916.
refrigerators, defective machinery, § 916.
exclusion of vessel from water channel, consequential damages, breach of statutory duties, § 32.
exemplary damages, allowance, rule of United States Supreme Court, § 392.
falling objects, consequential damages for torts, liability, illustrations, § 19.
false imprisonment, damages, elements, securing release from restraint, § 1257.
fraud, false representations by carriers, loss of time of passengers, damages, § 1173.
freight charges, charter to load with enumerated articles, § 895.
demurrage, definition, § 987.
delivery of goods hindered or prevented, § 894.
injury or loss of goods, recovery by shipper of market value, liability for freight charges, § 918.
pro rata freight charges, circumstances entitling shipper to take goods without being liable for freight charges, § 889.
rule for adjustment, § 893.
time when due, common law and admiralty rules, § 890.
transshipment of freight, § 891.
when pro rata freight is due, common law and admiralty rules, § 890.
recoupment against freight negligence or violation of contract, § 896.
right to freight when cargo is insured, § 892.
stopping goods at intermediate point, § 888.
when due and earned, prepayment, §§ 887, 888.
harbor light extinguished, consequential damages for torts, liability illustrations, § 19.
indemnity, damages recoverable, mental and physical suffering, liability for original trespass, § 763.
injuries to vessels, agent's particular duties and liabilities, right of principal to indemnity, scope of agent's liability, § 770.
canals, act or omission as proximate cause of injury, consequential damages, § 30.
consequential damages, liability, illustrations, § 19.

Vessels—continued.
injuries to vessels—continued.
intervening cause, canal boat delayed and wrecked by flood, § 37.
proximate consequences of breach, § 45n.
tendency of act or omission to cause damages, injury need not be foreseen, § 28.
trespass to personal property, special and consequential damages, § 1100.
remote damages, § 1102.
insurance, cause of loss, necessity that cause of damage be proximate cause, § 803.
illegal cargo, insurance on, bills and notes, consideration fraudulent or illegal in part, § 550.
total loss, what constitutes, § 807.
libel, measure of damages against officers for neglect of duty, nominal damages, § 492.
machinery, installation, liquidated damages, stipulation when damages are uncertain, § 291.
sales, acceptance of goods, buyer's right to return property, § 650n.
marine insurance, see Insurance.
medicine, insufficient supply, anticipation of injury to persons, illustrations, § 25.
obstruction to navigation, consequential damages, only items which are certain are recoverable, § 55.
vessel injured, nuisance, interference with business, element of damage, § 1054.
passengers, breach of contract to carry, elements of damage, pecuniary elements, other elements, § 92.
delay, consequential damage, certainty, recovery for successive consequences of act or omission, § 57.
ejection of passengers, removal at wrong place, damages peculiar to passenger, intervening cause, § 939.
loss of time and expense, consequences of exposure, § 938.
injury to passenger, proof of damage, § 946.
refusal to carry, exemplary damages, § 937.
liability as affected by extraordinary circumstances, illustrations, § 35.
proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
personal injuries, interest, actions for torts, § 355.
person interested in cargo sent abroad, interest, allowance, money paid, § 326.
refusal to transport goods, breach of contract, carrier's liability for remote consequences, § 902.
damages, increased expenditures, loss of customers, § 901.
damages measured by cost of transportation, decline in value, increased cost, § 899.
liability for loss of shipper's profits, notice to carrier of contract for profits, shipper's good faith, § 900.
repairs
contracts, contractor's liability, consequential damages for defective work, § 705.
entire and apportionable contracts, § 691.
sales
breach of contract by seller, delay in delivery, damages, § 664.
non-delivery of property contracted for, consequential damages, illustrations, § 663.
damages in favor of vendor when delivery is impossible, § 655.
property obtainable in open market, damages, § 651.
fraud, natural and proximate consequences of fraud, § 1165.
part of stipulated quantity received, recovery by seller, § 645.

Vessels—continued.
salvage service, agreements, right to fix specific amount as compensation for salvage service, § 716.
amount recoverable, considerations upon which compensation is fixed, interest, conflict of laws, § 719.
derelict property, § 720.
interest, conflict of laws, § 719.
compensation, to whom payment may be made, § 231.
forfeiture of right to compensation, § 721.
nature of peril, duty of claimant, persons who may be salvors, §§ 716, 717.
necessity of saving property, § 718.
requisites, parties liable, § 715.
seamen, compensation, pleading, matters of aggravation, necessity of alleging, § 422n.
contracts for services, necessity of full performance of contracts, § 686.
crews, procuring, cause of action, severance, contract to do several things successively or one thing continuously, § 110.
injuries to seamen, mental suffering, compensatory damages, mental suffering independent of physical harm, § 96.
neglect to keep supply of medicine, consequential damages, anticipation of injury to persons, proximate cause, § 25.
wrongful discharge of servant, liability for expenses and lost commissions, § 694.
stateroom not supplied, mental anguish, breach of contract, damages as including other than pecuniary elements, § 92.
suretyship, creditor's duty to acquire liens, notice of reliance thereon, § 739.
express indemnity, damages recoverable, mental and physical suffering, trespass, § 763.
towage, consequential damages, breach of contract, liability under special circumstances, § 51.
trover, measure of damages, value of property enhanced by defendant, § 1128.
value of property, proof of value, § 1113.
watercraft law, recoupment, parties, § 175.
whaling voyage, abandonment, certainty of damage required, § 61.
wharf, vessel removed from, consequential damage, injury through third person, § 33.
wreck, agent's particular duties and liabilities, principal's right to indemnity, § 770.

Vexation
see Annoyance; Humiliation, and similar titles.
mental anguish, necessity that anguish proceed from act causing physical injury, § 95.

Vibration
eminent domain, injury to property not taken, ascertainment, § 1066.

Vindictive Damages
see Exemplary Damages.

Virginia
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
stipulations for costs and attorney's fees, § 564.
bonds of public officers, construction, § 485.
breach of marriage promise, excuses for breach, § 990.
carriers of goods, qualification of carrier's liability by notice, interstate commerce, § 926.
carriers of passengers, liability for exemplary damages, § 951.

Virginia—continued.
contract for particular work, recovery by contractors, part performance of severable contract, § 708.
covenants, breach, defenses and crosselaims against purchase money, §§ 636, 637.
covenants of warranty and for quiet enjoyment, breach, expenses, costs and counsel fees as damages, § 618.
measure of damages for breach, § 605.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
damages recoverable, facts and circumstances to be considered in estimating damages, § 1271.
eminent domain, compensation, wrongdoer's improvements, § 1076.
evidence of value and damages, § 1089.
injunction bonds, recovery of costs and expenses, attorney's fees, § 524.
landlord and tenant, covenant for quiet enjoyment, what constitutes breach, § 863.
rent, lessee's liability for interest, § 854.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
breach of contract by seller, consequential damages, § 662.
non-delivery of stock, § 657.
suretyship, remedy for indemnity, who is principal, § 746.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
mental anguish, damages, grounds upon which liability is denied, § 978.
notice, liability when object of sender is known, negligence in transmitting message, § 961.
usury, recovery under usury statutes, § 317.
vendor and purchaser, action for purchase money, defenses and counterclaims, §§ 636, 637.

Volunteer
accord and satisfaction, consideration, act or promise which is new consideration, § 249.
agent's violation of duty, secret profits, § 768.
payment, effect, § 218.
persons who may make payment, § 230.
replevin bonds, damages when plaintiff recovers as special owner, § 508.
salvage service, amount recoverable, considerations upon which compensation is fixed, conflict of laws, § 719.

W

Wages
see Master and Servant.

Wagons
see Vehicles.

Waiver
see Acquiescence.
buildings and construction contracts, liquidated damages, waiver of right to liquidate damages, § 299.
carriers, duty of carrier, goods lost or injured, conduct of shipper as affecting damages, § 925.
cause of action, severance of entire demand, § 109.
contracts, forfeiture, waiver of right to declare forfeiture, § 567.
contracts for particular work, contract price as measure of damages, action by contractor against employer, § 706.
demand for extra work, basis for adjustment, § 709.

Waiver—continued.
contracts for particular work—continued.
express contracts, necessity of full performance of entire contract, § 686.
insurance, contract methods for ascertainment of damages, § 808.
proof of loss, object, information of insurer, § 811.
waiver of proofs of loss, § 810.
interest, agreements for interest, rate applicable after debt due, § 308.
agreements for more than legal rate before maturity, definition of usury, effect, § 313.
allowance of interest on annuities and legacies, § 344.
landlord and tenant, breach of covenant for quiet enjoyment, general rule of damages, § 864.
repairs, covenants for repairs by lessee, § 855.
liquidated damages, waiver of right, § 299.
master and servant, servant's violation of contract, recoupment of damages, consequential losses, § 695.
nuisance, recovery of exemplary damages, continuance of nuisance, waiver of damages, § 1052.
part payment, what is not payment, § 217.
sales
breach of contract by seller, evidence of loss, § 653.
vendee's right to return property, § 650.
executed sales, recovery by seller of full value, payment by bill or note, § 644.
tender, waiver and omission of tender on sufficient excuse, § 273.
vendor and purchaser
damages recoverable by vendor of land against purchaser, interest on purchase money, § 577.
recoupment for defect of title and for tort, § 573.
right of seller of land to recover purchase price and interest, abatement of price, § 567.
title, time for conveyance of good title, § 572.
verdicts, rendition and amendment, affirmation, § 457.

Walls
see Party Walls.
erection, contracts for work, demands for part performance of entire contract, allowance of recovery on quantum meruit, action by contractor against employer, § 711.
falling wall, consequential damages, certainty, liability for principal loss, extending to details and incidents, § 54.
contract for particular work, contractor's liability, consequential damages for defective work, § 705.
nuisance, joint and several liability, private and public nuisance, § 1059.
landlord and tenant, wall defective, repairs, lessor's liability for special and consequential damages, § 874.

War
army supplies sold, part of stipulated quantity received, recovery by seller, § 646.
destruction of property as damnum absque injuria, § 3.
interest, rate applicable after debt is due, § 309.
suspension of interest, war preventing payment, § 382.
landlord and tenant, partial destruction of demised property, effect as to rent, § 851.
trespass, damages, measure of damages, benefit received, § 1014.

Warehouses
agent's rights, reimbursement of expenditures, § 789.
bond, measure of surety's liability, § 723n.

Warehouses—continued.
carriers of goods, limitation of liability by contract, interstate commerce, § 904.
consequential damages, anticipation of injury of persons, proximate cause of injury, storage of gunpowder, explosion, § 25.
breach of contract, proximate consequences of breach, § 45n.
recovery only when contemplated by parties, destruction of goods, § 45, n25.
quantum meruit recovery for services, evidence, defenses, § 679.
receipts, fraud, false representations, validity of warehouse receipts, taken as security for loan, damages, § 1173.
recoupment and counterclaim, acts which may be basis of recoupment. § 181.
sales, acceptance of goods, liability for not accepting, remedies of seller, § 647.
servant's violation of contract, recoupment of damages, consequential losses, § 695.

Warrants
cancellation, official bonds, measure of damages against sureties, § 488.
consequential damages, injury through third person, § 33.
counties, interest, allowance against government, § 332.
interest on judgments, § 333.
officers, bonds, absolute liability for money received, § 479.
wrongful issue of distress warrant, elements of damage, mental suffering, § 95.

Warranty
see Covenants.

Washington
attachment bonds, accrual of cause of action, § 510.
exemplary damages, § 514.
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
partial failure of consideration, § 545.
stipulations for costs and attorney's fees, § 564.
childbirth, personal injuries, premature birth, increase of suffering, § 1244.
covenants against incumbrances, definition, what are incumbrances, § 620.
death by wrongful act, beneficiaries, § 1261.
compensation for pecuniary losses, exemplary damages, § 1263.
recovery for death of child, § 1272.
eminent domain, assessment of damages and benefits, time of, § 1083.
deduction for benefits, special benefits, § 1087.
evidence of value and damages, § 1089.
property not taken, consequential injury, § 1062.
railroad property condemned for railroad uses, compensation, § 1078.
evidence, physical examination of plaintiff, § 451.
exemplary damages, restriction or denial, § 400.
guaranty, measure of guarantor's liability, § 729.
interest, compound interest, interest on instalments of interest, § 375.
landlord and tenant, destruction of demised premises, effect as to rent, § 852.
mesne profits, remedy under code, § 1000.
personal injuries, loss of capacity for enjoyment as damages, § 1243.
sales, breach of contract by seller, delay in delivery, damages, § 664.
trover, damages, rule in particular states, § 1111.
usury, recovery under usury statute, § 317.

Washington—continued.
vendor and purchaser
breach of contract by vendor, measure of damages, English rule, application, § 581.
recovery on parol contract, § 583.
rescission, adjustment of counter demands, § 587.

Waste
appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
attachment, forthcoming bonds, measure of damages for failure to deliver property, § 518.
bonds, conditions, instances of liability under statutes specifying certain conditions of appeal bonds, § 537.
damages recoverable, remainders and reversions, § 1034.
definition of waste, § 1033.
injunction bonds, damages from restraint of injunction, § 527.
master and servant, recoupment and counterclaim for negligence, § 180.
mesne profits, action for, damages recoverable, consequential and punitive damages, § 994.
mitigation of damages, measure of prevention, return of property, discharge of plaintiff's debt, § 156.
probate bonds, liability as between sets of sureties, § 498.
mitigation of damages, § 497.
remainders and reversions, injuries to property, pleading, § 1033.
suretyship, creditor's duty to realize on securities, application of deposit to indebtedness, § 737.
vendor and purchaser
breach of contract by vendor, rescission, adjustment of counter demands, § 587.
specific performance, adjustment of counter equities, § 588.
will contest, appeal and supersedeas bonds, liability in state court, judgment partly for money or in rem, § 534.

Watches
carriers of goods, loss or injury to goods, damages less than value of goods at destination, § 922.

Watch Repairer
business injured, trespass to real property, aggravation and special damages, § 1029.

Waters and Water Courses
see Drains and Drainage; Floods.
channels, exclusion of vessel from water channel, consequential damages, breach of statutory duties, § 32.
consequential damages, intervening cause, flood caused by dam, § 38.
covenants against incumbrances, definition, what are incumbrances, § 620n.
covenants of warranty and quiet enjoyment, breach, what constitutes breach, § 604.
easements, covenant against incumbrances, damages for breach, permanent incumbrance, §§ 627, 628.
eminent domain, assessments of damages and benefits, lands to be considered, § 1088.
injury to property not taken, ascertainment of damages, facts which may be considered, §§ 1067, 1070.
landlord and tenant, lessee's right to damages for injury to business, § 867.
nuisance
continuing liability of person causing nuisance, § 1040.
when nuisance is not a continuous wrong, § 1043.

Waters and Water Courses—continued.
nuisance—continued.
interference with business, element of damage, § 1054.
joint and several liability, private and public nuisance, § 1059.
mitigation of damages, § 1055.
deduction for benefits, § 1056.
remote consequences of nuisance, liability for, § 1051.
special elements of damages, § 1048.
obstruction of water course, nuisance, remote consequences, liability, § 1050.
joint and several liability, § 141.
passage to waters obstructed, elements of damage, losses, expenses incurred to prevent or lessen damage, § 88.
pleading, allegation of damage, nuisance, § 1060.
pollution of stream, consequential damages, certainty, liability for principal loss, extending to details and incidents, § 54.
eminent domain, injury to property not taken, ascertainment of damages, facts which may be considered, § 1067.
reservoirs, parties, joint and several liability for torts, § 141.
stagnant waters, nuisance, remote consequences, liability, § 1051.
subterranean waters
diversion, digging well, right to damages, § 3.
injuria sine damno, § 3.
nuisance, measure of damages, decrease in value of land, § 1049.
mines and mining, drainage of percolating waters, damnum absque injuria, § 3.
nuisance, injury to crops and trees, damages, § 1049.
trespass to real property, remediable injury, damages, § 1018.
surface water
diversion, civil law, damnum absque injuria, § 3.
continuance of liability of person who causes nuisance, § 1040.
when nuisance is not a continuous wrong, § 1044.
landlord and tenant, lessee's right to damages for injury to business, § 869.
nuisance, remote consequences, liability, § 1050.
parties, joint and several liability for torts, § 141.
pleading, special damages, necessity of alleging, § 420.
right to discharge on adjoining property, § 3, n17.
eminent domain, compensation, injury to property not taken, § 1065.
losses as elements of damages, what losses consist of, § 79.
nominal damages, right to nominal damages, trespass, § 10.
nuisances, joint and several liability, § 1059.
mitigation of damages, deduction for benefits, § 1056.
pleading, allegations of damage, § 1060.
obstruction, consequential damages, intervening cause, § 38.
pollution, consequential damages, liability for principal loss extends to details and incidents, § 54.
nominal damages, illustration of right to nominal damages, § 10.
trespass to real property, damages, § 1022.
mitigation of damages, § 1027.
permanent injury, estimate of damages, § 1017.
remediable injuries, estimate of damages, § 1018.

Water Supply
assessments, rent, recovery of rent payable in specific articles or taxes, § 846.
breach of contract to supply water, causes of action, splitting, continuing obligations, § 112.
certainty in nature and cause of damage required, § 53, n7.
damages as including other than pecuniary elements, § 92.

Water Supply—continued.
breach of contract to supply water—continued.
duty of water company, liquidated damages, intention to liquidate, evidence and effect of, § 284.
elements of damage, losses, § 79.
motive, distinction made for bad motive, contracts, § 99.
liability for non-performance of contract, consequential losses, § 702.
liability of employer for delaying or stopping work, recovery on contract and quantum meruit, consequential losses, mitigation of damages, action by contractor against employer, § 713n.
measure of damages, losses as elements of damage, § 79.
vendor and purchaser, damages recoverable by vendor of land against purchaser, conveyance in consideration of non-pecuniary covenants, § 576.
breach of covenants against incumbrance, damages where incumbrance is permanent, § 627.
breach of covenants of warranty and quiet enjoyment, measure of damages, extinguishment of adverse title by covenants, § 610.
eminent domain, compensation, basis for estimating value of land, § 1074.
leases
repairs, covenant by lessor, failure to supply water, breach of covenant, measure of liability, irrigation, § 872.
duty of landlord, plumbing fixtures, water freezing in pipes, § 872.
lessor's liability for special and consequential damages, pipe defective, § 874.
trespass to real property, remediable injury, damages, § 1018.
water companies, eminent domain, compensation affected by title and nature of interest condemned and purpose of use, proof of value, § 1077.
franchises, compensation for injury to franchises, ascertainment of value, § 1079.
liquidated damages, evidence and effect of intention to liquidate, § 284.

Water Wheel
sales, acceptance of goods, refusal to accept property produced according to order, damages, remote losses, § 649.

Wealth
alienation of affections, action by wife, damages recoverable, evidence, § 1285.
contracts for service of attorney, evidence of value, § 682n.
exemplary damages
enhancement and mitigation, § 404.
wealth of defendant, scope of inquiry, § 405.
joint liability for, § 407.
false imprisonment, exemplary damages, evidence of wealth of defendant, § 1258.
seduction, evidence for plaintiff, damages recoverable, § 1283.
slander and libel, aggravation of damages, wealth and rank of parties, §§ 1210, 1211.

Weapons
anticipation of injury as to persons, illustrations, § 25.
civil damage laws, actions, parties who may sue for injury under civil damage laws, § 16.
consequential damages, anticipation of injury to person, proximate cause of injury, § 25.

Weapons—continued.
consequential damages—continued.
breach of statutory duty, unlawful carrying of weapon, § 32.
explosion of gun, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
infant injured, consequential damages for torts, liability, illustration, § 19.
exhibition of injured parts, means of injury, § 452.
militia, drill, consequential damages for torts, liability, illustrations, § 17.
sale, explosion, wilful or malicious injuries, consequential damages, § 44.
shooting at fox, dog injured, consequential damages, proximate consequences of act or omission, wilful or malicious injuries, § 44.
trade-marks, infringement, measure of damages in equity and at law, § 1202.

Weather
business injured, certainty of damages, tortious interference with business, § 70.
carriers of goods, perishable property, liability of carrier, property not protected from weather, § 931.
contract for particular work, breach, accident preventing performance, contractor's liability, § 700.
erection of stables enjoined, injunction bonds, damages from restraint of injunction, § 528.
horse injured, consequential damages, carrier's liability, distinction between liability in tort and on contract, § 49.
landlord and tenant, covenants for repairs, § 855.
ejection of tenant, exemplary damages, allowance, ground upon which allowed, § 393.

Weeds
destruction, repairs, liability for not making repairs, special cases, § 860.
land injured, evidence, opinions on subjects of common experience and observation, admissibility, § 443.
landlord and tenant, lessee furnished seed, lessee's right to damages for injury to business, § 867.

Wells
boring
contract for, contractor's liability, consequential damages for defective work, § 705.
employer's liability for delaying or stopping work, § 713.
general rule, benefit of contract to employer, cost and inconvenience, § 697.
landlord and tenant, repairs, breach of covenant to repair, measure of liability, § 856.
use of property, damnum absque injuria, § 3.

West Virginia
bills and notes, damages on protested foreign bills, re-exchange, § 563n.
partial failure of consideration, § 545.
carriers of goods, liability for partial loss of goods, value limited, § 927.
carriers of passengers, liability for exemplary damages, § 951.
death by wrongful act, compensation for pecuniary losses, exemplary damages, § 1263.
eminent domain, evidence of value and damages, § 1089.
exemplary damages, parties liable, master's liability for acts of servant, § 410.
restriction or denial, § 400.
insurance, total loss, what constitutes, § 807.
nuisance, joint and several liability, private and public nuisance, § 1059.

West Virginia—continued.
personal injuries, excessive or insufficient verdicts, power of court over verdicts, § 460.
interest, actions for torts, § 355.
telegraphs and telephones, cipher messages, negligence in transmission, notice of importance, § 960.
usury, recovery under usury statute, § 317.

Wharves and Wharfingers
application of Federal Employers' Liability Act to, see Federal Employers' Liability Act.
construction, contractor's liability, damages for delay, actual loss, § 704.
leases, covenant for quiet enjoyment, breach of covenant, general rule of damages, § 864.
repairs, consequential damages for torts, liability, illustration, § 18.
sale of lumber, bills and notes, consideration, parol evidence to show defect of consideration, § 553.
vessel removed from wharf, consequential damages, injury through third person, § 33.
wharfingers, duty of agent to adhere to instructions, liability for exceeding commission, § 774.

Wheat
compensatory damages, property sued for improved by wrongdoer, § 102.
factors, liability for failure to sell at certain time, §§ 780, 781.
landlord and tenant, rent payable in specific articles, recovery, § 846.
machinery delayed in delivery, wheat injured, consequential damages, certainty, recovery for successive consequences of act or omission, § 56.
trespass to real property, crops injured or destroyed, damages, § 1023.
trover, damages, value of property enhanced by defendant, § 1127.

Whipping
consequential damages, breach of statutory duty, person injured, unlawful beating of horse, § 32.

Whiskey
carriers of goods, loss or injury to property, proof of value, § 933.
compensatory damages, property sued for improved by wrongdoer, § 103.
sale, broker's compensation for services, measure of compensation, § 683.
trover, damages, value of property, enhanced by defendant, § 1126.

Whistle
consequential damages, intervening cause, horses on boat frightened by whistle, falling into water, § 38.

Wholesale Price
sales, acceptance of goods, buyer's notice of refusal to accept, seller's duty to mitigate damages, § 648.

Wild Animals
injuries to person, mitigation of damages, § 154.

Wild Land
covenants of warranty and quiet enjoyment, breach, interest and taxes as items of damage, § 616.
sale, interest, quantum meruit claims between vendor and purchaser, § 328.
vendor and purchaser, breach of contract by vendor, rescission, adjustment of counter demands, § 587n.

Wilful Negligence
see Negligence.

Wilfulness
see Malice.

Wills
see Advancements.
attestation, neglect of officer, official bond, measure of damages against sureties, § 488.
contest, appeal and supersedeas bonds, liability in state courts if judgment is in part for money or in rem, § 534.
hotchpot, interest, allowance on advancements, § 345.
interest, agreement to pay money with interest, construction, § 305n.
judgment of vacation, appeal and supersedeas bonds, instances of liability, specific conditions, § 537.
legacies, bequests or devises, contracts for services, implied contracts, right to recover for services rendered, § 679.
interest, allowance on annuities and legacies, § 344.
interest as damages incident to debts, § 372.
payment by devise or legacy, § 220.
quantum meruit recovery for services rendered, § 679.
release, requisites, what will operate as release, bequests, § 258.
legatees, execution of probate bonds, manner, recoveries, which may be had, § 494.
trespass to personal property, damages, ascertainment of value of nonmarketable property, § 1099.

Wind
fire, consequential damages for torts, liability, illustration, § 18.
injury to passenger on delayed train, consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
ladder falling, consequential damages, intervening cause, ladder on sidewalk striking pedestrian, § 37.
passenger alighting at wrong place, wind storm, consequential damages, liability of carriers, extraordinary circumstances, § 36.

Wine
compensatory damages, property sued for improved by wrongdoer, § 102.
sale of defective rope, wine lost, warranty of quality, damages for breach, interest, expenses and special injuries, § 672.

Wisconsin
bills and notes, principal sum, certainty, § 541.
stipulations for costs and attorneys' fees, § 564.
breach of marriage promise, injury to feelings, and other elements of damage, § 986.
carriers of passengers, liability for exemplary damages, § 951.
contract for particular work, demand for part performance of entire contract, recovery by contractor on quantum meruit, § 711.
covenants, breach, defenses and crossclaims against purchase money, § 636.
covenants against incumbrances as covenants running with the land, damages recoverable for breach, rule in some states, § 625.
covenants of warranty and quiet enjoyment, action by covenantee against remote covenantor, § 614.
death by wrongful act, beneficiaries, § 1261.
special damages, § 1278.
eminent domain, assessment of damages and benefits, time of, § 1083.
evidence of value and damages, § 1089.
injury to property not taken, ascertainment, § 1069.
compensation, § 1065.
interest, element of compensation, § 1091.

Wisconsin—continued.
eminent domain—continued.
railroad property condemned for railroad uses, compensation, § 1078
evidence of injury, annuity and life tables, § 455.
exemplary damages as matter of right, power of court over verdict, § 403.
highways and streets, consequential damages in highway cases, § 26.
husband and wife, covenants of seizin and good right to convey, damages for breach of covenants, § 593.
insurance, total loss, what constitutes, § 807.
interest, compound interest, interest on instalments of interest, § 375.
landlord and tenant, actions on covenants of lease, recoupment, § 876.
lessee's right to damages for injury to business, § 869.
master and servant, wrongful discharge of employees, measure of damages, remedies, § 692.
nuisance, damages recoverable, first action, § 1039.
personal injuries, actions maintainable, prospective damages, § 1251n.
excessive or insufficient verdicts, power of court over verdicts, § 460.
loss of capacity for enjoyment as damages, § 1243.
railroads, animals injured, interest, actions for torts, § 355.
replevin
damages, increase in value by defendant, § 1154.
intermediate injury and depreciation, § 1152.
property not returned, § 1148.
parties, who may sue, § 1143.
special and consequential damages, § 1146.
trespass to personal property, special and consequential damages, § 1102.
trespass to real property, occupation of land by railroads, damages, § 1016.
trover
damages, rule in particular states, § 1111.
value of property enhanced by defendant, § 1127.
mitigation of damages, § 1140.
vendor and purchaser, action for purchase money, defenses and counterclaims, rule in various states, § 636.
verdicts, impeachment by affidavits, § 456.

Witnesses
competency
opinion evidence as to value of property, § 446.
questions which may be asked witnesses as to grounds of opinion, § 450.
contracts for services, necessity for full performance of express contract, inability to perform, relief from forfeiture, § 687.

Wood
see Timber.
sales, recoupment and counterclaim, acts which may be basis of recoupment, § 181.
warranties of quality and quantity, breach, damages, § 670.
trover, damages, value of property enhanced by defendant, § 1126.

Wool Injured
floods, carriers of goods, liability, for consequential damages, intervening cause, § 37.
consequential damages, proximate consequences of act or omission, effect of extraordinary circumstances, § 35.
landlord and tenant, repairs, lessor's liability for special and consequential damages, § 874.

Work and Labor
see Quantum Meruit.
recoupment, nature of defense, § 170.
validity of claim essential, § 174.

Workmen's Compensation
Ch. XLI, §§ 1359 to 1388.
Federal Employers' Liability Act
acceptance of compensation as barring action under, § 1341.
effect on state acts, § 1303.

Wrist Injured
carriers of passengers, damages recoverable by passenger, verdicts excessive, § 953n.
consequences of injury, recovery for secondary consequences, aggravation of disease, etc., § 1244.
nominal damages, illustrations of right to, § 10.

Writ of Assistance
delay in execution, officers, neglect of duty, measure of damages, nominal damages, § 490.

Writ of Error
see Appeal and Error.

Writ of Inquiry
see Assessment of Damages.
assessment of damages, common law, § 427.
jury, when new trial may be called, § 433.
breach of bond or non-performance of agreement, assignment, assessment of damages and costs, statute of 8 and 9 William III, § 472.

Writ of Possession
officer's neglect, measure of damages against officers for neglect of duty, nominal damages, § 490.

Writ of Restitution
restitution after reversal of judgment, how made, § 468.

Wrong Destination
see Carriers of Passengers.
carriers of passengers, delay, damages peculiar to passenger, § 939.

Wyoming
trover, damages, property of fluctuating value, § 1118.

X

X-ray
evidence of injury, photographs, § 454.
physical examination of plaintiff, discretion of court, § 451.

Y

Yarn
contract to spin, entire and apportionable contracts, § 691.

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